Governance News

COVID-19 Special Edition

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Contents

Diversity

Keeping the focus on board gender diversity: Glass Lewis has released its 2021 Proxy Voting Policy Guidelines for Australia

For 2020/21, CGI Glass Lewis has made two key revisions to its Australian policy guidelines.

Promoting board (gender) diversity

Under its existing approach, Glass Lewis would consider recommending that shareholders vote against board members of ASX 300 companies where the board includes no female directors.

The 2020/21 guidelines have been revised to provide that Glass Lewis may recommend shareholders vote against board members where:

- A board has six or more directors and does not include at least two female directors.
- A board has five directors and does not include at least one female director.

Glass Lewis states that it may make exceptions where companies demonstrate: 'high female representation' in their senior management team; or where they disclose a 'credible plan' to increase board diversity and diversity in the senior management team in 'near future periods'.

The revised policy applies to meetings held after 1 January 2021.

Glass Lewis states that change is aimed at promoting female diversity on boards.

> 'We wish to ensure boards have an open and diverse culture and believe that having more than one female director is reassuring that female director participation is not tokenistic. While we believe diversity of thought is important at smaller boards, we did not wish to limit director appointments on small boards to a single gender and so our guideline change at this time is principally targeted at boards with six or more directors (comprising a majority of boards)'.

More flexible approach to audit/risk committee composition

The 2019/2020 guidelines state that where an audit committee does not include an 'audit and financial reporting expert) eg a chartered accountant, retired CFO or certified practicing accountant, Glass Lewis would 'typically vote' against the Committee Chair.

The 2020/21 guidelines soften this approach. Glass Lewis may support the audit committee chair where the Committee does not include an 'audit and financial reporting expert' but where the 'collective experience of the committee is considered appropriate'.

Glass Lewis makes clear that the change does not mean that it will not encourage the inclusion of an audit an financial reporting expert and that it still intends to highlight where a committee does not include such an expert.

Other changes

In addition to these changes, Glass Lewis has made several other changes which it characterises as being of a 'housekeeping nature' eg updating outdated references.

[Source: 2020/2021 Proxy Paper Guidelines: An overview of the Glass Lewis approach to proxy advice Australia]

State Street flags racial/ethnic diversity and climate transition risk as its two main stewardship priorities for 2021

State Street Global Advisors CEO and President Cyrus Taraporevala has written to CEOs outlining State Street's proxy voting agenda and priorities for the coming year.

The letter identifies the systemic risks associated with climate change and separately, the risks arising from a lack of racial and ethnic diversity as State Street's two 'main stewardship priorities for 2021'.

Transition risk

- Noting the increasing investor focus on the on net-zero emissions and moves by regulators in some jurisdictions towards mandating TCFD reporting, Mr Taraporevala reiterated State Street's expectation that all portfolio companies report using the TCFD recommendations.
- Mr Taraporevala said that State Street will continue to engage with companies to understand their approaches to mitigating and managing the physical and transitional impacts of climate change. In addition to engaging with companies in less carbon-intensive sectors, State Street will sharpen its focus on companies it considers to be especially vulnerable to transition risk from climate change.

Financial risks related to racial and ethnic diversity

- Lack of diversity is a systemic risk: The letter makes clear that State Street considers racial/ethnic inequity to be a financial risk capable of negatively impacting companies' ability to deliver strong and sustainable returns. The letter states,

  'The preponderance of evidence demonstrates clearly and unequivocally that racial and ethnic inequity is a systemic risk that threatens lives, companies, communities, and our economy — and is material to long-term sustainable returns.'
- Building on previous guidance, which is primarily focused on ensuring access to detailed diversity data about portfolio companies, the letter flags that State Street will step up its expectations with respect to the racial and ethnic diversity of boards and workforces.
- 'Thorough engagement': State Street has conducted more than 70 engagements with companies on racial and ethnic diversity since the release of guidance on the issue in August 2020, and flags that companies should be prepared for 'thorough engagements on these and related subjects in the coming year'. The letter states that State Street will 'analyse shareholder proposals' in light of the expectations set out in the guidance.
- Voting intentions:
  - In 2021, States will vote against the Chair of the Nominating and Governance Committee at companies in the S&P 500 and FTSE 100 that do not disclose the racial and ethnic composition of their boards

  - From 2022, State Street will: a) vote against the Chair of the Compensation Committee at companies in the S&P 500 that do not disclose their Employer Information Report EEO-1 Survey responses (EEO-1 data); and b) vote against the Chair of the Nominating and Governance Committee at companies in the S&P 500 and FTSE 100 that do not have at least one director from an underrepresented community on their boards.
- Internal commitment to increase racial/ethnic diversity: State Street will disclose the racial and ethnic composition of our board and its EEO-1 data. State Street has also committed to advancing various actions to 'eliminate racial inequity' within the organisation including committing to triple the number of leadership positions within the company held by Black and Latinx people. State Street's board will be tasked with holding senior management accountable for progress against these commitments.

[Source: State Street Global Advisors: CEO's Letter on Our 2021 Proxy Voting Agenda 11/01/2021]

50/50 Women on Boards has set a new target for the boards of Russell 3000 Index companies to achieve gender balance

Context

2020 Women on Boards, a global advocacy and education group set a ten year target in 2010 for women to hold 20% of board seats at Russell 3000 Index companies. In 2020, this target was exceeded with women accounting for 22.6% of board seats.

New gender parity target

The group has now announced a new campaign.

- The group is now calling for gender balance on the boards of Russell 3000 Index companies and corporations that report on the diversity of their boards. The group has renamed itself 50/50 Women on Boards to reflect this new aim.
- 50/50 women on boards defines gender balanced boards as boards in which men and women hold an equal number of seats. Where boards have an odd number of seats, the group will consider they are gender balanced if women hold one more or one less than half of the corporate board seats.

Announcing the new campaign, group co-founder and board chair Stephanie Sonnabend applauded the progress that has been made on the issue noting that a number of boards have already achieved gender balance eg Amazon, Etsy, Eventbrite, Exponent Inc, GM, iRobot, LendingTree, and Merck.

CEO of 50/50 Women on Boards Betsy Berkhemer-Credaire commented that the benefits of gender-diverse boards are now increasingly accepted with ISS, Goldman Sachs and Nasdaq all accepting that gender balanced/diverse boards make good business sense.

[Source: 5050 women on boards media release 12/01/2021]

In Brief | The Council of Institutional Investors (CII) has backed Nasdaq's proposed new board diversity requirements for companies listed on the exchange in a letter filed with the Securities and Exchange Commission (SEC)

[Source: CII Letter to SEC 30/12/2020]

Meetings and Proxy Advisers

Lessons from the 2020 AGM season: Survey of European companies finds shareholder rights were negatively impacted by the rapid switch to virtual meetings

Key Takeouts

- Research from Better Finance shows that individual shareholders and their representatives perceive that the rapid shift to virtual meetings as a result of the COVID-19 pandemic at European companies has negatively impacted shareholder rights
- Individual shareholders and their representatives saw some positives in virtual meetings, including the increased opportunity to attend
- On balance, the report argues that hybrid meetings should be the preferred model post-pandemic (provided that weaknesses in the current approach are addressed to ensure shareholder rights are not compromised)

Better Finance has released a report presenting their analysis of the benefits and disadvantages of physical, virtual and hybrid AGMs, based a survey of individual non-professional shareholders/shareholder representatives from Austria, Belgium, France, Germany, Italy, Lithuania, Luxembourg, the Netherlands, Poland, Spain, the UK as well as from various non-EU countries.

The report reflects on the 'lessons learned' from the rapid transition to electronic meetings as a result of COVID-19 restrictions, including the (overall) negative impact this had on shareholder rights.

Ultimately the report argues that going forward, hybrid rather than virtual meetings offer the greatest benefits from both a company and shareholder perspective (provided that weaknesses in the current approach are addressed to ensure shareholder rights are upheld).

Individual shareholders' views

According to the report, though shareholders perceived that there are some advantages in the virtual meeting format -– the primary advantages identified were reduced costs for companies and the opportunity to reach a broader audience – they also flagged a number of concerns, chiefly the negative impact on discussion and their ability to hold management to account.

