Governance News

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

28 July 2021

Contents

Remuneration

APRA consultation on Draft CPG 511: Key takeaways from the AICD's submission on APRA's proposed draft remuneration guidance

Key Takeouts

- The AICD suggests that the implementation date for CPS 511 and CPG 511 (once finalised) should be the performance year commencing on/after 1 January 2023 to allow more time for implementation. This is echoed in the Australian Banking Association's submission (covered separately below).
- The ABA's submission argues that APRA guidance and requirements under the proposed Financial Accountability Regime (FAR) should be in alignment
- The ABA's submission also argues that the drafting in the draft CPG 511 could be tightened in a number of ways to provide greater certainty/clarity. The submission flags some concerns around inconsistencies in the proposed requirements under both the draft standard and the draft guidance and has called on the regulator to clarify these points.

Context

On 30 April 2021, the Australian Prudential Regulation Authority (APRA) released draft guidance (draft CPG 511) (summarised in Governance News 05/05/2021 at p4) to support implementation/compliance with the proposed new remuneration prudential standard draft CPS511 (summarised here).

Consultation on the draft guidance closed on 23 July 2021.

AICD submission: Key takeaways

The Australian Institute of Company Directors' (AICD) submission to the consultation is broadly supportive of APRA's proposed approach, and in particular, is supportive of the overall more principles-based focus in the draft guidance.

General concerns

The submission states that a number of concerns previously raised by the AICD around proposed requirements in the draft standard – eg the level of reporting expected to the board remuneration committee, the proposed length of the deferral periods, the 'prescriptive and mandatory criteria for the application of clawback', the broad definition of significant financial institution (SFI) and the lack of a 'tailored' approach to RSE Licensees - have not been addressed in the draft guidance.

On the issue of deferral periods, the submission makes clear that the AICD considers that there is a gap between the proposed requirements in the draft guidance and the proposed requirements in the draft legislation to establish the Financial Accountability Regime (FAR). The AICD strongly argues that APRA requirements and those in the proposed FAR should be in alignment. The submission states:

> 'the recently released Financial Accountability Regime (FAR) draft legislation provides for less onerous deferral periods and amounts for CEOs and senior managers and executive directors other than the CEO. In our view the Standard should align to the FAR periods'.
>
> [Note: The consultation package to establish the proposed FAR is here. You can find our summary of the proposed reforms here.]

Suggested improvements to the draft guidance

In addition, the submission suggests a number of other ways in which the AICD considers the draft guidance could be made clearer/improved. Some of the key recommended changes in the submission are summarised in the table below.

ISSUE IDENTIFIED	AICD'S SUGGESTED CHANGE
Implementation of the reforms	
Proposed implementation date: ▪ APRA proposes that entities will need to be compliant with the draft standard and draft guidance by the proposed commencement date of 1 January 2023. ▪ The submission raises concerns that this will not allow sufficient time for full implementation. The submission states: 'we have received feedback that the scale of change required by them is such that an implementation timeframe of more than one performance period will be required to properly identify potential alignment gaps, develop appropriate solutions and implement required changes'.	▪ The AICD suggests that the implementation date for CPS 511 and CPG 511 should be the performance year commencing on/after 1 January 2023
Clarification of the role/responsibilities of the board	
'Material weight' in the context of variable remuneration: ▪ Paragraph 56 of the draft guidance sets out the considerations that a 'prudent board' might take into account when assessing whether 'material weight' is being applied effectively in the design/determination of variable remuneration outcomes. The AICD's submission raises concerns that as currently drafted, the draft guidance 'overstates the role of the board' in this context by suggesting that 'the board should be responsible for determining the material weight applied to variable remuneration outcomes across the business' on an individual basis.	▪ The AICD suggests some changes to the drafting of the draft guidance to make clear that the board is not expected to determine material weights at the level of the individual (outside the specific requirements in the standard).
Responsibility for applying risk/conduct adjustments: ▪ The submission expresses concern that the section on risk and conduct adjustments in the draft guidance could be read as implying that the board is necessarily responsible for making risk/conduct adjustments when in fact it may be appropriate that the board delegate this function to management.	▪ The AICD suggests some changes to the drafting to clarify that escalation of an issue to the board (though an option) may not necessarily be the only appropriate mechanism for escalation of issues in this context.
Third-party oversight (mortgage brokers)	
ADI oversight of mortgage broker remuneration: ▪ ADI oversight of mortgage broker remuneration: The submission flags that 'a common mortgage broker model' in use by a number of ADIs entails the ADI engaging directly with approved aggregators (which have separate contracts and remuneration arrangements with mortgage brokers), rather than directly with mortgage brokers. The submission argues that these arrangements could make it difficult for ADIs to fulfil the proposed requirements around third-party service providers.	▪ The submission calls for APRA to engage directly with ADIs around the practice and their role within it, and for clarification around the proposed extent of the duty in the draft guidance. ▪ Separately the ABA has raised similar concerns (These are discussed in more detail below).

[Source: AICD submission: Draft Prudential Practice Guide CPG 511: Remuneration 23/07/2021]

APRA consultation on Draft CPG 511: The proposed commencement date and ADI oversight of service providers among the key concerns raised in the ABA's submission

The Australian Banking Association's (ABA's) submission to APRA's consultation on draft CPG 511 raises several concerns about the proposed approach in both the draft standard (draft CPS 511) and the draft guidance (draft (CPG 511) and emphasises that its submissions to both consultations should be read together.

Key concerns raised in the ABA's submission include, in common with the Australian Institute of Company Directors' submission, the proposed commencement date for the new obligations and ADI oversight of third service providers.

- **The ABA would like to see the proposed commencement date of the new requirements amended:** Consistent with the AICD's submission to the consultation (discussed separately above) the ABA 'strongly recommends' that the obligations under the proposed new standard (CPS 511) and the guidance apply to the performance years commencing on or after 1 January 2023 to allow 'sufficient time to comply'.
- **Oversight of service providers:** The ABA's submission also raises concerns around the proposed obligations on ADIs to oversee the remuneration frameworks of service providers eg mortgage brokers. The submission argues among other things, and in common with the AICD's submission, that ADIs are limited both in their ability to identify conflicts and in their ability to influence service providers' remuneration frameworks. The ABA also points out that some service providers' remuneration is already regulated, and that in consequence, the imposition of new requirements would create unnecessary overlap.

  To address this, the submission suggests that 'for those service providers whose remuneration arrangements are currently regulated, APRA could identify the residual prudential risk it is seeking to address through CPG/CPS 511 so that the ABA can offer constructive options for how the required oversight might be managed'.

  The submission further suggests that APRA might potentially consider amending draft standard (CPS 511) to require ADIs to seek assurances from services providers that their remuneration arrangements align with the remuneration design requirements in the APRA standard/guidance. In the case of mortgage brokers, the submission suggests that this assurance could be provided to ADIs by head groups (ie approved aggregators), rather than individual brokers.

Other concerns

- **International banks:** The ABA suggests that draft CPG 511 be amended to include guidance on how the Australian subsidiaries of global banks can apply for an adjustment or exemption from a specific requirement in the standard.
- **Material risk takers:** The submission asks that APRA clarify its 'expected approach to the identification of Material Risk Takers' to address what the ABA considers to be an inconsistency between the draft standard and the draft guidance.
- **Variable remuneration:** The submission also asks that APRA clarify the definition of variable remuneration in draft CPS 511 paragraph 18(u) to eliminate uncertainty. The ABA also raises concerns about the 'prescriptive' approach to variable remuneration in paragraph 40 and Table 2 in draft CPG 511. The ABA submits that this should be replaced with principles based guidance eg 'parameters' or 'guardrails' for general categories of variable remuneration that APRA considers are to be 'avoided' or 'tightly controlled'.

  [Source: ABA submission: APRA to APRA's consultation on draft CPG 511]

Diversity and Inclusion

It works: FRC-commissioned study confirms a causal link between increased board (gender) diversity and stronger financial performance

The UK Financial Reporting Council (FRC) has released a report (commissioned by the regulator) into the impact that efforts to diversify boards have had on boardroom culture and performance. The report also sets out some suggested actions that could be implemented to accelerate the rate of change.

Headline findings

Broadly, the report makes three findings:

- There has been progress over time towards increased board diversity - especially gender diversity – on many boards. For example, the proportion of women directors on FTSE 350 boards in 2001 was 5%. The latest Hampton-Alexander review (published February 2021) found that in 2020 the proportion now stands at 34% overall.
- This increased diversity has delivered both financial benefits as well as stronger boardroom culture.
- Importantly, boards are still far from representative of the diversity in the UK population. For example, the proportion of directors from an ethnic minority stands at 7% (vs 13% of the UK population). The report comments that significant work will be needed over time to lift levels of diversity and inclusion and to realise the associated benefits. The report makes clear that driving increased diversity/inclusion is the responsibility of the Chair (and the board).

Further Detail

Confirmation of a causal link between increased diversity and better financial performance:

- **The link between gender diversity and better financial performance is clear:** The report identified a positive correlation between higher levels of gender diversity of FTSE 350 boards and better future financial performance (as measured by EBITDA margin). This positive impact was found not to be immediate but to build over time, with the effect being the strongest after three years.
- **Increased diversity linked with lower levels of shareholder dissent:** One measure used in the report to assess board effectiveness was the level of shareholder dissent.
  - The report found that an increase in gender diversity of FTSE 350 boards in the period between 2014 and 2016 was associated with less strong opposition to resolutions put forward by the board between 2017 and 2019. That is, companies that increased the level of gender diversity on their boards were less likely to experience shareholder dissent. The report attributes this to the more collaborative nature of gender-diverse boards and their tendency to engage with stakeholders.
  - The report also found a 'significant but weaker relationship' between more ethnically diverse FTSE 350 boards and reduction in shareholder dissent (though the report makes clear that drawing any final conclusions is not possible due to both the limited availability of ethnicity data and the lack of variation in ethnic diversity across FTSE 350 boards which makes meaningful comparison impossible).
- **The link between increased ethnic minority and benefits including stronger financial returns because of the very low levels of representation:** The report comments that as levels of ethnic minority diversity are so low/unchanged over time, it was not possible to measure the impact of any change 'with any confidence'

According to the report, these findings are 'significant because, for decades, researchers have largely failed to confirm any causal link between board demographic diversity and a firm's overall performance and market value'.

