Governance News

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

7 July 2021

Contents

Boards and Directors

In Brief | Climate risk and directors' duties: The Commonwealth Climate and Law Initiative (CCLI) and the Climate Governance Initiative have released a new 'primer' providing a succinct overview of how climate risk and the net-zero transition impact directors' duties across jurisdictions

[Source: Primer on Climate Change: Directors’ Duties and Disclosure Obligations]

In Brief | Oversight of climate risk and ESG more generally is a board responsibility: In her keynote address to the 2021 Society for Corporate Governance National Conference, SEC Commissioner Allison Herron Lee reflected on the role and obligations of directors in managing ESG risk and the associated challenges. A key message is that 'substantive consideration of ESG should be meaningfully integrated into board oversight'

[Source: SEC Commissioner Allison Herron Lee, Keynote Address at the 2021 Society for Corporate Governance National Conference 28/06/2021]

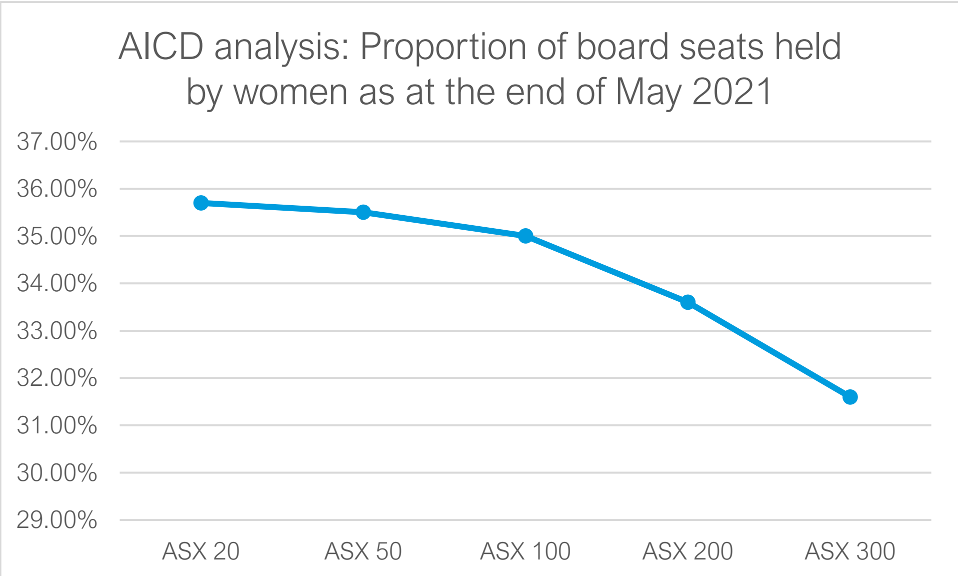
Diversity

Still room to improve: AICD data shows there is still one ASX 200 company with zero women and 12 ASX 300 companies with all-male boards

The Australian Institute of Company Directors (AICD) has released its latest report tracking board gender diversity in ASX 200 and ASX 300 companies.

Key Takeaways

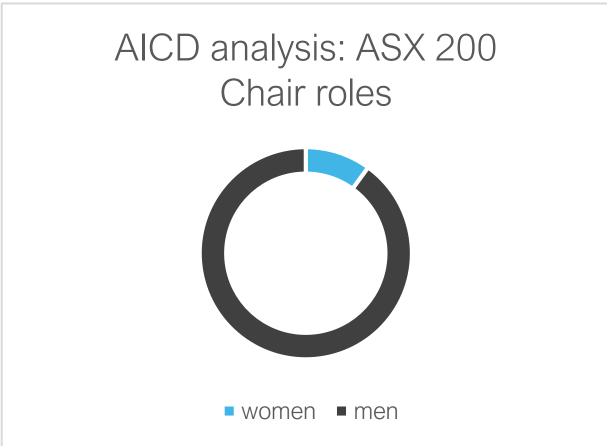
The larger the company the more gender-diverse the board: The report found that Australia's largest companies continue to lead the way on board gender diversity. As the graph shows, the proportion of women on ASX 20 boards sat (as at the end of May 2021) at 35.7% decreasing steadily to 31.6% for ASX 300 boards. As such the 40% aspirational goal is still some distance away from being achieved.



In terms of board appointments, the female appointment rate to ASX 200 boards is 48%. The pattern is similar in the ASX 300 and All Ords.

Room for improvement

- **ASX 200:** Not every individual ASX 200 company has met the 30% female board representation target. According to the report, one ASX 200 companies has zero women directors and 22 have only one woman director.
- **ASX 300:** There are 12 ASX 300 boards with zero women.
- **Women continue to be underrepresented in top roles:** Women currently account for 10% (or 21 ASX 200 Chair roles).
- **Women also continue to be underrepresented in line-roles** (the feeder roles to board positions).



Two AICD initiatives to help drive progress

- The AICD will be launching the next iteration of the Chair's Mentoring Program in early 2022, with applications opening in August 2021. The original Chairs Mentoring Program was launched a decade ago and 343 alumni now sit on listed company boards, with 11 holding ASX 200 board seats.
- Partnering with the Federal Office for Women, 100 full scholarships will be offered to women in regional and rural Australia to undertake the AICD's Company Director Course and Foundations of Directorship course. Scholarship applications will open in the latter part of 2021.

[Sources: AICD media release 01/07/2021; AICD report: Gender Diversity Progress Report March to May 2021]

In Brief | Tasmanian Minister for Women Jane Howlett says that her government is on track to meet its own 50% female representation target for all positions on government boards and committees. The proportion of positions held by women as at 23 March 2021 stood at 47.92%

[Source: Tasmanian Minister for Women Jane Howlett media release 01/07/2021]

Remuneration

COVID-19 induced pay pause? National survey finds board and executive pay has largely remained 'stagnant' over the past year

A joint national report from Aon and the Governance Institute of Australia analyses trends in executive and director remuneration based on the annual reports of ASX300 organisations, and a survey 100 organisations who participated in a Governance Institute of Australia remuneration survey.

