Governance News

Weekly wrap up of key financial services, governance, regulatory, risk and ESG developments

17 February 2021

Contents

Diversity

Norway's sovereign wealth fund flags board gender diversity as an engagement priority

Norges Bank Investment Management has released a position paper outlining its position on board gender diversity.

Broadly it states that:

- **Boards should avoid 'group think':**
  - Boards should have a diversity of competencies and backgrounds to ensure there are a range of perspectives and approaches to decision making
  - Boards should regularly assess the level of diversity of skills/competencies/backgrounds represented
- **Boards should have 'an appropriate gender balance'.** More particularly, where boards have less than 30% representation of 'either gender' the board should 'consider setting targets for gender diversity and report on progress'
- **Boards should have a formal nomination process to identify potential candidates from diverse backgrounds.**

Commenting on this, Norges Bank states highlights board gender diversity as a particular focus,

> '…we consider board diversity as a contribution to the overall effectiveness of the board and an indication of an effective board nomination process…While there are many different dimensions to diversity, we are particularly concerned by persistent underrepresentation of women on boards…As a long-term global investor, we are also concerned that companies with boards that are not diverse will not be able to maintain the trust of their customers, investors and society at large over time. This position will serve as a basis for our discussions with company boards'.
>
> [Source: Norges Bank Investment Management Position Paper: Gender Diversity 15/-2/2021]

Study compares the composition of S&P midcap 400 boards and S&P 500 boards

Spencer Stuart has released the results of analysis of the differences between the boards of S&P midcap 400 companies and S&P 500 boards.

Some interesting findings

Board composition

- S&P midcap 400 boards tend to be smaller on average (9.5 members) than the boards of large cap companies (10.7 members).
- The proportion of independent directors appointed to S&P midcap 400 boards and the boards of large cap companies is roughly similar – at 82% and 85% respectively
- 44% of S&P Midcap 400 boards have an independent Chair, compared with only 34% of S&P500 boards.
- The average age of independent directors on mid-cap boards is 61.7 years. Independent directors at large cap companies are slightly older (on average) at 63 years on average.
- The average tenure of independent directors of both mid-cap and large cap companies is relatively long at 8.2 years (mid-cap companies) and 7.9 years (large cap companies).
- Large cap and mid-cap companies have a similar number of board committees (4.2 and 4 committees respectively)

CEO profile

- CEOs at large-cap companies are more likely to serve on one or more outside board that their mid-cap peers: 28% of CEOs at mid-cap companies serve on one or more outside boards, vs 42% of CEOs at large-cap companies.

- CEOs of mid-cap companies are likely (on average) to have been with the company for less time (15.9 years) than the CEOs of large cap firms (19.6 years).

Meeting frequency

- The frequency of meetings at midcap and large cap companies is roughly similar: the average number of board meetings at mid-cap companies is 7.5 meetings vs 7.9 for large cap company boards

Board turnover

- Mandatory retirement policies: Retirement policies at large-cap companies are more likely to set a mandatory retirement age than policies at mid-cap companies: 57% of mandatory retirement policies at mid-cap companies set a mandatory retirement age vs 70% of policies at large cap companies.
- Only 6% of boards at both mid-cap and large cap companieshave tenure policies in place
- The average retirement age for directors at both mid-cap and large cap companies is similar (73.8 years and 73.6 years respectively.
- The report comments that the fact that 30% of the mid-cap boards included in the report have a classified board structure, which the report describes as a 'potential inhibitor' of board turnover. In contrast, annual director elections are the norm at most S&P 500 companies.

New independent directors

- New directors joining mid-cap boards are more likely to be first time directors than new directors joining boards of large-cap companies: 43% of new midcap directors are first time directors. In contrast only 28% of large-cap new directors are first time directors.
- New directors joining mid-cap boards are less likely to have held senior roles (CEO, Chair COO, president), or be financial professionals that new directors joining large cap boards.
- Gender diversity: 48% of new independent directors at mid-cap companies were women vs 47% at large cap companies
- Racial/ethnic diversity:
  - Large cap companies were slightly more likely than mid-cap companies to appoint directors from minority backgrounds (ie Black/African American, Hispanic/Latinx and Asian directors): 22% of incoming independentdirectors at large cap companies were from minority backgrounds vs 18% at mid-cap companies.
  - The report comments that overall, the largest companies are far ahead of mid-cap companies in terms of minority board representation with only 3% of the largest200 S&P 500 companies lacking minority directors. In contrast, 34% of the largest 100 S&P Midcap 400 companies (by annual revenue) have no minority directors.
- Disclosure:
  - According to the report, about 25% of mid-cap boards surveyed disclosed details about the racial/ethnic diversity of their boards, usually on an aggregate basis (19%) as opposed to providing director specific details.
  - Only a small proportion of companies surveyed disclose commitments to increase board diversity.

[Source: Harvard Law School Forum on Corporate Governance and Financial Regulation 12/02/2021]

Shareholder sues US company over lack of board diversity

Shareholder Robert Foote has filed suit against Idaho-based Micron Technology Inc (Micron) and its directors over the company's alleged failure to live up to publicly stated diversity commitments.

'Hollow words'

Broadly, the complaint alleges that public statements made by the company to the effect that diversity is a priority and that the company is acting to address the issue were 'hollow words' given that:

- there has been no improvement in board diversity at the company since 2018 – the Micron board has zero Black directors and only one 'director of color' (the CEO)
- diversity within the company's senior leadership has also not improved over the same period.

The complaint alleges that the opportunity to diversify the workforce through new hires was 'present but was squandered'.

The complaint alleges that because of the company and the directors' (alleged) actions/inactions the company has been exposed to the risk of litigation and incurred/stands to incur (unnecessary) additional costs.

> 'As a result of the Individual Defendants' misconduct, which has subjected Micron to this and potentially other lawsuits, the need to undertake internal investigations, the need to implement adequate internal controls, the losses from the waste of corporate assets, the losses due to the unjust enrichment of the Individual Defendants who received excessive compensation and/or who benefitted from the wrongdoing alleged herein, the Company has, and will have, to expend many millions of dollars'.

Further detail: allegations against the individual directors

Among other things, the complaint alleges that from 2018 to the present the individual directors of Micron

> …'breached their fiduciary duties by personally making and/or causing the Company to make materially false and misleading statements which failed to disclose that: (1) despite public assertions to the contrary diversity was not a key priority of the Company; (2) despite assertions to the contrary the Company was not meaningfully diversifying its workforce; (3) despite assertions to the contrary the Company was not diversifying its leadership or its Board of Directors; (4) that the Company failed to maintain adequate internal controls, and (5) that the independent auditor the Company repeatedly reselected to evaluate its internal controls was neither independent nor effective at ensuring the adequacy of the Company's internal controls'

The complaint alleges that the inclusion of allegedly false/misleading statements in 2018, 2019 and 2020 proxy statements constitutes a breach of Section 14(a) of the Exchange Act.

The complaint further alleges that the directors breached their fiduciary duties by

> 'causing themselves to receive excessive compensation, including because certain executive compensation was nominally tied, in part, to the achievement of diversity-related goals'.

Relief being sought

Mr Foote is seeking (among other things) that:

- the court order that each of the directors pay damages for breach of their fiduciary duties.
- the court direct Micron and the individual directors to take 'all necessary actions to reform and improve its corporate governance and internal procedures to comply with applicable laws and to protect Micron and its shareholders from a repeat of the damaging events described herein,' including putting forward for shareholder vote several proposals to increase diversity at the company.

These proposals include (among others) proposals to: a) 'strengthen the Board's supervision of operations and develop and implement procedures for greater shareholder input into the policies and guidelines of the Board'; b) enable shareholders to nominate four diverse candidates for election to the board; c) establish a fund to hire and promote diverse people within the company; d) tie 30% of executive compensation to the achievement of specific diversity objectives; and d) 'a proposal to ensure the establishment of effective oversight of compliance with applicable laws, rules, and regulations'.

[Sources: Complaint: Foote v. Micron Technology Inc et al, U.S. District Court, District of Delaware, No. 21-cv-00169]

In Brief | Providing families up to 12 months paid parental leave at full pay (equally shared) would lead to an increase of $116bn in GDP by 2050 as a result of higher female workforce participation and productivity according to a new report from lobby group the Parent hood

[Source: Parenthood report summary; Full text report: Making Australia the best place in the world to be a parent; Parenthood fact sheet]

Remuneration

Draft prudential standard CPS 511 Remuneration: The Governance Institute's submission welcomes APRA's less prescriptive approach, but recommends a number of further changes

Context

In response to feedback on the initial draft of its proposed new cross industry standard on remuneration CPS 511 Remuneration, The Australian Prudential Regulation Authority (APRA) recently conducted a second round of consultation on proposed further revisions. You can find our overview of the proposed changes here.

Governance Institute submission to the consultation

The Governance Institute's submission welcomes APRA's shift in approach, and in particular the decreased level of prescription in the revised draft standard. However, the submission also raises a number of concerns.

The table below provides a high level summary of the issues raised in the Governance Institute's submission.