Link between increased gender diversity and stronger board culture

The report also found a link between increased board gender diversity and stronger board culture. More particularly, the percentage of women on boards was found to be 'highly correlated with an emphasis on boardroom relationships and collaboration'.

Emerging best practice for nomination committees

- The following four actions – undertaking a skills assessment; managing the pipeline of diverse talent; setting clear targets; and reporting regularly and publicly against them - are identified as existing 'best practice' in terms of the approach nominations committees are taking to support increased diversity in the context of appointing independent non-executive directors.
- Providing a clear mandate to a search firm with a diverse talent pool; ensuring that Nominations Committees themselves are diverse; starting the search early and taking time over it; and building longer-term relationships with potential NED appointments are described in the report as 'emerging as best practice' though as yet these approaches are 'only moderately well utilised'.

Long term, active commitment at board level is required to achieve lasting change and realise the benefits

- The report makes clear that 'the full benefits [of increased board diversity] will not be achieved in the short term' and will only be realised if active efforts to increase diversity are accompanied by high levels of inclusion.
- The report observes that companies that have been successful in appointing and as importantly retaining diverse directors have boards that:
  - are already committed to addressing the issue
  - use 'strong targets' backed by clear policy, and an expectation that targets are met, to push through the necessary change
  - monitor the pipeline (internal and external) of potential board candidates (including regular reporting at the main board level rather than just at the nomination committee level)
  - seek feedback/turn their own minds to what steps they can take to make their company more attractive to minority candidates
  - are 'intellectually flexible' and open to recalibrating opinions based on new data that challenges their current thinking
  - have a Chair 'who is considered by board members to be a good listener'.

Commenting on the report findings overall, FRC CEO Jon Thompson said:

> 'The FRC wants to see companies which thrive in the long term and both benefit the economy, society and reflect its make-up. I want to see boards invest time and energy in making diverse appointments not to achieve a target but because it will have a positive impact on their business. The UK Corporate Governance Code makes it clear that board appointments should promote diversity and we want to see nominations committees reporting on progress'.

[Sources: FRC media release 20/07/2021; Full text report: Board Diversity and Effectiveness in FTSE 350 Companies]

Meetings and Proxy Advisers

Still no movement: Electronic execution and meeting requirements

Despite ongoing COVID-19 restrictions, including the introduction of hard lockdowns, there is currently no permanent or temporary legislative relief in place to enable electronic execution of documents/convening of meetings: pre-Covid requirements under the Corporations Act 2001 (Cth) continue to apply.

We've published an article providing an overview and discussion proposed reforms and confirming the current situation. The full text can be accessed here.

Context: Proposed reforms to meeting and electronic execution requirements under the Corporations Act

- A government Bill - Treasury Laws Amendment (2021 Measures No. 1) Bill 2021 (TLA 1 Bill) (our summary here) – would, if passed in its current form, temporarily remove legal uncertainty around the validity of virtual meetings and enable electronic execution of documents by company officers under section 127 of the Corporations Act 2001 (Cth) until 15 September 2021. The Bill has passed the House of Representatives but has yet to pass the senate.
- Separately, the government has also released exposure draft legislation for consultation – [exposure draft] Treasury Laws Amendment (Measures for Consultation) Bill 2021: Use of technology for meetings and related amendments (draft Bill) – proposing to permanently enable electronic execution of company documents, distribution of meeting-related materials and use of technology in meetings (our summary of the proposed measures in the draft Bill here). The proposed changes in the draft Bill assume the passage of/build on the proposed changes in Schedule 1 of the TLA 1 Bill as it is currently drafted. Consultation on the draft Bill closed on 16 July 2021.
- You can find a brief overview of the current status and discussion of the interaction between the proposed changes in the TLA 1 Bill and the draft Bill here.
- This following section of the newsletter provides an overview of some of the key issues raised in submissions to the consultation on the draft Bill: [exposure draft] Treasury Laws Amendment (Measures for Consultation) Bill 2021: Use of technology for meetings and related amendments.

Permanently modernising meeting and execution requirements: SAFAA calls for the draft Bill to include stronger safeguards around shareholder participation

Key Takeaways

- .SAFAA supports proposed permanent changes to execution requirements and the proposed approach to allowing companies to hold virtual meetings
- An interesting point to note in SAFAA's submission is the recommendation that the proposed safeguards around shareholder participation in electronic meetings be further strengthened

Proposed changes to execution requirements

- The Stockbrokers and Financial Advisers Association (SAFAA) supports the proposed amendments to the Corporations Act 2001 (Cth) that would, if legislated, permanently enable companies to execute company documents, including deeds, electronically. The submission comments that 'these changes are long overdue and will provide much needed clarity and certainty'.

Virtual general meetings

- **Constitutional amendment:** The submission supports giving companies the option to hold wholly virtual meetings, provided that doing so is expressly permitted/required in their constitution, as set out in the draft Bill. SAFAA considers that this approach is appropriate because shareholders will have to approve the necessary constitutional amendments, effectively enabling shareholders 'to decide the format of the company AGM'.

- **Participation in electronic meetings:** SAFAA is supportive of the proposed requirements around shareholder participation in electronic meetings, including the proposed safeguards around members' ability to 'speak or ask questions orally or in writing' (which SAFAA observes is their existing right in the physical meeting context).
- **Strengthening the proposed approach to shareholder participation:** SAFAA's submission includes a recommendation that the section 249S of the draft Bill be amended to include a right for shareholders to be able to see/hear the questions or comments being made during electronic meetings by other shareholders. In practical terms this might mean that companies: a) enable shareholders to dial into the meeting and speak in person in real time; and/or b) arrange for shareholders to submit questions/comments digitally and for this information to be made visible to other shareholders and (in a hybrid setting) for the questions/comments to be read out to those attending the physical meeting. SAFAA argues that 'unless this amendment is made, a vital shareholder right will be diluted. Providing for innovation in the use of technology to hold general meetings of shareholders should not diminish shareholder rights'.

  [Source: Stockbrokers and Financial Advisers Association (SAFAA) submission: Exposure Draft: Treasury Laws Amendment (Measures for Consultation) Bill 2021: Use of technology for meetings and related amendments]

Permanently modernising meeting and execution requirements: The major accounting bodies call for proposed modernisation efforts to be extended to existing requirements under the Insolvency Practice Rules

Key Takeaways

- The submission from the major accounting bodies is broadly supportive of the proposed reforms to both convening and holding meetings and execution requirements. Importantly, the submission states that the major accounting bodies 'do not believe that there are obvious disadvantages to implementing the permanent changes as outlined in the exposure draft'.
- The submission does suggest that temporary relief measures in the TLA 1 Bill and ASIC's no action position be extended in light of the ongoing COVID-19 disruption/restrictions.
- Extending proposed changes to external administration (insolvency)? The submission suggests 'extending the ability to provide meeting-related documents electronically to the Insolvency Practice Rules (Corporations) 2016 where certain requirements still currently need to be undertaken in writing'.

Providing certainty – extension of existing temporary relief measures should be considered

The submission from the Chartered Accountants Australia and New Zealand and CPA Australia submission (major accounting bodies) is, as flagged, broadly supporting of the proposed reforms.

Having said this, the submission emphasises the need for parliament to pass both the TLA 1 Bill and the draft Bill in order to provide the necessary certainty for companies, given design of the legislation – that is, the major accounting bodies consider that the draft Bill alone will not accomplish this.

The submission suggests that in light of the ongoing COVID-19 restrictions, consideration should to be given to extending the temporary measures in the TLA 1 Bill for six months after the Bill receives Assent, and for the necessary legislation to enact permanent change (the draft Bill) to be legislated sooner than six months after the TLA 1 Bill receives Assent. In addition the submission calls for ASIC to extend its 'no action position' to the end of the calendar year.

Both the Australian Institute of Company Directors and the Governance Institute also emphasise the need for urgent resolution of the current uncertainty in their submissions (this is discussed in more details separately below).

An overarching reform framework

The submission suggests that Treasury consider establishing an 'overarching framework' that clearly articulates how proposed changes to meeting/execution requirements complement other existing or future modernisation or deregulation projects. The submission suggests that such a framework would assist in identifying, for example, how the changes in the draft Bill align with Treasury's consultation on modernising business communications.

Extending proposed changes?

The submission suggests 'extending the ability to provide meeting-related documents electronically to the Insolvency Practice Rules (Corporations) 2016 where certain requirements still currently need to be undertaken in writing' should be considered in the interests of modernisation/mitigating disruption in the event of a crisis (eg COVID-19 restrictions).

[Source: Chartered Accountants Australia and New Zealand and CPA Australia submission: Exposure Draft: Treasury Laws Amendment (Measures for Consultation) Bill 2021: Use of technology for meetings and related amendments]

Permanently modernising meeting and execution requirements: The AICD urges the extension of proposed temporary relief

Key Takeaways

- The AICD's submission is broadly supportive of all of the proposed amendments in the draft Bill
- The submission, in common with the submission from the major accounting bodies calls on the government to consider extending temporary relief under the TLA 1 Bill to the end of the calendar year (the major accounting bodies advocate extending relief for six months after the Bill receives Assent).
- The submission also calls on the government to consider including in the draft Bill, a permanent mechanism to enable emergency relief measures to be in put place in the event of future disruptions eg through a disallowable legislative instrument or through giving ASIC a 'class action relief power'. The Governance Institute has also called for the introduction of a permanent mechanism of this kind.

Flexible approach to meeting format

The Australian Institute of Company Directors (AICD's) is supportive of the proposed approach to virtual meetings in the Bill – that is, the submission supports giving companies the option to hold wholly virtual meetings, provided that doing so is expressly permitted/required in their constitution, as set out in the draft Bill. Like SAFAA, the AICD considers that this approach will 'protect shareholder democracy' by ensuring shareholders/members have consented through approval of the necessary constitutional amendment.

Participation in electronic meetings

The submission expresses support for the proposed approach to shareholder participation in the draft Bill.