The headline finding is that there has been a sharp decline in the number of organisations awarding increases in either fixed pay or bonuses, with many companies opting to hold pay at current levels/defer increases. Where increases were awarded they were more modest than in previous years.

The effect of this is that within the ASX 300 and the other surveyed organisations, pay for executives and non-executive directors has essentially remained 'stagnant'.

The report attributes this to the impact of the COVID-19 pandemic from both a financial perspective – the uncertain economic outlook - and from a reputational perspective - the reputation risk for organisations attaching to increasing board/CEO pay in the current environment.

Key Takeaways

Context: Board workload and composition

- 13-14 scheduled board meetings a year:
  - The number of board meetings held per year varied within very narrow limits with most publicly listed companies included holding either 13 or 14 meetings a year.
  - Listed companies in the ASX 1-50, ASX 101-150, ASX 151-200 and ASX 251-300 categories all held an average of 13 meetings a year. Companies in the ASX 51-100 and ASX 201-250 categories held an average of 14 meetings a year.
- Larger companies have larger boards: Companies in the ASX 1-50 category have on average 9 directors on their boards. This number decreases to seven directors (on average) for companies in the ASX 101-150 category. The boards of smaller listed companies (companies in the ASX 151-200, ASX 201-250 and ASX 251-300 categories) have six directors (on average).

Executive remuneration

- CEO pay:
  - Across all 413 organisations sampled, average total remuneration for CEOs/Managing Directors was $2,479,019.
  - Listed companies: Looking at average total remuneration by ASX ranking, pay was highest at the largest companies with CEOs of ASX50 companies receiving on average $6,062,169 (total remuneration) and lowest at companies in the ASX 251-300 category where average compensation stands at $1,576,157 (total remuneration).
- Fewer and smaller increases awarded:
  - The proportion of CEOs awarded an increase in fixed pay halved: Only 25% of CEOs received an increase in the last year (compared to 53% in the previous twelve months).
  - Modest increases: For CEOs who were awarded an increase in fixed remuneration, the average increase was 1.4% (down from 2% in the previous year).
- Executive pay:
  - A third of senior executives received an increase in their fixed remuneration. On average the increase was 1.9%.
  - The proportion of ASX 300 executives who received a bonus in the 12 months to March 2021 fell by 10% compared with the previous 12 months to 64%

Boards/Non-Executive Directors

- Approach to board pay:

- Rather than paying their members a flat fee, the majority of ASX 300 companies pay their board members a base fee in addition to supplementary additional fees for any further duties they may take on as a Chair and/or as a member of a board committee.
- The approach is most prevalent at larger companies. For example: 100% of ASX 1-50 companies employ this approach, falling to 80% for ASX 101-150 companies. Even among ASX 251-300 companies, 58% of companies adopt this approach.
- Unsurprisingly, the largest companies pay the highest fees.

- Fewer increases awarded:
  - The proportion of companies who increased non-executive director (NED) fees fell from 29% last year, to 21% this year.
  - The report comments that as NED fees do not increase on an annual basis but far less frequently, this could indicate that in practice, the boards that did not receive a pay increase have not received one for several years.
  - The median fee increase for Chairs awarded increases was 5%.
  - The median fee increase for board members who were awarded an increase was slightly lower at 4%.
- Committees: The largest fee increases were for members of the audit or risk committee.

[Source: Governance Institute of Australia media release 07/07/2021; Full report: Aon and Governance Institute of Australia Board and Executive Remuneration Report 2021]

Shareholder Activism

Shifting expectations? Another shareholder climate lobbying resolution has received majority support

- 63% of Delta Airlines shareholders have backed a shareholder resolution, against the board's recommendation, calling for stronger disclosure around how the company's direct and indirect lobbying efforts align with the goals of the Paris Agreement.
- Ceres argues that the voting outcome at Delta, the fifth in a string of majority votes for similar resolutions, is confirmation that alignment of lobbying efforts with the goals of the Paris Agreement is now a baseline expectation for investors.

Investor support for the Delta resolution?

- BlackRock voted against the resolution because it considers the company already meets its expectations around corporate political lobbying disclosure.
- The resolution was supported by Norway's sovereign wealth fund, Norges Bank Investment Management on the basis that boards 'should account for material sustainability risks facing the company, and the broader environmental and social consequences of its operations and products' and on the grounds that the resolution was not considered to be unreasonable/overly prescriptive etc.

Broader context

According to Ceres, similar resolutions at the following companies have also received majority support.

- Phillips66: 64.4% support for a proposal filed by California State Teachers Retirement System
- Norfolk Southern Corp: 76.4% support for a proposal filed by Friends Fiduciary Corp
- ExxonMobil: 63.8% support for a proposal filed by BNP Paribas Asset Management
- United Airlines: 65.4% support for a proposal filed by Presbyterian Church USA

Ceres notes that a further six similar lobbying proposals were withdrawn at CSX, Duke Energy, Entergy, First Energy Corp, General Motors and Valero Energy after the companies agreed to improve their lobbying disclosure.

[Sources: Ceres media release 17/06/2021; BlackRock voting bulletin; Norges Bank voting bulletin; Delta Airline Form 8K]

Plastic waste: 45% of Kroger shareholders, including BlackRock, have voted in support of a shareholder plastic reduction resolution

- According to As You Sow, 45% of Kroger shareholders have backed a shareholder resolution (filed by As You Sow) calling on the grocery retailer to commit to reducing its use of plastic packaging and to disclose how much of its packaging currently escapes to the environment and the strategies and goals being implemented to reduce this/and its overall use of plastic packaging.
- In a voting bulletin, BlackRock states that it voted in support of the proposal at Kroger (against the board's recommendation) because 'we agree with its intent to address the business risk of plastic packaging and determined that support for it could accelerate Kroger's progress on this issue'. More broadly, BlackRock states that it is 'increasingly engaging on plastic pollution' because of the negative environmental and health impacts, and because it considers that companies that source/use plastic products in their operations 'face regulatory and reputational risks to their business'.