ISSUE	GOVERNANCE INSTITUTE'S CONCERNS AND RECOMMENDATIONS
Alignment with the Banking Executive Accountability Regime (BEAR) and the proposed Financial Accountability Regime (FAR) requirements	▪ Though the Governance Institute considers that the revised draft standard is more aligned with both the BEAR and the proposed FAR requirements, the submission raises concerns about APRA's proposed approach to implementation – that is, the submission raises concerns about APRA's proposal to roll out the standard, and conduct a further round of consultation once the FAR legislation is finalised ▪ To decrease the regulatory burden this approach would place on businesses, the submission recommends that that the approach to the alignment of BEAR and FAR be 'settled and agreed, with appropriate industry consultation, before the Standard commences'.
Alignment with existing 'good governance' requirements under the ASX Corporate Governance Council's Corporate Governance Principles and Recommendations	▪ The revised standard proposes that non-significant financial institutions (non-SFIs) and significant financial institutions (SFIs) will be required to meet different governance requirements in order to reduce the regulatory burden on smaller entities. ▪ The submission raises concerns that this approach may have unintended consequences in that it departs from existing 'good governance' practice and could lead to confusion for smaller entities. The submission notes: …'there are likely to be listed entities which APRA determines are 'non-SFIs' which on one hand, are required under the current Australian standard for good governance practice to report on an "if not, why not" basis on whether they have a remuneration committee, but on the other hand are not required to have a remuneration committee under the Standard. This is potentially confusing and proliferates the number of differing governance requirements for smaller APRA-regulated entities'. ▪ To address this issue, the submission recommends that the standard require entities to report, on an 'if not, why not' basis, on whether they have a remuneration committee. The submission also suggests that APRA could issue guidance to provide more detail about its expectations in relation to remuneration committees.
Board oversight of remuneration – ensuring boards have	Paragraphs 31-33 of the revised standard state:

ISSUE	GOVERNANCE INSTITUTE'S CONCERNS AND RECOMMENDATIONS
access to the information they need to make their own assessment	[31] An APRA-regulated entity must review compliance of the remuneration framework against the requirements of this Prudential Standard at least annually. [32] In addition to the annual review of compliance, the effectiveness of the remuneration framework must be subject to a comprehensive review by operationally independent, appropriately experienced and competent persons at least every three years. [33] An APRA-regulated entity must document and report the results of the reviews required under paragraphs 31 and 32 of this Prudential Standard, to the Board Remuneration Committee, or relevant oversight function, in a timely manner. The Board Remuneration Committee, or relevant oversight function, must take appropriate and timely action to ensure the findings of these reviews are adequately considered and addressed. ▪ The submission raises concerns that this drafting suggests that boards will not have access to the reports (required under paragraphs 31 and 32) but instead will need to rely on management's report on the results. That is, that boards will need to rely on management reporting on its own remuneration. ▪ To address this issue, the submission recommends that APRA review the drafting in paragraph 33 to 'ensure that directors have access to the material they need to make their own independent assessment of the compliance of remuneration frameworks with the Standard and their effectiveness'. ▪ The submission suggests that a possible approach could be that the remuneration committee directly engages the party preparing the independent report who then presents their report to the Committee.
Clarification of deferral and clawback requirements	▪ The submission raises concerns that as currently drafted, it is unclear from paragraph 51 'whether the relevant percentage must be deferred for the whole period and then pro-rata vesting is permitted or whether pro-rata vesting is permitted after four years or two years in the case of highly paid material risk takers who are not senior managers'. ▪ To address this issue, the submission recommends that APRA review the drafting of paragraph 51 to ensure alignment with APRA's intention as outlined in the response paper.
Public disclosure around risk adjustments to remuneration	▪ The submission comments that 'Our members consider the purpose of public disclosures around risk adjustments to remuneration, is to give investors, employees and other stakeholders an understanding of the behaviours that a board will not condone, rather than to publicly identify individuals'. ▪ The submission suggests that 'any guidance APRA gives in this area should provide for generic rather than individual disclosures, given the potential for litigation'. ▪ To minimise the reporting burden on entities, the submission also recommends that where possible, APRA consider enabling entities to satisfy reporting and disclosure requirements under the Standard by cross referencing existing remuneration reporting and disclosure
Consultation on further guidance	▪ The submission notes that APRA plans to issue new guidance (CPG 511) and other guidance to accompany the standard and recommends that APRA consult on this as soon as possible to assist the transition to the new standard.

ISSUE	GOVERNANCE INSTITUTE'S CONCERNS AND RECOMMENDATIONS
should be conducted as soon as possible	
Implementation of CPS 511	▪ The submission recommends that the implementation date for the Standard align with regulated entities' financial years, to ease implementation. ▪ The submission suggests that this could be achieved by providing that entities are required to implement the CPS 511 for their first full financial year commencing on or after the relevant implementation date.
Clarification of 'performance related' remuneration	▪ Paragraph 37 of the draft revised standard states that: [37] The determination of each component of a person's variable remuneration must: (a) give material weight to non-financial measures where the remuneration is performance related. ▪ The submission considers that it would assist with the interpretation of the requirements if APRA provided clarification of what is meant by the term 'performance related'.
Application of the standard to groups	▪ The submission raises concerns about the workability of the proposed approach to the application of the standard to groups (as set out in paragraphs 57(a) and 57(b) of the revised draft standard) on the basis that a subsidiary Board Remuneration Committee is unlikely to have 'jurisdiction' over the employees of related parties or connected entities.
Remuneration for service providers	▪ The submission raises concerns about the number of individuals potentially captured by the revised draft standard. ▪ The submission recommends that APRA either: a) amend the standard to limit the group that the Standard is expected to cover; or b) addresses the issue in guidance.

[Source: Governance Institute submission to APRA on strengthening prudential requirements for remuneration 11/02/2021]

Accountability: Mining executives to forgo incentive payments for the current financial year, three resign

Fortescue Metals Group has issued a short statement announcing that following a review of the company's Iron Bridge project, three executives have resigned from the business: the COO, the Director Projects and the Director Iron Bridge.

Commenting on the leadership changes, Fortescue CEO Elizabeth Gaines said the changes were linked to 'slips' in culture and values within the project team. Ms Gaines said,

> 'At Fortescue, our commitment to our values and culture is our highest priority. What we've learned through our review of the Iron Bridge project to date, is that we have lost sight of that critical focus. Since Fortescue was established, our values, above all else, have driven our behaviours and our decisions. These values were allowed to slip inside the Iron Bridge team'.

Ms Gaines (as CEO) and the CFO will forego incentive payments for the current financial year,

Ms Gaines commented that as 'CEO I must also take accountability and learn from this…We take this opportunity to reset the Company's focus on our culture and values which defines us and makes Fortescue a truly great company'.

[Source: Fortescue Metals media release 16/02/2021]

Meetings and Proxy Advisers

Top Story | Key trends to emerge from the 2020 AGM season

MinterEllison has published a report providing a high level snapshot of key trends from the AGMs of Australia's largest companies (ASX100 listed) over the course of the last five years.

The report also includes a section on the rapid transition to virtual meetings in 2020 (as a result of the COVID-19 pandemic restrictions).

You can access a summary of the report on our website here.

The full text of the report is here.

What to expect from the US 2021 proxy voting season: Conference board highlights four trends to watch

Key Takeouts

- The report predicts that virtual meetings are likely to remain a necessity heading into 2021 (as a result of the COVID-19 pandemic). In light of this, companies are advised to reflect on the lessons learned from their 2020 experiences and to identify and plan to address any technological/administrative/other shortcomings (to allay investor concerns). In particular, companies are advised to focus on ensuring measures are in place to safeguard shareholder participation.
- The focus on ESG issues (and in particular on climate risk, diversity and human capital management) is predicted to continue in 2021. Among other things, the report suggests that boards should review their own capability/skills/expertise to ensure they are able to provide adequate oversight of ESG risks/opportunities

Conference Board Inc has released a report - 2021 Proxy Season Preview and Shareholder Voting Trends (2017-2020) – highlighting four key areas that it considers are likely to top of mind for investors heading into the 2021 proxy season based on analysis of resolutions submitted by investors at Russell 3000 companies over the three years to 2020.