This includes support for the current drafting of section 249S(8) in the draft Bill which states that shareholders or members should have the opportunity to speak or ask questions at a meeting orally or in writing, The submission comments that 'we would however caution against hardwiring any requirement for both oral and written communication from shareholders or members throughout a meeting'.

Extending temporary relief under the TLA 1 Bill, and including a permanent mechanism to grant emergency relief

In light of the ongoing uncertainty caused by the COVID-19 pandemic, and in light of the delay in passing the TLA 1 Bill, the submission calls on the government to consider extending the temporary relief measures in the TLA 1 to the end of the calendar year.

The submission also calls on the government to consider including a mechanism in the draft Bill to grant emergency relief to organisations from meeting Corporations Act requirements, in certain circumstances (eg snap lockdowns). The AICD emphasises that in order to be effective any measure of this kind would need to 'displace constitutional requirements that may otherwise prohibit virtual meetings or sending notices of meeting electronically'.

The AICD suggests that the mechanism could take the form of: a) granting the Treasurer the power to make a disallowable legislative instrument; or b) giving ASIC power to provide class order relief to modify or exempt entities from provisions of the Corporations Act concerning the use of technology in this context.

One important advantage of this, the AICD suggests, would be that companies would not need to rely on a 'no action position' from ASIC if/when they are unable to hold a physical meeting (which exposes them to the potential risk of legal action from third parties challenging the validity of resolutions passed at a virtual meeting).

Electronic communication of documents – an opportunity streamline the proposed approach

The submission is supportive of the proposed approach in the draft Bill to electronic execution requirements.

The submission is also supportive of the amendments in the draft Bill that, if legislated in their current form, will enable organisations to send documents, including notices of meetings, electronically.

The submission does however suggest that there is some room to streamline the proposed approach to enabling shareholders/members the opportunity to 'opt-in' to receive hardcopy materials. The Governance Institute's submission (discussed separately below) also makes this point.

> [Source: Australian Institute of Company Directors submission: Exposure Draft: Treasury Laws Amendment (Measures for Consultation) Bill 2021: Use of technology for meetings and related amendments]

Permanently modernising meeting and execution requirements: The Governance Institute strongly emphasises the need for certainty

Key Takeaways

- The GIA's submission is broadly supportive of all of the proposed amendments in the draft Bill
- The submission questions the need for the constitution of a company that elects to hold a wholly virtual meeting, to be permitted/required to do so under its constitution. In this respect, the Governance Institute's position differs from both the AICD and SAFAA submissions.
- The submission, in common with the submission from the AICD, also calls on the government to consider including in the draft Bill, a permanent mechanism to enable emergency relief measures to be in put place in the event of future disruptions (in common with the AICD's submission).

The proposed approach to virtual meetings – there should be no requirement for companies to pass a constitutional amendment

The submission recommends against the inclusion of a requirement in the draft Bill, that if legislated, will require companies to amend their constitutions to allow virtual meetings because to do so would be 'inconsistent with technology neutrality'.

The submission states:

> '…our members consider the proposal to require a constitutional amendment to hold a virtual meeting is inconsistent with technology neutrality and indicates that one form of meeting is to be preferred over others. In our members' experience amendments to the Corporations Act remain for many years. They therefore do not wish to see provisions that are at odds with the stated aim of technology neutrality become permanent features of the Corporations Act. They also consider technology neutrality gives companies the flexibility to communicate with their shareholders and hold meetings in the way best suited to their unique circumstance'.

The proposed approach to participation in electronic meetings

The submission raises concerns about the current drafting of certain requirements in the draft Bill around providing shareholders/members as a whole, with a reasonable opportunity to participate in the meeting.

To resolve this uncertainty, the submission recommends:

> 'amending the proposed sub-section 249S (8) to clarify that companies can satisfy the requirement to allow a member to exercise a right to ask questions or make comments either in writing by means of a question sent in advance of the meeting or through an online question facility during the meeting, OR by means of a telephone line or similar form of technology but are not required to offer both methods at the same meeting. Some companies may wish to offer one method, some companies may wish to both methods and there should be flexibility, particularly at a time when technology is evolving'.

An urgent need to resolve the current uncertainty

The submission emphasises the need to resolve the current legal uncertainty for organisations in light of the ongoing COVID-19 restrictions and in light of the time that has elapsed since the introduction of the TLA 1 Bill and the time needed to pass the measures in the draft Bill.

The submission also flags that the Governance Institue intends to approach ASIC to extend its current 'no action' position on meetings until the end of the calendar year.

A permanent mechanism to grant emergency relief

The Governance Institute, like the AICD, suggests that the draft Bill should be amended to include a permanent mechanism for the granting of emergency relief in certain situations.

Specifically, the submission recommends that the draft Bill be amended to 'enable the Treasurer to make legislative instruments and/or for ASIC to grant relief by way of Class Order in emergency situations such as continuing outbreaks of COVID-19 or other emergency situations which prevent the holding of company meetings'.

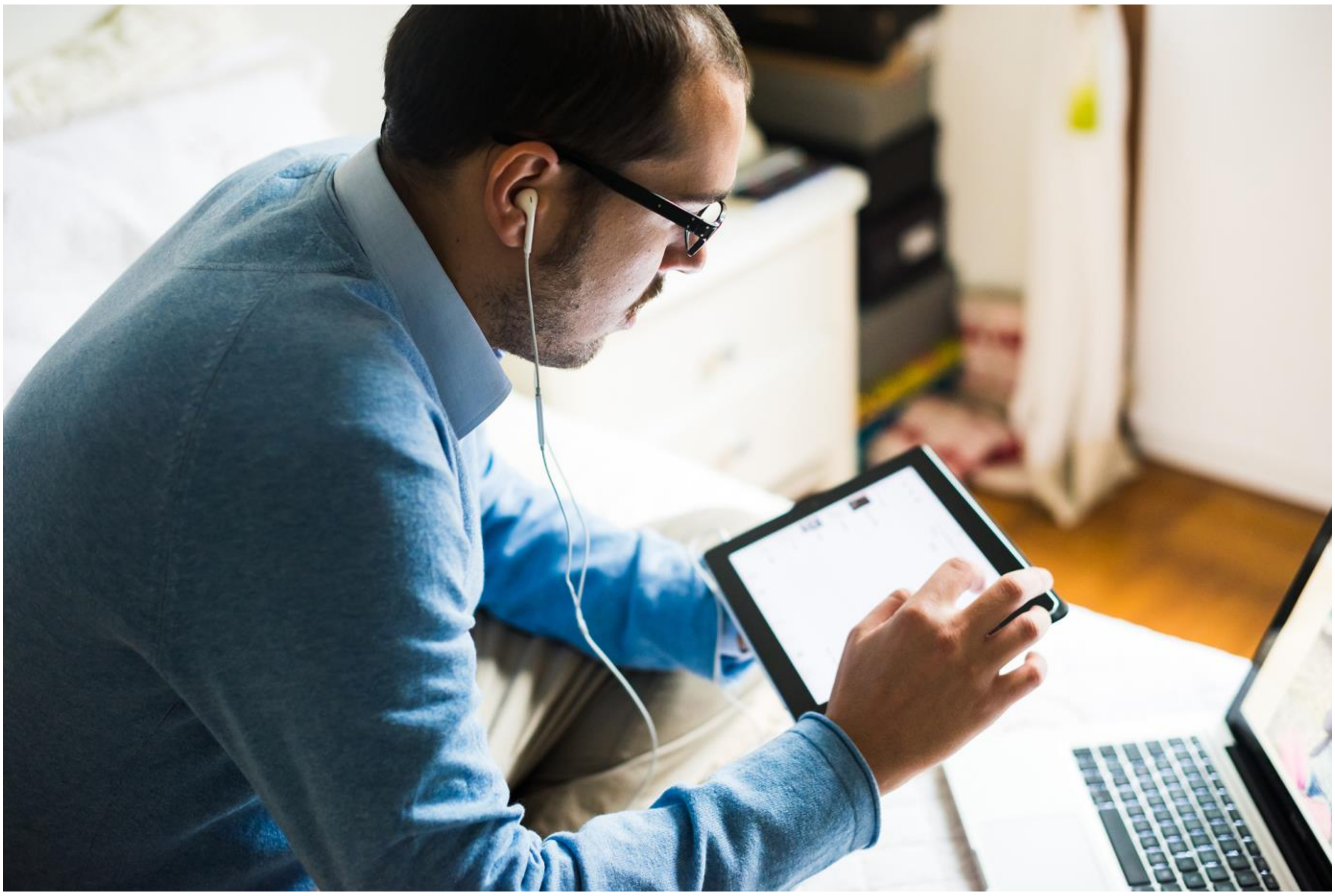
An opportunity to streamline proposed 'opt in' arrangements for shareholders to elect to receive hardcopy documents

Like the AICD, the Governance Institue considers there is scope to streamline the proposed approach in the draft Bill, to enabling shareholders to opt in to receive hardcopy materials.

Specifically, the submission recommends that the draft Bill amend section 1679B of the TLA 1 Bill to remove the requirement for companies to contact shareholders to advise them of their right to opt in to receive hardcopy communications, as many shareholders have already expressed a preference for digital communication.

The submission observes that 'contacting them [shareholders] to advise they have a right to opt in to receive hard copy communications will involve considerable cost and administrative burden and is likely to be perceived unfavourably by shareholders, particularly those who have already asked for digital communications'.

[Source: Governance Institute of Australia submission: Exposure Draft: Treasury Laws Amendment (Measures for Consultation) Bill 2021: Use of technology for meetings and related amendments]



Shareholder Activism

AGL will give shareholders a 'say on climate' at 2022 AGMs

AGL Energy Ltd (AGL Energy) has announced that will put its climate reporting to a non-binding, advisory vote of shareholders at its 2022 AGM.

If the proposed demerger proceeds, shareholders will have an opportunity vote on the climate reporting of both proposed demerged entities (Accel Energy and AGL Australia) at the first AGM for each organisation in 2022.

There is no mention in AGL Energy's announcement of whether the 'say on climate' vote will be a one-off or an ongoing commitment.

