# Governance News

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

**14 July 2021**

# Contents

# Diversity

## Too slow: UK regulators are seeking views on possible options to speed up the increase in diversity in financial services firms

### Key Takeouts

- The policy proposals under consideration are geared towards speeding up the rate of progress on increased diversity and improving inclusion across the financial services sector
- The possible introduction of new disclosure reporting requirements, diversity targets, tying remuneration to diversity/inclusion objectives and integrating diversity and inclusion accountabilities into existing individual and collective accountability mechanisms are among the possible policy options on which initial views are being sought.

UK regulators (the Financial Conduct Authority (FCA), Prudential Regulation Authority (PRA) and the Bank of England) have released a joint discussion paper seeking views on potential policy directions/options aimed at accelerating the rate of progress toward increased diversity in regulated financial services firms.

The deadline for submissions is 30 September 2021.

### Why regulatory intervention is warranted

Despite growing acceptance of the value of diversity, and despite mounting investor pressure, regulatory efforts and a range of voluntary initiatives all aimed at driving improvement, the pace of change remains unacceptably slow. For example significant gender and ethnicity pay gaps are set to persist for some time into the future and women and ethnically diverse leaders remain underrepresented in senior roles.

To address this, the regulators are looking for ways to make 'rapid and more substantive progress across the financial sector'.

### Planned pilot data collection

As a first step, the regulators intend to conduct a one-off voluntary pilot data collection in the UK 'autumn' to inform future policy development, including informing proposals around (possible) future reporting requirements. More particularly, the pilot aims to improve the regulators' understanding of the current levels of diversity within firms, the categories of data already being collected and to test firms' ability to provide data/identify barriers or challenges to implementation of any future data collection requirements.

The pilot will involve firms supplying the diversity data that they already hold in aggregated and anonymised form (ie firms would not be required to approach staff to complete a survey/collect additional information for the purposes of the pilot).

### Views sought: Possible policy options to accelerate the pace of change

The consultation paper seeks feedback on a number of potential issues and potential policy options. A recurring theme throughout the discussion paper is the regulators' intention that:

- any new requirements be designed and implemented in a way that is proportionate and scaleable
- duplication of any new reporting requirements is minimised

The table below provides a high level overview of some of the key options/questions on which the regulators are seeking feedback.

Appendix 1 of the discussion paper sets out the full list of questions on which the regulators are seeking feedback.

| POLICY OPTION | DETAILS |
|---|---|
| INCREASING TRANSPARENCY | |
| Introducing new diversity reporting requirements | ▪ A key aim of any future data collection would be to enable the regulators and the firms themselves to monitor progress over time, and to enable benchmarking – |

| POLICY OPTION | DETAILS |
|---|---|
| | collecting and monitoring diversity and inclusion data in this way would help drive improvements across the financial services sector.<br>▪ Appendix 2 of the report set out a possible approach to building a framework for the design, monitoring and benchmarking of diversity and inclusion data.<br>▪ The discussion paper suggests that any future proposal for a regular data collection would 'most likely involve' firms collecting (probably through a staff questionnaire) and reporting information about: the nine protected characteristics defined in the Equality Act 2010 (age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation) as well as socio-economic background.<br>▪ It's also suggested that future data collection could involve not only collecting demographic diversity data, but disclosure of internal diversity targets and the progress being made against them.<br>▪ It's suggested that new reporting requirements could cover all levels of the organisation: board members, senior managers and the workforce would all be covered.<br>▪ Further consultation on more specific proposals would be undertaken before the introduction of any new requirements. |
| Introducing a disclosure template | ▪ The discussion paper seeks views on the benefits/challenges of issuing a disclosure template for reporting purposes.<br>▪ The discussion paper also seeks views on the value of the regulators releasing an aggregated disclosure report to 'complement and follow any biennial data collection by firms'. |
| Introducing a universal definition of 'senior management' for diversity reporting purposes | ▪ To support comparability, its suggested that a universal definition of 'senior management' be introduced for the purposes of diversity reporting/monitoring progress/benchmarking.<br>▪ The discussion paper suggests that for large firms the definition used by the Hampton Alexander Review – ie senior management includes the Board and two leadership levels below the board – should be used. To the extent possible, smaller firms would use the same definition. |
| Introducing a new requirement for firms to publish a firm-wide diversity and inclusion policy | ▪ The discussion paper seeks feedback on the possible introduction of a new requirement for firms to have a firm-wide diversity and inclusion policy and to publish this on their website.<br>▪ The regulators propose that in the interests of proportionality, there would be no prescriptive requirements about the content of these policies though as a minimum, it's suggested that policies should 'promote' diversity on the board and set out clear objectives, a plan for achieving them and how progress will be measured. |
| INTRODUCING TARGETS | |
| Firm-wide diversity targets | ▪ The discussion paper seeks feedback on the value (or not) of introducing 'regulatory requirements or expectations' around firms having targets for boards, senior management and their workforce (including customer-facing roles).<br>▪ In particular, feedback is sought on whether such targeted should be set by firms or whether the regulators should have 'any role' in 'overseeing target setting'. |
| Introducing minimum diversity requirements at board level | Possible options to increase diversity at board/leadership level put forward for consideration include:<br>▪ expanding existing minimum board representation targets that apply to significant banks, investment firms and some financial market infrastructures (FMIs) to a wider range of entities. |

| POLICY OPTION | DETAILS |
|---|---|
| | ▪ the FCA will also consider the introduction of new board diversity representation requirements similar to those proposed by NASDAQ.<br>[Note: Broadly under NASDAQ's proposed changes, all companies listed on Nasdaq's US exchange would meet a minimum objective of one or two diverse directors (depending on board size) or explain their reasons for not doing so. You can find the most recent status update on NASDAQ's proposal here] |
| INCREASED REGULATORY OVERSIGHT OF APPOINTMENTS | |
| SM&CR firms: Potential grounds for withholding approval of appointments | ▪ Senior Managers and Certification Regime (SM&CR) firms: The regulators are considering whether to collect diversity data about the individual as part of the information provided for Senior management Function applications. This is intended to provide insight into how the proposed applicant will contribute to the 'collective suitability' of the board/senior management from a diversity/inclusion standpoint. The discussion paper suggests that where the there are concerns about a proposed appointment, firms would be asked to engage/provide more information. The discussion would then feed into consideration of whether this 'could provide grounds for withholding approval'. |
| STRENGTHENING INDIVIDUAL AND COLLECTIVE ACCOUNTABILITY FOR PROGRESS | |
| Strengthening collective board responsibility | ▪ The paper seeks views on possible options to reinforce collective board responsibility for increasing board diversity. In particular, the discussion paper seeks views on making explicit in rules/guidance that diversity should be a key consideration in the context of board succession planning.<br>▪ Views are sought on the value of nominations committees in the context of succession planning and on the possibility of 'mandating areas of responsibility for diversity and inclusion at Board level'. |
| Individual accountability | ▪ The regulators consider that 'making senior leaders directly accountable for diversity and inclusion in their firms would be a way to drive strategic thinking and relevant discussions among the key decision-makers'.<br>– Dual-regulated firms: The discussion paper observes that most dual-regulated firms are already required to allocate the prescribed responsibilities in the PRA Rulebook to a PRA Senior management Function Holder, including through two prescribed responsibilities around firm culture. The discussion paper suggests that these existing prescribed responsibilities could be revised to make clear that they encompass responsibility for the implementation/execution of the firm's diversity and inclusion strategy. The discussion paper further suggests that these changes could be supplemented by specific actions in the Senior Managers' Statements of Responsibilities.<br>– Firms not already covered: The discussion paper suggests that where firms do not already have Prescribed Responsibilities for culture, they could be incorporated into the Senior Managers' Statements of Responsibilities.<br>▪ Remuneration: The discussion paper also seeks views on linking remuneration to progress on diversity and inclusion both to support accountability and incentivise progress. |
| Assessing fitness and propriety | ▪ The discussion paper flags that the regulators are 'exploring whether adverse findings in relation to individuals' conduct with respect to diversity and inclusion issues' should affect its future assessment of the fitness and propriety of individuals to carry out certain functions, noting that the FCA has previously found an individual not to be 'fit and proper' on the basis of their non-financial misconduct.<br>▪ The discussion paper suggests that it may be helpful to have 'guidance' as to what constitutes 'non-financial misconduct'. Guidance could be developed to 'include evidence of sexual harassment, bullying and discrimination on the basis of someone's protected (or otherwise) characteristics as factors to take into account'. |