As You Sow's broader campaign

The result at Kroger has been welcomed by As You Sow as evidence of the rising level of support among shareholders on plastic use. For example:

- As You Sow observes that an identical resolution (to the resolution filed at Kroger) received 35% at the recent Amazon AGM.

- The group also points to the string of companies who have set/agreed to set plastic reduction goals as a result of engagement efforts. These include:
  - Target has committed to reduce its use of single-use plastic in its owned brand packaging by 20% by 2025 (following engagement with As You Sow)
  - Keurig Dr Pepper Inc agreed to cut use of virgin plastic for packaging by 20% by 2025.
  - Mondelez has committed to a 5% absolute reduction in virgin plastic, including a 25% cut in virgin plastic in its rigid plastic packaging
  - PepsiCo and Walmart have committed to reduce their virgin plastic use, but are yet to announce details (including the specific size of the cuts)
  - In 2019, Unilever committed to reduce its use of virgin plastic by 50% by 2025.

[Source: As you Sow media release 29/06/2021]

Successful engagement secures commitment from Wendy's to eliminate the routine use of 'medically important antibiotics' in its Canadian and US meat supply chains by the end of 2030

- Context: As You Sow filed a shareholder resolution with Wendy's in 2020, calling on the company to disclose its progress toward reducing 'important antibiotics in all of its meat supply chains'. The resolution was withdrawn following agreement by the company to commit to take action to reduce its antibiotic use.
- Wendy's has released an updated antibiotic use policy that includes commitments to:
  - report on the use of 'medically important antibiotics' and set targets and strategies to reduce antibiotic use over time, within US and Canadian beef and pork supply chains by 2024
  - set a goal to source 100% of its US and Canadian beef, chicken and pork from suppliers that prohibit the routine use of medically important antibiotics by the end of 2030
- As You Sow has welcomed this development, and in particular, the company's commitment to end (rather than merely reduce) routine use of antibiotics. As You Sow has called on other companies to follow suit.

[Sources: As You Sow media release 29/06/2021; Wendy's Antibiotic use policy]

In Brief | Push for board change: Having increased its stake in Myer to 15.8%, Premier Investments has renewed its attack on Myer, citing poor performance and alleging the existing board lacks expertise. Premier has called for the immediate resignation of the existing board stating that it will 'work with other shareholders to reconstitute the Myer Board with directors who have expertise across retail, property, logistics and e-commerce so that Myer can reverse its decline'

[Source: Premier Investments media release 06/07/2021]

Institutional Shareholders and Stewardship

Net Zero tipping point? 128 investors have joined the Net Zero Asset Managers Initiative in the six months since its launch

- Context: The Net Zero Asset Managers Initiative brings together an international group of asset managers who are committed to supporting investing aligned with net zero emissions by 2050 or sooner. You can find full details of the commitments made by signatories here.
- New signatories: 41 new investors representing $9 trillion AUD in assets have joined the Initiative bringing the total number of investor signatories who have joined in the six months since its launch to 128. You can find the full list of new signatories on the last page of the media release here.
- Significant influence: According to the Investor Group on Climate Change, total assets collectively managed by investor signatories now stands at $43 trillion, which equivalent to the combined GDP of the United States, China and United Kingdom ($42 trillion).
- CEO of the Institutional Investors Group on Climate Change Stephanie Pfeifer considers the rapid increase in the number of signatories joining the initiative as marking a 'fundamental tipping point across the investment sector and a significant boost in efforts to tackle climate change and decarbonise the global economy'.
- Signatories plan to publish details of their individual emissions reduction targets ahead of the COP 26 summit in November.

[Source: IGCC media release 06/07/2021]

BlackRock votes against directors and remuneration report at Boohoo citing supply chain and accountability/oversight concerns

Context

- In July 2020 allegations of worker exploitation in online retailer Boohoo's supply chain came to light. These allegations included the alleged failure to supply workers with personal protective equipment/enable social distancing during the COVID-19 pandemic and workers being paid less than the national minimum wage.
- An independent review commissioned by the company in response to the allegations concluded the allegations were 'substantially true', that the board knew of the issues but did not take sufficient action to address them and that the company's monitoring of its supply chain was inadequate.

- Boohoo accepted the recommendations of the independent review and outlined its plans to implement them (the Agenda for change). A progress report, prepared by the same independent reviewer who prepared the initial report, was released by the company in March 2021.
- The supply chain issues have had a significant negative impact on the company's share price.

AGM result

- The Boohoo plc AGM was held on 18 June 2021. All resolutions were passed at the meeting, however 20.20% of shareholders voted against the remuneration report and 11.96% of shareholders voted against the re-election of Boohoo co-founder and former co-CEO Carole Kane to the board.

BlackRock voting decisions

- BlackRock has issued a voting bulletin confirming that it voted against the say on pay resolution, against the re-election of Carole Kane and against the election of Shaun McCabe as a director. Each of these resolutions had board support.
- **Rationale for opposing the re-election of Carol Kane (the only female board member):** BlackRock states that it voted against Ms Kane's re-election to the board to 'signal our concerns about governance and board oversight related to the findings of the independent review'. BlackRock explains that it did so, against its usual practice - ordinarily its voting decisions around the election/re-election of directors are limited to the election/re-election of non-executive directors – because in this instance the non-executive directors on the ballot were appointed after the supply chain issues came to light. The vote against Ms Kane was also justified, BlackRock states, to reflect the need for board accountability for the governance/supply chain issues identified and to reflect the need for leadership change.