In a statement, the Australasian Centre for Corporate Responsibility's (ACCR) Director of Climate and Environment Dan Gocher welcomed AGL's say on climate commitment but called on the company to also commit (in line with a shareholder resolution filed by ACCR with the company) to Paris-aligned emissions reduction targets for the proposed demerged companies. Mr Gocher stated:

> 'Until AGL sets Paris-aligned targets for both Accel Energy and AGL Australia, for Scope 1, 2 and 3 emissions, investors will rightly be sceptical of its commitment to climate action…To provide investors with the confidence they sorely need, it is imperative that AGL provide a Paris-aligned climate transition plan for both of the proposed entities, with short, medium and long term targets, capital expenditure alignment and a remuneration framework that incentivises rapid decarbonisation'.

The AGL board has not yet issued a voting recommendation on the ACCR resolution. The resolution will be considered at the AGL Energy AGM which will be held on 22 September 2021.

[Sources: AGL ASX announcements 21/07/2021; 22/07/2021; ACCR media release 22/07/2021]

Climate risk: Market Forces requests ASIC launch an investigation into an Australian coal company's disclosures

- Market Forces has issued a statement confirming that it has requested (through the Environmental Defenders Office Australia) that the Australian Securities and Investments Commission (ASIC) open an investigation into 'potential misleading or deceptive statements' made by New Hope's CEO concerning the future viability of the Australian coal industry.
- More particularly, Market Forces alleges that New Hope has relied on outdated information or omitted relevant information to justify its strategy/business direction. For example Market Forces alleges that the company has consistently 'cherry-picked International Energy Agency (IEA) scenarios that have a positive outlook for coal demand and omitted modelling that has dire consequences for the coal industry'. Further, Market forces alleges that, when called upon to do so by the Parliamentary Inquiry Prudential regulation of investment in Australia's export industries, the company was unable to account for its (alleged) reliance on outdated information/omission on unfavourable information.
- Market has called on New Hope to 'immediately stop this practice' and provide shareholders with 'more recent and balanced information about IEA scenarios'.
- New Hope has not issued an official response.

[Sources: Market Forces media release 21/07/2021]

Institutional Investors and Stewardship

BlackRock stewardship report released: BlackRock has stepped up its support of shareholder proposals and engagement efforts on climate, some groups argue more is needed

Key Takeouts

- Increase in the opposition to 'Say on Pay' resolutions: BlackRock voted in support of 84% of resolutions to approve executive compensation and against 33% (up from 26% on last year).
- Support for 'Say on Climate' resolutions: BlackRock voted in support of 100% of board-endorsed, say on climate resolutions
- Increase in support for shareholder resolutions: Overall, BlackRock voted in support of 35% of shareholder proposals (up from 17% in the previous year). Looking only at shareholder 'environmental' and 'social' proposals the level of support was much higher at 47%.
- Despite BlackRock's increased focus on climate, some groups argue that that the asset managers' engagement-focussed approach is too conservative given the urgency of the climate crisis and have called on BlackRock to take a stronger stance

Blackrock's latest stewardship report highlights Blackrock's stewardship activities over the period 1 July 2020 to 30 June 2021. A brief overview of some of the key actions/activities highlighted in the report is below.

Key Takeaways

Director elections

The report reiterates BlackRock's previously stated position that voting against the election/reelection of directors is 'one of the most important ways that BlackRock can signal support for or concern about a board's oversight of management'. On this point, BlackRock comments that in most cases where the board is 'constructively engaged' and 'receptive to shareholder feedback' and also willing to 'initiate change from within', BlackRock is 'inclined to support' existing directors/board-endorsed director candidates. The figures on BlackRock's voting record appear to bear this out, in that they arguably illustrate BlackRock's preference for engagement over voting action (where this is judged to be feasible).

- BlackRock voted against individual board-endorsed directors relatively rarely during the 1 July 2020 to 30 June 2021 period, voting in support of 90% of (board endorsed) directors.
- Where BlackRock did vote against board-endorsed director candidates, the primary reasons were: 1) lack of board independence (this was most marked in the APAC and EMEA regions); 2) lack of board diversity; and 3) executive remuneration.
- BlackRock took voting action against 255 directors over the 1 July 2020 to 30 June 2021 period for climate-related concerns.
- Shareholder endorsed candidates: BlackRock also voted in support of 26% of shareholder endorsed director candidates. The report explains that where activist investors initiate a campaign for change, BlackRock seeks to engage with the company and also 'usually' with the activist with the result that in some cases mutual agreement between the activist and the board is reached. However, where no agreement has been reached, and BlackRock has determined that it is in the best economic interests of clients for there to be a change in leadership, BlackRock will vote in support of shareholder endorsed candidates (eg at Exxon Mobil, Toshiba and Tegna).

Executive remuneration

- BlackRock voted in support of 80% of board-endorsed proposals relating to executive compensation (including 'say on pay proposals, proposals to approve the remuneration policy and equity plans') and against the remaining 20% of proposals.
- Slight uptick in opposition to 'say on pay' proposals:

- Drilling down, BlackRock voted in support of 84% of 'say on pay' proposals to approve executive compensation and against 33% (up from 26% on last year).
- BlackRock attributes the uptick in 'against' votes to companies' handling of COVID-19 pay adjustments. For example, BlackRock took voting action in cases where companies decided to reward executives when financial performance targets were not met/where they reduced their workforce due to the pandemic and/or where the company received government financial support without providing sufficient justification for the decision.
- The report also flags that in some cases, the decision to vote against 'say on pay' proposals reflected companies' slow progress toward meeting the European Union Shareholder Rights Directive II's (SRD II) executive pay disclosure requirements which came into effect in September 2020.

Increased willingness to support shareholder resolutions

Over the 1 July 2020 to 30 June 2021 period BlackRock voted against more shareholder resolutions than it supported, though there was a significant increase in the level of support as compared with the previous year.

Overall, BlackRock voted in support of 35% of shareholder proposals (up from 17% in the previous year).

Looking only at shareholder 'environmental' and 'social' proposals the level of support was much higher at 47%.

Closer look

- Environmental (or climate) resolutions:
  - BlackRock voted in support of 38% of shareholder 'environmental' resolutions and against 61%
  - This category of resolutions includes resolutions calling for reports on climate risk, energy efficiency, recycling, community environmental impacts, and environmental policies.
- Social resolutions:
  - BlackRock voted in support of 35% of shareholder 'social' resolutions and against 65% (in contrast, BlackRock voted in support of 100% of board endorsed social resolutions)
  - This category of resolutions includes resolutions relating to a range of issues including: reports on pay disparity, requests for anti-bias policies or reports on human rights policies
- Governance resolutions:
  - BlackRock voted against 71% of shareholder 'governance' resolutions and for 27%
  - This category of resolutions includes resolutions affecting shareholder rights as well as proposals on compensation, political spending and/or lobbying policies

'Say on climate' resolutions

BlackRock voted in support of 100% of board-endorsed 'say on climate' resolutions over the period.

Response to the report

In a statement, Eli Kasargod-Staub, Executive Director of Majority Action called on BlackRock to step up its engagement climate issues in particular, and to take stronger voting action to prompt companies to accelerate their efforts. Ms Staub commented:

> 'Despite an incremental increase in support for ESG shareholder proposals and their high-profile support of Engine No. 1's efforts to replace board members at ExxonMobil, BlackRock's voting performance and engagement standards continue to fail to protect long-term investors from the largest systemic risks they face. With the climate crisis upon us and a historic reckoning underway on racial justice and the future of democracy, BlackRock will need to substantially enhance its voting and engagement strategies to protect its clients, company stakeholders, and long-term shareholders overall.'

Similarly, representatives from the group BlackRock's big problem, called on the asset manager to go further to push companies to act on climate. Ben Cushing, Finance Campaign Manager with the Sierra Club commented:

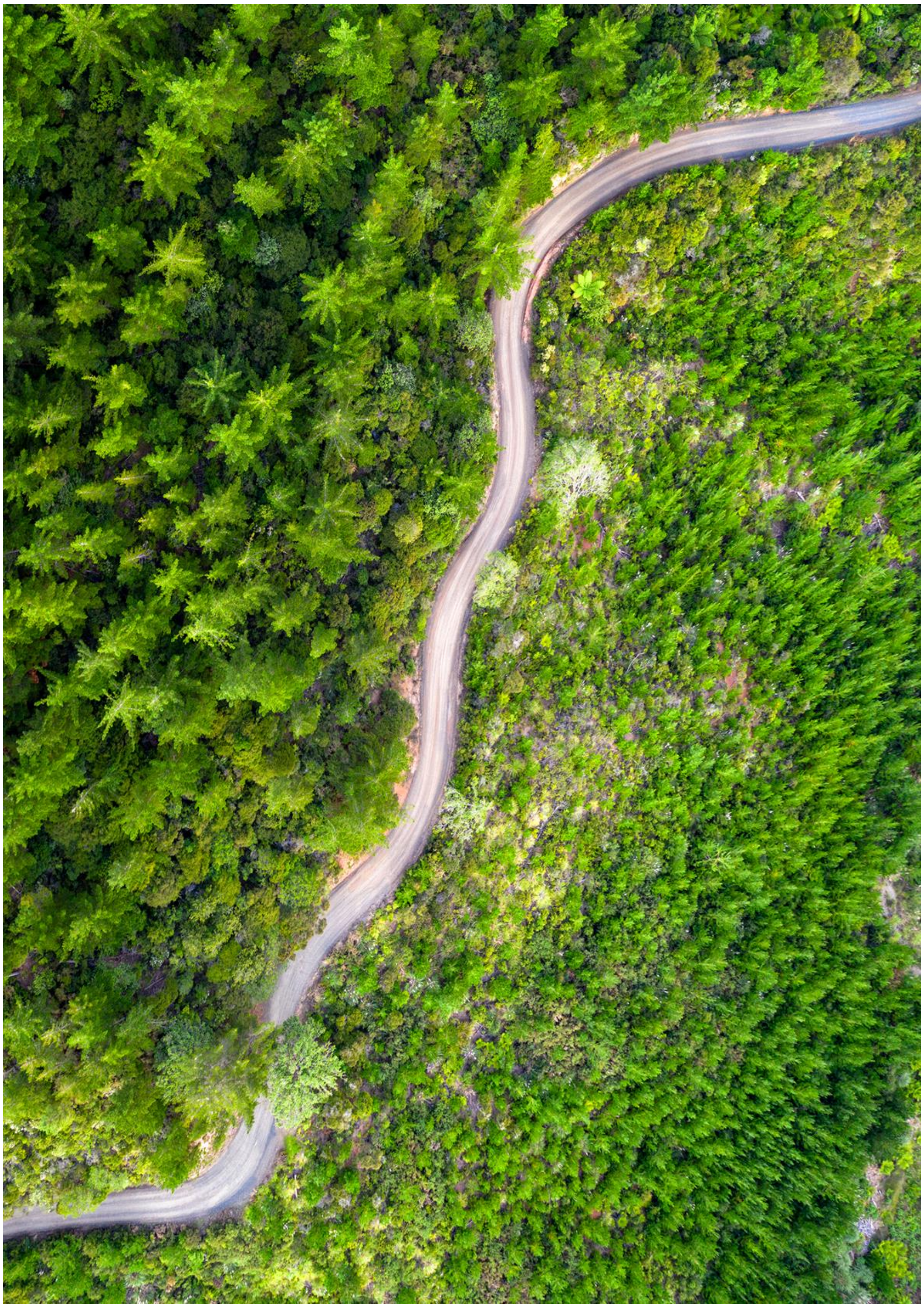
> 'While we welcome the clear progress BlackRock has made in its stewardship strategy and transparency, it is not yet going fast enough or far enough to actually make an impact on the deepening climate crisis. BlackRock is still pushing for baby steps when what's needed is bold action. We need an immediate end to fossil fuel expansion and deforestation, and plans for complete fossil fuel phase out by 2050, not just disclosure and vague transition plans. And engagement is just one piece of the puzzle. BlackRock must also detail how it will swiftly align its entire portfolio, active and index funds, with a 1.5ºC future, including exiting fossil fuel companies that are not actively and rapidly transitioning to a clean energy economy.'

