Governance News

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

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Contents

Diversity

State Street calls on companies to improve disclosure of racial/ethnic diversity information

Key Takeouts

- Generally companies are supportive of State Street's expectations concerning disclosure of diversity information (including disclosure the racial/ethnic diversity of their workforces and boards)
- Based on engagement with companies to date, State Street considers that disclosure of workforce and board diversity metrics is the area where there is 'least alignment' with State Street's expectations
- Companies that fail to align their diversity disclosure (including disclosure of the racial and ethnic diversity of their board and workforce) with State Street's expectations could face voting action

Writing in Harvard Law School Forum, State Street offers insights into how companies can enhance their racial and ethnic diversity disclosure, based on the 70+ engagements it has had with companies since the release of its August 2020 letter to board Chairs setting out its expectations on the issue.

Recap: State Street's expectations

State Street's expectation is that all portfolio companies provide disclosure of:

- **The link between diversity and strategy:** the role that diversity plays in the firms human capital management practices and long term strategy
- **Metrics/timeframes/progress:** Specific diversity goals, the timeframes set to reach them, progress against achieving them, and how the goals contribute to the firm's overall strategy
- **Statistical information on workforce diversity** by race, ethnicity, gender for all full time employees. State Street suggests that US firms could use the EEO-1 Survey. Outside, the US (companies are encouraged to disclose this information in line with the SASB's guidance and nationally appropriate frameworks. Statistical information about board diversity.
- **Board diversity information**, including 'how the board reflects the diversity of the company's workforce, community, customers and other key stakeholders'
- **Board oversight:** the measures the board has in place to oversee diversity and inclusion.

Insights from engagements (so far)

- State Street has found that companies have been 'largely supportive' of its expectations. Based on this, State Street expects that 'many companies will offer disclosures generally in line with our expectations in the coming months'
- Generally, the strongest disclosure is provided by firms in the technology and financial services sectors. State Street comments that this is 'logical since diversity and inclusion is considered financial material for these sectors according to the Sustainability Accounting Standards Board'.
- Some companies have raised questions about whether the information in EEO-1 reports is an accurate representation of a company's workforce. State Street observes that this expectation is intended to be a 'baseline' or minimum starting point only, and that companies are 'encouraged to share additional context to assist investors to understand the fuller picture'.
- State Street identifies both: a) disclosure around how diversity and inclusion serves to advance firms' long term strategy; and b) disclosure around the progress being made toward reaching diversity/incision goals as two areas where disclosure tends to be limited.
- Overall, disclosure of workforce and board diversity metrics is the area where there is 'least alignment' with State Street's expectations. State Street comments that,

> 'In an effort to better understand the state of racial and ethnic diversity disclosures and practices in the US and UK, and to encourage greater alignment with our expectations across these markets, we will engage the largest employers in the US and UK on human capital management topics including racial and ethnic

diversity in 2021. We will analyze their diversity disclosures at the beginning of the year, request an engagement during the year, and generally report on their progress at the end of 2021'.

Voting intentions

State Street plans to implement the following voting guidelines, in addition to existing guidelines regarding gender diversity for S&P 500 companies and FTSE 100 companies.

TIMELINE	APPLICATION	EXPECTATION	VOTING INTENTION [UNLESS 'SUBSTANTIVE ENGAGEMENT WITH COMPANIES RESULTS IS A FORMAL COMMITMENT TO COMPLY WITH STATE STREET'S EXPECTATIONS]
From the 2021 proxy season	▪ S&P 500 companies ▪ FTSE 100 companies.	Disclosure of board racial and ethnic diversity. State Street considers that 'acceptable disclosure' includes: ▪ aggregate-level diversity data (eg 5% directs are Black, 30% choose not to self-identify) ▪ Individual level data (eg Jane Doe is Caucasian)	Vote against the Chair of the Nominating and Governance Committee
From the 2022 proxy season	▪ S&P 500 companies	▪ Disclosure of EEO-1 report. ▪ State Street considers that 'acceptable disclosure' includes either the original EEO-1 report response or the 'exact content of the report translated into custom graphics'	Vote against the Chair of the Compensation committee
From the 2022 proxy season	▪ S&P 500 companies ▪ FTSE 100 companies	▪ Inclusion of at least one director from an underrepresented community	Vote against the Chair of the Nominating & Governance Committee

Focus on the 'social' aspect of ESG

State Street writes that as part of its broader racial equity initiative and the increased focus on the 'social' ('s') in ESG, it will be partnering with Russell Reynolds Associates and the Ford Foundation to identify potential best practices for board oversight of racial diversity and inclusion as part of its racial equity initiative.

[Source: Harvard Law School Forum on Corporate Governance and Financial Regulation 22/02/2021]

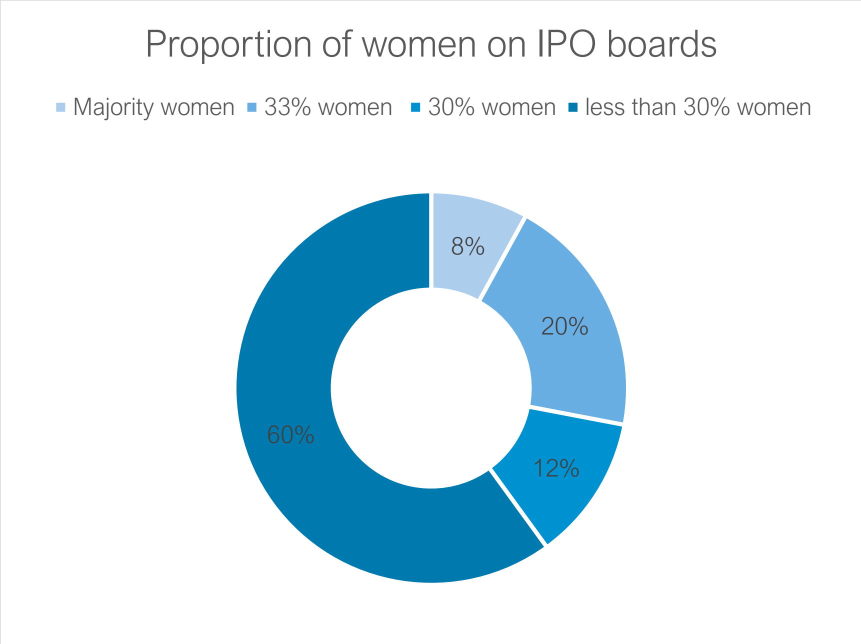
US: More women are being included on IPO boards

50/50 Women on Boards has released the results of its annual review of the proportion of women on boards of the 25 largest US IPOs by market cap.

Key Findings

According to their analysis in 2020:

- Overall, women held 24% of the board seats of the 25 largest IPOs. In contrast, women hold only 22.6% of board positions at Russell 3000 companies
- 10 of the 25 companies included 30% or more female directors on their board. Of this group, two companies had boards in which women accounted for 43% of seats, which according to the report is similar to 2019
- Six of the 25 companies were close to having 30% female board representation (women accounted for between 22% and 29% of board seats at these companies)
- Six boards ranging in size between seven and ten directors included only one female director
- One of the 25 companies included zero women.
- Of the top 25 companies that went public in 2019, 12 had added female directors by the end of 2020 – bringing the total proportion of women in the group to 25.6%.



50/50 women comments that the uptick in the number of women from 2019 to 2020 may be due to pressure from institutional investors, increased shareholder expectations, regulatory pressure (eg Nasdaq's proposal to adopt new listing rules setting minimum board diversity and disclosure requirements) and research 'reconfirming that companies with women directors outperform companies without'.

The group predicts that the trend is likely to continue as 'it's likely that the investment community will continue to flex its muscle about boardroom diversity. It's also likely that venture capital funds and other early-stage investors abandon their practice of stacking boardrooms with their friends and look for other, more diverse candidates'.

[Source: 50/50 women on boards IPO report February 2021]

COVID-19: UK EHRC announces six month grace period on pay gap reporting

The UK Equality and Human Rights Commission (EHRC) has announced that in light of the continuing uncertainty caused by the COVID-19 pandemic, it will further defer taking enforcement action against employers who do not meet their gender pay gap reporting requirements until 5 October 2021.

Enforcement for the reporting year 2019/20 was suspended in March 2020 at the start of pandemic.

[Source: EHRC media release 23/02/2021]

Meetings and Proxy Advisers

Top Story | Legislating COVID-19 measures: Meetings, electronic execution and continuous disclosure changes now before parliament

Treasury Laws Amendment (2021 Measures No. 1) Bill 2021 proposes to temporarily extend until 15 September changes to meeting and electronic execution requirements that otherwise would have expired on 21 March and to make temporary changes to continuous disclosure laws introduced in response to the COVID-19 pandemic permanent.