  > 'We note the extent to which the company's longer-serving leaders were implicated by the independent review in the company's failure to manage the issues in its supply chain. We also note that they should have moved more quickly to address these issues. Even though Ms. Kane is a co-founder of the company, given this history it does not seem appropriate for her to remain on the board, or necessary for her to be an effective executive. Her stepping down and being succeeded by a fully independent newly appointed director would facilitate a meaningful change that will assist with a renewed approach to board oversight…We also believe governance would be improved by having annual elections for all directors to provide shareholders the ability to hold relevant directors accountable and have urged the company to review its approach'.

- **Rationale for voting for the re-election of other executive directors:** BlackRock explains that it did not vote against the election of the two other executive directors standing for re-election who have been on the boards since 2013 and 2019 respectively, because it considered their 'input is important to the functioning of the board and it is important to have some leadership stability to address the controversies and ensure the company delivers on its commitments'.
- **Rationale for voting against the election of Shaun McCabe:** BlackRock states that it voted against the election of Shaun McCabe to the board because it considers he would have been over-committed – Mr McCabe currently serves as the CFO of another UK-listed company (Trainline Plc) and also serves as a non-executive director at a third (AO World Plc). This approach is consistent with BlackRock's proxy voting guidelines. Mr McCabe was elected with 93.04% support (6.96% against).

Opposing the remuneration report

- BlackRock voted against the remuneration report in light of concerns about the design of the new Management Incentive Plan (MIP) which ties significant awards to eligible executives to a stated increase in share price within a set timeframe. BlackRock considers the dependence on share price in the plan to be 'inappropriate for the executives in question, particularly M. Kamani (who is the company's largest shareholder with a holding of around 12.5%) and Ms Kane (who holds 2.6% of the share capital)'. BlackRock further comments that the decision to make vesting of awards dependent on the successful implementation of the 'Agenda for Change' (ie the company's response to the findings of the independent report into supply chain issues/governance) to be insufficient to allay concerns about the plan overall and the company's approach to its implementation.

  [Source: BlackRock voting bulletin Boohoo 18/06/2021; Results of AGM 18/06/2021]

Norges Bank has placed one company under observation, revoked the exclusion of three companies and ended observation of four companies

- Norway's sovereign wealth fund Norges Bank Investment Management has announced its decision to revoke the exclusions of Anglo American PLC, Empire District Electric Company, and Precious Shipping PCL (Precious Shipping).
- Precious Shipping has been excluded since 2018 due to what Norge Bank considers to be 'unacceptable risk that the company contributes to gross violations of human rights and severe environmental damage through its disposing of decommissioned vessels by sending them to be broken up for scrap on the beaches of Bangladesh and Pakistan'. The decision to revoke the exclusion was made because the company has not disposed of decommissioned vessels in this way since 2016.
- The fund has also decided to end observation of EDP – Energias de Portugal SA, Endesa SA, Portland General Electric Co (PGE) and Enel SpA.
- Hyundai Engineering & Construction Co Ltd has been placed under observation for a period of four years, as recommended by the Council of Ethics, due to what the Council considers to be 'unacceptable risk that the company contributes to or is responsible for gross corruption'. Despite the risk, the Council decided to recommend against excluding the company because it considers that it has taken steps to improve its anti-corruption efforts in recent years, has proven willing to assist the Council's inquiries and because the company acknowledges that 'some work remains to be done to further develop and implement the company's anti-corruption program'.

  On this basis, Norges Bank has recommended that the council monitor the company's anti-corruption activities and see whether any new allegations of corruption or other financial irregularities emerge. Should this occur, or if the company fails to demonstrate progress in the prevention, detection and response to corruption in its operations, the Council may recommend its exclusion.

  [Source: Norges Bank media release 01/07/2021]

Disclosure and Reporting

Greenwashing: Stronger regulatory expectations and new disclosure requirements for asset managers? IOSCO is seeking feedback on five proposals

The Board of the International Organization of Securities Commissions (IOSCO) has released a consultation report, chapter 6 of which sets out five recommendations aimed at strengthening asset managers' existing practices in the context of sustainability risk. More particularly, the recommendations are aimed at addressing various 'challenges' that IOSCO considers are contributing to the lack of comparability of sustainability related products and facilitating greenwashing.

Five recommendations for policy makers/regulators to consider

AREA	RECOMMENDATION
Stronger disclosure requirements	**Recommendation 1** recommends that securities regulators and/or policymakers consider 'setting regulatory and supervisory expectations for asset managers' around the development, implementation and disclosure of practices relating to sustainability related risks and opportunities.
	Recommendation 2 recommends that regulator/policy makers consider clarifying/expanding and/or creating new regulatory requirements/guidance to improve product level disclosure with the aim of assisting investors to better understand sustainability related products and material sustainability related risks for all products.
New supervisory and enforcement tools to enforce compliance	**Recommendation 3** recommends that regulators/policy makers 'have supervisory tools to ensure that asset managers and sustainability related products are in compliance with regulatory requirements' as well as 'enforcement tools to address any breaches'.
Consistent terminology	**Recommendation 4** recommends that regulators/policy makers consider 'encouraging industry participants to develop common sustainability finance related terms and definitions to ensure consistency throughout the global asset management industry'.
Promoting investor education initiatives	**Recommendation 5** recommends that securities regulators/policy makers consider 'promoting financial and investor education initiatives relating to sustainability, or, where applicable, enhance existing sustainability related financial and investor education initiatives'.

Timeline

IOSCO is seeking views on these five recommendations. The deadline for submissions is 15 August 2021.