[Sources: Full text report: BlackRock Investment Stewardship: A look into the 2020-2021 proxy voting year; Majority Action media release 20/07/2021; BlackRock's Big Problem statement 20/07/2021]

ISS global investor survey finds climate is the top engagement priority for investors

Key Takeouts

- ISS global survey of investors confirms climate is now the top engagement topic worldwide, followed by a range of other ESG topics
- Going forward, ISS predicts that the shift among investors towards outcomes-focused active engagement/stewardship strategies will only accelerate



Institutional Shareholder Services (ISS) has released a report analysing the rise of active stewardship globally in recent years and the shift towards an increasingly outcomes-based approach to engagement on the part of investors over time. Essentially, the report observes that investors are increasingly using engagement to drive specific 'real world' change, particularly on sustainability issues.

ISS observes that the 'growth of impact strategies, specifically those following the UN Sustainable Development Goals (SDGs) framework, clearly indicates a shift from risk oriented sustainable investment to an attempt to measure concrete action and outcomes achieved through investment'.

ISS anticipates that this move towards active stewardship will only accelerate.

'Going forward, with a growing number of Sustainable Finance regulatory initiatives, stewardship codes and PRI membership increasing every year, and with a high level of shared interest across the top engagement topics, more investors will continue to be encouraged or pushed to engage with investee companies, and with more formal frameworks and collective options at their disposal to implement their engagement strategies as part of their broader stewardship responsibilities'.

Top engagement priorities?

The report also identifies the current engagement priorities for investors globally.

- **Climate is the top engagement topic for investors worldwide:** Results of a 2021 global survey of 133 investors, carried out by ISS ESG found that climate is the most commonly shared ESG engagement priority in every country (except Austria where it ranked second).
- **Other ESG topics are also top of mind:** The survey found that there is variation across different regions in the priority given by investors to other engagement topics (outside of climate), though human capital management appears to be a priority across a number of regions. For example:
  - In Australia, modern slavery, human capital management and labour rights are the most commonly identified important topics
  - In the US, board independence, gender equality and human capital management are the most commonly identified important topics
  - Similarly, in the UK, board independence is a key priority. Executive compensation and gender equality are the next most commonly identified important topics
  - In Canada, ethnic diversity, executive remuneration and human rights are the most commonly identified important topics

[Sources: Harvard Law School Forum on Corporate Governance and Financial Regulation 26/07/2021; ISS report: Stewardship Excellence, Engagement in 2021]

An 'actionable toolkit' for investors to support (and benefit from) a just transition: IGCC report released

The Investor Group on Climate Change (IGCC) has released a report highlighting the actions investors can take to support an equitable and just transition to net zero emissions for the communities that stand to be most impacted by the shift eg the communities currently largely dependent on the fossil fuel industry which are exposed to a significant decline in demand.

The key message in the report is that the net zero emissions transition is both 'inevitable', 'foreseeable' and also (if managed effectively), 'a huge opportunity to create new jobs and boost economic growth'.

Conversely, the report highlights that the cost of failing to take meaningful action on climate change represents significant financial (and social) risk. A 'disorderly transition' is anticipated to pose greater economic, social and environmental costs than the investment required to achieve net zero carbon emissions by 2050.

The report is intended to provide investors with what the IGCC describes as an 'actionable toolkit' to support and benefit from a just transition.

[Sources: IGCC media release 26/07/2021; Full text report: Empowering Communities, How investors can support an equitable transition to net zero]

Financial Services

Status update: Tracking progress against each of the Hayne Commission's 76 recommendations

The Financial Services Royal Commission's final report was publicly released on 4 February 2019. In the two (plus) years since its release a number of actions have been implemented in response – though in many cases, the changes have not yet been fully implemented or have been deferred due to COVID-19.

We have prepared a table briefly outlining the actions taken to date and/or the planned actions to be taken in response to each of the Commission's 76 recommendations.

We will be updating the table regularly. The table (which you can access here) was last updated on **28 July 2021.**

Rethink required? SAFAA and FPA have separately called for an urgent review of the design of the 'unsustainable' ASIC levy

- The Australian Securities and Investments Commission (ASIC) published its latest draft Cost Recovery Implementation Statement (or CRIS) on 23 July 2021 for feedback. The deadline for submissions is 13 August 2021.
- Following this, the Stockbrokers and Financial Advisers Association (SAFAA) and the Financial Planning Association of Australia (FPA) each issued separate statements raising concerns about the sustainability of the model going forward and calling on the government to initiate an urgent review.

SAFAA's key concerns

SAFAA has raised concerns about the sustainability of the model going forward given the diminishing pool of financial advisers and the rising cost of the levy. SAFAA CEO Judith Fox commented,

> 'ASIC's latest ASIC's levy estimate of at least $1,500 plus $3,138 per financial adviser for FY 2020-21, an increase of $712 from the previous financial year, proves that the current levy model is unsustainable…This increase comes on top of an increase of 160% in the two years to 2019-20 and is coupled with a sustained reduction in the number of financial advisers across which this cost can be recovered…The recent increases to the ASIC levy are not sustainable and are being unfairly attributed to the current population of financial advisers.'

SAFAA also raised concerns about:

- the unpredictability of the levy: SAFAA observes that ASIC's cost estimates have 'routinely been between 25-55% less than the final levy amount, making it extremely difficult for businesses to plan for this expense.'
- the overall fairness of the levy: SAFAA argues that certain sectors (and in particular the stockbroking and listed securities advice sectors) that generate little of the regulator's enforcement and supervisory work are bearing a disproportionate (an unfair) costs burden.

The statement also flags SAFAA's concern that the costs of the proposed new single disciplinary body for financial advisers (as proposed in The Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Bill 2021 which was introduced into the House of Representatives on 24 June 2021 and referred to committee for report by 28 July 2021) will be passed on to advisers and further 'push up' the levy.

The FPA's key concerns

The FPA raised similar concerns to SAFAA about both the fairness and sustainability of the current model including, the unpredictability of the levy and the 'dramatic rate' of increases over time.

The FPA also questioned the 'validity and timing of the increase' in light of the extended COVID-19 lockdowns/restrictions and the associated pressure on businesses to keep on staff.

Call for an urgent review

Both the FPA and the SAFAA have called on the government to initiate an urgent review of the design of the ASIC levy with both associations arguing that the risks costs for advisers will ultimately impact the affordability of advice.

[Sources: SAFAA media release 26/07/2021; FPA media release 23/07/2021]

In Brief | Hayne implementation: ASIC has released a new regulatory guide (RG 275) to support implementation of the new deferred sales model for add-on insurance which will take effect from 5 October 2021. ASIC has also made an instrument specifying the information that must be given to a customer to start the four-day deferral period, and how that information must be given

[Sources: ASIC media release 28/07/2021; RG 275 The deferred sales model for add-on insurance (including attachments Compliant form and Data template); ASIC (Information under the Deferred Sales Model for Add-On Insurance) Instrument 2021/632; Explanatory Statement to ASIC (Information under the Deferred Sales Model for Add-On Insurance) Instrument 2021/632]

In Brief | Treasury is conducting an evaluation of the operation of important reforms to Australia's foreign investment review framework that commenced on 1 January 2021. The primary focus is consideration of the impact that the reforms and their implementation have had on foreign investment and the broader economy, and in particular, 'whether the right balance is struck between welcoming foreign investment and protecting Australia's national interests'. The due date for submissions is 31 August 2021

[Source: Treasury Consultation: Evaluation of the 2021 foreign investment reforms]

Accounting and Audit

The FRC's latest review of the seven largest audit firms finds 29% of audits are below standard (down from 33% in 2019/20)

The Financial Reporting Council (FRC) has released its annual inspection and supervision results for 2020/21. The individual reports cover the seven largest audit firms: BDO, Deloitte, EY, Grant Thornton, KPMG, Mazars and PwC.

Broadly, the FRC found that:

- There was wide variation in the quality across firms and the FRC has published measures that individual firms will be required to implement in response to individual inspection findings.
- Overall however, there has been a slight overall improvement in audit quality (though the FRC considers more work is needed):
  - 71% of audits were assessed as being of a good standard or requiring only limited improvement (up from only 67% in 2019/20)
  - 29% of audits reviewed required improvement or significant improvement (down from 33% in 2019/20)

Why is the rate of improvement so slow?