Key Takeouts

Use of technology

- **A stop gap measure?** The government has signalled that the further extension and expansion of temporary changes enabling electronic execution, electronic communication and electronic meetings does not indicate that it has abandoned plans to permanently modernise requirements.
- **Hybrid meeting pilot scheme:** The explanatory memorandum states that the government intends to conduct 'an opt-in pilot for hybrid annual general meetings in which shareholders can attend meetings in person or virtually' after the temporary extension sunsets on 16 September.
- **Hardcopies:** If passed, shareholders will be given the right to opt in to receive hard copies of meeting related materials. Companies and responsible entities of registered schemes will be required to notify members of their right to 'opt in', within two months of the day of commencement of Schedule 1 of the Bill. Failure to provide this notice will be a strict liability offence with a penalty of 30 penalty units.
- **Issues to consider:** Our recent report Key trends to emerge from the 2020 AGM season provides insights into how companies adapted to the rapid shift to holding electronic meetings in 2020 and puts forward some suggestions around the questions boards may wish to consider heading into the 2021 AGM season.

Continuous disclosure

- **Permanently easing disclosure laws:** The proposed changes to continuous disclosure laws will implement the government's response to the parliamentary joint committee's recommendation that temporary measures introduced during the pandemic - Corporations (Coronavirus Economic Response) Determination (No. 2) 2020 (and subsequently extended by Determination No 4) - be made permanent. The permanent introduction of a 'fault' element is expected to insulate companies and their officers from the threat of 'opportunistic' litigation, while ensuring the market is kept informed of material information – an approach the Treasurer has described as striking the right balance.

Overview

Broadly, Treasury Laws Amendment (2021 Measures No. 1) Bill 2021 proposes to do two things:

- Schedule 1 of the Bill proposes to temporarily extend and expand on the measures in Corporations (Coronavirus Economic Response Determination (No. 3) 2020 to provide companies with legal certainty around the use technology in the context of holding and conducting meetings, distributing meeting related materials and executing and witnessing documents. It's proposed that these measures will apply until 15 September 2021.
- Schedule 2 of the Bill proposes to make permanent the temporary changes to continuous disclosure laws introduced in May 2020, which are intended to insulate directors from opportunistic class actions, and which would otherwise expire in March 2021.

The Bill has been referred to the Senate Economics Legislation Committee for report by 12 March.

Schedule 1: Electronic execution, distribution of meeting related materials and electronic meetings

Electronic meetings

- Schedule 1 proposes to allow meetings (including AGMs) to be held using technology (as virtual or hybrid meetings), provided that 'the members as a whole' have a reasonable opportunity to participate.
- To facilitate this, it's proposed that the notice of meeting will need to include 'sufficient information' about how to participate in the meeting as well as 'sufficient information to allow members to provide proxy documents by electronic means'.
- Members will also need to be provided with a 'reasonable opportunity to speak and verbally ask questions in situations where they have a right to speak and ask questions'.
- The explanatory memorandum makes clear that the phrase 'members as a whole' is intended to ensure that meetings are 'not invalidated merely because a member experienced technical issues and is unable to participate virtually…so long as the vast majority of members can contribute and no member is intentionally excluded'. The explanatory memorandum further comments that 'similar language' is also used in the context of members' right to ask questions at an AGM. .
- In the event that 'members as a whole' are not afforded a reasonable opportunity to 'participate, speak or ask questions' it would be open to members to apply to the court to have meeting invalidated.
- Quorum: If passed the changes will mean that where meetings are held using technology, every participant (whether attending virtually or physically) will be taken to be 'present' and need to be counted for the purposes of determining whether there is a quorum.
- Voting: If passed, the changes will mean that all participants entitled to vote at a meeting must be given the option to vote at the meeting itself.
- Tabling documents : If passed, the Bill would mean that documents could be tabled at a meeting by providing the documents to the person in advance of the meeting or by 'making the documents accessible to persons attending the meeting in any way' for example by using a 'screen sharing facility'. This would only apply where 'virtual meeting technology is used to hold the meeting'.

- Minutes of meetings: It's proposed that minutes of meetings will be able to be taken, provided to members/shareholders and kept electronically.
- Meeting-related documents: Schedule 1 also proposes to allow 'any document that relates to a meeting', to be given and signed electronically provided that: a) it is reasonable to expect that 'the document would be readily accessible so as to be useable for subsequent reference at the time that the document is given'; and b) the person has not exercised their right to 'opt in' to receive the materials in hard copy or, the person has not been notified of this right. It's proposed that these changes will apply 'regardless of whether the meeting is held using electronic technology or in person'.
- Option to receive meeting related documents in hard copy: If passed, companies and responsible entities of registered schemes will be required to notify members of their right to 'opt in' to receive meeting related documents or resolutions considered without a meeting in hard copy within two months of the day of commencement of Schedule 1. Failure to provide this notice will be a strict liability offence with a penalty of 30 penalty units.

Electronic execution of company documents

Schedule 1 proposes to enable all documents executed by a company under section 127 of the existing law (including deeds) to be executed electronically.

It's proposed that until 15 September 2021,

- Documents executed without a company seal will be able to be signed electronically with no requirement for the signatories to sign the same copy of the document (provided that the copy being signed includes the entire contents of the original document). The explanatory memorandum states that this 'does not mean that the person needs to print or sign every page of the document'.
- Documents executed with a seal will be able to be executed and witnessed electronically, with the witness able to use technology (eg videoconferencing) to observe the fixing of the seal and no requirement for the witnesses to sign the same document as the one to which the seal was affixed. That is, witnesses will be able to sign and witness documents executed with a seal by:
  - observing the fixing of the seal on the document using technology (the explanatory memorandum makes clear that this is intended to include watching the affixing of the seal 'live' rather than a pre-recording);
  - signing (electronically or physically) the document or a full copy of the document; and
  - annotating the document with a statement confirming that they have observed the fixing of the seal using electronic means.

  The explanatory memorandum comments that these changes 'expand upon the relief provided by Determination No 3 and ensure that the rules relating to the execution of company documents using a common seal are not more restrictive than the rules relating to the execution of company documents without a common seal'.
- Deeds: With respect to the execution of deeds, the explanatory memorandum makes clear that the proposed changes are intended to enable companies to execute company deeds by following the process outlined in section 127 with no requirement for companies 'follow the established process for signing, sealing and delivering a deed under the common law'.
- Mandatory rules: The proposed changes relating to electronic execution and virtual meetings (apart from those relating to time and place, and to the method of voting) will apply as mandatory rules rather than replaceable rules.

Why only a temporary extension?

The explanatory memorandum makes clear that the temporary changes being put forward in the Bill are not a signal that the government has abandoned plans to permanently modernise existing requirements.

The explanatory memorandum states,

> 'The amendments do not apply on and after 16 September 2021. This reflects the fact that they are designed to provide companies with additional flexibility during the Coronavirus pandemic. The Government is intending to make permanent the changes relating to electronic communication and to conduct an opt-in pilot for hybrid annual general meetings in which shareholders can attend meetings in person or virtually. These changes will be in place when the temporary extension sunsets'.

In his second reading speech, Assistant Treasurer Michael Sukkar also touched on this point stating that,

> ..'the government remains committed to consulting on making permanent this temporary relief — consistent with its agenda to modernise business communications and improve the technology neutrality of legislation, which it had made a priority of its Deregulation Taskforce.
>
> …The government also proposes to conduct an opt-in pilot for hybrid annual general meetings in which shareholders can choose whether to attend meetings in person or virtually. This pilot will commence when the extension to the temporary relief ends. The aim of the pilot will be to encourage companies and shareholders to engage with technology with a view to considering whether future permanent reforms are needed to further support companies to effectively use technology to positively engage with their shareholders.'

Response to the proposed temporary extension

- The Governance Institute has issued a statement welcoming the proposed changes but has raised concerns about the fact that they will sunset in September. Governance Institute CEO Megan Motto said that …'failing to make the ability to hold virtual AGMs a permanent change is a significant missed opportunity that will perpetuate further uncertainty…Keeping these measures in a temporary state means that many organisations, eager for clarity and confidence, have been placed into an extended holding pattern.'
- Business Council of Australia CEO Jennifer Westacott also welcomed 'the continued suspension of outdated, unnecessary red tape that makes it harder to do business'.
- The Australian Shareholders' Association's (ASA) Allan Goldin expressed qualified support, describing the Bill overall as a 'mixed bag'. Mr Goldin expressed concern that companies will continue to able to hold entirely virtual AGMs until 15 September on the basis that the virtual meeting format makes it more difficult for shareholders to hold management/boards to account. However, he described the government's planned hybrid meeting pilot project as a 'good measure'. Mr Goldin said that more information is required in order to be able to form a view on allowing corporate correspondence to be sent electronically. Mr Goldin reiterated that the ASA's position is that shareholders need to have the option to request a paper copy of notices, reports and proxy forms to ensure access for those without/who do not want internet access.

Schedule 2: Permanent relaxation of continuous disclosure requirements

Broadly, if passed, the changes will mean that:

- all civil penalty proceedings brought under the continuous disclosure and misleading and/or deceptive conduct provisions, will need to establish that an entity or officer was at fault – ie that the entity or officer acted with 'knowledge, recklessness or negligence' - in order to establish a contravention.
- existing criminal offences for failing to comply with the continuous disclosure obligations set out in sections 674(2) and 675(2) of the Corporations Act will continue to apply (though they will no longer be civil penalty provisions).
- ASIC will also retain the ability to issue infringement notices and administrative penalties without the need to establish 'fault'.