Top four trends to watch heading into 2021

<table>
<tr><th colspan="2">KEY TRENDS</th><th>SUGGESTED ACTIONS FOR COMPANIES HEADING INTO 2021</th></tr>
<tr><td>Virtual Shareholder Meetings</td><td>The proportion of Russell 3000 companies electing to hold virtual (as opposed to physical) AGMs has tripled over the 2014-2019 period from 2.4% to 7.7%.
In 2020, the number of Russell 3000 companies holding electronic meetings spiked to 73.5% (due to COVID-19). The report notes that it is unclear what proportion of these were held as virtual vs hybrid meetings. Only 1.2% disclosed a hybrid format.
In S&P 500 companies the proportion of 2020 virtual-only meetings was 81%.
The report predicts that virtual meetings are likely to remain a necessity heading into 2021 (as a result of the COVID-19 pandemic).</td><td>The report advises companies to review the 'many lessons' from their 2020 experiences holding electronic meetings. In particular, companies are advised to:
document and address any technical/administrative shortcomings
plan/implement steps to safeguard and to optimise shareholder participation in meetings (especially the ability of shareholders to ask questions/receive answers)
engage with investors to explain these measures to allay (possible) concerns about the virtual meeting format
review organisational documentation to address any barriers to convening/postponing/facilitating virtual meetings and to ensure alignment with current legal/regulatory requirements</td></tr>
<tr><td>Environmental Issues</td><td>Key issue for large investors:
Environmental issues, and in particular climate changes is now a key focus for all large institutional shareholders and this is reflected in their voting policies/stewardship guidelines.
The key request/demand is for increased disclosure on a range of climate-related issues including disclosure around alignment of business operations with the goals of the Paris Agreement.
In some instances, companies are being asked to issue sustainability reports that comply with disclosure frameworks, such as the guidelines issued by the Global Reporting Initiative (GRI) or the Sustainability Accounting Standard Board (SASB) or by the Task Force on Climate-related Financial Disclosures (TCFD).
Shareholder proposals:
In 2020, 75 climate-related shareholder proposals were filed with Russell 3000 companies 24 of which proceeded to a vote.</td><td>The report suggests that in light of these issues, companies yet to do so should consider (among matters):
whether their leadership team (board and C-suite) have 'sufficient expertise in relevant environmental matters'
undertaking a periodic assessment of the quality of the internal control process used to oversee the business' environmental impact, identify areas of vulnerability, and capture new opportunities.
enhancing disclosure of environmental issues in sustainability reports and SEC filings with particular focus on 'the intersection between environmental and social impact'</td></tr>
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<tr><th colspan="2">KEY TRENDS</th><th>SUGGESTED ACTIONS FOR COMPANIES HEADING INTO 2021</th></tr>
<tr><td></td><td>Many of the filings were made at larger companies that are also included in the S&P 500 index. 61 proposals were filed at S&P 500 companies, 19 of which proceeded to a vote.
These 19 proposals were primarily (but not exclusively) targeted at carbon intensive sectors: industrials (6), energy (5). Dollar Tree (a discount retailer) was also targeted.
As you Sow was the most prolific proponent (filing 24 resolutions).
Climate resolutions:
Support levels for climate-related proposals increased from 24.1% in 2019 to 31.6% in 2020.
Four climate-related proposals that went to a vote in 2020 received majority support – in once instance (Dollar Tree) the proposal received 70.7% support.
51 climate-related proposals were withdrawn in 2020 – which the authors interpret as an indication of the level of investor engagement taking place on sustainability issues outside of AGMs.</td><td></td></tr>
<tr><td>Human Capital Management (HCM)</td><td>Shareholder resolutions:
2020 saw a spike in the number of HCM related resolutions with 63 proposals filed at Russell 3000 companies in 2020. Of this number, 34 went to a vote.
Topics of resolutions included: disclosure of workforce diversity (16) board diversity (12), disclosure of pay equity (12) and the adoption of employee arbitration policies (9).
Resolutions targeted a wide range of sectors particularly those that were hardest hit by the pandemic and reported mass layoffs/furloughs eg retail and industrials
Seven of the shareholder resolutions voted on the HCM-related categories received majority support and passed during the 2020 proxy season up from four in 2019 and three in 2017.
The highest support averages are seen among proposals on diversity (38.2%t for those on workforce diversity, up from 28.6% in 2017)</td><td>The report suggests that in light of this companies should consider (among other things):
clarifying/strengthening the role of the board/board committees in the oversight of HCM issues.
ensuring boards include HCM capability (eg building assessment of HCM skills into board assessment processes and taking steps where required to upskill board members/expand the board/engage outside expertise to fill HCM skills gaps if necessary)
maintaining and monitoring HCM data to identify issues/ensure alignment with strategy. It's suggested that this should be part of broader monitoring/evaluation of corporate cultureas a whole
preparing for more detailed HCM reporting – including engaging with investors to discuss why the company has chosen to use specific</td></tr>
</table>

KEY TRENDS		SUGGESTED ACTIONS FOR COMPANIES HEADING INTO 2021
		metrics/report against specific disclosure standard/framework – monitoring the shift towards the 'harmonisation and consolidation' of existing ESG disclosure frameworks – benchmarking reporting on HCM practices against peer disclosures
Board Diversity	▪ The report suggests that focus on gender and racial/ethnic diversity will continue to intensify driven by: pressure from institutional investors; proxy advisers, legislative and regulatory initiatives	▪ Boards are advised to ensure gender and ethnic diversity is part of ongoing board and CEO succession planning

Other trends

In addition to these issues, the report highlights the following as topics to watch in the 2021 proxy season.

- CEO/board chair separation: The report predicts that demand for CEO/board separation will continue to grow.
- Executive remuneration: The report suggests that executive remuneration will be a key focus heading into the 2021 proxy season as investors and proxy advisers will have an opportunity to evaluate compensation adjustments made in response to the global COVID-19 pandemic
- Political contributions and lobbying activities: Investors are increasingly focused on the alignment of publicly stated policy positions (eg in ESG areas such as diversity, racial justice and environmental issues) and the political and lobbying activities of the industry associations to which companies below. This is expected to continue in 2021.
- Director elections: The report suggests that the trend towards holding individual directors accountable for their organisation's ESG stance (eg environmental and diversity) is likely to continue. This may result in an uptick in the number of 'protest' votes against the election/re-election of directors.
- Exclusion of proposals: Companies continue to seek permission from the Securities and Exchange Commission (SEC) to exclude shareholder proposals relating to ESG matters from the voting ballot and the report predicts that this will continue especiallygiven the increasing volume of ESG proposals.

[Sources: Harvard Law School Forum on Corporate Governance and Financial Regulation 11/02/2021]

Shareholder Activism

The 'say on climate' initiative continues to gain traction

Context

The Say on Climate Initiative is an investor initiative that calls on companies to: a) provide annual disclosure of emissions; b) disclose their plans to manage emissions; and c) to automatically submit their climate change strategies to an annual shareholder vote (ie an annual 'say on climate' vote). It's suggested that the 'Say on Pay' rules in the UK and US could provide a precedent.

You can find our previous post tracking the growing level of support for the initiative and concerns that have been raised about its likely effectiveness in Governance News 20/01/2021 at p15.

US: As You Sow has joined the initiative

In a subscriber update, As you Sow has said that it is pushing for 'at least 100' of the S&P 500 companies to adopt 'say on climate' by 2022.

More particularly, As you Sow is asking that companies:

- disclose a net-zero transition plan, consistent with the goals of the Paris Agreement
- report their progress annually against benchmarks in the plan
- hold a shareholder vote on progress at their AGM.

To date, As You Sow states that it has written to 75 companies and met with a 'handful'. 'Say on Pay' resolutions are pending at three companies (Union Pacific, Booking Holdings and Monster Beverage).

[Source: As You Sow subscriber update 11/02/2021]

Australia: ACCR to target ASX listed companies with 'say on climate' resolutions

The Australasian Centre for Corporate Responsibility (ACCR) is coordinating the implementation of the initiative in Australia.

The ACCR considers that 'say on climate' would provide an 'attractive mechanism to promote change in the behaviour of Australian companies', by enabling shareholders to express their approval/disapproval of a company's climate strategy.

So far, 'say on climate' resolutions have been lodged with Santos Ltd and Woodside Petroleum.

The resolutions are in two parts – a constitutional amendment (special resolution) and a contingent ordinary resolution seeking that the company put its climate report to a shareholder vote every year, commencing 2022.

The full text of the resolution filed at Santos is here. The identical resolution (with minor adjustments to reflect the different numbering in constitution) filed at Woodside is here.

[Source: ACCR media release 11/02/2021]

Shell shareholders to vote on the company's transition plan

Shell has confirmed that starting at the 2021 AGM, the company will submit its Energy Transition Plan for an advisory vote to shareholders. The plan will be updated every three years and be put to an advisory vote (to enable shareholders to express their views on progress) annually.

[Source: Shell media release 11/02/2021]

Successful engagement: ACCR withdraws plans to push forward with a COVID-19 'worker rights' shareholder resolution

The Australasian Centre for Corporate Responsibility (ACCR) has announced that it will not push forward with a planned shareholder resolution seeking additional disclosure around the management of cleaning contracts by Scentre Group (the owner and operator of Westfield shopping centres in Australia and New Zealand) following successful engagement with the company.

According to the ACCR, Scentre Group has agreed to:

- report on 'how it prevents wage theft in its cleaning contracts and how it is managing safe workloads for cleaning staff'. The disclosure will include: a) the processes for identifying and mitigating risks within cleaning supply chains; b) the measures being implemented to monitor work, health and safety obligations; and c) the 'efficacy' of employee grievance mechanisms.
- the new information will be included in the Scentre Group's Responsible Business Report and Modern Slavery Statement to be released in H1 2021.

[Source: ACCR media release 02/02/2021]

Financial Services

Progress update: Financial Sector Reform (Hayne Royal Commission Response No 2) Bill 2020

The Financial Sector Reform (Hayne Royal Commission Response No. 2) Bill 2020 was introduced into the House of Representatives on 9 December 2020.

Broadly, the Bill proposes to implement the government's response to four Hayne Commission recommendations.

- Annual renewal and payment: Schedule 1 proposes to implement the government's response to Recommendation 2.1 (annual renewal and payment) by introducing a new requirement for financial services providers that receive fees under an ongoing fee arrangement to: a) provide clients with a single document each year outlining the fees that will be charged and the services which the client will be entitled to in the following 12 months and which seeks annual renewal from clients for all ongoing fee arrangements; and b) obtain written consent before fees under an ongoing fee arrangement can be deducted from a client's account. The proposed commencement date is 1 July 2021.
- Disclosure of lack of independence: Schedule 2 proposes to implement the government's response to Recommendation 2.2 (disclosure of lack of independence) by introducing (from 1 July 2021) a new requirement for providing entities (financial services licensees/authorised representatives) to give a written disclosure of lack of independence where they are authorised to provide personal advice to a retail client.
- Advice fees in superannuation: Schedule 3 proposes to implement the government's response to Recommendations 3.2 (no deducting advice fees from MySuper accounts) and 3.3 (limits on deducting fees from choice accounts) by increasing 'the visibility of advice fees for all superannuation products' and prohibiting the charging of ongoing fees for financial product advice from MySuper products. It's proposed that the new requirements will apply from 1 July 2021 (with a 12 month transitional period commencing 1 July 2021 for arrangements entered into before 1 July 2021).