FRC CEO Jon Thompson commented:

> 'Some may question what the FRC has been doing and why audit quality improvement remains slow. Over the last 12 months the FRC has initiated its own program of measures in response to many of the recommendations in the Kingman review such as: initiating operational separation of the Big Four firms; introducing enhanced audit standards in relation to ethics and fraud; building on our supervisory oversight; and strengthening our enforcement capability. However, elements of these actions remain voluntary on the part of audit firms and this is why the BEIS White Paper 'Restoring trust in audit and corporate governance' is so important. Legislation will ensure that a new regulator, ARGA, with increased remit and powers can be created to promote improved audit quality as the key output of audit firm work, in the public interest.'
>
> [Source: FRC media release 23/07/2021]

The FRC is consulting on minor and procedural amendments to the Audit Enforcement Procedure FRC

The UK Financial Reporting Council (FRC) is consulting on proposed changes to the Audit Enforcement Procedure which are intended to clarify and facilitate a 'more effective and robust enforcement process'. The FRC comments that the bulk of the proposed changes are 'minor' in nature and that any 'any significant amendments' are procedural only – for example:

- Proposed new Rules 12 and 13 would provide for the scope of an investigation to be amended where related breaches are suspected, rather than to be dealt with under a new investigation
- Proposed new Rule 52 would permit the Tribunal to treat a finding or court-approved statement of fact made by other bodies or officers as prima facie evidence of that fact in the Tribunal's proceedings

None of the proposed amendments would extend the scope of the FRC's ability to pursue an enforcement action.

The due date for submissions is 7 October 2021.

> [Sources: FRC media release 22/07/2021; The Audit Enforcement Procedure July 2021: Consultation on proposed amendments]

Risk Management

Top Story | Cyber Security reforms: 6 key proposals

The government is consulting on regulatory changes targeted at improving the country's cybersecurity infrastructure and readiness. Feedback is due by 27 August 2021.

MinterEllison has published an expert summary and discussion of the proposed options for reform. You can find the full text here.

At risk of becoming a tick box exercise? ACSI report provides early insights into modern slavery reporting by ASX 200 companies

Key Takeouts

- The report found that many companies appear to be adopting a 'race to the middle' approach when it comes to disclosure, limiting investors'/stakeholders' ability to assess their approach to identifying, managing and ultimately responding to the risk
- The report calls on investors to step up their engagement efforts on the issue, for companies to revisit their existing approach to reporting to ensure it meets legal requirements and investor expectations and for the government to provide further guidance to clarify certain ambiguities in the existing requirements and support higher quality reporting

Ahead of the planned three year review of Modern Slavery Act 2018 (Cth) (MSA) in 2022, the Australian Council of Superannuation Investors (ACSI) has released a report analysing the quality and compliance of modern slavery reporting by 151 ASX200 companies for the first reporting cycle.

Room for improvement

The headline message in the report is that many companies appear to be adopting a 'race to the middle' approach when it comes to disclosure - that is, the majority of companies appear to be aiming to satisfy the bare legal requirements under the MSA, without disclosing more information than their peers.

In practical terms, the lack of detailed information means in ACSI's view, that investors and other stakeholders have limited insight into the steps being taken by reporting entity/entities to identify, manage and act to address modern slavery risks in reporting entities' operations and supply chains.

Examples of key improvement areas identified in the report

- Disclosure about what is covered by the statement: The MSA requires statements to describe the structure, operations and supply chains of each reporting entity covered by the statement. This information is important in the context of understanding (from the perspective of the user of the statement) where modern slavery risks might be present. The report found that in practice, the information provided by most companies is basic and lacking in detail. For example, the report found that in general statements did not include information about entities' extended supply chains (ie below Tier 1). Further, though most statements identified the number of employees engaged by the reporting entity/entities, only 28% of statements disclosed the composition of the workforce and even smaller number also disclosed the status of workers (ie full time or contracted worker).

  Pages 31-32 of the report outline how ACSI considers reporting in this area could be improved as well as emerging 'good practice trends'.

- Disclosure of the risks in operations and supply chains: The MSA requires statements to describe the risks of modern slavery practices in the operations and supply chains of each reporting entity covered by the statement, as well as any owned or controlled entities. The report found that in practice:
  - Over 60% of statements did not identify any potential modern slavery risk areas or risk factors relating to companies' operations (ie the focus in most cases was on potential risks in supply chains only).
  - The information that was provided was generally high level and lacking in detail with very few companies drawing (in a meaningful way) on the UN Guiding Principles on Business and Human Rights (UNGPs) to assist in the identification or disclosure of potential involvement in modern slavery in their operations or supply chains. Only 5% of the statements analysed explained how companies could potentially be involved

in modern slavery risks through their operations and supply chains by using the UNGPs 'cause', 'contribute', 'directly linked' continuum or similar language.

Pages 37-38 outline how ACSI considers reporting in this area could be improved as well as emerging 'good practice trends'. A table at pages 39-40 sets out examples of modern risks identified in ASX200 statements.

- Disclosure of the actions taken: The MSA requires statements to describe the actions taken during the reporting period by the reporting entity/entities and any owned or controlled entities to assess and address modern slavery risks in their operations and supply chains. In practice, the report found that the descriptions of the actions being taken are often high level and more particularly, lack detail on implementation.

  The report comments that this may indicate that 'most ASX 200 companies are taking action "on paper: but not yet "in practice"'.

  To illustrate, ASCI observes that only 25% of statements provided one or more case studies to demonstrate how companies have worked to assess/address modern slavery risks in practice. An even smaller proportion (6%) of statements provided detailed explanations of how companies have/would respond to allegations or instances of modern slavery or less serious exploitation in their operations/supply chains.

  Pages 46-49 of the report outlines how ACSI considers reporting in this area could be improved and emerging 'good practice trends'.

- How effectiveness is assessed: In addition to requiring statements to disclose actions to assess and address modern slavery risks, the MSA also requires statements to describe how the reporting entity/entities assess the effectiveness of these actions (including actions taken by owned or controlled entities). The report comments that this is intended to ensure that entities do not 'adopt a set and forget' approach to management of modern slavery risk.

  The report found that in practice the information provided was again lacking in detail. For example: 59% of statements indicated the reporting entity/entities are taking steps to assess the effectiveness of their actions but provided limited or no detail about how these assessments are undertaken. Further, very few (less than 5%) of statements explained what the reporting entity/entities consider to be an effective response to modern slavery

  Pages 54-55 of the report outlines how ACSI considers reporting in this area could be improved and emerging 'good practice trends'.

- Procedural requirements: The MSA sets out various procedural requirements around the need for consultation (statements need to describe consultation with any entities owned or controlled by the reporting entity), approval and signature (for example in the case of companies, statements must be approved by the board and signed by a director). The report comments that though procedural in nature the requirements are important in helping to 'support the integrity and quality of the reporting process'. For example, the report observes that approval requirements are aimed at ensuring the board (or other principal governing body) is aware of/accountable for the actions being taken to respond to modern slavery risks. The report suggests that 'in the absence of financial penalties for non-compliance, the scrutiny involved in the board review process may also contribute to the development of higher quality statements'.

  The report found that in practice 100% of statements met the approval and signature requirements with most statement signed by either the CEO and Chair or Executive Director. However, 21% of statements were assessed as being 'potentially non-compliant' with the requirement to describe consultation with owned or controlled entities, and 9% of statements were assessed as being 'potentially non-compliant with the requirement to describe consultation between reporting entities'.

  Page 59 of the report outlines how reporting in this area could be improved and emerging 'good practice trends'.

Recommended actions for investors, companies and government

The report comments that

> 'The next twelve months will determine whether the MSA is driving concrete action and continuous improvement from businesses, or becomes an ineffective 'box-ticking' compliance exercise. Investors and other stakeholders have a key role to play in engaging with ASX200 companies to ensure statements give them the information they need to meaningfully assess Australian companies' modern slavery risk management, and that the MSA delivers important change'.

The report includes a number of recommended actions for companies, investors and governments to take to support improved management and reporting of modern slavery risk (see: pages 16-18 of the report).

Among other things, it's suggested that investors prioritise and intensify their engagement with companies on the issue of modern slavery generally, the quality of reporting and the actions being implemented to address the issue.

The report also calls on the government to issue further guidance to clarify 'areas of ambiguity relating to the interpretation of the MSA'. More particularly, ACSI recommends that this guidance should include: a) confirmation that modern slavery statements meed to name all reporting entities within corporate groups; b) guidance about how best to report on country and category-specific modern slavery risks; and c) suggested principles or frameworks to support reporting entities to better assess the effectiveness of their actions.

> [Source: ACSI media release 20/07/2021; ACSI report: Moving from paper to practice: ASX200 reporting under Australia's Modern Slavery Act]

Restoring trust and strengthening governance: Should a BEAR-like accountability regime be extended beyond financial institutions?

In closing submissions to the Commission into the Casino Operator and Licence, Counsel Assisting the Commission suggests that one way to strengthen internal risk governance/culture and individual accountability within the casino going forward, would be to implement a 'regime analogous to the accountability regime introduced by the Banking Executive Accountability Regime (BEAR)'.

The submission draws a parallel between the issues facing the banking sector (before the introduction of the BEAR) and the casino now, arguing that the introduction of a BEAR-like accountability regime would be an effective way of both strengthening accountability and restoring public trust. The submission states,

> 'The BEAR is a dynamic process where entities are expected to have honest discussions internally to develop a clear, transparent and common understanding of who is accountable, what actions are expected from them and how consequences will be applied for any failure to meet those obligations. This facilitates opportunities for reflection on, and refinement of, operational and governance structures and practices, which in turn strengthens the risk culture practices at all levels. The introduction of an analogous system for the casino operator merits consideration'.

Closing submissions by parties with leave will be heard on Tuesday 3 August 2021. Parties with leave are due to file their written submissions by 2 August 2021.

The Commission is required to report on its findings and any recommendations to the Governor no later than 15 October 2021.

> [Source: Closing submissions of Counsel Assisting the Commission, July 2021]

Consultation on the extension of the BEAR-like accountability requirements to other APRA regulated entities

Government is currently consulting on an exposure draft of legislation that proposes to establish the Financial Accountability Regime (FAR) (which will replace the Banking Executive Accountability Regime or BEAR). FAR proposes to extend strengthened, but BEAR-like accountability requirements, to other APRA-regulated entities and to the directors/senior executives of those entities in accordance with the government's response to several Hayne Commission recommendations.