| POLICY OPTION | DETAILS |
|---|---|
| MEASURING AND MONITORING PROGRESS | |
| Promoting use of/improving the effectiveness of diversity and inclusion audits | ▪ The discussion paper makes clear that the regulators see internal audit playing an important role in assisting organisations/boards to understand the effectiveness (or not) of measures implemented to change culture/behaviour. They regard diversity/inclusion as an important aspect of firm culture.<br>▪ The paper seeks feedback on the steps that could be taken to 'achieve effective auditing of diversity and inclusion' and how internal audit can 'best assist firms to measure and monitor diversity and inclusion'. |

### New guidance on product governance?

- The discussion paper also includes discussion of diversity and inclusion in the context of the proposed new Consumer Duty (put forward in a separate discussion paper CP21-13).
- For context, the Consumer Duty 'proposes additional requirements for firms to focus on the needs and outcomes of customers in their target market when designing products and services, in their customer service and their communications, including an understanding of the impact of behavioural biases on customers'.
- While it is not expected that firms design products/services to meet the needs of every consumer, there is an expectation that firms target products/services appropriately. The FCA's proposals in CP21-13 include an expectation that firms are able to identify when a particular group of customers receives 'systematically poorer outcomes' and an expectation that where this is identified, firms investigate why (ie the root cause) and implement steps to address the issue.
- Against this background, the discussion paper seeks views on the possible development of 'expectations on product governance' that specifically take into account consumers' protected characteristics (ie the nine protected characteristics defined in the Equality Act 2010: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation) or other diversity characteristics.

[Source: Financial Conduct Authority media release 07/07/2021; Discussion paper DP21/2: Diversity and inclusion in the financial sector – working together to drive change]

## In Brief | Still one all-male board and virtually no change otherwise: Bloomberg reports that the percentage of female directorships at S&P/ASX200 companies fell to 33.8% in June (from 33.9% in the previous month). There is still one company with an all-male board

[Source: Bloomberg 12/07/2021]

## In Brief | Well-known and respected business leader Ming Long has been appointed as the Chair of the Diversity Council of Australia, replacing outgoing Chair David Morrison

[Source: Diversity Council of Australia media release 12/07/2021]

# Remuneration

## Boards 'rose to the challenge'? ACSI's latest CEO pay report finds most companies exercised pay restraint in light of the pandemic

### Key Takeouts

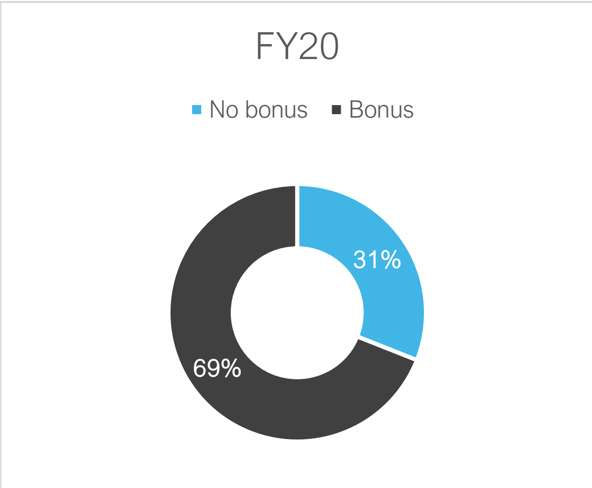
- The report identified that the impact of the COVID-19 pandemic on CEO pay has been most acute at ASX 100 companies with many companies acting to reduce CEO pay. The report identifies that this was less marked at ASX 101-200 companies.
- The report identifies that bonuses were awarded less frequently and were less generous when they were awarded. Companies also demonstrated increased willingness to reduce bonuses to zero.
- ACSI CEO Louise Davidson comments that 'boards largely…rose to the challenge in a COVID-19 environment, to ensure that incentive payouts were truly earned, not just windfalls from being in the right place in troubled times. And sensible discretion was applied to reduce formulaic outcomes'.
- Going forward, ACSI suggests boards should continue to think about 'whether the potential equity rewards on offer for CEOs will deliver gains proportionate to those of investors'.

The Australian Council of Superannuation Investors (ACSI) has released its 20th annual report into CEO pay trends at ASX 200 companies . The report is based on FY20 pay data for 82 ASX100 CEOs and 79 ASX101-200 CEOs.

An interesting theme to emerge from the report is the different impact that the COVID-19 pandemic has had on ASX100 CEO pay vs ASX101-200 CEO pay.

### Sharp decline in ASX 100 CEO pay as companies exercised restraint

- **FY20 saw bonuses still being awarded more often than not, but less generously and less frequently than in previous years.**
  - 69% of ASX 100 CEOs eligible for a bonus in FY20 received one (down from 85% in FY19).
  - Where bonuses were awarded they were more modest than previously – the median award as a proportion of maximum fell by almost half from 60% in FY19 to 31% in FY20.
  - Companies also demonstrated increased willingness to reduce bonuses to zero. Of the 77 ASX100 CEOs eligible for a bonus in FY20, 24 (or 31%) were awarded no bonus. This is over double the proportion in the previous year (in FY19, 12 of 80 eligible CEOs or 15%) were awarded no bonus.
  - The report found that the combination of lower and less frequent bonuses saw median ASX 100 CEO cash pay fall 26.4% to $1.98 million, the lowest point since FY03.




- ASX 100 CEO pay fell:
  - Only four of the CEOs in the top ten highest paid CEOs (on a reported pay basis) were paid above $10 million (down from seven in FY19) as annual bonuses declined and deferral into equity increased.
  - Median reported pay fell almost 19% to $3.68mn which, according to the report, is the lowest median in 15 years (FY06) and the first time below $4mn since FY12.
  - Median realised pay (ie the value of cash and equity, excluding share-based payments expense) for ASX 100 CEOs fell 3.6% from $4.1 million to $3.99 million (the lowest since FY 16).
  - Median fixed pay for ASX100 CEOs fell 5.1% to $1.68 million, the lowest since FY 07 (when the median was $1.53 million).

ACSI attributes this outcome to new CEOs starting at lower pay levels than their predecessors – for example the number of CEOs with fixed pay above $2.5 million fell from 12 in FY 19 to 10 in FY 20 – pay cuts made in response to the pandemic and to flat wage growth among incumbent CEOs.

### Less impact for ASX 101-200 CEOs

Interestingly, the report found that the pandemic appears to have had less impact on pay outcomes for CEOs of ASX101-200 companies, relative to their ASX 100 peers. For example:

- Bonus outcomes for ASX 101-200 CEOs fell from 60% to 50% of maximum potential (vs 31% for ASX 100 CEOs). The proportion of CEOs in the ASX 101-200 CEO cohort receiving zero bonus was little changed on FY19, with 21% receiving no bonus in FY20 (up from 20% in FY19).
- Median reported pay for ASX101-200 CEOs remained almost flat, falling only 0.5% to $1.89 million (vs an almost 19% fall for ASX 100 CEOs). The report observes that median reported pay for the ASX101-200 CEO cohort remains at the second highest level it has been over the past 10 year period.
- Median and average fixed pay for ASX101-200 CEOs actually rose with average pay increasing 3.9% to $1.07million.