For example, shareholders were concerned about the potential for companies to avoid answering shareholder questions by picking and choosing the questions they would answer. Overall, shareholders perceived that the average number of questions companies answered in 2020 had decreased (as compared with 2019) and that there was either no change in the quality of answers provided by management (50% of those surveyed) or that the answers given were of poorer quality (38%).

Likewise, shareholders raised concerns about the lack of opportunity for follow up questions which they perceived as tipping the balance of power in management's favour. .

A separate concern raised by shareholders was the potential for the virtual meeting format to disadvantage/exclude meeting participants with poor internet access and/or poor IT skills.

Other negative aspects of virtual meetings identified by shareholders included (among other concerns): the lack of opportunity to talk with other shareholders and to talk to the managers after the meeting is closed; the lack of interaction generally during the meeting; the difficulty in assessing the personalities of individual board members in the virtual meeting format; and feeling 'less able to scrutinise the procedure and handling of the general meeting including the voting process'.

Shareholder representatives' views

Along similar lines, the report found that individual investor associations overall considered that various shareholders' rights were restricted at virtual-only meetings. 49% noted a lack and/or reduction of debate as a negative aspect of the virtual-only meeting format.

More specifically, their main concerns related to the limitations on the right of shareholders to speak and explain their positions (21% of respondents); the right engage in dialogue with boards (21%), followed by the right to ask questions (16%). Concerns were also raised about the potential negative impacts on shareholders with either poor internet access or poor IT skills or both.

On the positive side, 55% of associations nominated the ability to reach a broader audience as the main advantage of the virtual meeting format. 25% of respondents nominated the reduction in costs for the company as an advantage. t

The opportunity to establish a virtual platform for shareholders (15%) or the possibility of posting statements on the company's website (5%) was considered a less important advantage.

Adapting to the virtual meeting format

The report found that most respondents have a positive view of the extent to which companies adapted to holding meetings in a virtual format. The report states that 'the overall perception is that companies tried to maintain the rights of shareholders at general meetings and not to reduce them or to place unfriendly items on the agenda', through there is room for improvement.

Having said this, the report notes that there was significant variation in the responses provided by respondents to individual questions on this theme, depending on where they were from.

For example shareholder associations in Belgium and Finland considered that companies had failed to make optimal use of technology while associations in Spain and Iceland had a far more positive view.

Asked for their views on whether companies had taken the opportunity to reduce shareholders' rights at virtual general meetings, shareholder representatives in Finland and the UK took a far more negative view than associations in Luxembourg and Denmark.

Top three improvements shareholders would like to see at virtual meetings

The three key improvements shareholder representatives would like to see companies make (were virtual meetings to become the norm) are: 1) disclosure of shareholder questions asked in advance of/during the meeting on the company's website; 2) question and answer functions to be available during the meeting; and 3) companies to provide answers to all appropriate questions.

Preference for hybrid rather than virtual meetings

Overall the report concludes that both the on-site meeting and the virtual-only meeting have advantages and weaknesses from a shareholder perspective. On balance, the report argues that a hybrid model would strike the right balance – combining the 'best of both worlds'.

Three surveys of shareholders and their representatives confirmed a general preference for the hybrid meeting format over other formats: 92% of shareholder representatives and 58% of individual shareholders preferred hybrid meetings over the alternatives.

In the case of individual shareholders, only 10% preferred a virtual-only model and 0% of shareholder representatives did so.

Moving towards hybrid meetings: suggested (necessary) improvements

The report argues that if hybrid meetings are to become the default format post-pandemic, they need to serve the needs of both companies and shareholders and this requires improvements in the way in which they are conducted to ensure shareholder rights are not compromised.

[Sources: Better Finance media release 15/12/2020; Full report: The Future of General Shareholder Meetings: a BETTER FINANCE - DSW Study on the 2020 Virtual Shareholder Meetings in the EU]

Related News

- In Australia consultation on draft legislation proposing to 'make permanent and expand on' the temporary changes to execution and meeting requirements implemented in response to the COVID-19 pandemic closed on 6 November. You can find our summary of the proposed changes here.
- According to The Australian, shareholder groups have recently reiterated calls for the government to abandon plans to permanently enable virtual meetings (as distinct from hybrid meetings) on the basis that virtual meetings negatively impact shareholder rights.

[Source: [registration required] The Australian 07/01/2021]

Other Shareholder News

Modernising business communications: Consultation launched

On 18 December 2020, Treasury released a consultation paper - Modernising Business Communications, Improving the Technology Neutrality of Treasury Portfolio Laws – seeking views on the benefits (from a business perspective) of making existing business communication requirements in various Treasury portfolio laws (eg the Corporations Act 2001, Australian Securities and Investments Commission Act 2001, Banking Act 1959, Insurance Act 1973, Life Insurance Act 1995, Superannuation Industry (Supervision) Act 1993, Consumer and Competition Act 2010 and the National Consumer Credit Protection Act 2009) technology neutral.

Broadly, the paper proposes that this would be achieved through the removal/reduction of existing exemptions to the Electronic Transactions Act 1999 (ETA) for Treasury portfolio laws.

Announcing the consultation, Treasurer Josh Frydenberg said that modernising existing requirements is being considered as part of the government's broader deregulation agenda as a means of reducing business costs and updating requirements to better reflect current/future communication practices/expectations.

The deadline for submissions is 28 February 2021.

Objectives of the consultation

Broadly, the objective of the consultation is to: a) identify the types of communications that would most benefit from a technology neutral approach; b) develop principles to guide legislative change; and c) aid in prioritising potential changes.

The consultation is focused on five categories of business communication. The table below provides a high level summary.

CATEGORY OF COMMUNICATION	PROPOSED PRINCIPLES
▪ Written communications or transfers of information among stakeholders, including business, customers, and investors eg product disclosures, reports, notices and meeting materials.	▪ The consultation paper states that as a starting point, the government is proposing to adopt a technology neutral approach to how businesses meet their legal requirements to provide written information to stakeholders. That is, it's proposed that it will be open to businesses to use any technology for the purposes of communication (provided that certain conditions are met). ▪ This flexible approach is intended to allow businesses the option to select the most appropriate method of communication for the circumstances.
▪ Communicating with regulators such as the Australian Securities and Investments Commission (ASIC), Australian Prudential Regulation Authority (APRA) and the Australian Competition and Consumer Commission (ACCC) for example: lodging documents and attending hearings	▪ Providing information to regulators: The government is considering allowing regulators to prescribe the manner in which they collect information both to reduce the regulatory burden on businesses and to support regulators by ensuring information is provided in the format that enables it to be used in the most efficient way possible. ▪ Hearings: As a starting point, the government proposes that regulators will be able to conduct hearings by electronic means (rather than in person) provided that certain conditions are met.
▪ Written signature requirements (beyond the proposed permanent changes to the execution of company documents relating to meetings)	▪ The government proposes to adopt an 'overarching principle' that technology may be used to 'verify a person's identity and receive their agreement provided that the electronic method used provides at least the same level of validity as a physical signature'. ▪ Where a signature is given to an individual or a business, it's proposed that the individual or business must consent to the use of that method to verify identity and receive agreement.
▪ Record keeping requirements eg keeping of books and registers	▪ As a starting point, the government is proposing to adopt a technology neutral approach to record keeping requirements. That is, it's proposed that written records would be able to be stored by any means provided that: a) the information is readily accessible and is in a format that can easily be reused; and b) 'where the integrity of the information can be maintained over a relevant period'.
▪ Payments by customers, investors, regulators and/or businesses	▪ The government proposes that legislation would not prescribe specific payment methods (except where doing so would achieve a specific policy outcome).

[Sources: Treasurer Josh Frydenberg media release 18/12/2020; Consultation paper: Modernising Business Communications, Improving the Technology Neutrality of Treasury Portfolio Laws 18/12/2020]

Disclosure and Reporting

COVID-19: ShareAction reports a significant uptick in the number of companies electing to disclose workforce data

Context

The Workforce Disclosure Initiative (WDI) collects workforce information- eg information about health and safety standards, policies and practices related to employee wellbeing, and actions relating to supply chain management – on a voluntary basis, via a survey from participating companies.