[Sources: IOSCO media release 30/06/2021; IOSCO consultation report: Recommendations on Sustainability-Related Practices, Policies, Procedures and Disclosure in Asset Management]

In Brief | The case against setting global sustainability standards: SEC Commissioner Hester M Peirce has urged the IFRS Foundation 'not to wade into sustainability standard setting'. Among other things, Commissioner Peirce argues that taking this step would involve the Foundation in the 'inherently fraught and often political exercise of choosing sustainability issues for which standards are warranted' which would in turn risk 'tainting the IASB's financial accounting standards by undermining the apolitical nature of the organisation within which these standards are made'

[Source: SEC Commissioner Hester M Peirce: Statement on the IFRS Foundation's Proposed Constitutional Amendments Relating to Sustainability Standards 01/07/2021]

Meetings and Proxy Advisers

Where are we at? Modernising electronic execution and meeting requirements, the story so far…

An overview of the current status of proposed reforms to meeting and execution requirements

Despite broad support for modernising existing Corporations Act 2001 (Cth) requirements around execution of documents and convening of meetings, and despite the ongoing uncertainty arising from COVID-19 restrictions, legislating change even on a temporary basis, has proven not to be a straightforward process. A brief overview of the developments to date is below.

Developments to date

Expiration of temporary relief in March

Corporations (Coronavirus Economic Response) Determination (No. 3) 2020 (Determination No. 3) which operated to temporarily remove legal uncertainty around the validity of virtual meetings and to enable electronic execution of documents by company officers under section 127 of the Corporations Act 2001 (Cth) expired on 21 March 2021. You can find a short summary of the measures in the original determination (which were subsequently extended) here.

In consequence, pre-COVID requirements now apply. That is, the temporary changes to requirements in the Corporations Act 2001 (Cth) and regulations have reverted to their pre-COVID form.

ASIC's temporary no-action position

In light of the ongoing uncertainty around COVID-19 restrictions, and following the expiry of Determination No. 3, the Australian Securities and Investments Commission (ASIC) has adopted a temporary 'no-action' position on non-compliance with requirements around holding/convening electronic meetings (summarised here).

Importantly, the 'no action' position is a 'statement of regulatory intention'. As such, it does not preclude either:

- third parties (eg the Office of the Director of Public Prosecutions) from taking action in relation to the conduct covered by the no-action position
- a Court from holding that particular conduct infringes the relevant legislation.

Further, though the position may remain in place until 31 October 2021, it may be withdrawn earlier should Parliament pass relevant measures.

The position also does not cover electronic execution of documents.

As such, though ASIC has said the position provides business with 'certainty in the current environment', this is somewhat limited.

A Bill to temporarily extend relief

A government Bill - Treasury Laws Amendment (2021 Measures No. 1) Bill 2021 (TLA 1 Bill) (summary here) – which would have temporarily extended and expanded on the changes in Determination No. 3 to 15 September 2021 passed the House on 17 March 2021, but has so far failed to pass the Senate.

Parliament has now risen and the Senate is not due to sit again until 3 August 2021.

Passage of the TLA 1 Bill in its current form may be in doubt?

The Economics References Committee's initial recommendation was that the TLA 1 Bill be passed without amendment. You can find a summary of the Committee's initial views on the Bill here.

However, in a report released on 30 June 2021, the Committee recommended that only Schedule 1 (which relates to electronic meetings and electronic execution) be passed subject to two amendments. These are: 1) that the date at which the relief will sunset be pushed out to 'at least six months from the Bill's date of Royal Assent'; and 2) that the government finalise the drafting of permanent provisions within six months of the date of Royal Assent of the TLA 1 Bill.

The Committee further recommended that the proposed permanent relaxation of continuous disclosure requirements in Schedule 2 not be passed.

However, the Committee was not unanimous in this view. Dissenting coalition senators recommended that the Bill be passed unamended.

Consultation on another separate Bill – this time proposing to make the changes permanent

On 25 June 2021, the government released exposure draft legislation for consultation – [exposure draft] Treasury Laws Amendment (Measures for Consultation) Bill 2021: Use of technology for meetings and related amendments – proposing to permanently enable electronic execution of company documents, distribution of meeting-related materials and use of technology in meetings (summary here).

A point to note is that the draft Bill proposes to permanently enable companies to elect to hold meetings in hybrid form, but will only allow them the option to hold wholly virtual meetings where this is 'expressly permitted or required' in their constitutions. This means that if legislated, companies who wish to have the option to hold virtual meetings will need to amend their constitutions.

Importantly, the draft Bill assumes the passage of Schedule 1 of the TLA 1 Bill in its current form ie it assumes that temporary measures to enable companies and registered schemes to hold virtual or hybrid meetings and to electronically sign documents until 15 September 2021 will be legislated.

If passed, the proposed changes in Schedule 1 of the draft Bill would not alter this position – ie companies would continue to be able to hold wholly virtual meetings until the sunset date in TLA 1 Bill.

It's proposed that the measures concerning hybrid meetings and use of technology to facilitate meetings in the draft Bill (if passed), would then apply permanently from 15 September 2021.

Longer term outlook for reform?

The two Senate Committee reports on TLA 1 Bill found there is broad stakeholder support for the measures included in Schedule 1 (which relate to electronic meetings and electronic execution) at least on a temporary basis, as well as the necessary political support from opposition parties.

However, the proposed changes in Schedule 2 (relating to the permanent relaxation of continuous disclosure requirements) remain controversial and the second of the Committee's reports expressly recommends that the measures should not be legislated.

It remains to be seen whether the government will bow to pressure to split the TLA 1 Bill to enable passage of the less controversial reforms in Schedule 1 and if so, whether temporary relief will be extended as recommended by the Committee.

The eventual form of the draft Bill proposing to enact permanent change will necessarily be impacted by this.

The government has indicated its intention to take steps to progress reform when parliament resumes, signalling that should the TLA 1 Bill fail to pass, 'work' is 'being undertaken to ensure that these amendments can be progressed in the Spring sitting period'.

Where does this leave us?

For now at least pre-COVID requirements now apply, though some entities may be opting to rely on ASIC's temporary no-action position on electronic meetings in the immediate term.

Markets and Exchanges

FCA consults on proposed changes to the UK listing regime

As part of the its response to the UK Listing Review conducted by Johnathan Hill (Hill Review) and the Kalifa Review of UK Fintech, the UK Financial Conduct Authority (FCA) is conducting a two part consultation seeking feedback on: a) specific proposed reforms intended to improve the effectiveness of the UK listing regime; and b) whether further reform to modernise the regime would be useful and if so, what changes would add most value.