The proposed reforms implement the government's response to recommendation 29 in the Parliamentary Joint Committee's report - Litigation funding and the regulation of the class action industry- which recommended that the government permanently legislate changes to continuous disclosure laws in the Corporations (Coronavirus Economic Response) Determination (No. 2) 2020 (and subsequently extended by Determination No 4) (summary here).

Rationale for the proposed relaxation of requirements

Announcing the introduction of the Bill, Treasurer Josh Frydenberg reiterated that the changes will serve to insulate companies and their officers from 'opportunistic' class actions and help to facilitate the flow of material information to the market. Mr Frydenberg observed that since the introduction of the fault element in May there has been increase in the number of material announcements to the market, relative to the same period last year.

On this basis, Mr Frydenberg said that the government considers that,

> 'These changes strike the right balance between ensuring shareholders and the market are appropriately informed while also allowing companies to more confidently make forecasts of future earnings or provide guidance updates without facing the undue risk of class actions'.

In his second reading speech, Assistant Treasurer Michael Sukkar emphasised that the changes are part of the government's broader deregulation agenda.

> 'The government is always seeking to remove regulatory barriers and spur economic growth. Businesses should be able to pursue commercial growth without being impeded by legal actions that undermine their capacity to focus on their core operations'.

Response to the proposed changes to continuous disclosure laws

Business groups have welcomed the proposed approach, the ASA remains strongly opposed.

Australian Institute of Company Directors (AICD) Managing Director and CEO, Angus Armour, said,

> 'The AICD welcomes the Treasurer's announcement today which comes when encouraging investment and risk-taking is crucial to Australia's economic future. Australia's securities class action settings have been out of step with the rest of the world, making us a lucrative market for litigation funders and driving adverse consequences for businesses, shareholders and the economy generally. The amendments announced today will discourage opportunistic securities class actions which were being driven by funders' returns rather than the interests of claimants. These changes do not "water down" disclosure requirements. The reckless or negligent director, and the individual who knew that disclosing information would affect the share price and said nothing, is still on the hook as they should be. The quality of disclosures has not decreased as a result of the Treasurer's temporary relief and this permanent measure will put us on equal footing with other nations'.

BCA CEO Jennifer Westacott said,

> 'These are sensible changes that will let company directors focus on our biggest challenge, creating the jobs we need to fuel our economic recovery…The threat of opportunistic class actions would have hampered business confidence at a time when business needs certainty to invest, expand and create new jobs'.

The ASA's Allan Goldwin expressed concern that the proposed changes will undermine the intent of continuous disclosure obligations.

Mr Goldin said,

> 'Now the pressure is taken off. Directors, they no longer need to ensure "Continuous Disclosure" is enforced. As ASIC says "the continuous disclosure regime is a fundamental tenet of our markets", this must not be watered down. So the new instruction to management from Boards could be, if you want to keep some information to yourself or exaggerate a bit just make sure you don't tell me so no one can sue me'.

> [Sources: Treasury Laws Amendment (2021 Measures No. 1) Bill 2021, Assistant Treasurer, Minister for Housing and Minister for Homelessness, Social and Community Housing second reading speech 17/02/2021, Treasurer Josh Frydenberg media releases 17/02/2021; 17/02/2021; ASA media release 17/02/2021; BCA media release 17/02/2021; AICD media release 17/02/2021; Governance Institute of Australia media release 17/02/2021]

Shareholder Activism

Say on Climate: The ACCR has welcomed Rio Tinto's commitment to put its climate strategy to a shareholder vote in 2022

The Australasian Centre for Corporate Responsibility (ACCR) has welcomed Rio Tinto's commitment to put its climate strategy to a shareholder vote at its 2022 AGM noting that the group has filed 'say on climate' shareholder resolutions at both Santos and Woodside Petroleum calling on them make similar commitments.

Commenting on Rio Tinto's commitment, Dan Gocher, Director of Climate and Environment, said:

> 'We welcome Rio Tinto's leadership and commitment to put its climate strategy to a vote in 2022, and urge Rio Tinto to commit to making this vote an annual exercise…This commitment heaps further pressure on Santos and Woodside to support ACCR's resolutions, which will allow shareholders a vote on their climate plans…Due to the rapid transition taking place in the energy sector, it is imperative that shareholders are provided with sufficient information to assess the future earnings and value of these companies. The Say on Climate framework will provide shareholders with the opportunity to send a clear signal to the board about whether the company is effectively managing the risks of climate change.'

According to the Say on Climate website, companies that have so far adopted a 'say on climate' now include: Unilever, Moody's Royal Dutch Shell, Canadian National Railway, Glencore and Rio Tinto.

[Sources: ACCR media release 17/02/2021; Say on Climate website: Glencore: 2020 Preliminary Results; Rio Tinto: Climate Change Report 2020]

2030 isn't soon enough? Market Forces calls on insurer to strengthen its existing climate commitments

Market Forces has issued a statement announcing that it has coordinated a shareholder resolution calling on QBE to:

- provide a timeline for exiting the fossil fuel sector completely
- fully align its investment and underwriting strategy with the goals of the Paris Agreement.

Market Forces is calling on QBE shareholders to write to QBE to request that the company strengthen its existing commitment to exit the thermal coal sector by 2030 by publicly committing to:

- 'unequivocally and immediately rul[ing] out underwriting all new and expansionary oil and gas exploration, production, transport and infrastructure projects'
- provide a timeline for divesting from 100% of fossil fuel assets in its investment portfolio
- advocate for action from Australian governments and businesses to limit global warming to 1.5 degrees

The QBE AGM will be held on 5 May 2021.

[Sources: Market Forces media releases 19/02/2021; 19/02/2021; QBE ASX announcement 19/02/2021]

Institutional Investors and Stewardship

Climate Action 100+ highlights five proposals to watch heading into the 2021 proxy season

Climate Action 100+ investors have filed 37 shareholder proposals at North American focus companies so far, calling for: a) disclosure of seeking disclosure of climate-related risks; b) for companies to align their business plans with the goals of the Paris Agreement; and c) for transparency around corporate lobbying practices that influence climate/energy regulations.

Five key proposals

Of these proposals, the group has flagged five as 'worthy of consideration by other investors because they advance the central goals of Climate Action 100+'. They are as follows.

- Berkshire Hathaway (TCFD reporting): The proposal calls on the company to 'publish an annual assessment addressing how the Company manages physical and transitional climate-related risks and opportunities, commencing prior to its 2022 annual shareholders' meeting'.
- General Electric (progress reporting against its net zero benchmark): The proposal calls for the company to report on how it has 'met the criteria of the Net Zero Indicator, or whether it intends to revise its policies to be fully responsive to such Indicator'.
- ExxonMobil, General Motors and Phillips66 (the proposals call for disclosure of the companies' respective lobbying practices).

The Group comments that additional shareholder proposals are likely to be 'flagged' following the release of the initiative's first Net Zero Company Benchmark next month which will identify the companies that are making progress against investor expectations and those which are failing to do so.

[Source: Climate Action 100+ media release 16/02/2021]

Shift in stance on shareholder proposals: Institutional investors including BlackRock back shareholder resolutions at Tyson Foods Inc

Tyson Foods Inc held its AGM on 11 February 2021.

Three shareholder proposals were put to the meeting (none of which had board support).

- Human Rights Due Diligence Proposal: A resolution calling for the board to report on the company's 'human rights due diligence process to assess, identify, prevent, mitigate, and remedy actual and potential human rights impacts'
- Recapitalisation proposal: A resolution calling for Tyson's board 'to retain an investment banker to develop a plan for a recapitalisation to result in one vote per share for all outstanding stock of the Company' recapitalisation to establish 'one share, one vote'. For context, Tyson Foods Inc has a dual class structure. Tyson Limited Partnership (TLP) controls 70.63% of the company's voting stock. Board Chair John Tyson is a general partner of TLP.
- Disclosure of lobbying activity: A resolution calling for the company to report annually on its lobbying activities to enable investors to assess 'whether Tyson Foods' lobbying is consistent with Tyson's expressed goals and the best interests of shareholders'.

A number of institutional investors, including BlackRock supported all three proposals. Investor Advocates for Social Justice puts the proportion of 'outside shareholders' who supported the lobbying and human rights proposals at in excess of 80% (though no proposal was carried).

Human Rights Due Diligence proposal

- In a voting bulletin, Blackrock said that it supported the human rights due diligence proposal (against the Tyson board's recommendation) given the limited disclosure provided by Tyson about its supply chain audits. Blackrock also notes concerns about 'Tyson Foods' health and safety protocols, as well as the overall corporate culture' in light of the way in which the company has responded to the COVID-19 pandemic.
- Vanguard also supported the proposal. Like BlackRock, Vanguard raised concerns about the current level of disclosure on the issue provided by Tyson. Vanguard adds that it reached its decision following engagement with both the company and the proponent and following independent research which found that the Tyson had 'realized legal, regulatory, reputational, and investment risks…in part because of the board's lack of oversight on human rights risks.' Accordingly, Vanguard states that it decided to support the proposal because 'in our assessment, the shareholder proposal's request allowed enough flexibility and discretion for Tyson to address the concerns without having the proposal dictate changes in company strategy'. Vanuguard also voted against the Chair of the governance and nominating committee to signal its concern about inadequate risk oversight.
- Norges Bank Investment Management voted in favour of the proposal on the basis that: 'the board should account for material sustainability risks facing the company, and the broader environmental and social consequences of its operations and products'.
- CALSTRS also voted in favour of the resolution.