Committee report

The Senate Standing Committee for the Scrutiny of Bills has raised concerns about the lack of detail around the scope of proposed record keeping requirements in the Bill and also about the maximum proposed penalties for noncompliance with these requirements (for a short summary of these issues see: Governance News 10/02/2021 at p20).

Current status: The Bill has passed the House of Representatives unamended and has progressed to second reading stage in the senate.

[Source: Financial Sector Reform (Hayne Royal Commission Response No. 2) Bill 2020]

APRA Deputy Chair Helen Rowell calls on funds to focus on lifting board capability

Australian Prudential Regulation Authority (APRA) Deputy Chair Helen Rowell's speech to the Association of Superannuation Funds of Australia (ASFA) Conference outlined the regulator's focus areas for the superannuation sector heading into 2021.

In particular, Ms Rowell emphasised APRA's focus on lifting board capability and the need for many boards to make changes to ensure they meet the standards and performance required by the regulator.

Key Takeaways

Increased expectations

- Ms Rowell said that 2020 illustrated the resilience of the financial services industry. This resilience has enabled APRA to recommence policy and supervision agenda which was temporarily paused due to COVID-19.

- APRA expects both the rapid growth – ten years ago the average fund had $2 billion in assets, now it's $10 billion - and the consolidation in the superannuation sector to continue. Ms Rowell observed that 'with growth and maturity comes an expectation – indeed a requirement – of a commensurate level of capability and professionalism for those running what are clearly significant financial services businesses'.
- In 2021 APRA plans to 'intensify' its focus on lifting governance standards, and otherwise pushing for improvements to ensure members' interests are assured and instances of underperformance are rectified
- In particular, Ms Rowell emphasised that APRA intends to 'continue to highlight those funds that are not operating at the expected level and I reiterate the message for those in the industry still lagging behind that, if you're not up to scratch, you need to get better or get out'.

Board skills and capability continues to be a focus for APRA

- APRA considers diversity in the leadership of organisations, and more particularly on boards, to be 'important to support the resilience of organisations' by enabling better decision making. APRA considers that the pandemic has demonstrated this with diverse boards (boards that include a wide range of skills, experience and perspectives) demonstrating 'clear advantages' over less diverse boards.
- Ms Rowel welcomed the 'tangible impact' APRA's focus on board skills and capability is having in some quarters – Ms Rowell said that some Chairs have reported finding the process of developing a board skills matrix has been a 'valuable exercise' in identifying skills gaps and prompting conversations about how to fill them. However, Ms Rowell raised concerns that some boards are less open to this process. Ms Rowell observed,

> 'Unfortunately, I have also had conversations that are defensive and dismissive of the need to make changes to governance frameworks and uplift board skills and experience, which obviously raises concerns for APRA. A good Chair or director recognises the need for ongoing improvement and is proactively addressing risks before they become issues, rather than reacting and responding after the fact and only when pushed to do so'.

Supervision and policy priorities:

- Ms Rowell highlighted APRA's work to strengthen prudential standards and the roll out of the revised and expanded superannuation data collection as two important areas of focus for the regulator.
- Ms Rowell said that APRA is focused on strengthening the prudential framework including undertaking a review of insurance and investment governance standards in the first half of 2021, followed by the outsourcing, risk management, governance, conflicts and fit and proper standards in late 2021 and 2022.
- APRA is also focused on enhancing supervision and improving data collection and transparency. In 2021, APRA will commence the revised superannuation data collection, which is expected to provide 'a broader and deeper data-set – particularly for choice products'. Ms Rowell said that this expanded data collection is 'critical' to both: a) implementation of the government's Your Future, Your Super reforms; and b) to enabling APRA to identify and address underperformance among Choice products. Ms Rowell encouraged funds to take steps to ensure that they will be ready to report when the final reporting standards come into effect in H2 2021. Ms Rowell commented, 'we think the data we propose to collect is important for running a high-performing fund in today's world – if you don't have it, you might want to ask why'.

Measuring performance

- Heatmaps:
  - APRA expects to continue to publish the MySuper heatmap on a 'December release cycle'.
  - In 2021, APRA will publish a heatmap assessing choice products. Following the publication of the choice heatmap APRA will step up its supervisory efforts to target underperforming choice options/products. .
- APRA intends to publish 'enhanced data on insurance some time in 2022'.

Adaptability and resilience

Ms Rowell concluded by calling for continued focus on lifting board capability.

> 'The last 12 months have demonstrated that the industry can operate well in a crisis, and does have the ability to adapt when the unexpected happens. It's important that we all maximise the value of this experience by considering the lessons and making necessary changes so we're ready for the next collection of challenges…

Whatever awaits us in 2021, the superannuation industry will continue to grow, mature and consolidate. The industry needs to continue to develop and evolve its capabilities and practices if it is to effectively oversight and manage the multi-billion dollar financial institutions that it increasingly comprises. That includes enhancing diversity through board renewal.

Much has been achieved by the industry, and that should be acknowledged. But so too should the reality that many boards will need to make changes to achieve the standards and performance that APRA requires and the community expects'.

[Source: APRA Deputy Chair Helen Rowell - Speech to ASFA Conference: Greater expectations: increasing scrutiny of a maturing superannuation industry 12/02/2021]

Calls for the government to 'recommit' to increasing the superannuation guarantee continue to mount

- Industry Super Australia has cautioned that failing to proceed with the legislated increase in the superannuation guarantee to 12% will increase age pension spending by $33 billion over coming decades.
- The Australian Institute of Superannuation Investors has also identified raising the superannuation guarantee to 12% as an important factor in ensuring the 'equity and adequacy of superannuation outcomes'.
- The Association of Superannuation Funds of Australia (ASFA) maintains that lifting the superannuation guarantee to 12% is critical to 'helping individual retirees to achieve a dignified retirement as well as improve the sustainability of the Age Pension and take pressure off future federal Government budgets as the population ages'. ASFA has published a number of media releases/research in support of this policy stance.
- The ACTU has raised concerns about the negative impact that withdrawals under the government's early release of superannuation scheme will have on retirement outcomes, especially for younger workers (aged under 30) and women. The statement emphasises the need to go ahead with the increase in order to rebuild retirement savings.
- The Federal Labor party has committed to go ahead with the increase (if elected).

[Source: ISA media release 12/02/2021; ACTU media release 09/02/2021; Shadow Assistant Treasurer Stephen Jones media release 10/02/2021; AIST newsletter 15/02/2021; ASFA website 16/02/2021]

Insurance brokers code of practice: discussion paper and preliminary draft changes released for consultation

The National Insurance Brokers Association (NIBA) is progressing an independent review of the Insurance Brokers Code of Practice (first commenced in 2018) ahead of submitting the Code (once finalised) to the Australian Securities and Investments Commission (ASIC) for approval.

The NIBA states that 'the Code review will not be limited in its scope, with NIBA's intent being to ensure that it remains relevant and a benchmark of industry self-regulation in a regulatory environment that has turned its focus more keenly to community expectations, culture, and conduct'.

The NIBA Board has appointed a consultant, Marigold Magnaye of Asperdel Consulting, to conduct the review.

A discussion paper and marked up copy of the proposed changes to the Code have been released for consultation. The deadline for submissions is 9 April 2021.

Proposed timing and roll out

- The NIBA plans that the Code will be finalised and submitted to ASIC for approval in the second half of 2021.
- It's planned that the Code will take effect, in mid to late 2022.

Preliminary views sought

The discussion paper seeks feedback on the NIBA's proposed changes to the Code (which NIBA emphasises are 'preliminary' in nature), and which have been informed by initial discussions with stakeholders.

The table below provides an overview of the ten issues/concerns raised through stakeholder discussions with NIBA, NIBA's proposed changes, and some of the specific questions on which NIBA has requested feedback.

<table>
<tr><th>ISSUE</th><th>NIBA'S SUGGESTED CHANGES</th><th>QUESTIONS FOR FEEDBACK</th></tr>
<tr><td>Higher standards
The Code should 'go beyond the law'</td><td>Concerns have been raised that the current Code does not state a position that is 'materially beyond legal obligations'.
It's suggested that there is opportunity for a revised Code to be 'visionary and aspirational for the profession'.
The NIBA's proposed revisions include a number of changes informed by this stakeholder feedback. These changes include:
A shift to determining compliance with legal obligations 'through the lens of acting with commercial standards of decency and fairness with due regard for the interests of our clients'
the addition of new Design and Distribution standards ahead of the regulation being finalised
Providing greater detail around compliance with existing Code obligations eg specifying a process for subscribers to follow when managing complaints and disputes with clients (standard 10)
The NIBA's proposed changes do not include a Statement of Ethics or a reference to the need to abide by ethical behaviour (as licensed financial services advisers arguably have an obligation to act ethically under the law already). Instead, the proposed changes repeat the existing commitment to discharge duties diligently, competently, fairly and with honesty and integrity'.</td><td>The discussion paper seeks feedback on a number of issues including (among others):
Whether a preamble should be added to the Code setting out clearer objectives/guiding principles
Whether the Code should include examples of behaviours that go against the guiding principles of the Code/communityexpectations.
Whether the Code should include a commitment by Code subscribers to adopt the recommendations of the Insurance Brokers Code Compliance Committee (IBCCC) own motion inquiry
Whether the Code should include a statement of ethics and if so, whether it should 'go as far as the FASEA standards given insurance brokers and general insurance are exempt)
Whether the revised Code should be clearer about what 'efficiently, honestly and fairly' means by providing examples/more detail and/or adoption some or all of the FASEA Code of Ethics
Whether some (or all) ethical/behavioural commitments should be extended to apply to all subscriber interactions
Whether insurance broking companies should formally adopt the Code as part of their strategy/values with all staff 'trained on it'</td></tr>
<tr><td>Broad application
The Code should apply to all services provided by a broker to a client</td><td>The NIBA proposes to remove certain qualifiers on the application of behavioural commitments in the Code to limit the ability of Code subscribers to 'opt out'.</td><td>The discussion paper seeks feedback on a number of issues including (among others):
Whether the Code should 'state certain practices and behaviours that should apply when a subscriber is retained by a client'
Whether different practices/behaviours should apply, depending on the type of advice the client is receiving
Whether these practices/behaviours should apply regardless of the size of the client/whether there should be an option for subscribers to agree (where a client is a large enterprise) that</td></tr>
</table>