Participating in the WDI is intended to provide companies with a means of demonstrating to investors and other stakeholders how they manage their workforce/supply chains and to provide investors and companies with access to a comprehensive and comparable data set . Ultimately, the aim of the initiative is to enhance transparency around workforce issues and lift workplace standards globally.

The WDI is run by ShareAction and backed by a coalition of 52 investors (including HESTA, Aberdeen Standard Investments, MFS and Quantum Advisors) with assets valued at $6.5 trillion.

Uptick in the number of companies participating

- Ahead of the release of a formal report into the disclosures (due at the end of March), ShareAction reports that in 2020, 141 companies with a combined market capitalisation of $7.9 trillion took part. This is a 20% increase on the number that elected to participate in 2019. First-time responders included the London Stock Exchange, Paypal Holdings, Santander, Nike and Vodafone (among others). The full list of companies who responded to the survey is here.
- Despite the pandemic, there was an increase in the number of companies electing to report across all sectors (even those most impacted by COVID-19).
- ShareAction's statement suggests that the uptick in the number of companies reporting is attributable in part to the pandemic and the increased focus on workforce issues. Rosie Mackenzie, Company Engagement Manager for the WDI, said

  > 'Covid-19 has shone a stark light on how companies look after their employees. The pandemic has demonstrated that many of the key workers we all rely on have little or no voice or visibility in the wider world. Against this backdrop, investors, employees and civil society are calling for a better understanding of how companies care for, protect and nurture their workers'.

  [Source: ShareAction media release 06/01/2021]

In Brief | TCFD reporting requirements: The UK Financial Conduct Authority has released a policy statement, final rule and guidance on how it will oversee new climate disclosure requirements for UK premium listed companies. The rule will apply for accounting periods beginning on or after 1 January 2021, meaning the first annual financial reports subject to our rule would then be published in spring 2022

[Source: FCA media release 21/12/2020]

Institutional Investors and Stewardship

Top Story | BlackRock has released updated global principles and voting guidelines for 2021

BlackRock has released updated global principles and voting guidelines for 2021.

Key changes include adjustments to its position on: shareholder proposals; climate risk; lobbying; diversity and inclusion and the incorporation of key stakeholder interests into company decision making.

BlackRock states that these adjustments are informed by:

- the expectation that companies will align their business models with the goal of limiting global warming to well below 2 degrees Celcius and reaching net zero emissions globally by 2050
- The positive impact sustainability-related factors have on the ability of companies to generate long term, risk-adjusted returns
- Blackrock's analysis of the impact voting behaviour has on corporate behaviour.

Key changes

Shareholder proposals

An effective means of driving change: BlackRock's analysis indicates that where shareholder E&S proposals receive significant support, companies tend to meet the request made in the proposal (even where the proposal fails to receive sufficient support to be carried). For example BlackRock found that:

- where shareholder ESG resolutions received 30% (or more) or votes in support, 75% of companies responded
- where the support for the proposal was between 30-50%, 67% of companies either fully or partially met the request made in the proposal
- where shareholder ESG proposals received 50% support, companies acted to meet the request in 94% of cases.

More likely to support shareholder ESG proposals: BlackRock flags that voting on shareholder proposals is likely to play an increasingly important role in its stewardship efforts around sustainability – including as a means of accelerating action on urgent sustainability issues. On this basis, BlackRock states that it will support shareholder proposals where:

- it agrees with the intent of the proposal; and
- the proposal addresses a material business risk that it considers management could 'do better' in managing or disclosing.

BlackRock flags that it may also support proposals where management is considered to be 'on track' but where voting in support of the proposal may 'accelerate' progress on an urgent issue. In this case, BlackRock adds that it will be more likely (than it has been previously) to support a shareholder proposal without waiting to first assess the effectiveness of engagement.

Already a change in voting behaviour: Since 1 July 2020, BlackRock states that it voted in support of 50% of the 22 shareholder ESG proposals put to a vote at shareholder meetings. BlackRock voted in support of 89% of shareholder 'E' proposals over the same period.

Climate risk

In 2020, BlackRock called on companies to report in line with the TCFD recommendations and the SASB standards.

From 2021, BlackRock expects companies to disclose a business plan aligned with the goal of limiting global warming to well below 2 degrees Celsius, consistent with achieving net zero global GHG emissions by 2050. BlackRock considers that this is not a 'new ask' as it is consistent with the TCFD recommendations which have been a topic of engagement for 'several years'.

BlackRock will step up engagement on climate risk with the 1000 companies on its focus list and 'consider accelerated voting actions should the substance of companies' climate-related commitments and disclosures not meet our expectations'.

Lobbying

BlackRock will seek confirmation from companies (either 'through engagement' or disclosure) that their 'corporate political activities' are aligned with/consistent with their public stance/statements on material and strategic policy issues. In particular, BlackRock expects companies to monitor alignment with the 'major policy positions' of the trade associations to which they belong and to provide an explanation where inconsistencies are identified.

This position is informed by the fact that the credibility of companies' commitments around climate risk management/mitigation may be undermined by affiliation/involvement with organisations that 'seek contradictory public policy aims'.

Diversity and inclusion

BlackRock is sharpening its expectations of board and workforce ethnic and gender diversity 'in the context of regional norms'.

In the UK context, BlackRock expects companies to adopt the recommendations of the Parker and Hampton-Alexander reviews.

In the US context, BlackRock expects companies to disclose:

- statistical information on the racial, ethnic and gender diversity of their workforces through the disclosure of Employer Information Report EEO-1 data; and
- the actions being taken to progress diversity, engagement and inclusion.

Key Stakeholder Interests

BlackRock expects companies to:

- report on how they have determined their key stakeholders and considered their interests in business decision making
- address 'adverse impacts' that could arise from business practices and to mitigate against any material risks going forward.

BlackRock states that it will initially focus in 2021 on 150 companies whose business practices 'may have resulted in adverse impacts or reflect insufficient management of "social" sustainability risks'.

BlackRock states that more information around its expectations will be included in updates to engagement priorities (which it plans to release early this year).

Further detail on BlackRock's engagement priorities to come

- In early 2021, BlackRock plans to release engagement priorities and supporting key performance indicators for the year.
- BlackRock will also release new commentaries outlining its perspective on companies' impact on natural capital ie the environment beyond climate.

[Source: BlackRock report: 2021 Stewardship Expectations Global Principles and Market-level Voting Guidelines]

ShareAction analysis shows that large asset managers remain slow to support shareholder ESG resolutions

ShareAction reviewed the voting decision of 60 of the world's largest asset managers on shareholder ESG resolutions – climate change, climate-related lobbying, social issues (human rights, human rights and diversity) during the period September 2019 to August 2020. 37 of the asset managers included in the group are members of the Climate Action 100+ initiative.

Some key points

- Overall findings:

- Only 15% (or 15 of 102 shareholder resolutions on climate and social issues) received majority support from asset managers.
- One sixth of asset managers abstained from voting on at least 10% of resolutions, despite holding the relevant stocks.
- BlackRock (12%) and Vanguard (14%), each supported fewer than 15% of the climate and social resolutions analysed.

- **Members of the ClimateAction 100+ initiative overall supported more shareholder climate and social resolutions than other asset managers**: ClimateAction 100+ members supported 69% of climate resolutions vs 39% for other asset managers. However, ShareAction comments that looking at the data more closely, a number of ClimateAction100+ signatories fall into the 'laggards' category.
- **Social resolutions:**
  - **Disclosure remained the primary focus:** 67 of the 102 resolutions reviewed focused on disclosure. Almost all of the 'social' resolutions, concerned policy development or disclosure.
  - **Diversity resolutions:** ShareAction found that the only social resolutions that passed were in the diversity category. Within this category, investors were more likely to support resolutions calling for disclosure of gender diversity (48%) as opposed to ethnicity.
  - **Pay gap resolutions:** Investors tended to oppose resolutions requiring disclosure of pay gaps with only 29% of investors voting in favour of resolutions asking companies to disclose both gender and racial pay gaps.
  - **Human rights resolutions:** Despite the purported increased focus on social issues, there no change in voting behaviour on human rights resolutions before and after the WHO COVID-19 pandemic declaration in March 2020. No voting rationales referenced the pandemic.
- **Inadequate justification for voting decisions?** ShareAction expressed disappointment in the reasons given by many asset managers for failing to support shareholder climate and/or social resolutions arguing that a preference to engage privately with companies and/or the fact that the asset manager considers that the company is already doing more than its peers on a particular issue are not sufficient justifications.