Recapitalisation proposal

- BlackRock supported the shareholder recapitalisation proposal on the basis that it 'prefers a "one vote for one share" capital structure for publicly traded companies. We believe that certain fundamental rights should be attached to share ownership, starting with equal voting rights for all shareholders so that they can act to protect their economic interests in a company. While we recognize the potential benefits of dual class shares to newly public companies in certain circumstances as they establish themselves, we believe that these structures should have a specific and limited duration'.
- Norges Bank Investment Management also voted for the proposal and gave a similar justification: 'All shareholders should have the right to vote on fundamental corporate decisions, and voting rights should be proportionate to cash flow rights. Any unequal voting rights should be time-limited and aligned with cash flow rights over time'.
- CALSTRS voted in favour of the resolution.
- Vanguard's statement makes no mention of this proposal.

Disclosure of lobbying activity

- BlackRock supported the resolution in light of 'the company's limited disclosures of its political contributions and corporate lobbying activities at present' and despite the fact that the Tyson board had launched an internal review of the company's current approach to disclosure.
- Vanguard also voted in support on the basis that it considered there is room to improve the company's disclosure around its lobbying efforts, including 'the board's oversight of corporate political activity risk' which Vanguard comments lags its industry peers. Vanguard considers that 'greater disclosure will enable investors to assess whether Tyson's lobbying activities are in line with the best long-term interests of its shareholders'.
- Norges Bank Investment Management also voted in favour of the proposal on the basis that: 'The board should account for material sustainability risks facing the company, and the broader environmental and social consequences of its operations and products. Sustainability disclosures should be aligned with applicable global reporting standards and frameworks to support investors in their analysis of risks and opportunities.'.
- CALSTRS also voted in favour of the resolution.

Concerns raised about the virtual meeting format

According to Investor Advocates for Social Justice, proponents who attended the meeting raised concerns about the fact that the meeting was held as a thirty minute virtual meeting with 'no accountability to shareholders'.

[Sources: BlackRock voting bulletin Tyson Foods 11/02/2021; Norges Bank 11/02/2021; CALSTRS 11/02/2021; Vanguard 11/02/2021; Investor Advocates for social justice media releases 17/02/2021; 19/02/2021]

Call on climate initiative launched: Investors renew calls for countries to 'back their net zero targets' by putting a price on carbon

Climate Leadership Coalition, Haga Initiative and Skift Business Climate Leaders (among others) have launched 'Call on Carbon initiative' to push countries to 'get the [climate] policies right'. A full list of signatories to the initiative is here.

Signatories to the initiative are calling for countries to:

- 'back their net zero targets' with 'Paris Agreement consistent' carbon pricing instruments to 'facilitate a cost-efficient investment path to reach net zero'
- (where appropriate) ensure alignment between carbon pricing instruments across countries
- 'finalise the rules for the international market mechanism under Article 6 of the Paris Agreement to support cost-effective mitigation efforts, create a level playing field and minimise carbon leakage, while enabling greater ambition'.

[Source: Call on Carbon initiative 15/02/2021]

Regulators

ACCC Chair Rod Sims has flagged the regulator's key compliance and enforcement priorities for 2021

Key Takeouts

- Compliance/enforcement priorities in the financial services sector include following through on the recommendations of the ACCC's Home loan price inquiry and monitoring debt collection issues
- Among the ACCC's key advocacy priorities in 2021 are: a) strengthening small business/consumerprotections through advocating for the inclusion of an 'unfair trading practice prohibition' in the consumer law framework; b) ensuring global product safety standards flow through to Australia's product safety framework; and c) merger control

In his annual address to Committee for Economic Development Australia (CEDA), Australian Competition and Consumer Commission (ACCC) Chair Rod Sims outlined the some of the regulator's key compliance and enforcement priorities for 2021. In doing so, Mr Sims made clear that the ACCC's work is not limited to the issues outlined.

Some Key Points

Enforcement and compliance priorities

- Pricing and selling of essential services (eg electricity and telecommunications services) and the lack of transparency in pricing will be a key area of focus for the ACCC in 2021. Mr Sims observed that the regulator had taken 'a considerable number of enforcement actions' in the electricity and telecommunications sectors over the past year and this is likely to continue. In particular, Mr Sims said that in the electricity sector where retailers are required to pass on reductions in wholesale electricity costs, the ACCC is 'actively monitoring costs and retailers' price responses and asking retailers to justify their prices'.
- Funeral businesses: The ACCC will conduct a 'deeper examination' into 'longstanding criticisms' of the sector eg their 'use of their significant market power to bundle services and block new entrants to the market, or to engage in unconscionable conduct'. The ACCC will 'take targeted action' if appropriate.
- Commercial construction: The ACCC's specialised commercial construction team will 'forcefully continue its activities in 2021'. Mr Sims observed that 'there have already been a number of cases; more will follow this year'.
- Financial sector:
  - Home loan pricy inquiry recommendations: The regulator will be 'following through' on the recommendations of the ACCC's Home Loan Price Inquiry Final Report recommendations (eg reducing the administrative burden on consumers who wish to switch home loan providers and promptly alerting borrowers to available prevailing rate). Mr Sims added that the regulator has some 'important investigations underway and we will be announcing some important enforcement outcomes over the next few months'.
  - Debt collection: Mr Sims said that the regulator has 'not seen growth in debt collection issues' throughout the COVID-19 pandemic which he attributes to the government support that has been made available to individuals and businesss. Mr Sims flagged that the ACCC will 'watch very closely to look for signs of concerning behaviour' during the COVID-19 recovery.
- Travel sector: Mr Sims said that the COVID-19 Enforcement Taskforce will be 'actively monitoring forward sales practices' by travel businesses given the continued uncertainty around the imposition and lifting of travel restrictions.
- Aviation sector: Mr Sims said that the results of the ACCC's monitoring of the costs and profits of the domestic aviation sector makes clear that the impacts of the COVID-19 pandemic remain an issue. Competition in the sector also 'remains fragile'. Mr Sims said that the regulator is focused on 'behaviours that adversely affect the competitive process' eg the ACCC will be closely monitoring plans by regional operator Rex to enter major domestic routes with a particular focus on Rex's ability to access slots at Sydney Airport.

- **Franchise sector:** Small business protections under the competition and consumer laws remains a focus. In particular, Mr Sims flagged that the regulator continues to receive reports about misleading representations made by franchisors about franchisees concerning earnings capacity and the use of marketing funds.
- **Agricultural sector:** Supply chain relationships in the agriculture sector continue to be a priority for the ACCC. Mr Sims said that following the Dairy Code's commencement in January 2020, the regulator has observed some significant positive changes, though it is too early to assess its full impact of the Code. Compliance with the Horticulture Code will be a priority for the ACCC in 2021 as the regulator continues to have concerns about the supply of perishable agriculture products.
- **Sale of motor vehicles and caravans:** Mr Sims said that the ACCC received a high volume of complaints about consumer guarantee motor vehicle issues in 2020 and a number of complaints about the failure of caravan manufacturers/dealers to comply with their consumer guarantee obligations. Mr Sims said that 'enforcement action against a number of motor vehicle dealers and then leveraging these enforcement outcomes to achieve broader industry behavioural change continues to be a key project for the ACCC'.
- **Product safety work:**
  - **Button batteries:** The ACCC is focused on implementing new button battery safety standards – which require that all consumer products have battery compartments designed to be inaccessible to children – with an initial focus in the 18 month transition period, on promoting compliance through education.
  - **Quad bikes:** The ACCC is working closely with states and territories to conduct surveillance of compliance with stage one of new mandatory safety standards for quad bikes (which came into effect from 11 October 2020). The regulator is also conducting education/outreach to prepare suppliers for stage two obligations which will start from October 2021.
- **Digital platforms:**
  - **Investigations continuing:** Mr Sims said that the establishment of the regulator's permanent digital platforms branch in 2020 has led to a number of high profile court actions against the better known digital platforms. The regulator plans to advance its investigations in 2021 with 'some more cases' expected to follow.
  - **Adtech:** The ACCC is also progressing studies looking at 'adtech' and 'apps' markets with its overseas counterparts.

Market studies and advocacy

- **Addressing weaknesses in the National Access Regime:** Mr Sims said that currently the National Access Regime which is designed to 'promote the economically efficient operation, use and investment in infrastructure by which monopoly services are provided…is not meeting that objective in relation to stand-alone monopoly infrastructure' and that the ACCC will continue to advocate for reform in 2021.
- **Strengthening small business/consumer protections:** Mr Sims said that enforcement and compliance action in relation to the Consumer Guarantee Regime and the Unfair Contract Terms provisions have identified, 'important deficiencies in the law that we believe need to be addressed'. In addition, the ACCC considers that the consumer law framework 'needs an unfair trading practice prohibition'. Mr Sims said that the inclusion of a prohibition is already being discussed with the government.
- **Product safety:** Mr Sims said that the ACCC is committed to seeing improvements in global safety policies 'flow into Australia's consumer product safety framework with a national safety provision'.
- **Merger control:** Mr Sims said that the ACCC has become 'increasingly concerned as to whether Australia's merger control regime remains fit for purpose and, in particular, whether it is achieving the balance required to ensure good outcomes for consumers and the economy'. In particular, the ACCC is concerned that the 'uncertainty inherent in the forward looking merger test has become a reason for clearing mergers'. Mr Sims said, 'As the goal of any merger control regime must be to prevent anti-competitive mergers in order to preserve or promote competition which will ultimately benefit consumers, we consider that the approach to merger control needs to be rebalanced. We are therefore currently exploring merger law reform options in 2021 to bring about this change'.