### Some exceptions to the downward trend?

The report highlights that for a small group of CEOs, significant share price increases coupled with large equity awards resulted in increased pay in FY20. For example, for the first time in ACSI's in seven years of calculating realised-pay outcomes, realised pay for an Australia-based CEO topped $40 million.

### More generous termination payments

- Total termination payments increased to $33.18mn in FY20. The increase was primarily due to payments to four ASX100 CEOs who received more than $3 million each.
- The collective cost of FY20 termination payments for ASX100 CEOs was the highest since FY11
- The collect cost of FY29 termination payments for ASX101-200 CEOs was the lowest in ten years.

### Companies are listening to investors

Commenting on the overall findings, ACSI CEO Louise Davidson said:

> 'The over-arching finding of the study is that boards have responded positively on pay outcomes in both the long and short term. Newly-appointed CEOs almost always now start on a salary base significantly lower than their predecessors. Boards largely also rose to the challenge in a COVID-19 environment, to ensure that incentive payouts were truly earned, not just windfalls from being in the right place in troubled times. And sensible discretion was applied to reduce formulaic outcomes'.

Ms Davidson went on to comment that looking forward, as equity markets recover boards will need to consider 'whether the potential equity rewards on offer for CEOs will deliver gains proportionate to those of investors'.

[Source: ACSI media release 12/07/2021; Full text report: CEO Pay in ASX 200 Companies 2021]

## The COVID-19 effect? UK report finds FTSE 100 executive remuneration fell and despite this, shareholder revolts more than doubled

Deloitte has released some highlights from its analysis of trends in FTSE 100 executive remuneration. The headline finding is that overall, companies have exercised restraint on executive pay reducing or eliminating bonuses, freezing or deferring increases and applying discretionary reductions, in light of the impact of the COVID-19 pandemic, and in response to investor pressure. For example:

- Deloitte found that 31% of executive directors received no annual bonus for 2020 (up from 6% in 2019)
- Almost 40% of companies exercised discretion to reduce/waive/cancel annual bonus payments
- Where bonuses were awarded, they were more modest than previously: the median bonus pay out was 38% of the maximum award (down from 68% in 2019).
- Deloitte also found that over 95% of companies have agreed to reduce existing executive pensions with the majority of companies committing to align executive and workforce pension rates by the end of 2022.

### Say on pay

- Deloitte found that overall, the level of shareholder support for remuneration reports was higher than last year (98% median support in 2021 vs 94% in 2020)

- Interestingly, Deloitte found that despite the restraint shown by many companies, the number of FTSE 100 companies receiving 'low votes' (ie less than 80% in favour) on their annual remuneration report has more than doubled to 12% in 2021 (up from 5% in 2020).
- According to Deloitte, the primary reasons for the low votes were: executive salary increases made above the wider workforce rate and golden handshakes (new CEO hire packages). There were also 'limited examples' of remuneration committees exercising their discretion to adjust pay upwards.

  [Source: Deloitte media release 02/07/2021]

# Disclosure and Reporting

## Greenwashing review: ASIC calls on boards to make the accuracy of disclosure a priority

In a recent article, Australian Securities and Investments Commission (ASIC) Commissioner Cathie Armour reflected on the emerging risks associated with 'greenwashing' – ie the misrepresentation of financial products or investment strategies as more 'green' or ESG-focused than is actually the case – and the steps being taken by the regulator to identify and address it. The Commissioner makes clear that she considers the issue should be a board priority.

### Key Takeaways

- Why greenwashing is a problem: ASIC considers that greenwashing to be a threat to the 'fair and efficient' functioning of the financial system because it 'distorts relevant information that a current or prospective investor might require in order to make informed investment decisions driven by ESG considerations. Addressing this threat will improve governance and accountability in the market'.
- The issue is causing global concern: Commissioner Armour said that there is 'growing global unease about the risks of greenwashing of financial products - partly driven by a lack of clarity around labelling or a single generally accepted taxonomy in this area'.
- International taskforce: ASIC is participating in the Sustainable Finance Task Force that has been established by the International Organisation of Securities Commissions to address this (and other issues).
- ASIC review aims to improve governance and accountability: Following ASIC's review of climate risk disclosure by large listed companies which identified instances where sustainability-related disclosures by some companies had a 'marketing feel', ASIC is conducting a review to assess the extent greenwashing of financial products in the funds management space. .
- A board priority: Commissioner Armour said that boards

  > 'should be mindful that prohibitions in the Corporations Act 2001 (Cth) on misleading and deceptive conduct and false or misleading statements apply in relation to financial products such as securities or interests in funds. Accordingly, we encourage boards to look out for any greenwashing – and to ask whether their company's disclosure around environmental risks and opportunities or their fund's promotion of ESG-focused investment products accurately reflects their practices in this area.

  [Source: Article by ASIC Commissioner Cathie Armour, What is "greenwashing" and what are its potential threats? The article was first published in AICD's Company Director magazine in July 2021.]

## In Brief | The FRC has released a statement of intent on environmental social and governance challenges. The statement identifies specific challenges for companies and the regulator around sustainability and ESG and outlines the broad approach the FRC intends to take to address them

[Source: FRC media release 07/07/2021; FRC Statement of Intent on Environmental, Social and Governance challenges]

# Shareholder Activism

## Top Story | Global report finds the level of shareholder activity remains much lower than pre-pandemic levels

**Insightia has released its latest statistical analysis of global trends in shareholder activist activity for H1 2021. Some key takeaways from the report are below.**

### Key Takeouts

- The global report found that the overall level of activist activity for H1 2021 was 13% down on last year
- Activist activity continues to be highest (by far) in the US, followed by Japan. Australia ranks fifth in terms of activist activity levels.
- The number of Australia-based companies publicly subjected to activist demands in H1 2021 is unchanged on H1 2020 levels, and still well down on pre-pandemic levels

Below is a short overview of some of the interesting findings in the report, the full text of which is here.

### Global trends

- Globally, 518 companies have been publicly subjected to activist demands. According to the report, this is 13% down on H1 2020 and the lowest level of activity over the same period in any year over the 2015-2021 period.
- The number of activist short campaigns stood at 67 in H1 2021, 20 fewer campaigns than the same period last year, and the lowest level for the same period in recent years.

#### Most active regions

- Levels of activity continue to be highest in the US where 302 companies were targeted in H1 2021.
- The next most active regions were: Japan (43 companies targeted in H1 202); Germany (31 companies targeted); Canada and the UK (both with 22 companies targeted); and Australia (21 companies targeted, consistent with H1 2021).
- Activity was lowest in Malaysia, Austria and Hong Kong (all had only 2 companies targeted during the period).

#### Sectors most targeted

- Globally, companies in the technology, consumer cyclical and industrials sector were the most targeted, each accounting for 14% of the total number of companies publicly subjected to activist demands. Financial services (13%), health care (11%) and basic materials (9%) were the next most targeted sectors.

#### Most targeted companies by size

- Large cap companies were the most targeted (accounting for 34% of the total number of companies publicly subjected to activist demands).

### Proxy voting

#### Pay revolts increased

- 459 companies faced pay revolts (ie 20% or more votes against) in H1 2021. According to the report, this is highest proportion in recent years.
- Pay revolts were most common in the following sectors: 1) financial services (16%); 2) consumer cyclical and healthcare (both 15%); 3) technology (13%); 4) industrials (12%); and 5) real estate (7%).

#### Support for directors (generally) decreased

- Overall, the average level of support for directors decreased (slightly) across all sectors with the exception of the consumer defensive sector where the level of support remained unchanged at 96.8% (on average)
- According to the report, the average level of support for directors of companies in the healthcare sector has fallen to a 'record low' of 93.7%, down from a high of 95% in 2018.