You can find an overview and explanation of the proposed reforms and discussion of the ways in which the proposed FAR would differ from the BEAR here.

Respect@Work Bill: The BCA has called for the Bill to be passed as soon as possible, supports tougher measures

Context

- The Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (the Bill) 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 was 9 July 2021.

- The Australian Human Rights Commission's submission to the Committee recommends that 11 amendments be made to strengthen the draft Bill before it is passed, including that the Sex Discrimination Act 1984 (Cth) (SD Act) be amended to include a positive duty on all employers to 'take reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation as far as possible', consistent with recommendation 17 of the Respect@Work report. You can find a brief summary of the AHRC's recommended changes in Governance News 14/07/2021 at p25.
- In its submission to the Committee, the Fair Work Commission (Commission) requested that the proposed extension of the anti-bullying jurisdiction (which will enable the FW Commission to make stop sexual harassment orders) be deferred for two months to enable more time for to prepare for/operationalise the changes. The Commission comments that without this extension of time, and in light of the fact that no additional resourcing has been allocated to the to implement the proposed changes/cope with the expected increased workload, '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'. You can find a brief summary of Commission's submission in Governance News 14/07/2021 at p25.

Business Council of Australia recommends the Bill be passed as soon as possible

- In its submission, the Business Council of Australia (BCA) expresses broad support for all the measures in the draft Bill and recommends that it be passed as soon as possible.
- The submission does suggest further amendments to the Fair Work Act, which the BCA considers would strengthen the proposed reforms by providing more certainty for employers, but makes clear that this should not be viewed as a reason not to pass the draft Bill in its current form.
- Further, the submission expresses in principle support for the introduction of a positive duty on employers to take reasonable steps to prevent/eliminate harassment, but again argues that this should not be barrier to the passage of the draft legislation.

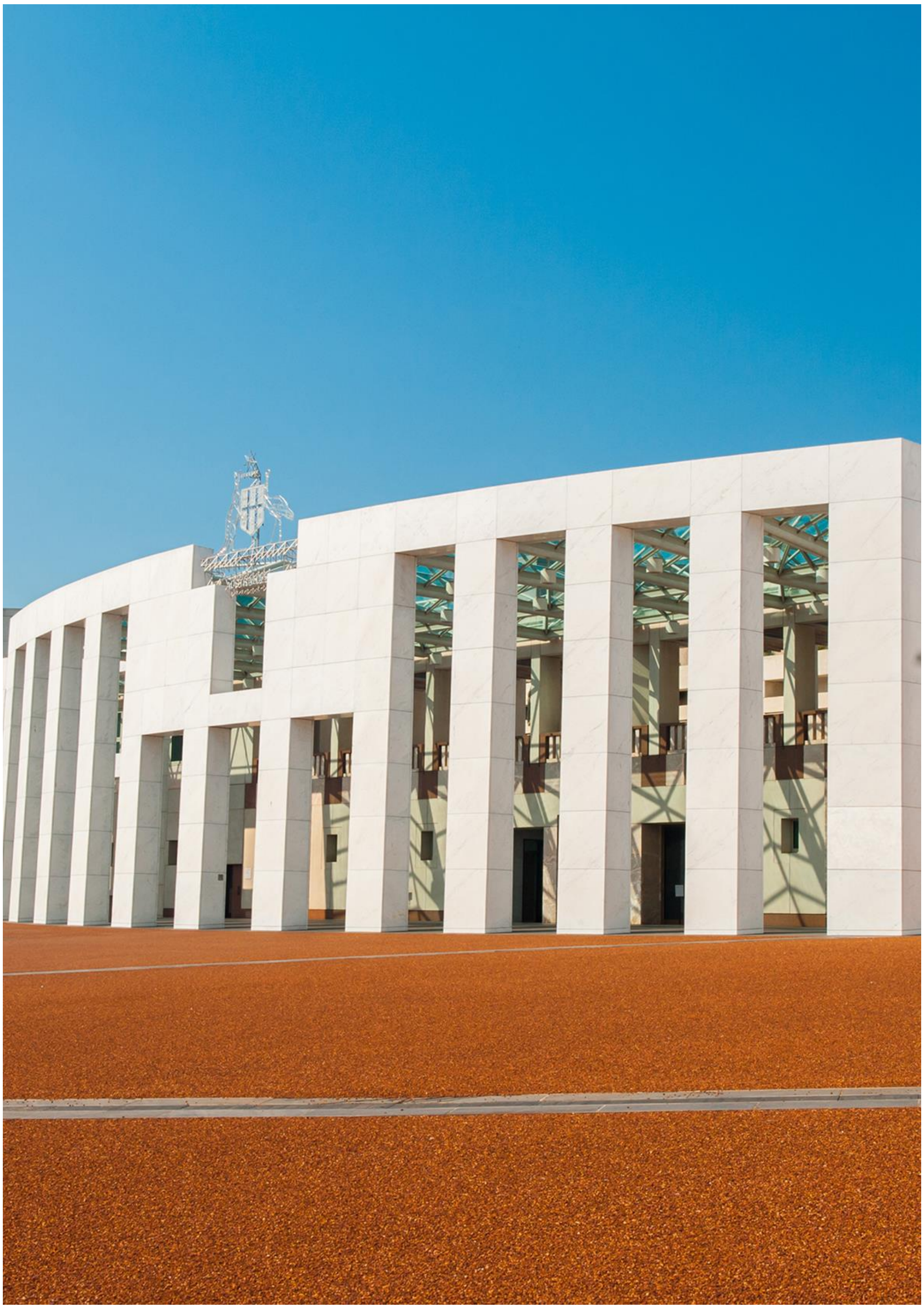
Details: BCA position on proposed amendments in the Bill

- Proposed amendments to the Sex Discrimination Act (SD Act): The BCA supports the proposed amendments in the Bill, which it describes as both 'reasonable and workable'. The submission also makes clear that the BCA supports the introduction of a positive duty on employers (as per the Respect@Work recommendations) in principles. However, the submission states that there is a question as to 'whether such a duty is best expressed in WHS laws or anti-discrimination laws'. The submission welcomes the government's commitment to conduct a 'further assessment' of this question and supports the passage of the Bill (as currently drafted) on this basis.
- Proposed amendments to the Australian Human Rights Commission Act (AHRC Act): The BCA supports the proposed change to the AHRC Act that will mean that complaints will not be dismissed by the AHRC president within 24 months of the (alleged) conduct.
- Proposed amendments to the Fair Work Act (FW):
  - Miscarriage leave: The BCA supports the proposed amendments providing for compassionate leave in the event of a miscarriage.
  - Sexual harassment as a valid reason for dismissal: The submission questions whether the proposed amendment to s387 of the FW Act will be effective in removing practical difficulties for employers in dismissing employees on the basis that they have engaged in sexual harassment. The submission observes that though the proposed amendment puts beyond doubt that sexual harassment constitutes a valid ground for dismissal, 'if the dismissal is harsh or procedurally unfair, the employer may not be able to defend an unfair dismissal application'. On this basis, the BCA considers that 'the risk remains…that an employee whose employment has been terminated for unacceptable sexually harassment could, even if the harassment constitutes a valid reason for termination, succeed in their unfair dismissal claim'. The submission suggests that the FW Act could be further amended to state that 'sexual harassment is not only a valid ground for dismissal but also constitutes serious misconduct, which would provide employers with greater confidence to deal with situations that justify dismissal'.

  [Source: BCA Submission on the provisions of the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021]

Workplace conduct within Parliament House: The government has accepted 100% of the recommendations made by the Foster Report

- **What is the Foster Report?** On 16 February 2021, the Prime Minister tasked Deputy Secretary of the Department of the Prime Minister and Cabinet Stephanie Foster to conduct a review into the procedures and processes involved in identifying, reporting and responding to serious incidents - ie 'an incident or pattern of behaviour that causes serious harm to someone eg assault, sexual assault, sexual harassment and 'serious and systemic bullying or harassment' - that occur during parliamentary employment. The full text of the report was released on 26 July 2021.



- **Key conclusions:** Broadly, the review found that current procedures/processes are 'not designed or able to respond appropriately to serious incidents in the parliamentary workplace, particularly to sexual assault' with the 'most significant gap' being the 'absence of readily accessible, timely, independent, trauma informed services and response mechanisms'.

  The report also found there was an 'immediate' need to implement both a 'trusted, independent complaints mechanism to deliver proportionate consequences for misconduct' and a 'tailored, face to face education and support' for parliamentarians and parliamentary staff on the prevention, identification and appropriate response to serious workplace incidents.

- **Ten recommendations for change:** The report includes ten recommendations for change, all of which the government has accepted. According to media reports (The Guardian, News.com.au) Brittany Higgins has welcomed the government's commitment to implement the report recommendations on the basis that it will make parliament house a safer working environment.

Overview of the recommendations

The table below provides a brief overview of the recommendations and planned next steps (where this information has been provided by the government).

RECOMMENDATION	RATIONALE	SPECIFIC GOVERNMENT ACTION (WHERE ANNOUNCED)
Clarifying expectations of appropriate behaviour		
Recommendation 1 (Ministerial standards and statement of standards for ministerial staff) ▪ The report recommends that 'All parliamentarians should clearly articulate that assault, sexual assault, sexual harassment, and serious and systemic bullying or harassment are unacceptable in their workplaces, and act to support that commitment where necessary. The Statement of Ministerial Standards and Statement of Standards for Ministerial Staff should be amended to align with this'.	This is intended to both support 'meaningful change in the management' of serious incidents' and to 'restore the trust and confidence of staff and the wider public' in that response.	▪ The recommendation has been accepted by the government. No specific action beyond this announced.
A new three part framework for responding to 'serious incidents'		
Recommendation 2 (New framework) ▪ The report recommends that a new three part framework for reporting and responding to serious incidents should be established, and that this should be 'underpinned' by clear expectations around appropriate workplace behaviour. ▪ The three elements in the new framework are: – 'trauma-informed support services' (see recommendation 3) – an independent confidential complaints mechanism (see recommendation 4) – 'tailored' education and support for parliamentarians and staff (see recommendation 5).	This is intended to address the key conclusions in the report concerning the inadequacy of the current approach to dealing with 'serious incidents'.	▪ The recommendation has been accepted by the government. ▪ In a statement, 'the government has said that the Department of Prime Minister and Cabinet will work with the Parliamentary Service Commissioner to stand-up an independent complaints mechanism within the next six weeks'.
Recommendation 3: (Access to support) ▪ The report recommends that all parliamentary staff and parliamentarians who 'experience, witness, are accused of or are supporting someone' in relation to a serious incident should have access to support. ▪ This support should be provided through a combination of the continuation of the 24 hour 1800 APH SPT Parliamentary support line and 'ongoing wrap-around	This is intended to ensure broad access to independent, 'trauma informed support' .	▪ The recommendation has been accepted by the government. No specific action beyond this has been announced.