  [Source: ACCC Chair Rod Sims, speech to the Committee for Economic Development Australia (CEDA) entitled ACCC 2021 Compliance and Enforcement Priorities 23/02/2021]

Financial Services

Your Future, Your Super legislation introduced

Treasury Laws Amendment (Your Future, Your Super) Bill 2021 proposes to implement the four point Your Future, Your Super reform package announced in the Federal budget.

Treasury Laws Amendment (Your Future, Your Super) Bill 2021 was introduced on 17 February. Broadly, the Bill proposes to do four things:

- 'Staple' an employee's superannuation account to the employee (so that the same superannuation account follow the employee when they switch jobs) to tackle the issue of multiple unintended accounts. The introduction of stapled accounts will implement the government's response to Hayne recommendation 3.5 and recommendation 1 of the Productivity Commission superannuation inquiry. (Schedule 1)
- Introduce a new annual performance test for MySuper products, and other products (to be specified in regulations). The test will be conducted by the Australian Prudential Regulation Authority (APRA) and consequences will be applied for failure to meet it. The Bill also provides APRA with a resolution planning prudential standard making power. (Schedule 2)
- Facilitate the establishment of a new online YourSuper comparison tool to increase transparency and foster competition between funds. (Schedule 2)
- Expressly require trustees to act in the best financial interests of members. The legislation will also require superannuation funds to disclose all of their portfolio holdings. (Schedule 3)

Generally, the proposed effective date for the changes is 1 July 2021.

The Bill has been referred to the Senate Economics Legislation Committee for report by 22 April 2021.

Further detail

1. Superannuation accounts will follow (be 'stapled' to) employees

To address the issue of unintended multiple accounts, the Bill proposes to introduce a new requirement for employers to pay superannuation contributions into a new employee's existing 'stapled' fund.

Under the new rule, where a new employee starts their employment on or after 1 July 2021 and has not chosen a fund to receive superannuation contributions, employers will be required to request that the Commissioner of Taxation identify whether the employee has a stapled fund.

If advised by the Commissioner that the employee has a stapled fund, employers will be required to pay contributions into that fund.

The explanatory memorandum makes clear that employers are required to seek information about whether the employee has a stapled fund from the Commissioner and cannot determine this themselves.

The explanatory memorandum states that a new digital service will be established and maintained by the Australian Taxation Office to receive requests from employers and provide them with notifications for this purpose.

What is a 'stapled fund'?

The explanatory memorandum states that a 'fund is the stapled fund for an employee at a particular time if the requirements prescribed by the regulations [not yet released] are met in relation to the fund at that time'.

The explanatory memorandum states that regulations (not yet released) will cover:

- 'basic requirements that must be satisfied for a fund to be a stapled fund, including the requirement that the fund is an existing fund of the employee;

- tie-breaker rules for selecting a single fund where an employee has multiple existing funds; and
- when a fund ceases to be the stapled fund for an employee'.

Proposed timing/implementation date

It's proposed that these changes will only apply to new employees whose employment commences on or after 1 July 2021.

Arrangements for existing employees (those who are employed before 1 July 2021) will not be impacted by these changes.

2. Introduction of a new annual product performance test

Annual performance test

If enacted, the changes will require APRA to conduct an annual performance test each financial year on 'Part 6A products' – ie MySuper products and other products specified in regulations (eg trustee directed products) - and to notify trustees of the result in writing within a period to specified in the regulations. APRA will also be required, within the same period, to publish the test results on a website maintained by the regulator.

The requirements for the annual performance test will be set out in regulations (not yet released).

The explanatory memorandum states that the regulations are 'expected to': a) specify 'requirements in respect of investment returns (which may be net of fees and taxes)'; b) specify 'requirements that depend on the exercise of a discretion by APRA'; c) specify 'matters that APRA may or must take into account in exercising such a discretion'; d) allow 'APRA to make specified assumptions in exercising such a discretion'; and e) specify the circumstances in which APRA will have discretion to depart from assumptions.

The explanatory memorandum also flags that the regulations may specify the circumstances in which two or more 'Part 6A products' are able to be treated, for the purposes of conducting the annual test, as being one product. The explanatory memorandum suggests that this may be appropriate where, for example, a trustee transfers beneficiaries from a product that is 'close to failing' or has previously failed the annual performance test into a new but similar product, in order to bypass the consequences of failing one or more annual performance tests.

Consequences of failure to pass the annual performance test

Obligation to notify beneficiaries

Trustees of superannuation products that fail the annual test will be required to notify beneficiaries who hold the product that the product has failed 'generally' within 28 days of APRA giving them notice of the test result.

Both ASIC and APRA will have discretion to defer the due date for a trustee to notify beneficiaries though the explanatory memorandum states that this 'discretion would be used in very limited circumstances'. As the notification by trustees is a disclosure obligation, it is expected that the discretion would generally be exercised by ASIC.

The notification will be required to be provided via pre-paid post or by courier and electronically to a beneficiary’s nominated electronic address (unless the beneficiary has not nominated an electronic address). Regulations (not yet released) will prescribe the form and content requirements for the notice).

The explanatory memorandum states that the regulations may specify that information relating to the ranking of products be included in the notification (eg by including a reference to the new YourSuper superannuation comparison tool).

The obligation to notify beneficiaries will be part of the section 52 covenants, and as such, a contravention will be subject to a civil penalty 2,400 penalty units (which is equivalent to $532, 800, as of 1 July 2020). Where the contravention involves dishonesty or an intention to deceive or defraud, a criminal offence applies. The maximum sentence for such a contravention is five years imprisonment.

Products closed to new beneficiaries

Where a product fails the test in two consecutive years, the trustee will be prohibited from accepting new beneficiaries into that product (except in certain circumstances). The prohibition will remain in place until APRA lifts the prohibition. This will occur once circumstances specified in the regulations (yet to be released) are satisfied.

As compliance with the prohibition is part of the section 52 covenants, the maximum penalty for accepting new beneficiaries into underperforming superannuation products is the same penalty that applies if a trustee contravenes a section 52 covenant.

The Bill includes amendments to ensure that an employer will not be in breach of various rules if they are prevented from making contributions to a fund on behalf of their employees because the funds' products are closed due to underperformance.

Outcomes assessment

Trustees will also be expected to 'factor' the results of the annual performance test into their annual outcomes assessment. The explanatory memorandum comments that 'Trustees of a product that fails the annual performance test will find it very difficult to show that the product is promoting the financial interests of beneficiaries in their annual outcomes assessment'.

New resolution planning prudential standard making power for APRA

If enacted, the changes will also mean that APRA will be given a 'resolution planning prudential standard making power that relates to facilitating the resolution of an RSE licensee, a registrable superannuation entity or a connected entity of an RSE licensee, in order to best protect the interests of beneficiaries'.

The explanatory memorandum states that this is necessary to ensure that APRA

> …'has clear powers to set appropriate prudential standards on resolution planning, and ensure that RSE licensees put in place measures to improve their preparedness for resolution. This allows APRA to ensure RSE licensees are prepared for a range of contingencies, including the possibility that the prohibition against accepting new beneficiaries into a product may lead to a material deterioration in the financial condition of the regulated superannuation fund'.

Proposed timing and implementation

Generally, it's proposed that the amendments relating to the new annual performance test will apply to MySuper products from 1 July 2021 and to and other products specified in regulations 1 July 2022.

If passed, the changes introducing a new resolution planning prudential standard making power for APRA will apply on the day after Royal Assent.

3. Enables the establishment of a new YourSuper comparison tool as announced in the Federal Budget.

As announced in the Federal Budget, the Your Future, Your Super Package includes the establishment of an online superannuation product comparison tool, which is intended to enable members to more easily assess the performance of 'Part 6A' superannuation products and make comparisons between products.

The product rankings will be based on 'one or more formulas' to be set out in regulations (not yet released). The formulas are expected to enable APRA to rank products 'according to specified metrics including fee levels, investment returns or any other criterion'.

APRA's rankings will then be published on a new interactive website which will be maintained by the ATO.

4. Increased trustee accountability – new best financial interests test

If enacted, the proposed changes will mean that:

- Trustees of registrable superannuation entities (RSE) and trustees of self-managed super funds (SMSFs) will be expressly required to perform their trustee's duties and to exercise their powers in the best financial interests of beneficiaries.
- Likewise, directors of the corporate trustee of a registrable superannuation entity will be required to perform their director's duties and to exercise the director's powers in the best financial interests of the beneficiaries.