Specific proposals

Specific changes on which the FCA is seeking feedback include the following.

- **Reducing potential barriers to issuers listing** by:
  - Allowing a 'targeted form' of dual class share structures within the premium listing segment. The measure is intended to 'encourage innovative, often founder-led companies onto public markets sooner, and so broaden the listed investment landscape for investors in the UK'.
  - Lowering the amount of shares an issuer is required to have in public hands (ie free float) from 25% to 10%
  - 'Showing more willingness to allow waivers for the coverage of the 3-year track record' (ie the requirements in Listing Rule 6.2).

  The FCA states that the key objective of these proposed changes is to encourage and make it easier for private companies to list earlier, thereby expanding the opportunities available to investors.

- **New safeguards:** To address increased risk arising from the proposed changes, the FCA also proposes to increase the minimum market capitalisation threshold for both the premium and standard listing segments for shares in ordinary commercial companies from £700,000 to £50 million

- **Simplification of requirements:** The FCA proposes to make 'minor changes' to the Listing Rules, Disclosure Guidance and Transparency Rules and the Prospectus Regulation Rules which are ;intended to simplify requirements and reflect changes in technology and market practices'.

The FCA comments that the proposed changes have been designed to address specific issues that stakeholders have advised are affecting decisions currently being made by prospective issuers. The FCA considers that taken together the proposed changes will reduce the barriers and the costs to companies considering listing and 'encourage more companies to become or stay listed in the UK'.

Views on whether further changes are necessary

More broadly, the FCA is also seeking views on the overall structure of its listing regime and whether further changes could improve the effectiveness/modernise the existing regime.

Timing and next steps

The deadline for submissions on the proposals is 14 September 2021.

- **Specific proposals:** Subject to feedback and FCA Board approval, the FCA plans to make relevant rules before the end of the year.

- **On the question of broader changes to the regime,** the FCA states that it may conduct a further consultation on further reforms to the listing regime depending on the feedback received.

[Sources: FCA media release 05/07/2021; Primary Markets Effectiveness Review Consultation Paper CP21/21 July 2021]

Regulators

ACCC has implemented a new organisational structure

As at 1 July 2021, the Australian Competition and Consumer Commission (ACCC) adopted a new organisational structure. The new structure is intended to more closely align the regulator's divisions with its strategic objectives and includes the establishment of new divisions including dedicated Consumer and Fair Trading, Competition, and Consumer Product Safety Divisions.

Other divisions include: Mergers, Exemptions and Digital; Infrastructure; Consumer Data Right Division; Specialist Advice and Services; and Corporate.

[Source: ACCC update 28/06/2021]

Financial Services

Top Story | 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. Some changes flagged by the government to be progressed by 30 June 2021 have yet to occur.

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

The table was last updated on 29 June 2021 and can be accessed on our website here.

ABA launches review of the Banking Code

The Australian Banking Association (ABA) has launched an independent review of the Banking Code to ensure its ongoing effectiveness.

A consultation note highlights particular areas of focus for the review and requests stakeholder views on certain issues. The full terms of reference for the review are here.

Key Points

- **Independent Reviewer:** The review will be led by the current Chair of the Commonwealth Grants Commission Mike Callaghan. Mr Callaghan will be assisted by a customer advisory panel which will include two consumer representatives and one small business representative.

Key focus areas

Scope

The review is not intended to revisit the reasons/rationale underpinning the recent extensive revisions to the Code. Rather the focus is intended to be on assessing whether the changes have had their intended effect and identifying areas for further improvement.

In particular, the review will assess the extent to which banks are living up to their commitments under the Code/whether the Code has been effective in changing banks' behaviour, and on the issue of enforcing Code compliance.

On this point, the consultation paper comments.

> 'Commissioner Hayne noted that if industry codes are to be more than public relations puffs, the promises must be enforced. While customers will have confidence in the Code if they knew commitments could and would be enforced, their trust in the banking industry may be even stronger if they were confident that commitments were being honoured, without the need for enforcement'.

Enforceable Code Provisions

The review will consider the new 'enforceable code provisions' regime introduced by the Financial Sector Reform (Hayne Royal Commission Response) Act 2020, following the Hayne Commission and 'the kind of provisions that the ABA and ASIC should consider in their process of identifying any provisions that should be designated under the regime'.

In the consultation note, the ABA suggests that possible examples of provisions that could be designated as enforceable might include: a) provisions which contain commitments by the banks to implement systems, controls, training and monitoring to ensure that they honour the commitments they make to customers in the Code; and b) provisions of the Code which 'underline all the commitments in the Code along with all aspects of how banks deal with their customers' eg the commitment in Clause 10 for banks to engage with their customers 'in a fair, reasonable and ethical manner'.

The role of the Banking Code Compliance Committee (BCCC)

The Review has also been asked to consider whether there is a need to adjust the duties/powers of the BCCC including whether: a) the sanctions available to the BCCC remain appropriate; and b) whether the Charter is the appropriate instrument to record the BCCC's duties and powers.

The definition of 'small business' in the Code

The ABA notes that it has accepted all nine recommendations of the 2020 Independent Review of the definition of small business in the Banking Code of Practice (Pottinger Review), including the recommendation that the threshold amount for total credit outstanding that a business may have (in order to fall within the definition of small business) should be lifted from $3 million to $5 million.

As the changes recommended by the Pottinger Review are already planned to be included in the revised Code, the issues considered by the Pottinger Review and the Pottinger Review recommendations are outside of scope of the current review, unless 'there is a compelling reason to do so'.

An outstanding Pottinger Review recommendation (to amend the definition of 'Related Entities') will be undertaken by legal experts engaged by the ABA.

Other focus areas

The review has also been asked to 'give specific attention' to the following areas.