ISSUE	NIBA'S SUGGESTED CHANGES	QUESTIONS FOR FEEDBACK
		compliance with the practices/behaviours is not required ▪ Whether certain practices/behaviours should apply more broadly – eg to potential clients, third parties, agents.
Agents and third parties A Code subscriber should ensure that its third-party agents and service providers abide by the Code to the extent applicable	▪ Currently Code subscribers are required to ensure their agents are competent/properly trained (but this is the extent of their obligations) ▪ NIBA proposes to make changes to Standard 8 'to improve standards and align to the extent relevant, with changes made to the [ICA 2020 Code of Practice]' including having policies/procedures for third party representatives that require them to conduct services appropriately and to prevent unacceptable sales practices. ▪ It's also proposed that Code subscribers will be in breach of their obligations where their representatives are in breach.	The discussion paper seeks feedback on a number of issues including (among others): ▪ Whether the behavioural standards applying to Code subscribers' third party agents should eb included in the Code ▪ Whether Code subscribers should be required to ensure that a third party agent adheres to the relevant standards and if so, what level of responsibility a Code subscriber should have for third party breaches ▪ What types of monitoring/review systems subscribers should have in place in relation to third party compliance with the revised Code ▪ Whether AFCA or the IBCCC should be able to 'directly sanction a Code Member's third party who breaches the Code'
Broker's role The limits of a broker's role need to be clearly spelled out to a client prior to insurance being placed to allow informed decision making	▪ NIBA proposes to rewrite standard 4 of the Code to clarify whether the broker is providing personal advice or not. ▪ The NIBA also proposes to amend standard 5 to require Code subscribers to undertake certain actions when providing Personal Advisory Services. The proposed changes are intended to clarify the reach of a broker's investigations prior to advising on insurance or risk options'.	The discussion paper seeks feedback on a number of issues including (among others): ▪ What information consumers require in order to make an 'informed' decision about insurance services ▪ What additional information would assist clients who only receive general insurance or factual advice rather than Personal Advisory Services ▪ What additional information is required to enable a client to make an 'informed decision' on insurance and risk options provided for clients receiving Personal Advisory Service ▪ Whether Code subscribers should state which markets were canvassed in order to provide the options for cover and if so, when this disclosure should occur ▪ Whether Code subscribers should be required to advise why a limited market was approached and if so, when this disclosure should occur
Conflicts of interest The Code should contain a revised	▪ Although no submissions were made to the Hayne Royal Commission about conflicts issues relating to insurance	The discussion paper seeks feedback on a number of issues including (among others):

ISSUE	NIBA'S SUGGESTED CHANGES	QUESTIONS FOR FEEDBACK
Conflicts of Interest section promoting transparency and informed consent from clients where a conflict of interest may arise	brokers, some stakeholders suggested there is an opportunity to improve the way in which the Code currently deals with conflicts of interest. ▪ In response to this feedback, the NIBA proposes to retain Standard 2 as currently drafted but to the commentary 'with a view to clearly setting out standards of communication with, and information for clients, regarding types of conflicts'. The proposed changes include providing conflict of interest examples.	▪ Stakeholder views on whether 'transparency should be the objective of a standard dealing with conflicts of interest, and if not, what issues the standard should be addressing. ▪ Whether there are any particular issues of concern about the way in which conflicts are currently managed ▪ What type of information/method of disclosure would be most helpful to consumers/small busiensses in in assessing their options/deciding whether to proceed despite a conflict of interest ▪ Whether adherence to the standard relating to conflicts merit specific monitoring and reporting by the Insurance Brokers Code Compliance Committee
Remuneration disclosure The Code should promote transparency in remuneration disclosure, not simply abiding by the letter of the law.	▪ Remuneration disclosure is dealt with in Standard 6 of the Code, which states: 'We will clearly tell you how our Covered Services are paid for before we provide them and answer any questions you have'. ▪ Standard 6 has been criticised for potentially having limited application. ▪ NIBA proposes 'completely rewriting' the standard with a view to enhancing the effectiveness of disclosure by including more detail around types of remuneration, who provides the remuneration, and when and how it is payable. The proposed changes also include new requirements about how this information should be communicated. ▪ The discussion paper notes that questions remain about whether providing more information/adding to the disclosure around remuneration/incentives is an effective means of enabling clients to make a more informed decision. The paper observes that the issue could also be addressed through subscriber commitments to managing conflicts of interest. ▪ The paper observes that general insurance brokers are exempt from the 2012 Future of Financial Advice legislative reforms (FOFA) which included introducing additional client	The discussion paper seeks feedback on a number of issues including (among others): ▪ What type of additional remuneration disclosure would assist customers in their decision making ▪ Whether it would assist customers to know: with which insurer a Code subsriber has a market derived income arrangement and what level of detail about the arrangement would be of greatest assistance ▪ Feedback on the extent to which 'full transparency' around market derived income os possible given these arrangements are generally commercially sensitive ▪ What other measures (apart from disclosure) could enhance conflicts management of market derived income ▪ Whether general insurance brokers (who benefit from a FOFA exemption) should commit to 'more than Standard 6 to ensure their ongoing exempt status' and if so, what additional commitments the community would expect. ▪ Whether any additional information (not already included in NIBA's proposed changes to standard 6) should be disclosed ▪ Whether the standard shold apply to all Code subscribers/distribution models

ISSUE	NIBA'S SUGGESTED CHANGES	QUESTIONS FOR FEEDBACK
	best interest duties and a ban on conflicted remuneration. This exemption is set to be reviewed in 2022 (as recommended by the Hayne Commission). ▪ In light of these issues, the discussion paper suggests that feedback from stakeholders on how conflicts can be better managed will be 'invaluable'	▪ Whether disclosure commitments should be different for larger clients ▪ What role the IBCCC should play in ensuring adherence to NIBA's enhanced communication and governance measures standard
Enforceability, remedies and sanctions The Code should be clear on how obligations are enforced and allow anyone to report a breach	▪ Key stakeholders have raised questions about the ability of customers to enforce the Code as well as concerns about limitations on who can allege/report a breach. ▪ NIBA's proposed changes extend the IBCCC's power regarding financial sanctions. It is also proposed that Code subscribers enter into an agreement with the IBCCC. ▪ NIBA also proposes to broaden the categories of persons able to report a breach by allowing a Client's representatives (including family members, MPs, legal representatives, etc) to make a complaint on behalf of the Client.	The discussion paper seeks feedback on a number of issues including (among others): ▪ What sanctions should be available to the IBCCC where 'members unsubscribe' when a complaint is made against them ▪ Whether the IBCCC should have power to notify ASIC of efforts to evade investigation or compliance with a sanction (even if the breach is minor) ▪ In view of the proposed legislative changes allowing ASIC the ability to determine whether code provisions should be enforceable, whether the NIBA should pre-empt the legislative change and prescribe certain provisions as enforceable. If so, which Standards should be enforceable Code provisions. ▪ Given membership of the Code is voluntary, whether there is 'a real disincentive for subscribers to sign up to the Code if certain Code provisions are made enforceable by ASIC'
Complaints process The Code should be clearer on how the complaints process works and consideration be given to whether the timeframes are appropriate.	▪ NIBA proposes to amend the Code to align with ASIC's new Regulatory Guide 271 Internal Dispute Resolution (replacing RG 165), which will apply to complaints received by financial services firms on or after 5 October 2021. ▪ Key changes proposed include: – an expanded definition of what will be treated as a complaint – standards about who will handle the complaint and how the complaint will be handled – a requirement to keep the complainant updated every 10 business days – resolution of the complaint within 30 calendar days (except in certain circumstances) – general complaint handling standards, including information available to the complainant, staff	The discussion paper seeks feedback on a number of issues including (among others): ▪ Whether Code subscribers should be required to refer individuals or small businesses who make complaints to support advocates upon receiving a complaint ▪ Whether access to mediation/conciliation early in the complaints process would reduce the time to resolve complaints/provide a more 'efficient' outcome for complainants ▪ Whether the NIBA's proposed changes can be further improved eg to address communication concerns ▪ Whether insurance brokers are 'facing the same issues as insurers regarding streamlining complaints handling if