RECOMMENDATION	RATIONALE	SPECIFIC GOVERNMENT ACTION (WHERE ANNOUNCED)
case management support' through the new independent complaints mechanism. ▪ Support should be independent, confidential and 'trauma-informed'.		
Recommendation 4 (Independent complaints mechanism) ▪ The report recommends that an independent complaints mechanism for serious incidents be established under the Parliamentary Service Act 1999 (Cth) as a function of the Parliamentary Service Commissioner (PSC), with oversight by the Presiding Officers of the House of Representatives and the Senate. ▪ This complaints mechanism should include a Serious Incident Team (SIT) 'comprising a group of highly skilled case officers with a mixture of expertise in trauma-informed support and administrative and employment law'. It's envisaged that this group would, among other things, refer criminal allegations to police and for 'administrative and less serious issues' provide referrals to the Department of Finance. ▪ It's recommended that 'in its initial phase' the new complaints mechanism should apply to 'incidents from the commencement of the current term of Parliament (ie since the 2019 election, including periods when either House is dissolved). ▪ 'Arrangements' to deal with historical complaints would be considered by the Jenkins Review.	This review explains that the design of the mechanism is intended to ensure independence from the Executive and the employer and to enable 'proportionate consequences for complaints that are upheld'.	▪ In a statement, 'the government has said that the Department of Prime Minister and Cabinet will work with the Parliamentary Service Commissioner to stand-up this mechanism within the next six weeks'.
Recommendation 5 ('awareness raising' and an education program) ▪ The report recommends that a voluntary 'awareness raising and education program should be implemented'. ▪ This should start with 'targeted personalised, face to face training for all parliamentarians and staff' to ensure they have the 'tools to promote safe and respectful workplaces and to respond appropriately to instances of unacceptable behaviour. ▪ The report suggests that 'Parliament may wish to consider taking action to make training mandatory for parliamentarians,	This report explains that this is intended to support cultural change and to ensure expectations of acceptable workplace behaviour are clearly understood.	▪ In a statement the government said that it has already been piloting a training program which will be made 'mandatory for all Coalition Ministers and Staff'. It's expected that 'all other parliamentarians and their staff will undertake this training when it is available to them'. ▪ The statement also commits the government to working with 'the opposition, minor parties and independents to develop a public register of

RECOMMENDATION	RATIONALE	SPECIFIC GOVERNMENT ACTION (WHERE ANNOUNCED)
and to create a publicly available register in which to record attendance'.		Parliamentarians who have undertaken the training.'
Clarification of expected actions for security services/AFP officers		
Recommendation 6: (Security services/AFP officers) ▪ Recommendation 6 recommends that where Department of Parliamentary Services (DPS) Parliamentary Security Service (PSS) officers or AFP officers deployed to Parliament House are the first to identify or respond to a serious incident within Parliament House they should: a) provide advice on avenues for assistance in addition to any emergency response action; and b) provide a confidential report on the incident to the Serious Incident Team. ▪ It's further recommended that Security Services/AFP officers review their operational procedures to ensure they are fit for purpose.	This is intended to ensure procedures/policies for security and AFP officers deployed to parliament house are reviewed/updated and fit for purpose.	The recommendation has been accepted by the government. No specific action beyond this announced.
Mitigating the risk of serious incidents occurring		
Recommendation 7 (Monitoring after hours access) ▪ The report recommends that measures should be introduced to monitor after hours access to parliament house whereby chiefs of staff or office managers would receive a report on instances of after hours access by staff. ▪ The report further recommends that areas of parliament house should be subject to additional patrols	This measure is intended to mitigate the risk of serious incidents occurring by deterring requests for non-work related after hours access and providing visibility around after hours requests for access. The report comments that these measures should be 'underpinned by a clear expectation from parliamentarians to their staff that after-hours access must be work related or for a legitimate purpose'.	The recommendation has been accepted by the government. No specific action beyond this announced.
The role of the Department of Finance		
Recommendation 8 (Role of the Department of Finance) ▪ The report recommends that, pending consideration by the Jenkins Review, the Department of Finance should remain responsible for 'underpinning Human Resources and WHS processes', including: managing workplace reports that are not serious incidents; workers' compensation claims; existing complaints currently on foot; 'historical	The report recommends that the role of the Department of Finance should be retained (pending any findings of the Jenkins review)	The recommendation has been accepted by the government. No specific action beyond this announced.

RECOMMENDATION	RATIONALE	SPECIFIC GOVERNMENT ACTION (WHERE ANNOUNCED)
reports that do not fall within the scope of the independent complaints mechanism'; HR and other shared services; and overall policies, general training and resources.		
	Implementation and Funding	
Recommendation 9 (Implementation taskforce) ▪ The report recommends that 'a small taskforce should be established in the Department of the Prime Minister and Cabinet to implement these recommendations'. ▪ It's envisaged that this taskforce will work closely with the Prime Minister, the Minister for Finance, the presiding officers, the parliamentary service commissioner and the departments of finance and parliamentary services. ▪ The implementation Taskforce should also engage 'where appropriate' with the opposition, minor parties, independents and other stakeholders.	Recommendations 9 and 109 are intended to support the implementation/roll out of the recommendations.	The recommendation has been accepted by the government. No specific action beyond this announced.
Recommendation 10 (Funding) ▪ The framework for reporting and responding to serious incidents and the implementation taskforce should be funded until the end of the 2021-22 financial year.		The recommendation has been accepted by the government. No specific action beyond this announced.

[Sources: Prime Minister Scott Morrison media release 26/07/2021; Full text report: Review of the Parliamentary Workplace: Responding to Serious Incidents Final Report]

COVID-19: Should there be more transparency around which companies received JobKeeper, and should companies that 'profiteered' from the support be required to pay it back?

Context

- The Coronavirus Economic Response Package Amendment (Ending JobKeeper Profiteering) Bill 2021 was introduced by the Greens into the Senate on 21 June 2021 and referred to Committee for report by 20 August 2021.
- The stated purpose of the Bill is to 'ensure that large corporations do not profiteer from JobKeeper payments [ie temporary wage subsidy benefit], and to introduce transparency measures around the receipt of JobKeeper funds by large corporations'.
- The Bill proposes to introduce two key reforms which, if legislated in their current form, would only apply to entities with annual turnover of more than $50 million that received JobKeeper payments. The changes would mean that:
  - these entities would have their entitlement to claim input tax credits 'delayed' for a period up to ten years, until they 'voluntarily' paid back 'the sum which it [the entity] profiteered from JobKeeper payments'
  - the Australian Taxation Office (ATO) would publish a list of entities, the amount of JobKeeper they received and details of any voluntary repayments.

Why the proposed measures in the Bill should be strengthened

In their submission to the Committee, ANU Professors Rabee Tourky and Rohan Pitchford argue that: 'There is a case for retrospective intervention in firms that greatly profited during the pandemic which received JobKeeper. It is our firm view that an inquiry into all aspects of corporate welfare during the pandemic in Australia, including profiteering from JobKeeper, is required'.

Commenting specifically on the Bill their view is that:

- the proposed repayment mechanism applying to businesses that have profited from JobKeeper should be 'direct and involuntary' and apply to all businesses who benefited regardless of their annual turnover. As currently drafted they consider that the proposed delay in entities' entitlement to claim tax input credits provides insufficient incentive for them to do so/could also lead to unforeseen consequences.
- data published by the ATO should be more substantially more detailed than what is proposed in the Bill to enable research into which workers benefitted most from the benefits of JobKeeper. Specifically they argue that published data should include: the composition of the workforce, hours worked, worker entitlements, demographic information about workers (including gender and ethnic background) of workers.

Support for increased transparency around which companies received Jobseeker payments

In separate submissions both the Australian Shareholders Association (ASA) and the Australasian Centre for Corporate Responsibility (ACCR) to varying degrees, expressed support for the proposed measures to increase transparency around which companies received JobKeeper wage subsidies and the amount they received.

The ACCR argues that that the proposed measure, is in line with similar measures introduced in the UK and New Zealand and would provide investors with important information that will enable them to assess whether companies have engaged in responsible stewardship, and generally support investors' engagement efforts on the issue.

The ASA's submission observes that the proposed publication of data of JobKeeper recipients would enable/facilitate further analysis/research.

Both the ACCR and the ASA offer no comment on the potential efficacy of the proposed repayment mechanism, though the ACCR expresses in principle support for measures that will encourage companies to repay surplus JobKeeper subsidies.

The ASA submission does raise concerns about what it considers to be a lack of precision in the drafting for example, the ASA suggests that the terms used in the Bill would 'need to be defined more precisely' to enable calculation of the exact numbers of repayments.

[Sources: Submissions: Coronavirus Economic Response Package Amendment (Ending Jobkeeper Profiteering) Bill 2021: ACCR submission, ASA submission, ANU Professors Rabee Tourky and Rohan Pitchford]

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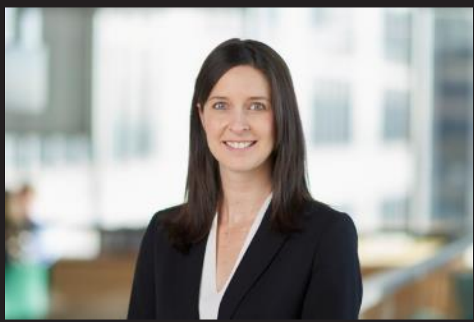

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