- The drop in the level of support for directors was greatest in the commercial services sector (drop in support from 96.6% to 95.8%) and the real estate and utilities sectors (support for directors in both sectors dropped 0.4% on H1 2020 levels).

Support for shareholder E&S proposals has increased

- Interestingly, the report found that the number of 'environmental and social' shareholder proposals is only slightly higher than in H1 2020: 218 proposals in H1 2020 up from 215 in H1 2020. However, the average level of support for these proposals has risen from 24% in H1 2020 to 30% in H1 2021.
- The volume of shareholder proposals in the board of directors category has more than halved from 1837 proposals in H1 2020 to 959 proposals in H1 2021. The average level of support for these proposals has also decreased from 83% in H1 2020 to 75% in H1 2021.

**Australia**

- The number of Australia-based companies publicly subjected to activist demands in H1 2021 remained stable at 21 (unchanged from H1 2020). For context, this is substantially down on 2019 levels (39 companies targeted during H1 2019).
- The basic materials sector was by far the most targeted (accounting for 48% of the overall total number of companies targeted during the period)
- Board-related demands were the most common accounting for 63% of demands overall.
- Activists have so far secured 17 board seats (up from just eight in H1 2020). Over 50% of these (9 of 17 seats) were secured through settlements.

[Source: Insightia report: Shareholder Activism in H1 2021]

## Possible EGM? Premier Investments has reiterated its call for complete board change at Myer

- According to media reports (AFR, SMH, The Australian) Premier Investments (Premier) has turned down Myer Holdings Ltd's (Myer) offer of board representation, which was extended following the increase in Premier's stake in the company. Premier is now Myers' biggest shareholder.
- Premier has issued a statement reiterating its demand for complete board change citing Myer's (alleged) poor operational and financial record over the past five years. Premier states,

  'Premier has nothing to gain from spending time with the members of the current Myer Board. The failure to appoint a permanent Chairman or any additional non-executive Directors seems to indicate that no credible company director would accept an offer to work with the current Myer Board. The only thing Premier will accept from the current Myer Board is the resignation of its three remaining non-executive directors'.

- An EGM? Premier subsequently advised that it has requested a copy of the Myer shareholder register through its lawyers ahead of calling an Extraordinary General Meeting (EGM) to elect a 'majority independent Myer Board with the necessary skills and experience.' Premier states that it has commenced consultation with other shareholders regarding this, and retained an (unnamed) 'leading proxy solicitation firm. Premier's statement concludes with the comment:

  'In Premier’s view, Myer’s three remaining Non-Executive Directors should for once put its shareholders first and resign immediately. Any other action would be futile, and costly for Myer shareholders who have endured enough'.

  [Sources: Premier Investments media release 08/07/2021; 09/07/2021]

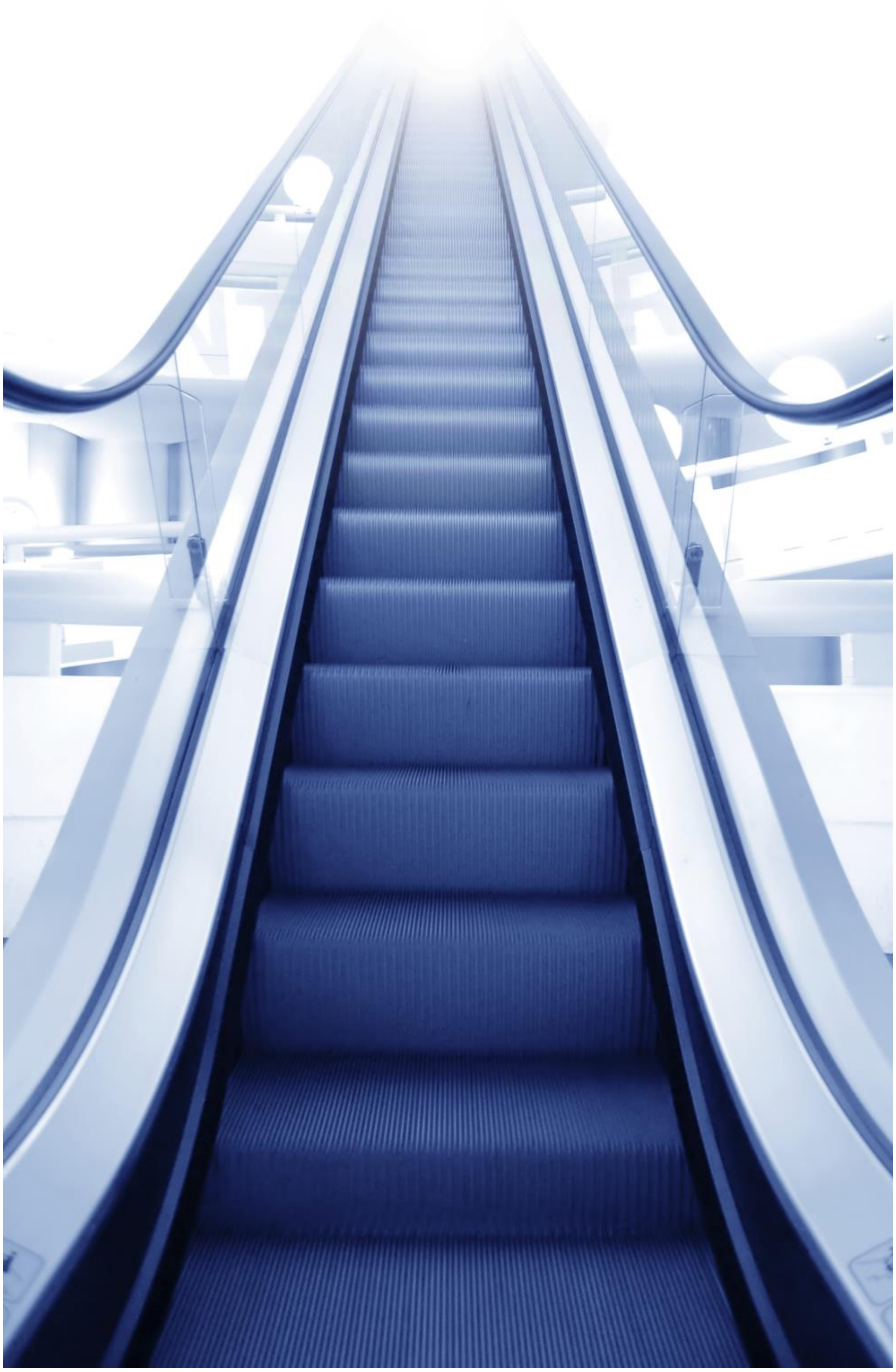
## In Brief | A relatively cheap and effective way to help accelerate climate action? The case for making 'say on climate' shareholder votes mandatory in public companies

[Source: Oxford Law School Blog 13/07/2021]

# Institutional Investors and Stewardship

## Investors call on banks to 'up the ante' on climate action or face possible voting action in 2022

- 115 investors representing $4.2tn have written to 63 global banks urging them to further strengthen their climate and biodiversity strategies and existing commitments (eg the Net Zero Banking Alliance and the Collective Commitment to Climate Action) ahead of the Kunming Conference (CBD COP15) and COP26 summit.
- More particularly, investors have called on the banks to:
  - Publish short-term (5-10 years) climate-related targets 'covering all relevant financial services' ahead of their 2022 AGMs.
  - Integrate the findings of the IEA Net-Zero scenario and/or another 1.5C scenario into their climate strategies
  - Ensure financial statements consider material climate risks associated with a 1.5C-aligned transition
  - Completely phase out coal financing by 2030 in OECD countries and by 2040 in non-OECD countries
  - Commit to publishing biodiversity strategies to protect/restore biodiversity
- Investors have requested a response by 15 August 2021, including an overview of the steps each bank is planning to implement to address each of the issues raised.