  [Source: ShareAction media release 01/12/2020]

Gaining traction? Calls to implement a 'Say on Climate' appear to be gaining support, but questions have been raised about the likely effectiveness of the measure

A 'say on climate' has the backing of UN climate envoy Mark Carney

The Say on Climate Initiative is an investor initiative pushing for companies to disclose emissions, disclose their plans to manage emissions and 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 for this.

In November the group announced that initiative has the backing of UN climate envoy Mark Carney. Mr Carney said that implementing the measure would 'establish a critical link between responsibility, accountability and sustainability'.

Adoption?

Both Moody's and Unilever have signalled their support for the introduction of Say on Climate votes.

- On 14 December 2020, the Unilever Board announced its intention to put its climate transition action plan before shareholders and seek a non-binding advisory vote on the plan. According to Unilever's statement, the company intends to share its climate transition plan in Q1 2021 (ahead of its AGM on 5 May). The plan will then be updated on a rolling basis and Unilever will seek an advisory vote every three years on 'any material changes made or proposed to the plan'. The first year the company will report on its annual progress against for the first time in 2022.
- On 22 December 2020, Moody's announced its commitment to the campaign becoming the first S&P 500 company to do so (a 'say on climate' resolution has been filed at the company).

Successful passage of Say on Pay resolutions at Aena

- To date, one company - Aena (Spanish airports group) which is 51% owned by the Spanish government - has adopted the publication an annual climate transition action plan with a shareholder vote following the successful passage of two shareholder resolutions calling for the introduction of the measures. According to BlackRock (which supported the introduction of the measures) the company's board and both resolutions received over 95% of votes in support.

- Say on climate resolutions have also been filed at a number of other companies including: Canadian Pacific Railway; Canadian National Railway; S&P Global; Union Pacific Railroad; Charter Communications; and Alphabet Inc.

UK Investor Forum supports 'say on climate'

Among other things, the UK Investor Forum's 2020 Activity Review calls for the introduction of a mandatory, non-binding, 'say on climate' on TCFD-aligned disclosure obligations.

The group argues that the requirement would:

- provide a clear mechanism for investors to express their views on the effectiveness (or otherwise) of mandated climate disclosures by the companies in which they invest
- enable the investment community to 'take a leadership position' on advancing the UK's net zero emission commitments
- serve to 'align the focus of premium-listed companies with the UK's increasingly ambitious climate commitments'.

The report argues that though shareholder resolutions can be a powerful tool in catalysing action on issues of concern to investors, filing them is a 'cumbersome' and expensive process for both shareholders and companies and that implementing a system-wide approach to signal shareholder views on climate strategy as suggested is preferable.

Concerns raised: This approach is unlikely to be as effective as other available options (including voting against directors)

Writing in Forbes, Professor Robert G Eccles questions whether the introduction of a 'say on climate' will be effective, given the body of evidence demonstrating the 'relative ineffectiveness of disclosure alone'. Further, he questions the desirability of adding another additional disclosure requirement on companies.

As such, Ms Eccles comments,

> 'I say it is well-intentioned, futile, and a drain on the engagement bandwidth of investors who have more effective tools for getting their portfolio companies to mitigate and adapt to climate change'.

Mr Eccles suggests that a more effective approach to address lack of action on climate risk and/or to speed progress, would be to target a small group of companies (perhaps the focus companies identified by the ClimateAction 100+ initiative) and to mobilise a vote against the directors of underperformers.

[Sources: Say on Climate initiative 19/11/2020; Say on Climate Initiative supporters; Unilever media release 14/12/2020; Moody's media release 22/12/2020; Investor Forum Review 2020 released 12/01/2021; Forbes 05/01/2021]

The ClimateAction 100+ Annual Progress Report finds gains have been made with 43% of focus companies now having set/made net zero commitments

The Climate Action 100+ 2020 Progress Report was released in December 2020. The report details progress at sector level for the focus companies engaged by the initiative.

Company-level progress against the goals of the initiative will be reported in Q1 2021 under the Climate Action 100+ Net Zero Company Benchmark.

Highlights from the report

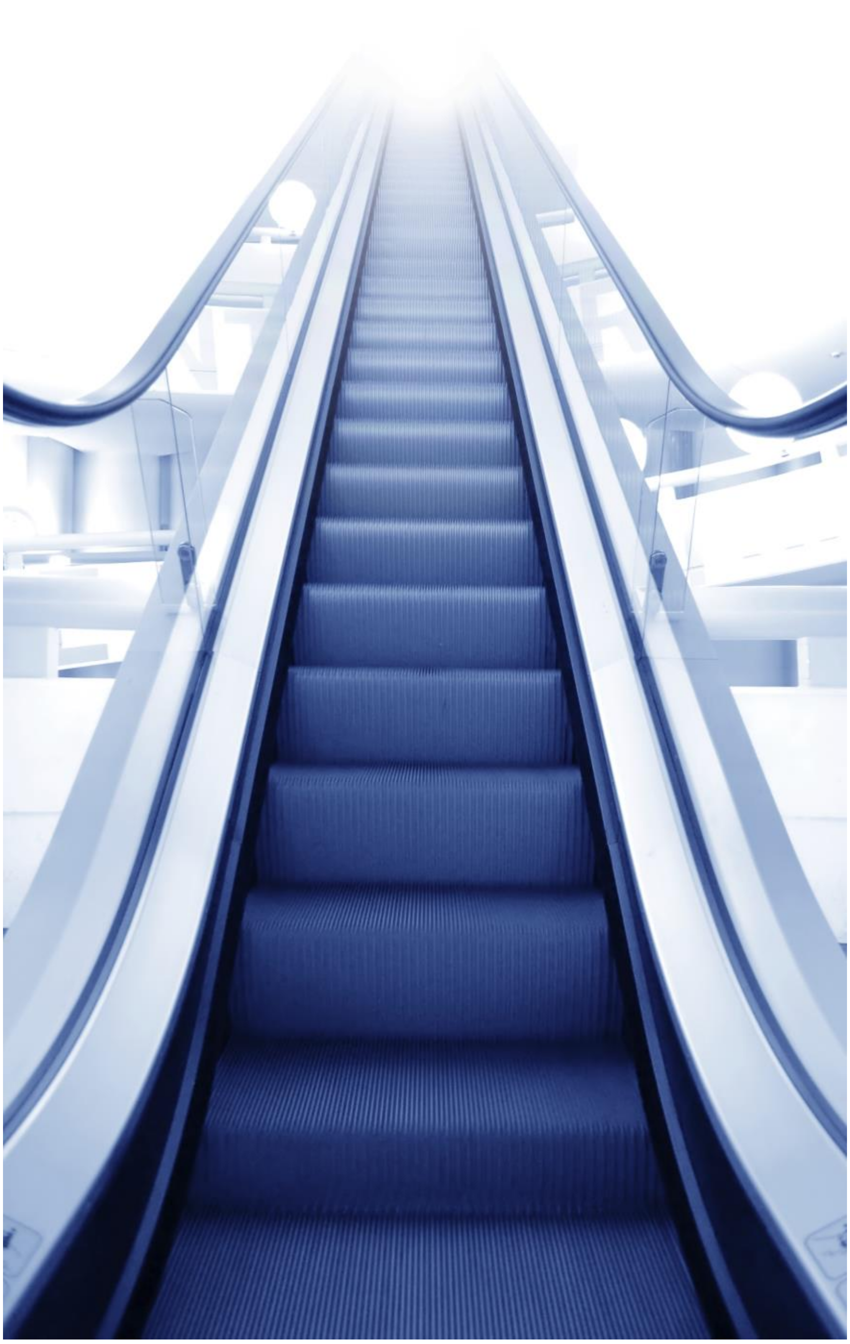
Overall findings

- Emissions reduction targets
  - 43% of the initiative's focus companies have now set or made commitments to achieve net zero emissions by 2050 or sooner
  - 51% of companies have also set short term emissions reduction targets (to 2025) and 38% have set medium term targets (2026-2035)
  - Only 10% of companies have set net zero targets that include coverage of Scope 3 emissions.