It's proposed that the new best financial interests obligation will not be subject to any materiality threshold.

The Bill would also allow regulations to be made prescribing additional financial best interests requirements on trustees/directors of trustee companies of registrable superannuation entities.

The explanatory memorandum explains the rationale for the change as follows:

> 'The new best financial interests duty test is intended to clarify the existing best interests duty. By requiring trustees and directors of corporate trustees to act in the financial interests of the beneficiaries, it eliminates the possibility that trustees and directors of corporate trustees can act in a manner that they judge improves the non-financial interests of the beneficiaries but at the expense of their financial interests.

The explanatory memorandum goes on to clarify that 'subject to the trustees complying with the sole purpose test, this does not preclude trustees undertaking actions that also yield non-financial benefits to the beneficiaries' provided that the action does not 'compromise the best financial interests of the beneficiaries'.

Page 42 of the explanatory memorandum includes illustrative examples of situations in which expenditure would be likely and unlikely to meet the best financial interests test.

The evidential burden of proof would be reversed

The Bill proposes to reverse the evidential burden of proof, so the onus would be on trustees registrable superannuation entities to prove they performed their duties/exercised their powers in the best financial interests of beneficiaries (though the reverse onus would not apply to any additional best interests financial duty requirements prescribed in regulations).

The reverse onus would only apply to actions brought by a regulator for the contravention of the best financial interests duty where a civil penalty applies for the breach and not to actions to recover loss or damages as a result of a contravention of the best financial interests duty.

The evidential burden of proof would not be reversed for trustees of SMSFs.

The explanatory memorandum states that the shift is intended to strengthen accountability.

> 'The reversal of the evidential burden should emphasise to trustees that they need to have strong systems and processes in place to ensure they can point to evidence, for example, quantifiable metrics, that the performance of their duties and exercise of their powers were in the best financial interests of members. It should also highlight the need for trustees to keep clear records of the decision making process….Actions taken by trustees differ in quantum, complexity and duration, and the detail in supporting analysis would be expected to reflect these aspects of a particular action'.

This explanatory memorandum goes on to state that the approach is

> …'proportional, necessary, reasonable and in pursuit of a legitimate objective. Given that the facts of whether a trustee has acted in the best financial interests of beneficiaries can be peculiarly within the knowledge of the trustee; proof of this could be readily provided by the trustee; and the reverse onus is confined to situations where the consequences of a breach are civil penalties sought by the regulator, and will not be applied to situations where a criminal penalty is pursued. The reversal of evidential burden is reasonable as a trustee should be readily able to point to evidence that they considered the likely financial impact on beneficiaries of a decision'.

Other changes

The Bill also proposes to:

- allow regulations to be made to prohibit certain payments made by registrable superannuation entities (unless certain conditions are met), 'regardless of whether the payment is considered to be in the best financial interests of the beneficiaries'. This prohibition is intended to extend to payments where the trustees have used a third party intermediary to procure the prohibited expenditure or investment on their behalf.
- allow contraventions of record-keeping obligations specified in regulations to be subject to a strict liability offence.
- remove an exemption enabling trustees to elect to not to disclosure up to 5% of their superannuation holdings. It's proposed that this change will apply to the six month period that commences 1 July 2021 (ie to reporting days starting from 31 December 2021).

[Sources: Treasurer Josh Frydenberg media release 17/02/2021; Treasury Laws Amendment (Your Future, Your Super) Bill 2021]

ABA and Consumer Action Law Centre call for stronger regulation of debt management firms

Context – consumer credit reforms

The government recently consulted on proposed measures to require providers of debt management services to hold an Australian Credit Licence and to meet the ongoing obligations imposed on credit licensees including (among other things): a) a requirement to meet the 'fit and proper person' test; and b) to undertake their activities 'efficiently, honestly and fairly' as well as to be members of the Australian Financial Complaints Authority (AFCA). Consultation closed on 12 February. You can find our summary in Governance News 20 January 2021 at p20.

The ABA supports the proposed changes

The Australian Banking Association's (ABA's) submission to the consultation supports the proposed changes and includes several suggested further actions 'aimed at strengthening the consumer protections in the proposed licencing regime'.

These include:

- enabling the Australian Securities and Investments Commission (ASIC) to 'supervise the debt management industry for fee structures that place Australians in financial vulnerability, including charging large upfront fees or placing caveats on people's property for minor services rendered'.
- for further consideration to be given to the regulation of 'pre-insolvency advisors' to small
- stronger compliance and enforcement action from regulators to prevent misleading advertising and unfair contract terms used by debt management firms.

ABA CEO Anna Bligh commented,

> 'Stronger compliance measures and regulation of the debt management sector will help to prevent Australians being ripped off. Banks are encouraging the government to ensure that customers are adequately protected from unscrupulous operators. Banks have been working with the Consumer Action Law Centre and other consumer bodies to ensure the proposed changes are effective. Stronger compliance measures and regulation of the debt management sector will help to prevent Australians being ripped off.

In the same statement, Consumer Action Law Centre CEO Gerard Brody commented,

> 'Debt management firms promise a life "free from debt" but instead charge large fees, often for poor advice which can leave people in even worse financial strife. We agree with banks that licensing debt management firms is a good first step, but even licensed firms show faults. The regime should be strengthened and targeted rules need to be enforced to ensure people receive the quality advice they can really trust'.

[Sources: ABA media release 16/02/2021; ABA submission: Treasury consultation on licensing debt management firms]

Responsible lending: Consumer groups have reiterated their concerns about legislation currently before parliament

Context

The National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020 which among other things, proposes to implement changes to responsible lending obligations, was introduced into the House of Representatives on 9 December 2020 and was referred to the Senate Economics Legislation Committee for report by the 12 March.

Public hearings

A public hearing was held on 19 February at which consumer groups voiced their concerns about the proposed changes (the transcript of the hearing has not yet been published, but will be available here).

Consumer groups – The Consumer Action Law Centre, Choice, The Financial Rights Legal Centre, and Financial Counselling Australia – have issued a statement reiterating their strong opposition to the proposed roll-back of responsible lending laws on the basis that the plan will harm consumers, is unnecessary to ensure the continued flow of credit, and contrary to recommendation 1 of the Hayne Commission.

The groups state that a petition calling for or Federal Senators to strengthen instead of repeal safe lending laws had secured 22,000 votes.

[Source: Consumer Action Law Centre media release 19/02/2021]

AFCA review launched, stakeholder views invited

Section 4 of the Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018 (the Act) requires the minister to establish an independent review of the operation of the Australian Financial Complaints Authority (AFCA) 'as soon as practicable after 18 months' of operation.

The review, has been launched having been deferred due to the pandemic. The review will be conducted by Treasury.

Scope of the Review

Broadly, the review will consider: a) the extent to which AFCA is meeting its statutory objectives/operating effectively; b) whether enhancements should be made to ensure it is 'appropriately calibrated'; c) the 'appropriateness of the monetary limits on claims that may be made to and remedies that may be determined by AFCA in relation to disputes about credit facilities provided to primary production businesses, including agriculture, fisheries and forestry businesses'; and d) the scope, remit and operation of AFCA's Independent Assessor function.

The terms of reference include a number of specific questions on which Treasury seeks feedback. Including:

- Whether 'AFCA's dispute resolution approach and capability are producing consistent, predictable and quality outcomes'
- Views on the effectiveness of AFCA's processes for identifying and responding to systemic issues arising from complaints
- Whether AFCA's funding and fee structures 'impact competition' and if so, what 'enhancements to the funding model' should be considered to alleviate this 'while balancing the need for a sustainable fee-for-service model'
- Views on the continued 'adequacy' of current monetary limits on claims made to, and remedies determined b, AFCA in relation to disputes about credit facilities provided to primary product businesses
- Views on whether the 'scope, remit and operation' of AFCA's independent assessor function remains effective/appropriate and in particular, whether there is a need for AFCA to have an internal mechanism where the substance of its decision can be reviewed (if so, how this should operate)

[Source: Treasury media release, Terms of Reference]

Inquiry launched into moves by financial institutions to withdraw investment from the export industries including coal

The Joint Standing Committee on Trade and Investment Growth will inquire into and report on the 'prudential regulation of investment in Australia's export industries'.

Broadly, the inquiry will investigate the 'potential impact' of changes in practices by banks, insurers and superannuation funds, as well as the advice and guidance provided by financial regulators on investment opportunities for Australian exporters (eg exporters in the agriculture, resources, and defence manufacturing sectors).

The full terms of reference are here.

The due date for submissions to the inquiry is 31 March 2021.

In a statement, Minister for Resources, Water and Northern Australia Keith Pitt welcomed the inquiry and in particular, the inquiry's strong focus on the resources sector.

Mr Pitt stated,

> 'I am pleased that the resources sector will be a key focus of this inquiry that will look into recent announcements by some banks and superannuation companies that they will withdraw investment support for the coal industry. It is of great concern to me that a legitimate industry like coal mining, which makes a significant contribution to the national economy and employs thousands of Australians, is being held back by what can only be described as corporate activism…It is only fair that banks, superannuation companies and other financial institutions that are withdrawing investment in sections of the resources sector, explain to all those women and men why their jobs are not worth supporting…I encourage all resources companies with an interest in this issue to make a submission to the inquiry, which is expected to begin hearings next month.'