ISSUE	NIBA'S SUGGESTED CHANGES	QUESTIONS FOR FEEDBACK
	training, and developing and maintaining a positive culture around complaints.	insurance broker complaint numbers are significantly lower'
Vulnerable clients The Code should make provision for the need for Code subscribers to identify and support vulnerable clients	▪ NIBA proposes to introduce a new Standard 13 which outlines the type of support subscribers of the Code will provide to vulnerable clients. ▪ The standard provides that subscribrs will develop policies/procedures/training for representatives to help them to identify, engage with and support vulnerable clients	The discussion paper seeks feedback on a number of issues including (among others): ▪ Whether the revised Coe should take into account the 'special needs of vulnerable clients' ▪ Whether specific groups should be identified in the Code as vulnerable ▪ Whether the revised Code should include a statement acknowledging the diverse needs of vulnerable clients and undertaking to provide assistance/support/training for representatives
Accessibility The Code should be accessible to consumers eg through adopting plain language, having non-English language versions and ensuring the Code can be accessed by the visually or hearing impaired.	▪ NIBA states that accessibility considerations will be addressed before the revised Code is finalised.	The discussion paper seeks feedback on a number of issues including (among others): ▪ Whether there is benefit in reformatting the Code so that it appears more like other industry Codes (eg ABA Code) ▪ Whether the Code should eb made available in other languages/formats to accommodate the visually and hearing impaired ▪ Whether complainants should be able to make a complaint on the Code website and if so, whether these complaints should be received by the IBCCC in the first instance ▪ Whether potential complainants should eb encouraged to seek redress from the Code subscriber in the first instance ▪ What support subscribers would expect NIBA to provide to ensure they are aware of/understand their commitments and obligations under the revised Code ▪ What (if any) additional steps NIBA can take to promote the Code

[Source: NIBA media release; Discussion paper; Proposed (preliminary) Code changes]

Banning school banking programs: Choice has welcomed the ACT's commitment to phase out the programs and has called on other states/territories to follow suit

The ACT legislative assembly has passed a motion to phase out school banking programs, following the release of the Australian Securities and Investments Commission (ASIC) report: REP 676 Review of school banking programs.

Broadly, the report found that though school banking programs purport to teach young children long-term savings habits, there is no evidence that they do so. Rather, they are more in the nature of advertising/marketing campaigns.

The ACT motion calls on the ACT Government to:

- 'continue to work with students, the ACT Council of Parents and Citizens Association, the Australian Education Union ACT Branch, and the ACT Principals' Association to develop a plan to deliver quality financial literacy education in public schools; and
- transition away from banks and financial institutions delivering school banking programs in ACT Government schools by the end of the 2020-2021 financial year'.

The motion notes that the ASIC Money Smart and the Australian Curriculum, Assessment and Report Authority have both developed financial education teaching resources.

In a short statement, Consumer group Choice welcomed the move and called on other states and territories to follow Victoria and the ACT's lead on the issue.

[Source: Choice media release 11/02/2021]

In Brief | FFNS bill tops $1.2bn: As at 31 December 2020, six of Australia's largest financial institutions have paid/offered a total of $1.24 billion in compensation to customers in connection with either fee no service conduct or provision of non-compliant advice

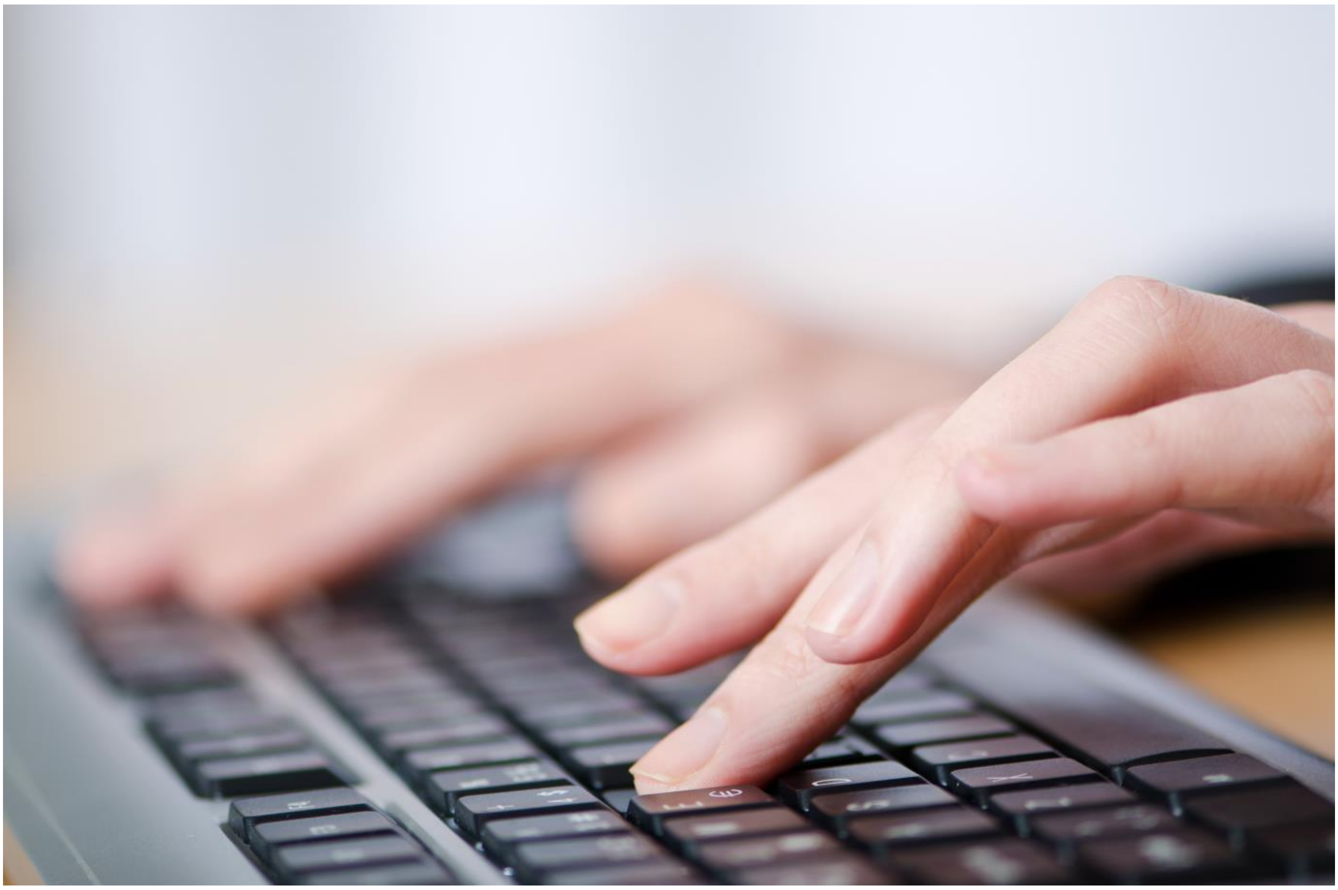
[Sources: ASIC media release 12/02/2021]

In Brief | ASIC Commissioner Sean Hughes calls on industry to 'prioritise' business resilience including against cyberattacks and regulatory changes (DDO and PIP), for BNPL providers to 'seize the opportunity' to ensure the BNPL Code is sufficient robust, and for lenders to ensure that credit continues to flow (and customers are treated fairly)

[Sources: Speech by ASIC Commissioner, Sean Hughes, to the Australian Finance Industry Association (AFIA) Risk Summit, 16/02/2021]

Risk Management

Cybersecurity, Technology and Privacy



WEF calls on business to continue to take a leadership role in cybersecurity heading into 2021

The World Economic Forum (WEF) writes that the COVID-19 pandemic, which triggered the rapid uptake and implementation of new technologies at a number of organisations, has also exposed the level of unpreparedness/vulnerability at some organisations as well as the level of digital inequality.

WEF also considers that the recent spate of high profile cyber-attacks has underlined the need for private sector organisations and governments to continue to sharpen their focus on the issue. WEF suggests that until 'security features become integral to technology – seamless, transparent, and naturally usable by people – we will need to rely on business leadership to pay serious attention to cybersecurity'.

Five key challenges for 2021

WEF identifies five key cybersecurity challenges that it considers leaders globally should 'consider and tackle' in 2021. These are briefly summarised in the table below.

CHALLENGES	SUGGESTED ACTION
Breadth of exposure to cyber-attack and dependence on third parties	▪ In light of the rapid uptick in the rate at which organisations have adopted and implemented new technologies as a result of the pandemic, and in light of the fact that the trend looks set to continue,

CHALLENGES	SUGGESTED ACTION
WEF considers that recent high profile attacks have both underscored the breadth of exposure within many organisations to the threat of cyber-attack and their increasing dependence third parties.	WEF highlights the need to ensure an 'acceptable level of visibility and understanding of digital assets' as a key challenge heading into 2021.
Lack of cybersecurity expertise WEF considers that in order to mitigate against the increased threat of cyber-attack, relevant expertise within organisations is key.	▪ WEF considers that 'security by design and by default are becoming integral to success' ▪ Businesses should take a proactive approach to improving their cybersecurity infrastructure. ▪ WEF suggests that organisations should have in place a 'proactive plan' for building/maintaining its 'cybersecurity workforce' including planning for the expected tenure of experienced/skilled cybersecurity professionals to manage turnover
Addressing the increasing complexities of digitalisation WEF considers that the 'blurring line between digital and physical domains' as a result of the digitalisation of all aspects of business means that governments are faced challenges on multiple fronts. For example – addressing the spread of fake news, mitigating against threats to critical infrastructure and distribution chains.	▪ WEF argues that governments must treat cybersecurity as a national security priority if these complex challenges are to be effectively addressed. WEF states, ▪ 'In today's battles, governments have to adapt to fight against attackers that are silent, distributed, varied and technically savvy. The public and private sectors alike are engaged in this battle – and the private sector will need what only the public sphere can bring to the fight, including policy-making, market-shaping incentive models and training on a large scale'.
Reducing regulatory complexity/finding ways to streamline requirements WEF considers that the complex web of different regulatory requirements globally – eg General Data Protection Regulation, the California Consumer Privacy Act, the Cybersecurity Law of the People's Republic of China and others - impose a significant compliance burden on organisations and, given their occasionally conflicting priorities/requirements, can serve to 'weaken defence mechanisms'.	▪ WEF calls on policymakers to be aware of the impact of multiple layers of regulatory requirements on companies and the significant difficulty this poses from a compliance perspective. ▪ WEF calls on policymakers globally to turn their minds to the challenge of streamlining requirements: 'Policies must be creative in increasing protection while decreasing regulatory complexity. Cooperation among different policymakers is critical'.
Addressing the difficulties in tracking 'cyber criminals' Currently the perpetrators of cyber-attacks are difficult to track and rarely face prosecution.	▪ WEF calls on policymakers globally to assist in addressing this issue by working with cyber crime experts to 'establish internationally accepted criteria for attribution, evidence, and cooperation in pursuing cyber criminals and bringing them to justice'.