- **Ensuring a 'just transition':** Globally, several companies are setting out plans to ensure a just transition for workers and communities which the report characterises as 'promising first steps' on the issue.
- **Alignment with the goals of the Paris Agreement:**
  - 26% of electricity utility companies on initiative's focus list had coal phaseout plans consistent with the goals of the Paris Agreement (up from 13% in 2019)
  - 68% of planned oil and gas capital expenditure was inconsistent with the goals of the Paris Agreement sanctioned by focus companies in 2020 are not aligned with the goals of the Paris Agreement
- **Lobbying/industry association memberships:** Over 80% of Climate Action 100+ focus companies remain members of industry associations whose actions/policies run counter to the goals of the Paris Agreement.

ASX Companies

- **Emissions reduction targets:**
  - More than half (62%) of the 13 companies listed on the ASX have announced a target or an ambition to reach net zero emissions by 2050. Two of the focus companies have set a science based target approved by the SBTi.
  - The report comments that companies currently lack detail on the scope of targets and in particular, detailed information on whether they cover material sources of Scope 3 emissions.
- **TCFD reporting:** 100% of companies are reporting in line with the TCFD recommendations
- **Lobbying/industry memberships:** The report comments that a number of companies provide disclosure on trade association memberships including assessments of the alignment between the views/actions of the associations and their own internal climate positions/policies. Despite this, the report flags that companies are continuing to support trade associations with 'problematic climate lobbying' without providing detail around their escalation and/or exit plans.



Commenting on the report findings, UN Special Envoy Mark Carney welcomed the progress made despite the COVID-19 pandemic, and in particular the increase in the number of companies committing to achieve net zero emissions, in many cases as a result of investor engagement.

However, he emphasised that there is still significant work to be done. 'It's time for every company to engage with this conversation' he said.

[Sources: Climate Action 100+ media release 17/12/2020; Climate Action 100+ 2020 Progress Report]

Regulators

All KPIs met (overall): APRA's self-assessment report released

The Australian Prudential Regulation Authority (APRA) has released its 2019/20 self-assessment against the six key performance indicators (KPIs) in the government's regulator performance framework (framework):

1. Regulators do not unnecessarily impede the efficient operation of regulated entities
2. Communication with regulated entities is clear, targeted and effective
3. Actions undertaken by regulators are proportionate to the regulatory risk being managed
4. Compliance and monitoring approaches are streamlined and coordinated
5. Regulators are open and transparent in their dealings with regulated entities
6. Regulators actively contribute to the continuous improvement of regulatory frameworks

Overall, APRA considers it has met all six KPIs, though the regulator identifies that there are 'areas for improvement' in relation to three.

- KPI 1: APRA considers that there are opportunities for improvement including greater transparency around the costs/benefits of policy changes (this work was deferred due shift in priorities as a result of the COVID-19 pandemic.)
- KPI 2: APRA comments that 'feedback from regulated entities has been positive and praise has been given in relation to supervisory engagement and APRA’s clear and timely communication and public statements'. The assessment notes that APRA's progress against planned actions to enhance its communication strategy was put on hold due to COVID-19. and the development/use of metrics was deferred in response to COVID-19.
- KPI 4: APRA considers that working relationships/coordination with other regulatory agencies have been strengthened. However, the assessment notes that work on APRA’s planned implementation of a new Data Collection Solution was temporarily put on hold due to COVID-19. APRA expects the APRA Connect project will

resume in the 2020-21 financial year. Work on towards other actions is progressing, but projects are not yet completed.

[Source: APRA's self-assessment – 2019/20 financial year 18/12/2020]

Heavy price: Australian banks second only to the US in terms of the total amount of fines imposed last year

Finbold has released a report quantifying the fines issued to banks by regulators globally during the period 1 January 2020 to December 31 2020.

Some Interesting Findings

- Overall, regulators issued US $14.21bn to banks in 2020
- Most breaches related to contravention of Anti-money laundering laws. Other fines related to contraventions of various other requirements eg Know Your Customer (KYC) and operating guidelines as well as personal data leaks (among others).
- The US had both the highest total number of bank fines and also the highest total with 12 fines imposed over the period totalling US $11.11bn.
- Australia ranked second in terms of the total amount of fines at US $981.06m but fourth in terms of the total number of fines imposed. US authorities imposed the highest number of fines at (12), followed by China (7), Germany and the UK (both with 4), and Australia (3).
- Israel ranked third globally by total amount of fines with banks paying a total of US $902.59m for a single fine.

Commenting on the findings, Finbold CEO Oliver Scott suggests that the figures look set to increase. He commented ,

> 'Fines on financial institutions are projected to grow in the coming years, as the U.S. and other countries reforms existing regulations while increasing sanctions with anti-money laundering regulations remaining a key enforcement priority. However, banks are spending more on conforming to changing regulatory requirements. Overall, new and complex regulations are proving to be a challenge for the compliance departments of many lenders.'

[Sources: Finbold media release 11/01/2021; Finbold report: Bank Fines 2020 report]

In Brief | n Brief | Let ASIC get on with it: Writing in The AFR, Professor Dimity Kingsford Smith argues strongly against calls to break up and/or narrow ASIC's remit arguing instead that now is the time to let ASIC do its job. 'Since the Hayne royal commission, ASIC has its marching orders, new powers and better funding. It is time to support it to do its work, independently and expertly' she writes

[Source: [registration required] The AFR 05/01/2021]

Financial Services

Consumer credit reforms: Consultation on proposed licensing regime for debt-management firms launched

Context – consumer credit reforms

On the 25 September, the government announced plans for the proposed overhaul of consumer credit laws, including plans to introduce a new requirement for debt management firms paid to represent consumer in disputes with financial institutions to hold an Australian Credit Licence (ACL).

Consultation on the introduction of new licensing requirements for debt management firms

- The government is consulting on proposed new regulations - [draft] The National Consumer Credit Protection Amendment (Debt Management Services) Regulations 2021 - that propose to introduce this new requirement.
- The proposed new regulations prescribe a new type of 'credit activity' for the purposes of section 6 of the National Consumer Credit Protection Act 2009, which will require providers of debt management services to hold an ACL and to and 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).

Timing

- It's proposed that the regulations will commence the day after they are registered on the Federal Register of Legislation.
- The deadline for submissions to the consultation is 12 February 2020.

[Source: Draft regulations; Draft explanatory statement; Treasury media release 15/01/2021]

Implementing Hayne recommendation 2.10: New financial advisers disciplinary body announced

Context

Hayne recommendation 2.10 recommends the establishment of a 'new disciplinary system' for financial advisers including the establishment of a new, single, central disciplinary body for financial advisers. The Commission recommended that Australian Financial Services License (AFSL) holders be required to report 'serious compliance concerns' to the disciplinary body and for clients/other stakeholders to also be able to report concerns about the conduct of advisers to the new disciplinary body.

New disciplinary body announced, FASEA to be replaced

In a joint media release, Treasurer Josh Frydenberg and senator Jane Human announced that the government will give effect to the recommendation to establish a new disciplinary body for advisers by expanding the operation of the existing Financial Services and Credit Panel (FSCP) within the Australian Securities and Investment Commission (ASIC) which currently supports ASIC in the exercise of its regulatory functions with respect to the making of banning orders against individuals for misconduct.

The government plans to transfer the standard-making functions of the Financial Adviser Standards and Ethics Authority (FASEA) to Treasury, with the standards to be set by legislative instrument.