- Whether amendments to the Code are needed to reflect changes to laws and/or regulations covering banking services to individual and small business customers eg new obligations flowing from implementation of the Hayne recommendations and 'any changes to responsible lending obligations'.
- The extent to which existing Code provisions meet consumer and community expectations, particularly expectations around banks:
  - acting fairly, reasonably and ethically
  - resolving complaints/disputes
  - supporting customers experiencing vulnerability
  - making customers aware of the Code including making them aware of their eligibility for basic, low fee/no fee bank accounts
  - providing hardship assistance to individuals/small businesses experiencing financial difficulties
  - supporting customers in times of crisis (eg COVID-19 pandemic). On the Review has been asked to draw on 'lessons learned from any consequent impact on banks' ability to comply with the Code and having regard to the utility of the COVID-19 Special Note'.
- How frequently the Code should be reviewed
- 'Any other matters required to be considered under ASIC's Regulatory Guide RG 183'
- Any 'particular matters of concern raised by stakeholders and considered by the reviewer to be important to address'.

Proposed timing and next steps

- Submissions on the issues rasied in the consultation note are due by 6 August.
- The planned completion date for the review process is 31 October 2021 with the final report due to be provided to the ABA by 30 November 2021. The ABA then plans to consult with members on the proposed changes.
- Following this process, the ABA plans to apply to ASIC for approval of the changes by 31 March 2022 with a view to securing approval by 30 June 2022. The intended commencement date for the revised Code is the later of either six months after ASIC notifies its approval or 1 January 2023.

[Sources: ABA media release 06/07/2021; Terms of Reference; Consultation Note]

Hayne recommendation 5.5 (implementation of Sedgwick review): The ABA announced that the final Sedgwick Review has confirmed the recommended reforms have been implemented

Context

- The Sedgwick Review (or Retail Banking Remuneration Review), was an independent review of remuneration practices in retail banking commissioned by the Australian Banking Association (ABA) in 2016 and completed in 2017 by Stephen Sedgwick. The review made 21 recommendations to tackle certain remuneration practices that, if left unaddressed were considered to 'carry an unacceptable risk of promoting behaviour that is inconsistent with the interests of customers'. Commissioner Hayne provides a brief summary of the recommendations in his final report at p343-344.
- Hayne Commission recommendation 5.5 recommended that banks fully implement the recommendations of the Sedgwick Review as 'an important first step towards improving front line remuneration practices.'
- In 2020, the ABA commissioned Mr Sedgwick to undertake an assessment of the 'scale and effectiveness' of implementation of his 21 recommendations. This final report has now been released.

Final report into implementation released

The report concludes that 'with few exceptions, the industry's policies have changed in line with the letter and intent of the 2017 Recommendations for staff in-scope for this Review'.

The Australian Banking Association has welcomed this as evidence that Hayne recommendation 5.5 is now 'complete' and that 'real change has occurred'.

Appendix B at p94 of the report provides a summary of Mr Sedgwick's overall assessment of progress against the original recommendations.

Some key takeaways

Areas of 'partial compliance'

Mr Sedgwick concludes that 'some banks are not fully compliant' across all of the original recommendations. He gives several examples of areas where 'partial compliance is most prevalent'. These areas are as follows.

- **Continued use (or perceived use) of leader boards?** Recommendation 12 of the original Sedgwick report recommended that 'each bank reconsider what use is made, if any, of leaderboards, recognition programs and campaigns as well as any other methods that have similar effect (including informally in branches or call centres) and ensure any continuing role in using these methods is consistent with the intention to de-emphasise sales relative to ethical behaviour and customer outcomes'. The final report flags that that 'while all but one bank reported that leader boards do not exist at their bank, over 30% of staff across the industry reported that leader boards exist in the survey – demonstrating the disconnect in the perceptions of executives and perceptions of frontline staff'.
- **Branding sales measures as productivity measures to meet the 33% cap on use of finanical measures:** The final report found that though most banks reported that scorecards used to assess performance gave 33% (or less) weighting to financial measures (consistent with Sedgwick recommendation 4), in practice some banks are using 'productivity' measures that would 'more accurately' be described as sales measures due to their dependence on a sale being made (eg the number of customer needs met). Mr Sedgwick considers that if these measures are treated as sales measures, then 'the weight of financial measures for these banks is greater than the recommended 33%'. One bank was flagged in the Review as continuing to accord financial measures more than 33% of the overall performance assessment for home lenders (though the bank in question is currently reviewing this).
- **Customer measures:** Recommendation 5 of the original Review recommended that all customer metrics be 'genuinely customer centric and tailored to the role being assessed and progressively reflect a focus on customer outcomes not just customer loyalty/satisfaction'. The Review found that three banks are not fully compliant with the recommendation because they continue to use 'productivity measures that are classified as customer measures, but are arguably financial in nature, which are included alongside other genuinely customer centric measures'. Mr Sedgwick comments that 'has been little progress as an industry to measure customer outcomes rather than customer satisfaction or advocacy' despite the incorporation of customer complaints data and verbatim feedback.

Assessment of progress towards implementing other key recommendations

Use of sales based incentives/targets (virtually) eliminated

Recommendation 2 of the original Review recommends that banks remove variable reward payments/incentives that with direct links to sales/achievement of sales targets. The review concluded that this has now been implemented (with the exception of home lenders at one bank).

Banks are now assessing performance against a range of factors and limiting the weight given to financial metrics in this assessment

Recommendation 3 recommended that 'eligibility to receive any variable reward payment should be based on an overall assessment against a range of factors that reflect the breadth of the responsibilities of each role' and recomemndation 4 recommended that the weighting given to finanical measures not exceed 33% in the scorecard context.

The Review concluded that across all banks, eligibility to receive any variable reward payment is now based on an overall assessment against a range of factors. However, not all banks have capped the use of finanical metrics in scorecards at 33%.