[Source: World Economic Forum 21/01/2021]

In Brief | Cybersecurity to rise up the list of board priorities: Gartner predicts that 40% of all boards will have a dedicated cybersecurity committee by 2025 in light organisations' increasing vulnerability to attack and in light of boards' increasing focus on the issue

[Source: Gartner media release 28/01/2021]

In Brief | Evaluating responsible corporate behaviour: ISS considers that disclosure of cyber risk metrics and ESG metrics (including climate disclosure) provide investors with valuable insights into corporate behaviour within an organisation

[Sources: ISS media release 10/02/2021]

Culture and Accountability

Top Story Balancing transparency and confidentiality key to managing workplace sexual harassment

MinterEllison has released an article discussing the implementation of the confidentiality and transparency principles advocated in the report Disrupting the System – Preventing and Responding to Sexual Harassment in the Workplace (2020) published by the Champions of Change Coalition (CCC), to create a culture of prevention.

The full text of the article is available on our website here.

ESG

Committee paves the way for a new EU law requiring companies to comply with human rights and environmental standards within their value chains

The European Parliament's Legal Affairs Committee has approved (by 21 votes in favour to one vote against) a draft legislative initiative calling on the Commission to 'urgently present a law that ensures companies are held accountable and liable when they harm - or contribute to harming - human rights, the environment and good governance'.

Rationale

The Committee argues that the measure is warranted because existing voluntary international frameworks on due diligence eg the UN Guiding Principles on Business and Human Rights and the OECD guidelines for Multinational Enterprises, have proven to be insufficient to address the issue. For example, only one in three companies in the EU currently takes due diligence measures.

What's being proposed

- The Committee has called on the Commission to legislate mandatory requirements obliging all companies operating in EU internal market (including those from outside the EU) to 'identify, address and remedy aspects of their value chain (all operation, direct or indirect business relations, investment chains) that could or do infringe on human rights (including social, trade union and labour rights), the environment (including contributing to climate change) and good governance'.
- The new requirements would be backed up with sanctions for non-compliance.
- The rights of victims or stakeholders in third countries would also be better protected.
- There would be an import ban on products linked to 'severe human rights violations' eg forced labour/child labour.

[Source: European Parliament's Legal Affairs Committee media release 27/01/2021]

APPEA supports net zero by 2050 target: Revised policy principles released

The Australian Petroleum Production & Exploration Association (APPEA) has released the third edition of its climate change policy principles.

Four policy principles

- Net-zero by 2050: APPEA considers that 'net zero emissions by 2050 should be the goal of national and international policy'.
- Cohesive approach to policy: APPEA considers that climate policies should be integrated with other economic, social, technology and energy policies.
- Australia's climate policies should 'maximise growth in jobs and investment' while maintaining the competitiveness of trade-exposed industries eg LNG.
- Ensure universal access to 'affordable, reliable, sustainable and modern energy'

Announcing the release of the revised policies APPEA CEO Andrew McConville that the industry has had a consistent policy on climate change.

> 'The oil and gas industry supports a national climate change policy that delivers greenhouse gas emissions reductions, consistent with the objectives of the Paris Agreement and with net zero emissions across the Australian economy by 2050 as part of a contribution to a goal of global net zero emissions by 2050.
>
> Greater use of Australian natural gas – in the domestic market, and LNG exported globally – can significantly reduce greenhouse gas emissions both here and abroad'

This is very much the theme of APPEA's report – Australia's cleaner energy future – which outlines the sector's policy stance and climate change commitments in more detail.

[Sources: APPEA media release 12/02/2021; 2021 APPEA Climate Change Policy Principles; APPEA report: Australia's cleaner energy future]

The ACCR has welcomed APPEA's net zero commitment

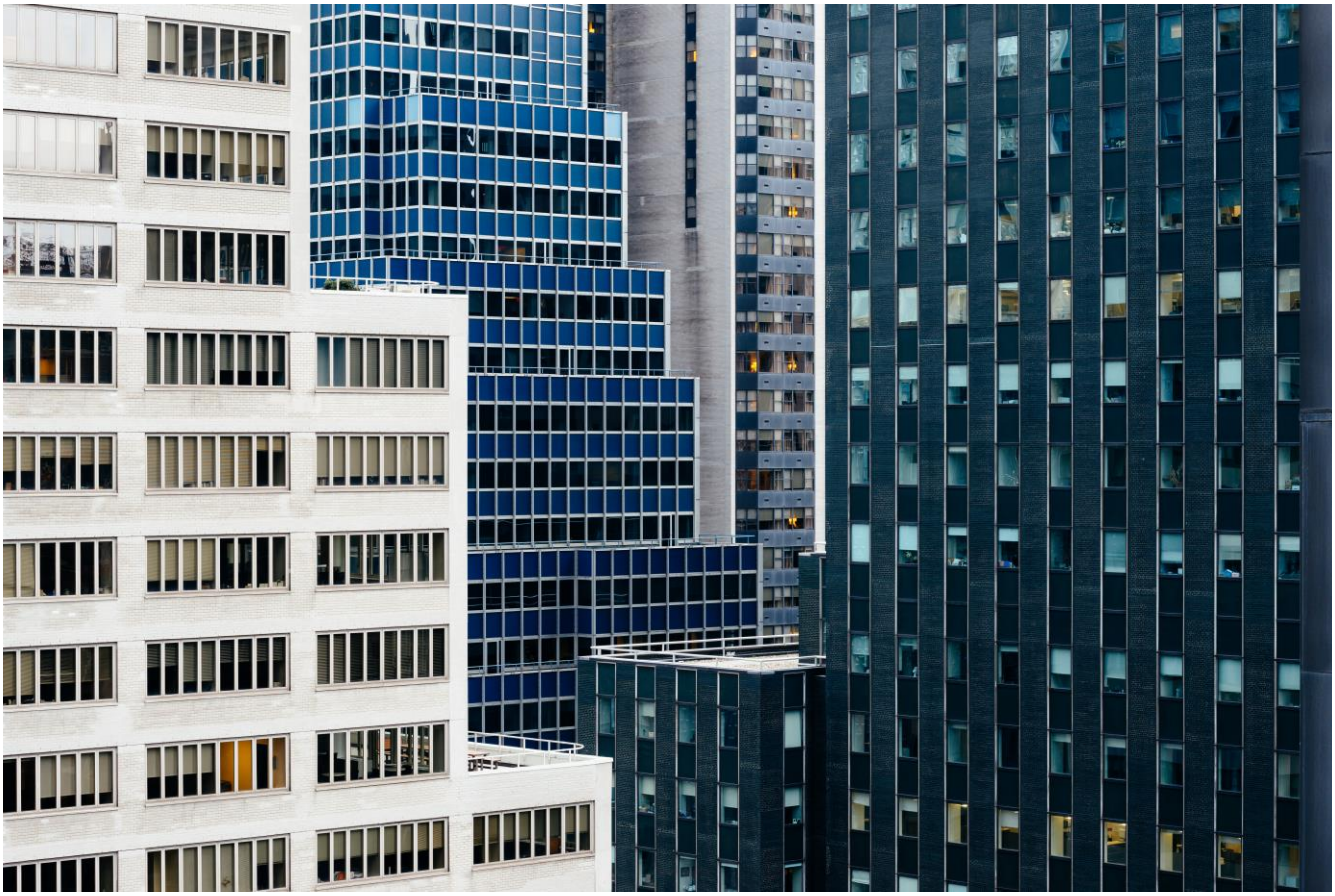
In a short statement, the Australasian Centre for Corporate Responsibility (ACCR) welcomed APPEA's net zero commitment and the revision of the policy principles., but has raised concerns about APPEA's stance on the LNG industry.

ACCR director of climate and environment Dan Gocher commented,

> 'APPEA says it supports climate action, but refuses to acknowledge that Australia's LNG industry has contributed the fastest growing emissions over the last decade. The sooner APPEA and its members acknowledge that the LNG industry simply cannot grow any further, the more chance Australia will have of meeting its Paris targets. While APPEA's support for net zero emissions by 2050 is welcome, we're not convinced APPEA understands what that means: the end of much of Australia's oil and gas industry.'

[Source: ACCR media release 12/01/2021]

Insolvency and Restructuring



Treasury seeks feedback on permanently raising the statutory demand threshold

Context

As part of its response to the COVID-19 pandemic, the statutory demand threshold - the minimum threshold at which creditors can issue a statutory demand on a company - was temporarily raised to $20,000. The measure was intended to 'lessen the threat of actions that could push otherwise viable businesses into insolvency'.

The measure expired on 31 December 2020, after which the small business insolvency reforms commenced.

Consultation on permanently raising the threshold

Treasury is now consulting on:

- whether the minimum threshold should be permanently lifted from the current $2000 threshold;
- if so, what the threshold should be
- what impact increasing the threshold would have. .