The remaining elements of FASEA's role, including administering the adviser examination, will be incorporated into the FSCP's expanded mandate. Treasury and ASIC will work closely with FASEA to ensure an orderly transition to the new regulatory framework.

The statement indicates that the government plans to introduce legislation to implement the changes in H1 2021.

[Source: Joint media release Treasurer Josh Frydenberg, Assistant Minister for Superannuation Jane Hume 09/12/2020]

Technical updates to RG 246 Conflicted Remuneration

The Australian Securities and Investments Commission (ASIC) has released technical updates to Regulatory Guide RG 246 on conflicted and other banned remuneration to reflect:

- the end of the grandfathering of conflicted remuneration for financial product advice from 1 January 2021 and;
- the extension of the ban on conflicted remuneration to stamping fees paid in relation to listed investment companies and listed investment trusts (excluding real estate investment trusts) that took effect on 1 July 2020.

Product issuers are required to provide rebates to clients for all previously grandfathered benefits that they remain legally obliged to pay on or after 1 January 2021.

The updated guidance also clarifies that the law does not prescribe a timeframe for repaying commissions that are being clawed back where a life insurance policy has been cancelled or reduced in the first two years.

ASIC states that it will continue to monitor industry's arrangements and 'will consider taking action' where misconduct is identified.

[Source: ASIC media release 10/12/2020]

Deferred Sales Model for add-on insurance: Consultation on possible exemptions to the new requirements

The Financial Sector Reform (Hayne Royal Commission Response) Act 2020 introduces an industry-wide deferred sales model (DSM) for add-on insurance (among other reforms).

Under section 12DX of the Australian Securities and Investments Commission Act 2001, a class of add-on insurance products may be provided an exemption through regulations. Any exemptions may be subject to certain conditions.

Consultation on possible exceptions

Treasury is seeking feedback on any classes of add-on insurance products that 'represent a very high level of consumer value', which should be exempted from the DSM requirement.

Stakeholders are invited to provide the following evidence in support of any (proposed) exemption:

- A description and suggested legal definition of the class of add-on insurance product proposed to be exempted.
- Evidence that the class of add-on insurance product has been historically good value for money for consumers including for example: evidence that failure to grant an exemption would result in a 'high risk' of underinsurance or noninsurance and evidence that the product is well understood by consumers.
- Treasury would encourage stakeholders to submit evidence on that basis, particularly for quantitative data such as pay-out ratios or claim acceptance rates. While data on a product or class of products from an individual add-on insurance provider will be useful, it may be difficult for such data to be sufficiently compelling to result in a whole of industry class exemption.

Treasury also invites views on any appropriate conditions that should be attached to any class exemptions provided.

Add-on travel insurance and Comprehensive Third Party (CTP) insurance for motor vehicles

The government intends to exempt both add on travel insurance and CTP insurance from the Deferred Sales Model.

Treasury has invited views on appropriate definitions of add-on travel insurance products and Comprehensive Third Party (CTP) insurance for motor vehicles as well as how the products could be captured in the regulations.

Timing

- The due date for submissions to the consultation is 15 February 2021.
- The Deferred Sales Model will be effective from 5 October 2021. Any add-on insurance products without an exemption in place at that time will be subject to the Deferred Sales Model from that date. Treasury states that 'it cannot be guaranteed that submissions received after this date can be fully considered, and exemptions provided, by 5 October 2021'.
- After 5 October 2021 stakeholders will need to contact Treasury should they wish to seek any additional class exemptions. Compliance with the Deferred Sales Model is required consideration of any additional exemptions.

[Source: Treasury Consultation 13/01/2021]

COVID-19: ASIC has approved changes to the Banking Code

The Australian Securities and Investments Commission (ASIC) has approved a number of amendments proposed by the Australian Banking Association's (ABA's) to the Banking Code of Practice (Code).

Key changes include:

- extending the application of the COVID-19 Special Note in the Code until 1 September 2021 (which states that where banks do not meet, but have made 'good faith efforts to comply with, the timing requirements' for certain notifications/communications under the Code, due to disruption caused by COVID-19, they will not be in breach of their Code obligations).
- aligning the timeframes in the Code for responding to complaints with the updated timeframes in ASIC's regulatory guide 271 Internal Dispute Resolution (which is set to commence on 5 October 2021).
- outlining the circumstances where a bank may decline, in financial hardship scenarios to continue to deal with a customer's appointed representative and instead deal directly with the customer
- amending the definition of 'small business' and 'banking services' in the Code

Triennial Review of the Code will consider enforceable code provisions

The changes do not include approval of any enforceable code provisions.

The ABA will be commencing a comprehensive triennial review of the Code in 2021, and the terms of reference will consider the enforceable code provisions framework.

The triennial review will also consider more 'comprehensive changes' to the small business definition.

[Sources: ASIC media release 08/01/2021; ASIC Corporations (Approval of Variation March 2020 Banking Code of Practice) Instrument 2021/11; Explanatory Statement]

Member Outcomes: APRA's refreshed MySuper heatmap shows the MySuper sector is 'delivering sound outcomes to members' but with 'much room for improvement'

Key Takeouts

- Australian Prudential Regulation Authority (APRA) Deputy Chair Helen Rowell considers that APRA's MySuper product heatmap has demonstrated its value in holding trustees to account over the past twelve months.
- Overall, APRA considers that the 2020 heatmap shows that trustees are generally delivering sound outcomes to members, 'but with much room for improvement and some areas of concern'.
- APRA has raised concerns that some funds identified as the poorest performers in the initial iteration of the heatmap have not improved their performance.
- In late 2021, APRA will look to publish the heatmap for a segment of the choice sector. APRA plans to publish a preview of how it intends to approach this task 'early' in 2021.
- APRA is committed to extending the MySuper heatmap to include insurance.

The Australian Prudential Regulation Authority (APRA) released its first full 'refresh' of its MySuper product heatmap in December along with an Insights Paper outlining some of the changes that have occurred in the sector in the twelve months since the heatmap was initially released.

Supporting improved member outcomes

Ms Rowell said that the heatmap has demonstrated its value in holding trustees publicly accountable for the performance of their products and the outcomes for members.

In a speech delivered ahead of the release of the updated heatmap ASIC Deputy Chair Helen Rowell said,

> 'Overall, this year's heatmap paints a picture of a MySuper sector that is generally delivering sound outcomes to members, but with much room for improvement and some areas of concern'.

Key insights

- Lower fees and costs: 71% of MySuper members (or 10 million members) as at 30 June 2020 are paying less in total fees and costs. APRA estimates the average savings per member account at $47 per annum. Overall, total savings are estimated at $408m. Despite this positive result for members, APRA considers that that fees and costs remain high and that further reductions are required.
- Some underperformers have exited: Of the 47 MySuper products that underperformed against APRA's investment performance benchmarks in the initial iteration of the heatmap, 11 have now exited the industry.
- Performance against benchmarks varied: Looking at investment outcomes over a six year period, APRA found that:
  - 53% (37 products) were performing at or above heatmap investment benchmarks
  - 39% of products (27 products) have 'some investment concerns' (APRA found that they underperformed by less than 0.75% per annum)
  - 9% of products (6 products) are significantly underperforming against benchmarks.
- Underperforming products: APRA estimates that 900,000 members ($31 billion in total assets as at 30 June 2020) are invested in the six MySuper products with significant investment underperformance. Of these six products, four were flagged as significantly underperforming in the 2019 Heatmap and the remainder were newly flagged in the 2020 heatmap.
- Overall, larger funds tended to outperform their smaller peer organisations: Generally APRA found that larger funds have better performance and that smaller funds with negative growth and cash flow trends face sustainability challenges going forward. APRA makes clear that trustees of underperforming MySuper products should consider their size (as well as other factors) in thinking through whether they are able to implement changes to strengthen their performance.

Areas of concern

- APRA has raised concerns that some funds identified as the poorest performers in the initial iteration of the heatmap have not improved their performance.
- APRA states that it is considering whether eight trustees may have failed in their obligations to members with respect to ten MySuper products, including possible breaches of the Superannuation Industry (Supervision) Act 1993 (SIS Act).
- APRA will issue notices requiring these trustees to provide information on the underperformance and the actions being taken to address it. Based on this information, APRA will then determine whether further action/what further action (including possible enforcement action) may be appropriate.