- Investors have cautioned that 'progress against these issues may be taken into consideration within investors' 2022 AGM voting action and engagement activities, such as voting on special and ordinary resolutions' (eg director re-elections).

Senior Campaign Manager at ShareAction Jeanne Martin comments:

> 'The message from investors is clear: distant net zero targets and warm words about the importance of biodiversity are not enough. Investors want concrete action now, and those banks which fail to respond can expect serious challenges at their next AGMs.'

[Sources: ShareAction media release 07/07/2021; Full text letter]

## Political donations: 125 investors have called on companies to provide full disclosure of their political donations and to take action to stop voter suppression

Following the passage of voter suppression Bills in several states and the Capitol Insurrection in January, a coalition of 125 investors (including state treasurers, public pension fund trustees, foundations, socially responsible investors and religious funds), coordinated by Majority Action and the Service Employees International Union, has written to the boards of 82 companies calling on them to:

- cease contributions to any elected official who has: a) 'sponsored efforts to restrict or impede voting rights or otherwise disenfranchise or limit the civil rights of communities of colour'; or b) voted against certification of the 2020 election; and
- provide comprehensive public disclosure of all political contributions: that is, 'full public disclosure of the recipient and amount of all direct and indirect election-related spending'.

[Source: Majority Action media release 17/06/2021]

## In Brief | COVID-19: In light of the NSW COVID-19 lockdown, the ACCR has re-issued its guide for investors on engaging with companies on their workplace COVID-19 safety measures. The ACCR states that it will be tracking workforce transmission during the NSW outbreak especially in the cleaning, security, aged care, warehousing and retail sectors, and 'will release work site or sector specific briefs if the circumstances arise'

[Sources: ACCR media release 14/07/2021; ACCR investor engagement guide]

## In Brief | Strengthening stewardship? The UK Department for Work and Pensions has established a new Occupational Pensions Stewardship Council which among other things aims to provide 'opportunities for schemes to collaborate on stewardship activities such as shareholder resolutions, climate change, corporate governance and other topics'. So far, 28 pension schemes – responsible for more than £550 billion of assets – have already joined.

[Sources: Department of work and pensions media releases 08/07/2021; 08/07/2021; List of members]

# Financial Services

## Top Story | The FFSP redesign begins

Following the Budget announcement in May, the Australian Government has now released its Consultation Paper seeking feedback on options for the regime that will apply to foreign financial services providers (FFSPs) in Australia.

Submissions on the Consultation Paper are due by 30 July 2021.

You can find an overview and discussion of the proposed reform options under consideration here.

## Status update: Implementation of the 76 Hayne recommendations

We have prepared a table, which we are updating regularly, summarising the actions taken to date and/or the planned actions to be implemented in response to each of the Hayne Commission's 76 recommendations.

You can access the latest version here.

## Hayne implementation: Exemptions from the deferred sales model for add-on insurance announced

### Context

- Hayne Recommendation 4.3 recommended the introduction of a deferred sales model for the sale of any add on insurance products (except policies of comprehensive motor insurance)'. Commissioner Hayne said that this should be 'implemented as soon as is reasonably practicable'.
- Schedule 3 of Financial Sector Reform (Hayne Royal Commission Response) Act 2020 implements an industry wide deferred sales model for the sale of add-on insurance products. Schedule 3 is due to commence on 5 October 2021.
- The legislation provides for regulations to exempt a class of add-on insurance products where it would not be appropriate that they be captured by the deferred sales model.

### Class exemptions announced

The Treasurer has announced that following consultation, the government will exempt the following classes of insurance products from the deferred sales model for add-on insurance:

- compulsory third party (CTP) insurance for motor vehicles;
- third party property damage, fire and theft insurance for motor vehicles;
- comprehensive insurance for boats, motorcycles, motorhomes, caravans, and trucks; insurance sold within superannuation (including group life insurance);
- postage and delivery of consumer goods insurance;
- home building insurance;
- home and contents insurance;
- landlord insurance.

Relief will also be provided for wholesale style insurances available to businesses.

### Anti-hawking regime

Basic banking products will also be made exempt from the anti-hawking regime, where the customer initiates the contact including contact about products such as transaction accounts, stored value cards, electronic cash, direct debit services and electronic payment services.

### Industry has welcomed the development

The **Customer Owned Banking Association** issued a statement welcoming the Treasurer's announcement and in particular the exemption of home building insurance and home and contents insurance from the deferred sales model. COBA CEO Michael Lawrence commented:

> 'New laws flowing from the Financial Services Royal Commission are intended to protect consumers, particularly from "junk" products or from sales pressure in relation to products they don't really need. However, home building insurance is not a "junk" product. The Treasurer's announcement is welcome recognition of this. We look forward to guidance from ASIC to ensure that the anti-hawking regime is not a barrier to the home loan borrowers obtaining timely insurance coverage. We also welcome the Treasurer's announcement that basic banking products will be exempt from the anti-hawking regime, where the customer initiates the contact. This is a sensible, practical approach which is in the interests of consumers'.

**The Insurance Council of Australia** (ICA) has similarly welcomed the Treasurers' announcement. ICA CEO Andrew Hall commented:

> 'Today's announcement shows the Government has listened to the concerns of the industry and applied appropriate exemptions, so consumers are able to get immediate insurance cover to protect their valuable purchases. Importantly for insurers the Government's decision means the industry has certainty about the implementation of the deferred sales model and can continue to provide valuable support to the economy through the challenges of COVID-19.
>
> The industry continues to be focused on ensuring that we are fully prepared for the commencement of the new legislation, and we look forward to working with the Government on the remaining recommendations of the Hayne Royal Commission'.

### Consumer groups have raised concerns about the breadth of the exemptions

In a statement, the Consumer Action law centre and the Financial Rights Legal Centre flagged concerns about the 'numerous exemptions' arguing that having so many carve outs runs contrary to the 'spirit of the Hayne reforms' – both because Commissioner Hayne recommended an 'economy wide' deferred sales model for add-on insurance, and more broadly because the Commissioner also cautioned against the over-use of exceptions.

Consumer Action Law Centre CEO Gerard Brody explains:

> 'Exemptions should only be provided where there is clear evidence that an exemption would benefit consumers. Treasury still has not published any submissions from the consultation process on exemptions – what evidence did industry provide to justify these regulatory loopholes? Commissioner Hayne specifically warned against regulatory loopholes and exemptions in the law, yet the government is already poking holes in its own legislation. This should be about protecting consumers, not insurers' bottom line'.

CEO of Financial Rights Legal Centre Karen Cox said the decision to exempt key insurance products from the deferred sales regime, 'will entrench the problems we have seen in the add-on space for years – add-on products that provide poor coverage and are more expensive versus the broader coverage and cheaper products available in the direct insurance space. These exemptions are just more of the same old loopholes handed out to the same old insurers leading to the same poor outcomes for consumers we have seen for decades.'

[Sources: Treasurer Josh Frydenberg media release 08/07/2021; COBA media release 08/07/2021; Insurance Council of Australia media release 08/07/2021; Consumer Action Law Centre media release 09/07/2021]

## Life Insurer to remediate 40,000+ customers by the end of the year

- The Australian Securities and Investments Commission (ASIC) has announced that OnePath Life Pty Ltd (OnePath) is remediating up to $35 million to over 40,000 customers who were sold life insurance policies over the phone between 2010 and 2016. During this period, OnePath was owned by ANZ bank.
- The remediation program started in July 2019 and is expected to finish in December 2021.
- According to ASIC, customer harm resulted from 'egregious sales practices' eg pressure selling. failing to provide information about policy exclusions and 'leading the consumer to believe that the salesperson was calling from ANZ Bank with a special customer offer'.
- To address ASIC's concerns about these sales practices, OnePath will:
  - review past claims and complaints

– refund premiums, with interest, to customers who purchased a life insurance policy which lapsed/was cancelled within two years of the sale
– waive certain conditions for affected customers who still hold an active policy

OnePath is writing to affected customers with information about the premium and refund arrangements.