[Source: Joint Standing Committee on Trade and Investment Growth media release 17/02/2021; Terms of reference; Minister for Resources, Water and Northern Australia Keith Pitt media release 17/02/2021]

In Brief | Consultation on proposed revisions to the vulnerable members section of the Insurance in Superannuation Voluntary Code of Practice launched. The deadline for submissions is 29 March 2021

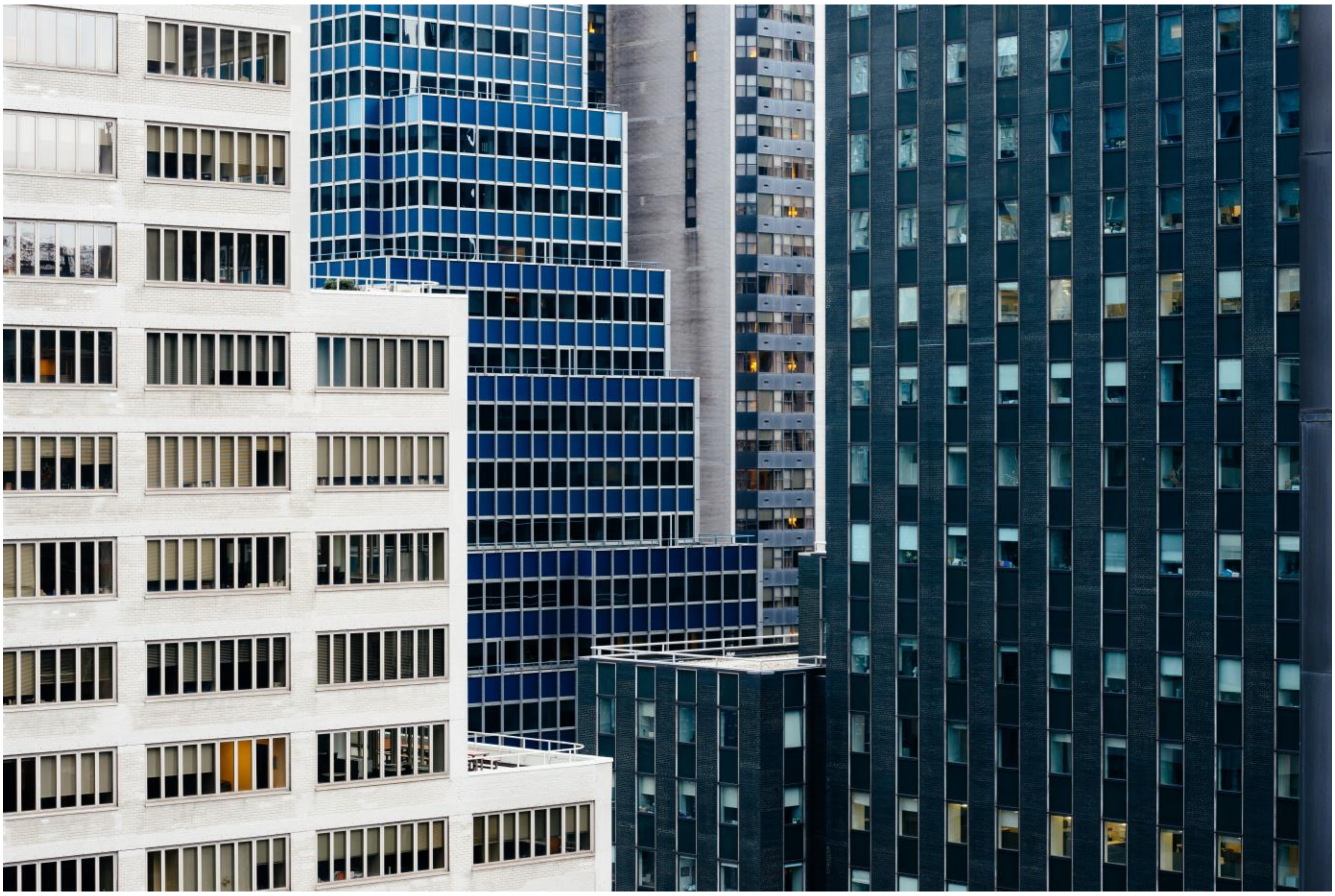
[Source: AIST policy news 18/02/2021]

In Brief | Financial Sector Reform (Hayne Royal Commission Response) (2021 Measures No 1) Regulations 2021 amend the Insurance Contracts Regulations 2017 to remove the concept of 'eligible contracts of insurance'. They also amend the Corporations Regulations 2001 to make the handling of an insurance claim a 'financial service' under the Corporations Act 2001. The regulations are now in force

[Sources: Financial Sector Reform (Hayne Royal Commission Response) (2021 Measures No 1) Regulations 2021; Explanatory Statement]

In Brief | The AFR reports that a new, stronger BNPL code will be launched on 1 March with no transition period

[Source: [registration required] The AFR 24/02/2021]



In Brief | Hayne referral: ASIC has announced that criminal charges have been brought against an insurance underwriter and separately a distributor of insurance products over allegedly false/misleading statements relating to the sale of domestic and international travel insurance products between 2016 and 2018

[Source: ASIC media release 23/02/2021]

In Brief | 'Nobody is going to fall off a cliff' if they are unable to resume making payments at the end of March when loan deferrals and JobKeeper payments end: ABA CEO Anna Bligh has given an interview discussing the impact of the end of JobKeeper payments and assuring the community that banks will work with customers

[Source: Transcript, Anna Bligh on ABC AM Radio 19/02/2021]

In Brief | Protecting vulnerable and excluded people in financial markets: The UK FRC and EHRC have signed an MoU to enable them to better target their resources and activities to meet their obligations under the Equality Act 2010

[Source: EHRC media release 23/02/2021]

Accounting and Audit

Audit reform: UK regulator gives green light to the big four to proceed with the operational separation of their audit practices, amends the principles for separation

Principles for the operational separation of the audit practices of the 'big four' audit firms were published by the Financial Reporting Council (FRC) in July 2020 (you can find our summary here). Firms were asked to submit their implementation plans by 23 October 2020.

Following a review of these plans and individual discussions with the firms, the FRC has:

- confirmed it is 'now content' for the firms to progress to the next stage of implementation. The FRC will continue to monitor their progress and provide 'feedback and challenge' on their arrangements.
- amended the principles to:
  - 'confirm that services provided to non-audited entities should be commissioned by those charged with governance at the entity or be assurance services for third party recipients'
  - 'increase the minimum proportion of revenue within the ring fence that must be derived from the audit'
  - 'confirm that the audit practice should not receive fees for introducing business to other parts of the firm'
  - 'confirm that partners in the audit practice should not be incentivised for sales passed to other parts of the firm'.

The updated principles are here.

[Source: FRC media release 23/02/2021]

Corporate Misconduct and Liability

ASIC launches immunity policy for market misconduct offences

The Australian Securities and Investments Commission (ASIC) has released an immunity policy under which an individual may be eligible to apply for immunity from civil and criminal proceedings in certain circumstances.

Some Key Takeaways

Coverage

- The policy covers immunity from civil penalty and criminal proceedings for alleged contraventions of a provision in Pt 7.10 of the Corporations Act 2001 (Cth)
- ASIC will not grant immunity from administrative proceedings (eg disqualification from managing a corporation or a ban on providing financial services or engaging in credit activities) or compensation proceedings.
- ASIC is responsible for granting civil immunity under the policy, while the Commonwealth Director of Public Prosecution (CDPP) is responsible for granting criminal immunity (ASIC states that it will work with/provide input to the CDPP on applications for criminal immunity).

Eligibility

Paragraph 11 of the policy (p7) sets out the eligibility criteria for making an application under the policy. Broadly, individuals are eligible to apply if:

- they are the first person to report to ASIC that they may have contravened, with at least one other person, a provision in Part 7.10 of the Corporations Act
- they are not the instigator of the misconduct
- ASIC has not already commenced an investigation in respect of the misconduct when the disclosure is made
- they admit that they have participated/are participating in the misconduct
- they have ceased their involvement in the misconduct or are prepared to immediately cease their involvement
- they provide 'full, frank and truthful disclosure, have cooperated fully and expeditiously while making the application, and have undertaken to continue to do so throughout ASIC's investigation and any ensuing court proceedings'.

Corporate entities are not eligible for immunity under the policy.

ASIC encourages individuals not eligible to apply for immunity to nevertheless cooperate with ASIC. Information Sheet 172 Cooperating with ASIC (INFO 172) outlines the benefits of doing so.

Making an application

An application for immunity can be made by completing an online form, contacting he ASIC Immunity Policy Hotline or emailing the regulator at a dedicated email address to request a 'marker'.

A marker preserves the status of the applicant as the first party to apply for immunity in respect of the conduct.

As long as an individual holds the marker for a particular course of conduct, no other individual will be eligible to apply for immunity for the same conduct.