The due date for submissions is 5 March 2021.

[Source: Consultation paper: Increasing the Statutory Demand Threshold 15/02/2021]

Other News

Commonwealth Integrity Commission: The Governance Institute has welcomed moves to establish a national anti-corruption body as 'long overdue' but has raised concerns about the proposed approach

Context

The government released two draft Bills proposing to establish a new Commonwealth Integrity Commission (CIC) for consultation in November 2020.

- The draft Commonwealth Integrity Commission Bill proposes to establish the CIC.

  The CIC is described as: '…a centralised, specialist centre investigating corruption in the public sector. It will be established as an independent statutory agency, led by the Integrity Commissioner and assisted by the Law Enforcement Integrity Commissioner and the Public Sector Integrity Commissioner'.

- The draft Integrity and Anti-Corruption Legislation Amendment (CIC Establishment and Other Measures) Bill, proposes to make 'necessary consequential amendments to existing Commonwealth legislation' to support the introduction of the CIC Bill.

For a brief summary see: Governance News 4 Novermber at p37.

Governance Institute submission

The Governance Institute has said that though it 'strongly welcomes' steps to establish a national anti-corruption body as 'long overdue' it has concerns about the proposed approach.

The submission sets out the principles that Governance Institute members consider should underpin the establishment of a CIC. These are as follows.

- seek to establish a best practice model for anti-corruption agencies for all jurisdictions, informed by analysis of what has worked well/hasn't worked well in state and territory contexts have a broad and comprehensive jurisdiction and be empowered to investigate corruption in all levels of the public sector
- be able to accept referrals to investigate an issue from any member of the public
- be guaranteed sustainable funding to safeguard its independence
- have a broad range of clearly defined powers – eg the ability to gather evidence by intercepting communications, conducting physical and electronic surveillance, compelling people to provide information and produce documents, conduct searches under warrant and conduct 'coercive public hearings' – to enable it to properly investigate matters referred to it.
- be able to address systemic issues as well as isolated issues
- be fully accountable to Parliament (but not be in any way accountable to the Executive to prevent political interference and real/perceived conflicts of interest) through a joint parliamentary committee.

Recommended changes

The submission recommends a number of changes to better align the proposed approach with the principles outlined above. These include the following.

1. Wide powers of referral/notification

As drafted there are a number of restrictions on who is able to make referrals and notifications to the CIC. The submission recommends that all members of the public should be able to refer a matter to the CIC for investigation and that the CIC should be free to investigate on its own initiative.

2. Preventative function

Section 88 of the draft Bill empowers the Minister to direct the Commission to conduct broad inquiries into systemic corruption issues in particular public sector agencies. However, the submission argues that this function should be more clearly defined. As a minimum, the submission states that the Commission should 'be able to conduct evaluations on its own initiative and in response to any referral or notification, including from public sector whistleblowers, without a ministerial direction'. The submission suggests that the approach adopted by the South Australian Independent Commission Against Corruption (ICAC) could provide a model.

3. Clearly defined powers including public hearings

The submission argues that under the proposed model, the CIC will be limited in its ability to hold public hearings. The submission recommends that the CIC should have a broader 'discretion to hold public hearings and that there should be clearly defined safeguards for due process'. The submission further recommends that the CIC should be required to consider matters of public interest (eg whether a public hearing would be unfair to an individual or 'imperil the prospect of a conviction') when determining whether to hold a public hearing.

The submission also raises concerns about:

- Limitations on the ability of the CIC to conduct investigations of parliamentarians, parliamentary staff and public servants. The submission argues that the CIC should apply to the entire public sector equally so far as is practical and unless there are exceedingly strong public interest grounds not to do so.
- The 'exceptionally broad powers' of the Attorney General to prevent documents/otherinformation from being given to/accessed by the CIC. The submission questions whether 'such broad ministerial discretion powers are the most appropriate way to deal with difficult issues of national security and other important public interest matters. Absent appropriate safeguards, these powers are potentially inconsistent with principles of accountability, transparency and parliamentary sovereignty and may be open to misuse'.

4. Independent funding

To insure against 'punitive reductions in funding' and to prevent any real or perceived conflict of interest from arising, the submission recommends that Parliament not the Executive be ultimately responsible for funding the CIC.

The Governance Institute further recommends that 'as a minimum' the CIC should be funded via a direct appropriation from the Parliament disclosed in the Federal Budget, rather though departmental funding overseen by the responsible minister and that Parliament should also consider making an independent body responsible for making recommendations on the appropriate level of the Commission's funding.

5. Professional membership organisations offering TEQSA-regulated awards should not be covered

The submission suggests that as currently drafted, the Commission would have jurisdictionover all Tertiary Education Quality and Standards Agency (TEQSA) regulated higher education providers including professional associations that offer TEQSA regulated awards. The submission argues that this approach 'potentially increases the regulatory burden [on professional associations] and falls outside the intended purpose and scope of the Commission'. The submission recommends the definition in section 10 of the draft Bill covering all higher education providers be' defined by reference to a schedule of higher education providers and research bodies at risk of foreign interference and excludes professional membership organisations'.

6. Whistleblowing

The submission also suggests that consideration should be given to giving the CIC 'a role in relation to whistleblowers which would enhance the Commission's ability to right corruption and fill an important gap in the current Australian whistleblower protection regime'.

[Source: Governance Institute of Australia media release 15/02/2021; Submission: Submission on Commonwealth Integrity Commission Bill – Exposure Draft (Exposure Draft) 12/02/2021]

Treasury is consulting on proposed changes to the governance standards for registered charities

Treasury has released a draft legislative instrument and draft explanatory materials for consultation that propose to amend standard three in the Australian Charities and Not-for-profits Commission Regulation 2013 to make clear that an entity is not entitled to be registered/remain a registered charity if (in addition to the current governance standard):

- the entity commits an act (or omits to do an act) that may be dealt with as a summary offence under an Australian law relating to real property (eg trespass or unlawful entry, gathering or remaining on land or in buildings), personal property (eg damage, theft or vandalism of personal property) or causing personal injury or harm to an individual (eg assault, threatening violence or otherwise intimidating an individual); or
- the entity fails to take reasonable steps to ensure that its resources (eg a charity's senior management, staff, fund property and other assets including its website/social media accounts) are not used to promote acts (or omissions) by any entity that may be dealt with as an indictable offence, a relevant summary offence, or a civil penalty of 60 penalty units or more.

The amendments are intended to ensure that the governance standard is more consistent with the disqualifying purposes set out in the Charities Act 2013 and to reflect community expectations.

Treasury has released a fact sheet that provides additional explanation of the proposed changes and the rationale behind them as well as several illustrative examples of situations in which a charity would contravene the (proposed) expanded governance standard.

The deadline for submissions is 14 March 2021.

[Source: Treasury consultation 16/02/2021]

Status update: Bill to introduce a mandatory news media and digital platforms bargaining code

Green light: Senate committee recommends no changes to the Bill

The Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 – a Bill to establish a new news media and digital platforms mandatory bargaining code to address bargaining power imbalances between digital platform services and Australian news businesses. – was introduced into the House of Representatives in December 2020 and referred to committee for report by 12 February. The Committee has recommended no changes to the Bill.

Additional comments from Labor and the Greens

An 'additional comments' section of the report notes that:

- 'Labor Senators recommend the bill be passed, subject to the government addressing key concerns as the government has "signalled" it will;'.
- The Greens recommended that the Bill be passed (subject to certain changes):
  - Recommendation 1: That the bill be amended to require news organisations to spend the revenue from the Code on resourcing public interest journalism.
  - Recommendation 2: That the Government establish a permanent Public Interest News Gathering Trust and ensure that AAP is supported through public funding.
  - Recommendation 3: That the bill be amended to require the 12-month review of the Code to report on the impact that the Code is having on small, independent and start up publications and the state of journalism in Australia including the number of journalists employed.

Treasurer flags the government's intention to introduce 'technical amendments' to the legislation

Treasurer Josh Frydenberg has issued a statement flagging the government's intention to introduce 'technical amendments' to the Code which the government considers will both enhance its operation and strengthen its ability to 'foster more sustainable public interest journalism in Australia'.

Mr Frydenberg said that the planned improvements will:

- 'streamline the requirements for digital platforms to give advanced notice of algorithm changes to make them more workable
- clarify the arbitration criteria so that it considers the reasonable costs of both the digital platform and news media business and amend the legislation to remove any doubt that arbitrated remuneration is to be in the form of lump-sum payments
- clarify the role of the ACCC, ensuring its focus is on providing factual information to assist the arbitrator
- adjust the effect of anti-avoidance provisions so that they take effect from the commencement of the Code and ensuring the government's policy intent of not interfering with existing contractual rights under the code is achieved'.

Mr Frydenberg said that the Code will be reviewed by Treasury within a year of its commencement.

Commenting briefly on recent reports that news media businesses and platform providers have successfully negotiated commercial agreements, Mr Frydenberg said it is a welcome and an 'encouraging' development.

[Sources: Treasurer Josh Frydenberg media release 12/02/2021; 16/02/2021; Senate Standing Committee on Economics report: Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 [Provisions]]

Contacts

Mark Standen
Partner

—

mark.standen@minterellison.com
T +61 2 9921 4902 | **M** +61 412 104 902

Siobhan Doherty
Partner

—

siobhan.doherty@minterellison.com
T +61 2 9921 4339 | **M** +61 413 187 544

Kate Hilder
Consultant

—

kate.hilder@minterellison.com
T +61 2 9921 8785