[Source: ASIC media release 12/06/2021]

## UK insurer fined £90,688,400 for misleading customer communications and failure to apply promised discounts

The UK Financial Conduct Authority (FCA) has imposed a £90,688,400 fine on LBGI (Lloyds Bank General Insurance Limited, St Andrew's Insurance Plc, Lloyds Bank Insurance Services Limited and Halifax General Insurance Services Limited) for historical failures to ensure that the language used in home insurance renewals communications during the January 2009 to November 2018 period was 'clear, fair and not misleading' in breach of Principle 3 and Principle 7 of the FCA's Principles for Businesses.

The FCA identifies two issues with LBGI's customer communications:

- **Use of 'competitive price' language:** LBGI sent close to nine million renewal communications to home insurance customers which included language to the effect that they were receiving a 'competitive price' at renewal without taking steps to ensure that this was the case. The FCA states that this caused a 'risk of harm for the majority of LBGI's home insurance customers who received these communications, because it was likely that the premium quoted to them at renewal would have increased when compared to their prior premium' and was also likely to have been higher than the premium quoted to new customers.

  The FCA has not imposed a requirement for LBGI to pay redress to those customers who received a renewal letter that included the claim the renewal premium was 'competitive'.

- **Use of 'discount language' and failure to apply the promised discounts:** LBGI informed approximately half a million customers that they would receive a discount based on their 'loyalty' or because they were a 'valued customer' or otherwise on a promotional/discretionary basis. However, 'the described discount was not applied and was never intended to apply'. According to the FCA this impacted approximately 1.2 million renewals.

The FCA notes that the voluntary payments of approximately £13.5 million already made to customers who did not receive promised discounts was taken into account in the assessment of the appropriate financial penalty.

The FCA observes that under new rules to come into effect from 1 January 2022, insurers will be required to offer renewing customers a price that is no higher than they would pay as a new customer. The FCA estimates that these measures will save consumers £4.2 billion over 10 years, by removing the loyalty penalty and making the market work better.

[Source: FCA media release 08/07/2021]

## The proposed Northern Australia reinsurance pool: Melbourne University academic suggests there may be a better way to address insurance affordability and accessibility issues

### Context

- On 4 May 2021, the government announced plans to improve the affordability and accessibility of residential, strata and small business property insurance for people in Northern Australia through establishing a reinsurance pool for cyclones and related flood damage.
- The government intends that the pool will be administered by the Australian Reinsurance Pool Corporation (ARPC). It's proposed that the pool will be backed by a $10 billion government guarantee and commence from 1 July 2022.
- A consultation paper was released on 21 May 2021 seeking feedback on 'key design features' of the scheme (summarised in Governance News 26/05/2021 p23). Consultation closed on 18 June 2021.

### Critique of the proposed plan

University of Melbourne academic Antonia Settle has raised concerns about the proposed scheme, chiefly because she considers that it will expose the government (and ultimately taxpayers) to 'potentially massive costs' without addressing the underlying causes of insurance accessibility and affordability issues.

This view, she observes, is consistent with the findings of the Northern Australia Insurance Inquiry Report (Report) which expressly recommended against the establishment of a reinsurance scheme.

Ultimately, Ms Settle argues that a more effective policy response would be, again consistent with the findings in the Report, to focus on mitigation measures to reduce the impact/costs of extreme weather events and to provide 'targeted direct subsidies for low-income households'.

Ms Settle concludes that this would require 'a multi-pronged policy package looking far beyond the next electoral cycle. It must support investment in mitigation by all levels of government as well as households. But unless this is done the insurance crisis is only going to intensify'.

[Source: The Conversation 07/07/2021]

## Preparing for the 'possibility of zero and negative interest rates': APRA seeks feedback on draft expectations

The Australian Prudential Regulation Authority (APRA) has released a consultation letter seeking views on draft expectations around measures it considers authorised deposit taking institutions' (ADIs') should be taking to prepare for the 'possibility of zero and negative interest rates'.

APRA has previously written to regulated entities seeking information about the extent of their preparedness. Responses to that consultation indicated that though most ADIs considered they are 'well placed' to deal with the development should it occur, some considered that it would pose operational challenges.

Though APRA considers the possibility to be unlikely, the regulator makes clear that it nevertheless considers the risks associated with lack of preparedness to constitute a 'material risk' that should be managed accordingly.

APRA states,

> 'the risks arising from an ADI's lack of preparedness for zero and negative interest rates to be material since this could have significant implications for an ADI's risk management, hedging, operational processes, contracts, product disclosures, IT and accounting systems among other areas. Insufficient preparation for the possibility of zero and negative interest rates could therefore have an adverse impact on an ADI, its customers and the markets in which it operates'.

### APRA's proposed expectations

As a minimum, APRA expects:

- ADIs to develop 'tactical solutions [ie shorter term 'fixes' or workarounds] to implement zero and negative market interest rates and cash rate' by 30 April 2022.
- APRA considers that all products should be 'in scope of this expectation' with the exception of 'lending products that do not reference the cash rate or a market rate including business lending, residential mortgages, personal loans and credit cards. Solutions that generate an economic outcome that is the same as a negative interest rate are acceptable, subject to the appropriate risk management considerations'.
- In developing tactical solutions APRA expects 'ADIs to consider all aspects of the products and activities that are in scope including customer communications and disclosures…[and to] assess the associated operational risks and ensure that there are appropriate controls in place to manage them. ADIs should also consider any relevant conduct related issues, including the potential for conflicts of interest, fair treatment of clients, and asymmetry of information'.

### Timing

- The regulator has requested feedback by 20 August 2021.
- APRA intends to finalise its zero and negative interest rate expectations by 31 October 2021.

[Source: APRA consultation letter to ADIs 12/07/2021]

## COVID-19: Loan deferrals among the support measures on offer to customers impacted by COVID-19 lockdowns/recovering from recent lockdowns.

The Australian Banking Association (ABA) has outlined a number of support measures banks will offer that are intended to assist customers impacted by recent COVID-19 lockdowns, not only in areas directly impacted, but throughout Australia.

The ABA called on individuals and businesses impacted to contact their bank to apply for support. Support measures include:

- Business banking repayment deferrals of up to three months (with loan terms extended accordingly)
- Refunds of merchant terminal fees for up to 3 months
- Waiving of fees and notice periods on Cash Deposit and Farm Management Deposit accounts for up to 3 months
- A 'range' of home loan support measures including deferrals on a month by month basis

The ABA notes that the measures are subject to re-authorisation by the ACCC.

[Source: ABA media release 08/07/2021]

## In Brief | APRA has granted Alex Bank Pty Ltd a licence to operate as a restricted authorised deposit-taking institution and Alex Corporation Limited as a non-operating holding company, under the Banking Act 1959. IN1Bank Ltd is currently the only other organisation to hold a restricted ADI licence

[Sources: APRA media release 07/07/2021; Register of deposit taking institutions; Register of non-operating holding companies]

## In Brief | 'Extraordinary guardrails' lifted: The UK PRA has removed COVID-19 restrictions on shareholder distributions by large UK banks judging them, based on the economic outlook and drawing on the results of recent stress tests, to be no longer necessary

[Source: PRA media release 13/06/2021]

## In Brief | Triennial review of the Terrorism Insurance Act: The government is seeking views on the continued need for the Terrorism Insurance Act to continue and whether the scheme remains appropriate. The deadline for submissions is 30 July 2021

[Source: Treasury Consultation: Terrorism Insurance Act Review 2021]

## In Brief | Financial advisers: FASEA has said all candidates who have been unsuccessful at any prior sitting, will be allowed to sit the November 2021 exam

[Source: FASEA media release 08/07/2021]

# Accounting and Audit

## The FRC has issued three revised audit quality management standards

The Financial Reporting Council (FRC) has issued three revised quality management standards covering audit firms' responsibilities to design, implement and operate a system of quality management. The FRC states that the new standards are focused on 'proactively identifying and responding to risks to quality'.