Conditional Immunity

- Immunity from civil penalty proceedings: If ASIC is satisfied that an individual satisfies the eligibility criteria in paragraph 11 of the policy, it will grant 'conditional immunity' from civil penalty proceedings. In making this decision, ASIC will consider 'all the factual circumstances of the misconduct as well as the role you played in the misconduct before granting conditional civil penalty immunity'. Unless otherwise specified, a grant of conditional immunity is ongoing until final immunity is granted or the application is withdrawn or revoked.
- Immunity from criminal proceedings: If satisfied that an individual satisfies the eligibility criteria in paragraph 11 of the policy, ASIC will make a recommendation to the DPP that immunity from prosecution be granted, subject

to further conditions. The DPP will then exercise an independent discretion. When the DPP considers that the conditions in Annexure E of the policy are met, it will issue a 'letter of comfort'.

Where an individual breaches the conditions of immunity, the individuals' immunity may be revoked by ASIC and/or the DPP.

Final Immunity

Immunity from civil penalty proceedings: In order to receive final civil penalty immunity, individuals are required to meet a number of conditions including:

- forfeiting the profits of any wrongdoing and (where ASIC considers it to be appropriate) make restitution to the victims of any wrongdoing
- maintaining eligibility under paragraph 11
- providing 'full, frank and truthful disclosure and cooperate fully and expeditiously throughout our investigation and any ensuing proceedings'
- maintaining confidentiality regarding their status as an immunity applicant/details of the investigation (unless granted written consent by ASIC/required by law)

Immunity from criminal proceedings: In order to receive final immunity from criminal proceedings, individuals are required to meet satisfy certain conditions including:

- providing ongoing, full cooperation during our investigation
- appearing as a witness for the prosecution as and when requested in any proceedings against the other participants
- giving truthful, accurate and complete evidence.

Policy rationale

ASIC states that the policy is intended to assist it to identify and take enforcement action against 'specific markets and financial services breaches of the law' and to strengthen ASIC's enforcement toolkit.

The policy states that it may be in the public interest to 'provide an incentive to individuals who have combined with others to break the law, to reveal misconduct that may otherwise have remained undiscovered'.

Regular review of the policy

ASIC will review its Immunity Policy at least every two years.

[Sources: ASIC media release 24/02/2021; ASIC immunity policy; Immunity policy FAQs]

Risk Management

Top Story | The risky business of ignoring diversity and inclusion: An interview with Debby Blakey, Chief Executive Officer of HESTA

MinterEllison Partner and Board Director Amanda Watt and CEO of the HESTA superannuation Debby Blacky discuss the importance of diversity and inclusion, the extent to which investment decisions are influenced by performance on diversity, inclusion and broader ESG issues and the risks inherent in a lack of diversity and inclusion in our workplaces.

You can access the podcast here.

Transport for NSW 'impacted' by Accellion data breach

Transport for NSW confirmed it has been 'impacted by the worldwide Accellion data breach'.

According to the statement:

- An investigation is underway, to determine the 'impact of the breach'. Identifying risks to customer information is the priority.
- The breach was limited to Accellion servers and no other Transport for NSW systems were impacted including systems related to driver licence information or Opal data.

Other organisations that have been impacted include the Reserve Bank of New Zealand and the Australian Securities and Investments Commission (see: Governance News 27 January at page 24).

[Source: Transport for NSW media release 23/02/2021]

Supply chain resilience: The Productivity Commission has been tasked with conducting a review into the stability of Australia's supply chains

The Productivity Commission has been tasked by the government with undertaking a study into Australia's resilience to global supply chain disruptions.

Announcing the consultation, Treasurer Josh Frydenberg said that the COVID-19 pandemic has highlighted Australia's potential vulnerability to global supply chain disruption (though so far Australia's supply chains have 'proved resilient)'.

Terms of Reference

The study will:

- examine 'the nature and source of risks to the effective functioning of the Australian economy and Australians' wellbeing associated with disruptions to global supply chains, identifying any significant vulnerabilities and possible approaches to managing them'.
- consider both Australia's role as an importer and as an exporter
- 'develop a framework for identifying supply chains that are vulnerable to the risk of disruption and also critical to the effective functioning of the economy, national security and Australians' wellbeing'
- use trade and other relevant data to identify supply chain vulnerabilities and to 'explore risk management strategies including , including the roles of, and options for, government and businesses to manage supply chain risks'.

Timing and next steps

The Productivity Commission will undertake consultation, and provide a report on Australia's role as an importer in March 2021. The Commission will report on Australia's role as an exporter in 'late May' 2021.

[Sources: Treasurer Josh Frydenberg media release 19/02/2021; Terms of Reference]

In Brief | CEDA's 2021 Economic and Political Outlook report calls on the government to focus on social, digital and climate investments to drive the COVID-19 recovery

[Source: CEDA media release 16/02/2021; CEDA 2021 Economic and Political Outlook report]

Other News

FaceBook to restore Australian news pages, government announces further amendments to the planned news media and digital platforms mandatory bargaining Code

Context

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 recommended no changes to the Bill.

The Bill has progressed to second reading stage in the senate having been amended in the House of Representatives.

Further amendments announced

In a joint media release, Treasurer Josh Frydenberg and Minister for Communications Paul Fletcher have announced the government's intention to introduce further amendments.

Operation of the Code

According to the statement, the amendments will further clarify how the Code is intended to operate by making clear that:

- 'a decision to designate a platform under the Code must take into account whether a digital platform has made a significant contribution to the sustainability of the Australian news industry through reaching commercial agreements with news media businesses
- a digital platform will be notified of the government's intention to designate prior to any final decision - noting that a final decision on whether or not to designate a digital platform would be made no sooner than one month from the date of notification
- non-differentiation provisions will not be triggered because commercial agreements resulted in different remuneration amounts or commercial outcomes that arose in the course of usual business practices
- final offer arbitration is a last resort where commercial deals cannot be reached by requiring mediation, in good faith, to occur prior to arbitration for no longer than two months'.

Remuneration

The changes will also 'strengthen the framework for ensuring news media businesses are fairly remunerated'. The statement emphasises that the amendments will 'strengthen the hand' of smaller and regional publishers when negotiating remuneration for the use of their content by digital platforms.

According to the statement, the amendments will 'add further impetus for parties to engage in commercial negotiations outside the Code'.

Facebook to restore news pages

According to the statement, Facebook that has advised the government that it intends to restore Australian news pages 'in the coming days'.

[Source: Joint media release Treasurer Josh Frydenberg and Minister for Communications, Urban Infrastructure, Cities and the Arts Paul Fletcher 23/02/2021]

Evaluation of foreign investment reforms

Treasury is conducting an evaluation of the foreign investment reforms implemented by Foreign Investment Reform (Protecting Australia's National Security) Act 2020 and the Foreign Acquisitions and Takeovers Fees Imposition Amendment Act 2020 that commenced on 1 January 2021.

Broadly, the evaluation will 'consider the impact that the reforms and their implementation have had on foreign investment in Australia and the broader Australian economy, and whether the right balance is struck between welcoming foreign investment and protecting Australia's national interests'. The terms of reference are here.

Treasury states that as the reforms have only been in place for such a short period, stakeholders will be invited to make formal submissions to the evaluation 'later in 2021'. Ahead of this, the terms of reference will be further reviewed to ensure that they 'remain suitable'.

Until then, Treasury will continue to engage with stakeholders to 'improve understanding of the new laws and their implementation'.

The review is required to be completed by 10 December 2021.

[Source: Treasury media release; Terms of reference]

Consultation on increasing harmonisedfinancialreporting thresholds for ACNC registered charities

The Council on Federal Financial Relations CFFR has asked that a framework for increasing harmonised financial reporting thresholds for charities registered with the Australian Charities and Not-for-profits Commission (ACNC) be announced by 30 June 2021.

As part of developing the framework, the Thresholds Working Group has released a consultation paper outlining current regulatory arrangements and seeking feedback on proposed increases to reporting thresholds.

Among other specific questions, the consultation paper seeks stakeholder views on:

- whether the proposed new thresholds are suitable (or not, and if not, what thresholds would be appropriate)
- whether it is more important for the ACNC to 'increase reporting thresholds as soon as Commonwealth legislative priorities allow, or for the increased thresholds to be increased simultaneously across all jurisdictions consistent with a longer timeframe'
- how much time would be required for charities to make the necessary changes
- whether extending the same reporting requirements to non-ACNC-registered incorporated associations would 'provide sufficient accountability and transparency, including for the purposes of members, donors and the interested public'
- whether potential differences in reporting thresholds for charity and non-charity incorporated associations might cause difficulties and why
- whether the Thresholds Working Group is 'overlooking any issues concerning the nexus between fundraising reporting requirements and financial reporting requirements for ACNC-registered charities'

[Sources: Treasury consultation; Consultation paper]

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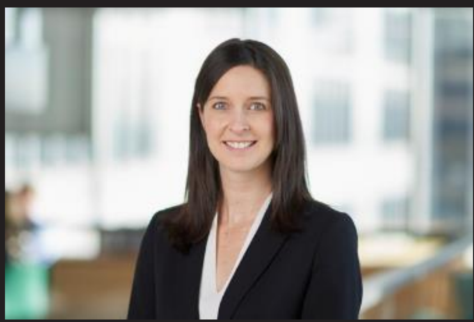

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