Further refinements to the heatmap

- Ms Rowell said that APRA is considering a number of enhancements for the 2021 version of the heatmap eg using a wider range of asset class indices.
- In late 2021, APRA will also look to publish the heatmap for a segment of the choice sector. APRA plans to publish a preview of how it intends to approach this task 'early' in 2021.

- APRA is committed to extending the MySuper heatmap to include insurance. This work has been deferred until 2022 to enable APRA to 'leverage' the expanded data collection that will be delivered through the Superannuation Data Transformation program.

  [Sources: APRA media release 18/12/2020; APRA Insights Paper; APRA MySuper product heatmap December 2020; APRA Deputy Chair Helen Rowell - Speech to ASFA Briefing: APRA Heatmap 17/12/2020]

Complementary obligations: ASIC and APRA have written to superannuation trustees to help explain the interaction between member outcome obligations and product design and distribution obligations

On 15 December 2020, the Australian Securities and Investments Commission (ASIC) and the Australian Prudential Regulation Authority (APRA) issued a joint letter to superannuation trustees to 'assist RSE licensees to better understand the way in which the MO obligations [member outcomes] and the DDOs [design and distribution obligations] interact'.

Complementary obligations

The regulators consider that the two sets of obligations are 'in many ways complementary' and that given the commencement dates for each regime – the first Business Performance Reviews were due by 31 December 2020 and the first Outcomes Assessments are expected to be completed early in 2021 while funds are already preparing for the commencement of the DDOs on 5 October 2021 - there may be opportunities for RSE Licensees to capitalise on potential synergies.

The letter identifies three areas in particular – a) planning, reviews and adjustments; b) data collection/analysis; and c) insurance in superannuation - where the regulators consider the two sets of obligations interact closely and where they may scope for RSE licensees to identify efficiencies.

Among other things, the letter suggests that there may be scope for RSE licensees to leverage some of the same data to meet both their member outcomes and design and distribution obligations. In the context of insurance in superannuation, the letter suggests that RSE licensees may be able to use data collected by an insurance provider on behalf of an RSE both to ensure that the cover offered to members achieves the outcome sought under the licensee's strategic objectives and Business Plan, and that the cover meets DDO requirements.

[Source: Joint letter to RSE Licensees 15/12/2020]

COVID-19: Funds have now paid out $35.9 billion under the government's early release of superannuation scheme

The Australian Prudential Regulation Authority (APRA) has released industry-level and fund-level data on the early release of superannuation scheme for applications received during the period 20 April (inception of the scheme) to 20 December 2020.

- Total payments made since the inception of the scheme have taken an average of 3.3 business days to process, with 95% of payments made within five business days.
- Over the week to 20 December, superannuation funds received 21,000 applications
- Of these, 69% were initial applications bringing the total number of initial applications received to date to 3.4 million since inception of the scheme.
- 31% of applications received over the week were repeat applications, bringing the total number of repeat applications to 1.4 million since the inception of the scheme.
- Funds made payments to 22,000 members worth $159 million.
- Funds have made approximately 4.7 million payments since inception worth a total of $35.9 billion.
- The average payment made over the period since inception is $7,643 overall and $8,284 when considering repeat applications only.

The scheme closed on 31 December 2020. The ATO anticipates that payments for applications submitted by 31 December cut off will be made throughout January.

[Source: APRA media release 06/01/2021]

Improving member outcomes: ASIC has released a report (REP 675) offering insights into how superannuation trustees can better quantify and assess the value members are receiving for default insurance

As part of a broader work project aimed at improving trustee practices around superannuation, and in the interests of supporting trustees to deliver better outcomes for members with default insurance, the Australian Securities and Investments Commission (ASIC) has released a report – Report 675 Default insurance in superannuation: Member value for money – presenting the regulator's insights into the extent to which members with default insurance are receiving value for money and offering insights for trustees into how they can better quantify and assess member outcomes going forward.

The insights in the report are of particular relevance for trustees, ASIC Commissioner Danielle Press suggests, in light of existing and new regulatory obligations.

> 'The findings in ASIC's report will help trustees take meaningful steps to enhance member outcomes and to meet their existing and new regulatory obligations. These include the member outcomes assessments overseen by APRA and the design and distribution obligations (DDO) overseen by ASIC, which commence in October 2021'.

Scope of the report

The report is based on ASIC's assessment of both publicly available data on the standard default insurance (ie death, total and permanent disability (TPD) and income protection cover) in 20 MySuper products offered by trustees of large funds as well as on more detailed data provided by 11 large superannuation trustees.

Assessing value

ASIC's findings are based on analysis of the following three metrics: 1) the unit price (ie the annual cost per $1,000 of default insurance); 2) claims ratios; and 3) claims-handling indicators (eg claims acceptance rates etc).

ASIC emphasises that none of these measures, when considered in isolation, provide a 'complete picture' and that each has its own strengths and weaknesses as an indicator of overall value. The report includes a table summarising what ASIC considers to be the strengths and the weaknesses of each metric at p5-6.

The report makes clear that particularly when designing default offerings, trustees should be making active decisions about which 'trade-offs between the different facets of value are best for their insured membership'.

Some Key Findings

'Shortcomings' in data collection and analysis by trustees

- A key issue identified in the report is the limited nature of the data that could be provided to the regulator.
- ASIC observed that some trustees were unable to identify which members had default insurance suggesting that they 'appear not to routinely analyse the outcomes their default insured members are receiving'.
- The report notes that some trustees also 'struggled' to provide an explanation to ASIC around patterns the regulator identified in the data provided to the regulator. ASIC observed that this was most often the case where the design and product structure were the most complex.

Some members may be receiving relatively low value for money

- The report found that claims ratios 'vary significantly across trustees, insurance policies and groups of members' and that some members may be receiving relatively low value for money.

- ASIC's analysis of detailed insurance claims data provided by trustees identified that certain cohorts of members (eg members under 30 and those in insurance policies with more restrictive terms and conditions), may be receiving relatively low value for money as compared with older members over a six year period.
- For example, the report found that members under 30 years of age had a 'systematically lower accrual claims ratios, on average, than those aged over 50' suggesting that this group may be receiving less value for money than older members (based on this measure).
- The report comments that though some trustees said they have recently sought to address imbalances between the cohorts, other trustees appeared not to be aware of the imbalances suggesting that they may be due to 'an unintentional result of levels of risk changing over time without premiums being adjusted in response'.

ASIC found there is 'wide variation in the design and pricing of default insurance'

- ASIC found that two identical members could receive very different cover, depending on the default product they have. For example, ASIC found that some MySuper products offered over 20 times as much default death and total and permanent disability (TPD) cover than others to the same type of member.
- ASIC also found that the cost of default insurance varied within wide limits. For example a 30-year-old woman's total premium could vary by 25 times (from $29 to $732 a year). Though some of this variation is due to differences in the types and levels of cover being provided, ASIC found that the unit price of cover (ie the annual cost per $1,000 of default insurance) also varied widely. For example, ASIC found that a 50-year-old man could be paying almost 5 times as much per $1,000 of death and TPD cover in the MySuper product with the highest unit price, compared to the lowest. The report suggests that the variation in unit price may be attributable to a number of factors including: the composition of a MySuper product's membership; the generosity of terms and conditions and waiting and benefit periods for income protection cover (a longer benefit period may be associated with a higher unit price).

Areas for improvement – improved data collection and analysis

Improved data collection and analysis is the key improvement area identified in the report and forms the basis for a number of suggested steps to assist trustees in improving member outcomes.

The report suggests that improved data collection and analysis will enable trustees to:

- better understand and assess, monitor and review what outcomes each cohort of their membership is receiving from a group insurance arrangement, why these outcomes may differ across cohorts, whether members' needs are being met/what value is being provided
- to inform actions to reduce the risk of low-value insurance
- to inform actions to 'refine the design and pricing of default insurance (including terms and conditions)'

Page 11-12 of the report set out a list of suggested actions and a brief overview of how trustees can use data to better monitor and review member outcomes.