The new standards are:

- International Standard on Quality Management (UK) 1 Quality Management For Firms That Perform Audits Or Reviews Of Financial Statements, Or Other Assurance Or Related Services Engagements
- International Standard on Quality Management (UK) 2 Engagement Quality Reviews
- International Standard on Auditing (UK) 220 (Revised July 2021) Quality Control For An Audit Of Financial Statements

The new standards will come into effect for audits of financial statements for periods beginning on or after 15 December 2022 (though early adoption of the revised standards is strongly encouraged).

[Source: FRC media release 09/07/2021]

# Risk Management

## Climate Risk

### Minister confirms government will appeal landmark climate decision

- In Sharma & Others v Minister for the Environment [2021] FCA 560 the Federal Court held that the Minister for the Environment has a duty of care to avoid causing injury to young people while exercising her powers to approve a new coal project. More particularly, Justice Bromberg held that the Minister for the Environment owes a duty of care to protect children from the health effects of climate change when exercising her power under s130 and s133 of the Environment Protection and Biodiversity Conversation Act 1999 (Cth) (EPBC Act) because 'a reasonable person in the position of the Minister would foresee that the approval of the Extension Project would expose the Children to a risk of personal injury'.

  In his official summary of the decision, Justice Bromberg states,

  > 'The evidence demonstrates that a reasonable person in the position of the Minister would foresee that, by reason of the Extension Project's effect on increased CO2 in the Earth's atmosphere and the consequential increase in global surface temperatures, each of the Children is exposed to a risk of death or other personal injury. The evidence therefore establishes an essential precondition for the law of negligence to recognise a duty of care owed by the Minister to each of the Children'.

- Following further submissions, the Court handed down orders on 8 July 2021. In Sharma & Others v Minister for the Environment (No 2) [2021] FCA 774 Justice Bromberg made a declaration that:

  > 'The first respondent [ie Minister for the Environment] has a duty to take reasonable care, in the exercise of her powers under s 130 and s 133 of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) in respect of referral EPBC No. 2016/7649, to avoid causing personal injury or death to persons who were under 18 years of age and ordinarily resident in Australia at the time of the commencement of this proceeding arising from emissions of carbon dioxide into the Earth's atmosphere'.

- Following this, the Minister for the environment Sussan Ley issued a statement confirming the government's intention to appeal the decision.

  [Sources: Sharma & Others v Minister for the Environment [2021] FCA 560; Sharma & Others v Minister for the Environment (No 2) [2021] FCA 774; Minister for the environment Sussan Ley media release 09/07/2021]

### The UN has released a first draft 'Paris Agreement' on Biodiversity

The UN Convention on Biological Diversity (CBD) Secretariat has released the first draft of a proposed new Global Biodiversity Framework intended to guide global efforts to preserve and protect biodiversity. The framework is based around the achievement of four proposed goals by 2050. To drive progress, the draft framework includes both milestones against each of these four goals and 21 target actions to be achieved by 2030.

#### 2050 overarching goals

The four proposed goals to be achieved by 2050 and the accompanying 2030 milestones against each are listed in the table below.

| FOUR 2050 GOALS | 2030 MILESTONES |
|---|---|
| 'The integrity of all ecosystems is enhanced, with an increase of at least 15% in the area, connectivity and integrity of natural ecosystems, supporting healthy and resilient populations of all species, the rate of extinctions has been reduced at least tenfold, and the risk of species extinctions across all taxonomic and functional groups, is halved, and genetic diversity of wild and domesticated species is safeguarded, with at least 90% of genetic diversity within all species maintained'. | ▪ 5% net gain in the area, connectivity and integrity of natural systems<br>▪ The 'abundance and distribution of populations of species is enhanced or at least maintained'; there is no increase in the extinction rate; the extinction risk is reduced by a minimum of 10.The increase in the extinction rate is halted or reversed, and the extinction risk is reduced by a minimum of 10% (with |

| FOUR 2050 GOALS | 2030 MILESTONES |
|---|---|
| | a decrease in the proportion of species that are threatened).<br>▪ Genetic diversity of wild and domesticated species is safeguarded, with an increase in the proportion of species that have at least 90% of their genetic diversity maintained. |
| 'Nature's contributions to people have been valued, maintained or enhanced through conservation and sustainable use supporting the global development agenda for the benefit of all'. | ▪ 'Nature and its contributions to people are fully accounted and inform all relevant public and private decisions'.<br>▪ 'The long-term sustainability of all categories of nature's contributions to people is ensured, with those currently in decline restored, contributing to each of the relevant Sustainable Development Goals'. |
| 'The benefits from the utilization of genetic resources are shared fairly and equitably, with a substantial increase in both monetary and non-monetary benefits shared, including for the conservation and sustainable use of biodiversity'. | ▪ 'The share of monetary benefits received by providers, including holders of traditional knowledge, has increased'.<br>▪ 'Non-monetary benefits, such as the participation of providers, including holders of traditional knowledge, in research and development, has increased'. |
| 'The gap between available financial and other means of implementation, and those necessary to achieve the 2050 Vision, is closed'. | ▪ 'Adequate financial resources to implement the framework are available and deployed, progressively closing the financing gap up to at least US $700 billion per year by 2030'.<br>▪ 'Adequate other means, including capacity-building and development, technical and scientific cooperation and technology transfer to implement the framework to 2030 are available and deployed'.<br>▪ 'Adequate financial and other resources for the period 2030 to 2040 are planned or committed by 2030'. |

### 2030 targets

The draft framework lists 21 actions to be achieved by 2030. These include the following (among others).

- Ensuring that a 30% minimum of land and sea areas globally are protected/conserved through 'well connected systems of protected areas (and other effective area-based conservation measures) (Target 3)
- Eliminating the 'discharge of plastic waste' and reducing pollution from all sources to 'levels that are not harmful to biodiversity and ecosystem functions and human health' (Target 7)
- Minimising the impact of climate change on biodiversity and contributing to mitigation/adaption through 'ecosystem-based approaches, contributing at least 10 GtCO2e per year to global mitigation efforts, and ensure that all mitigation and adaptation efforts avoid negative impacts on biodiversity' (Target 8)
- 'Fully integrate biodiversity values into policies, regulations, planning, development processes, poverty reduction strategies, accounts, and assessments of environmental impacts at all levels of government and across all sectors of the economy, ensuring that all activities and financial flows are aligned with biodiversity values' (Target 14).
- 'Redirect, repurpose, reform or eliminate incentives harmful for biodiversity, in a just and equitable way, reducing them by at least US$ 500 billion per year, including all of the most harmful subsidies, and ensure that incentives, including public and private economic and regulatory incentives, are either positive or neutral for biodiversity'. (Target 18)

- 'Increase financial resources from all sources to at least US$ 200 billion per year, including new, additional and effective financial resources, increasing by at least US$ 10 billion per year international financial flows to developing countries, leveraging private finance, and increasing domestic resource mobilization, taking into account national biodiversity finance planning, and strengthen capacity-building and technology transfer and scientific cooperation, to meet the needs for implementation, commensurate with the ambition of the goals and targets of the framework' (Target 19).

The draft framework will be considered at the UN Convention on Biological Diversity's COP-15 scheduled for Kunming, China 11-24 October.2021, following further input from the 24th meeting of the Subsidiary Body on Scientific, Technical and Technological Advice and the 3rd meeting of the Subsidiary Body in Implementation, as well as the advice from thematic consultations.

[Source: UN Sustainable Development Press release 12/07/2021]

## In Brief | MSCI has released its inaugural new Net Zero Tracker, tracking the annual emissions of 9300 publicly listed companies globally (based on the MSCI All Country World Investable Market Index (MSCI ACWI IMI). The key takeaway is that the world's largest companies have less than six years to significantly reduce their emissions if the global temperature risk is to be limited to 1.5C

[Source: MSCI media release 12/07/2021]

# Conduct risk

## Respect@Work Bill: The Fair Work Commission has requested more time and more resources to implement the proposed changes

### Context

- The Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 proposes to implement the government's response to several recommendations in the Australian Human Rights Commission's Respect@Work report. You can find a short summary of the proposed reforms in Governance News 30/06/2021 at p21.
- On 24 June 2021 the Senate referred the Bill to the Education and Employment Legislation Committee for inquiry and report by 6 August 2021. The closing date for submissions is 9 July 2021.

### Fair Work Commission has called for more time (and resources) to implement the changes

In its submission to the Committee, the Fair Work Commission (Commission) has asked that the proposed extension of the anti-bullying jurisdiction, which will enable the Commission to make stop sexual harassment orders, be pushed back by two months from the day of Assent, rather than commencing the day after Assent.

The submission outlines six reasons for the request:

- 'To provide adequate time to consult with experts and advisory groups on appropriate processes for case managing applications for orders to stop sexual harassment(including ensuring that appropriate confidentiality arrangements are in place).
- To provide adequate time to engage with industry and employee representatives, frequent users of the Commission's services and other stakeholders.
- To establish appropriate support services for applicants (which could include triage and referral to external services such as sexual harassment support, counselling and mental health services).
- To make changes to the Commission's forms and procedural rules.
- To provide adequate time to train Commission Members, conciliators and case management staff who will deal with sexual harassment cases (in particular, on the nature, drivers and impacts of sexual harassment and on trauma informed practice).
- To develop tailored information resources for applicants, respondents, Commission staff and Members (including website material, template correspondence, guides and a benchmbook)'.

In addition, the Commission states that it 'expects a significant increase in applications when the amendments commence' and observes that it 'has not received any additional funding or resourcing to implement and administer the extension to the anti-bullying jurisdiction, which also limits the Commission's capacity to operationalise the amendments within a very short lead-in time'.

The submission cautions that if the requested two month deferral is not granted 'there is a significant risk that the Commission's capacity to successfully implement the new jurisdiction and uphold the interests of vulnerable parties will be compromised'.

[Source: Fair Work submission to the Education and Employment Legislation Committee Inquiry into the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021]

## Additional amendments required: The AHRC submission on the Respect@Work Bill recommends 11 changes to the Bill before it's passed

- In its submission to the Education and Employment Legislation Committee inquiry into the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (the Bill) the Australian Human Rights Commission (AHRC) acknowledges that implementation of the Respect@Work recommendations will take time. However, the AHRC considers that 11 changes 'can, and should, be made now to further strengthen, simplify and streamline the laws dealt with by the Bill', before it is passed.

These changes include the following (among others).

### The inclusion of a positive duty on employers to eliminate/prevent workplace sexual harassment

- The AHRC reiterates its recommendation (Recommendation 17 of the Respect@Work report) that a positive duty on all employers to 'take reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation as far as possible' (through making the necessary amendments to the Sex Discrimination Act 1984 (Cth)) should be introduced. As per Recommendation 17, the submission states that the changes should set out a non-exhaustive list of factors relevant to determining whether a measure is reasonable and proportionate including: 'a) the size of the person's business or operations; b) the nature and circumstances of the person's business or operations; c) the person's resources; d) the person's business and operational priorities; e) the practicability and the cost of the measures and f) all other relevant facts and circumstances'.
- The AHRC's submission also reiterates that the AHRC should be given the power to assess and enforce compliance with the positive duty (Recommendation 18 of the Respect@Work report).
- The AHRC considers that these measures would be a 'powerful tool to promote broad systemic and cultural change that sits outside of the current adversarial framework of discrimination law'.

### Ensuring the threshold for making a finding of sexual harassment is not set too high

- The AHRC recommends that the proposed threshold for sex-based harassment in s 28AA of the Bill be changed from unwelcome conduct of a 'seriously demeaning' nature to unwelcome conduct of a 'demeaning' nature. The AHRC considers this change is necessary because the proposed threshold - conduct that is 'seriously demeaning' - could 'set the bar too high for a finding of harassment to be made'.

[Source: Australian Human Rights Commission submission: Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021]

## Respect@Work: Changes to the Fair Work Regulations registered

- Recommendation 31 of the Respect@Work Report recommended that the definition of 'serious misconduct' in the Fair Work Regulations 2009 (Principal Regulations) be amended to include sexual harassment.
- Consistent with this recommendation, the Fair Work Amendment (Respect at Work) Regulations 2021 amend the Principal Regulations to:
  - add sexual harassment to the list of conduct falling within the definition of 'serious misconduct'
  - define 'sexually harass' as having the meaning given by section 28A of the Sex Discrimination Act 1984
  - enable fee waiver applications to be delegated with respect to applications under Part 6-4B of the Fair Work Act.

The regulations are also intended to 'support' the proposed amendments in the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 by including 'sexual harassment' in the existing stop-bullying jurisdiction.

The regulations were registered on 9 July.

[Source: Fair Work Amendment (Respect at Work) Regulations 2021]

# Cybersecurity, Technology and Privacy

## 184% increase in money lost remote access scams

- According to the Australian Competition and Consumer Commission (ACCC), Scamwatch data shows that consumers have so far lost $7.2 million this year to scammers through gaining access to their home computer (up 184% on last year).
- Scammers typically persuade people to download software giving access to their home computer (so that they can then install software/gain access to personal information/banking details etc) by impersonating a member of a well-known organisation. The most commonly impersonated organisations in 2021 were: Telstra with 1730 reports and reported losses of $1.95 million, and NBN Co with 1023 reports and reported losses of $477,980. Organisations not previously reported as being impersonated include: Amazon (801 reports and losses of $1.2 million) and eBay (230 reports and losses of $149 thousand).
- Most vulnerable groups:
  - People aged 55 or older lost more money ($4.4 million) to these scams than any other group
  - Young people reported losing on average $20,000
  - Eight Indigenous consumers, some in remote communities, lost a total of $38,000.

- The ACCC urged consumers to use caution. ACCC Deputy Chair Delia Rickard said,

  > 'It is really important not to let anyone who contacts you out of the blue access your devices, as once you give them access, you have no way of knowing what the person will do to your computer or what programs they may install…If you receive contact from someone claiming to be from a telecommunications company, a technical support service provider or online marketplace, hang up. If you think the communication may have been legitimate, independently source the contact details for the organisation to contact them. Don't use the contact details in the communication. Also, don't click on any of the links.'

  Ms Rickard also reminded consumers that banks will make requests for remote access to their computer or accounts or ask for the codes to verify transactions.
- The ACCC has said it is working with the private sector to disrupt these scams eg by sharing information with telecommunications carriers about the phone numbers used to call Australians so they can trace and block calls.

[Source: ACCC media release 12/07/2021]

# Other News

## In Brief | A 'critical lifeline': The BCA has welcomed the announcement of additional government funded COVID-19 financial support for extended lockdowns, but has emphasised the importance of preventing future lockdowns through ramping up vaccination efforts stating, 'as more and more people are vaccinated, National Cabinet should quickly implement the plan to unwind restrictions with clear timelines and achievable targets'

[Sources: Joint media release: Prime Minister Scott Morrison, Treasurer Josh Frydenberg, NSW Premier Gladys Berejiklian, NSW Treasurer Dominic Perrottett 13/07/2021; BCA media release 13/07/2021]

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