Announcing the release of the report ASIC Commissioner Danielle Press said,

> 'Most default insurance cover is complex. Trustees play a pivotal role in designing default cover and negotiating with insurers on behalf of their members. I encourage trustees to examine the outcomes they are delivering to members through default insurance and to proactively consider how to deliver value for money in a way that is financially sustainable.'
>
> [Sources: ASIC media release 14/12/2020; Report 675 Default insurance in superannuation: Member value for money (REP 675)]

In Brief | Following consultation ASIC has released its final principles-based guidance - Regulatory Guide 271 Design and Distribution Obligations - on forthcoming product design and distribution obligations as well as a response document outlining its response to submissions to the consultation

> [Sources: ASIC media release 11/12/2020; RG 274 Product design and distribution obligations; REP 674 Response to submissions on CP 325 Product design and distribution obligations]

In Brief | A win for policyholders: The UK Supreme Court delivered its judgment in the FCA's business interruption insurance test case. The Court substantially allowed the FCA's appeal on behalf of policyholders

[Source: Financial Conduct Authority (Appellant) v Arch Insurance (UK) Ltd and others (Respondents) [2021] UKSC 1; Press Summary]

In Brief | Passage of Hayne omnibus reform Bills : The Financial Sector Reform (Hayne Royal Commission Response) Bill 2020 and the Corporations (Fees) Amendment (Hayne Royal Commission Response) Bill 2020 which implement the government's response to multiple Hayne recommendations received Assent on 17 Dec 2020

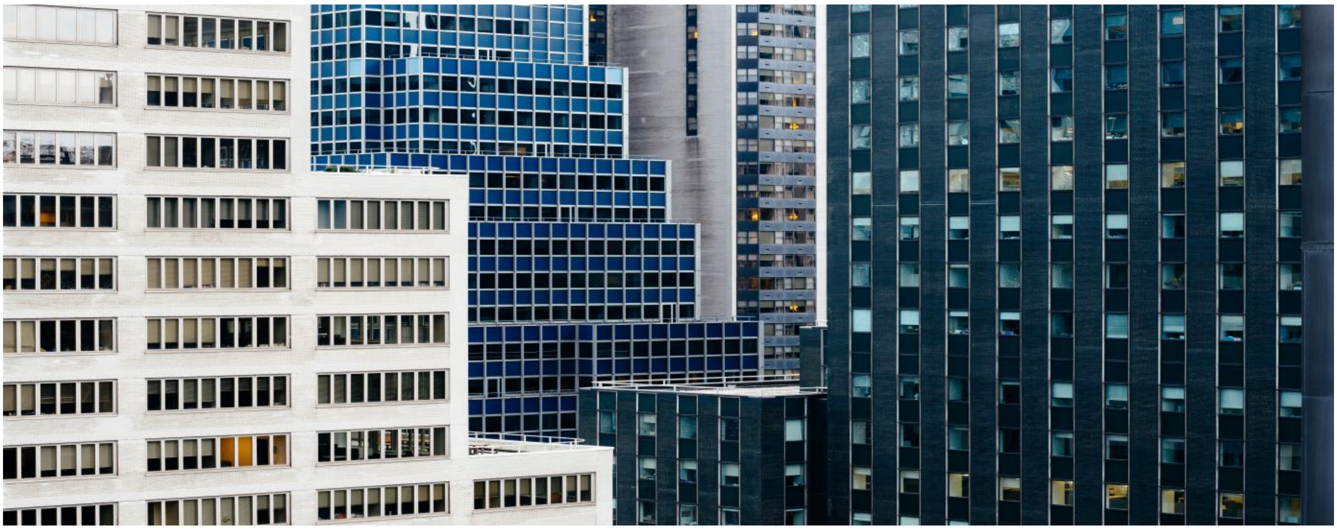
[Sources: The Financial Sector Reform (Hayne Royal Commission Response) Bill 2020; Corporations (Fees) Amendment (Hayne Royal Commission Response) Bill 2020]

In Brief | The Financial Sector Reform (Hayne Royal Commission Response) (Regulation of Superannuation) Regulations 2020 were registered on 12 December 2020. The regulations remove certain exemptions from the requirement to hold an AFSL and make other minor amendments to support the reforms to the roles of the superannuation regulators made by the Financial Sector Reform (Hayne Royal Commission Response) Bill 2020

[Source: Financial Sector Reform (Hayne Royal Commission Response) (Regulation of Superannuation) Regulations 2020]

In Brief | Responsible lending reform Bill: The National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020 which proposes to implement changes to responsible lending obligations was introduced into the House of Representatives following consultation, on 9 December 2020 and has been referred to the Senate Economics Legislation Committee for report by the 12 March

[Source: National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020]



Risk Management

The cyber incident at the RBNZ has been contained, but the full impact is yet to be determined: The Reserve Bank of New Zealand is investigating a breach of a third party file sharing service used by the bank to share and store data

On 10 January, the Reserve Bank of New Zealand (RBNZ) announced that a third party file sharing service which is both used to share and to store some sensitive information, was illegally accessed. Governor Adrian Orr said:

- the breach had been contained and that an investigation into the breach is underway
- the file sharing system has been secured and taken offline until pending the completion of the investigation
- the bank's 'core functions remain sound and operational'.

In subsequent updates (11/01 and 15/01) the RBNZ confirmed that:

- the extent of the breach is still being determined, but some commercially and personally sensitive information may have been accessed
- the third party provider has advised the RBNZ that the attack was not specifically directed at the RBNZ and that other users of the file sharing application were also compromised
- RBNZ is now communicating with system users about alternative ways to securely share data
- the bank has said that its 'immediate focus' is on working directly with system users and those who may have had their information compromised. The bank is prioritising 'direct engagement with institutions and individuals affected'.
- a 'detailed forensic cyber investigation' is being undertaken involving domestic and international cybersecurity experts and other relevant authorities
- RBNZ has also appointed an 'independent third party' to undertake a 'comprehensive general review' of the incident. The RBNZ says that it will release the terms of reference for the review 'shortly'.

Mr Orr said that though he recognises the public interest in the issue, providing further details at this time could adversely impact the investigation. He said that the bank will provide further details 'when it is appropriate to do so'.

[Sources: Reserve Bank of New Zealand media releases 10/01/2021; 11/01/2021; 15/01/2021]

Insolvency and Restructuring

Top Story | Small business insolvency reforms commence on 1 January 2021

Australia's largest corporate insolvency reform in 30 years came into effect at the beginning of 2021. MinterEllison's team has provided a concise, expert summary of the changes which can be accessed here.

Related news

- Treasury has published a fact sheet for small business. This can be accessed here.
- ASIC has published an article summarising the changes on its website here.

In Brief | Targeting phoenix activity: The Australian quotes the new interim head of ASIC's anti-phoenix investigations, ASIC Commissioner Diana Steicke, as saying that the regulator will target 40 surveillances in FY21 of 'high risk company directors and pre-insolvency advisers at risk of illegal phoenixing'

> [Source: [registration required] The Australian 17/01/2021]

Other News

COVID-19: Treasurer welcomes moves by some companies to pay back JobKeeper but emphasises that companies have no legal obligation to do so

In a recent interview, Treasurer Josh Frydenberg was asked to comment on moves by two companies - Super Retail Group and Toyota – to repay taxpayer funded JobKeeper payments to the government following stronger than expected performance. Mr Frydenberg was asked in particular to comment on whether he welcomed the move and whether other companies should follow suit.

Mr Frydenberg said that ultimately businesses who were eligible to receive JobKeeper and who received the support have no legal obligation to repay it.

He went on to say that he considers it a matter for the individual business to decide whether repaying the money is appropriate.

> '… if they do so, then I'm not going to say no. That's additional money that will flow into the government coffers, and it's appreciated. But businesses don't have an obligation to pay back JobKeeper. That is a matter for those individual businesses, as they see fit'.
>
> [Source: Transcript: Doorstop interview, Treasurer Josh Frydenberg 18/01/2021]

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