Use of accelerators has ceased

The Review concludes that recommendation 6 which recommended that 'credible behavioural or equivalent values gateways be applied to determine whether an individual can access any variable rewards to which they might otherwise be entitled' has been fully implemented.

Likewise, the Review concludes that recommendation 7 has been fully implemented. Recommendation 7 recommended that 'variable payments no longer include: accelerators related to financial measures; accelerator-like modifiers related to financial measures; other mechanisms related to financial measures that have such an accelerator-like effect on the value of variable rewards available; and financial gateways, including but not limited to those that relate to the number or value of cross sells'.

Banks have reviewed their culture and performance management systems

Recommendation 9 recommended tht 'each bank formally examine its workplace culture and institute formal processes to redress any conscious or unconscious bias towards sales in preference to ethical behaviour and customer service'.

Recommendation 10 recommended that 'each bank examine its performance management system and make changes as necessary to ensure that the embedded signals and incentives to staff are aligned with Recommendations 2 to 8'.

The Review found that banks have reviewed their culture and have reviewed or are reviewing their perrformance management systems to 'embed signals and incentives to staff aligned with Recommendations 2-8'. However, Mr Sedgwick comments that reviews of bank culture, in some cases 'do not appear to have focused on assessing whether there is a bias towards sales in preference to ethical behaviour and customer service'.

Banks have invested in leadership training

Recommendation 11 recommended that every bank ensure its managers 'reflect predominantly an ethical and customer focus when communicating with staff, exercising any discretion while managing performance, and in allocating variable reward payments'.

All banks reported that this recommendation has been implemented. The Review comments that many banks have invested in leadership programs to build managers' capability in coaching and performance assessments. Mr Sedgwick cautions that care should be taken to ensure that these training programs 'do not reflect a focus on sales outcomes'.

Financial measures are still the key focus in (some) banks' approach to executive remuneration

Recommendation 13 recommended that 'consistent with the objectives of the recommendations for frontline staff, the variable reward payment and performance management arrangements of all senior and (retail bank) middle level executives be based on: a) their overall performance against a number of measures that reflect the nature and breadth of their role; and b) customer oriented, ethical behaviour and non-financial measures accounting for the dominant factors in that assessment'.

The Review concluded that though 'most executive scorecards balance financial measures with risk, customer and people measures' in some instances, the primary focus continues to be on financial measures which are accorded 50% (or more) of the overall weighting.

Transparency around how retail staff are remunerated

Recommendation 14 recommended that boards and CEOs 'visibly and effectively oversee the implementation of these recommendations for at least the next five years and report publicly, in their Annual Report to shareholders, for example, on how retail staff are remunerated, and their performance assessed' and 'ensure that effective, safe channels are in place to obtain feedback from frontline staff about their perceptions of the effectiveness of efforts to reform the bank's culture, performance management and remuneration arrangements, including in respect of whistle-blower arrangements'.

The Review found that all banks have publicly reported on how retail staff are remunerated and report that they have 'effective and safe whistle-blower channels where staff can provide feedback, anonymously if required'.

Review of specific governance arrangments

- **Retail (non-mortgage) brokers:** Recommendation 16 recommended that banks review their 'governance arrangements with retail (non-mortgage) brokers to ensure their practices are consistent with the recommendations of this review'. The Review concludes that all banks have examined these arrangements to ensure alignment, though this was not relevant for most banks.
- **Introducers and Referrers:** Recommendation 20 recommended that banks examine their governance arrangements with respect to introducers and referrers to ensure that their 'existing practices are appropriate'. Recommendation further recommended that ASIC should 'investigate whether the upfront commission paid to Introducers and Referrer is justified'. The Review found that every bank that pays incentives to introducers and referrers has reviewed its governance arrangement and 'uplifted processes and controls to ensure they meet minimum conduct and compliance standards'.
- **Franchisees:** Recommendation 21 recommends that 'banks that provide products or services through franchisees examine their governance and, as appropriate, remuneration arrangements and seek to make changes that are consistent with the recommendations of this Review'. The Review concluded that 'all banks with franchisee networks have examined their governance and remuneration arrangements to ensure these are consistent with the recommendations of this Review'.

[Sources: ABA media release 01/07/2021; Final Report: Retail banking Remuneration Review Final Report 2021]

The BCCC has published updated Operating Procedures

The Banking Code Compliance Committee (BCCC) has published an updated version of its Operating Procedures which cover (among other things) the BCCC's approach to inquiries, investigations, making a finding, imposing sanctions.

The changes came into effect on 1 July 2021.

The Operating Procedures have been updated to:

- clarify the steps the BCCC will undertake when imposing a sanction to name a bank
- explain the BCCC's role/involvement in any corrective actions and/or customer remediation a bank might undertake as a result of non-compliance with the Code
- include additional procedures to meet the requirements set out in clause 13 of the Charter.

[Source: BCCC media release 06/07/2021]

Insurance in Super Voluntary Code of Conduct replaced with new guidance documents, consumers groups have expressed disappointment in the development

The Association of Superannuation Funds of Australia (ASFA), the Australian Institute of Superannuation Trustees (AIST) and the Financial Services Council (FSC) have announced their decision to replace the Insurance in Superannuation Voluntary Code of Practice with two new guidance documents setting out respectively, principles intended to improve claims handling and to improve outcomes for vulnerable members. The new guidance notes are attached to the announcement and can be viewed here.

The announcement states:

'The joint decision by the Voluntary Code Owners, ASFA, AIST and FSC, to replace the Voluntary Code with guidance maintains consumer protections and recognises that the other key components of the Voluntary Code have been almost entirely overtaken by recent legislative and regulatory reform'.

Consumer groups Super Consumers Australia and Financial Rights Legal Centre have raised concerns

In a statement, Super Consumers Australia and the Financial Rights Legal Centre expressed disappointment the decision to replace the Voluntary Code with the new guidance documents, describing it as a rejection by industry of the Productivity Commission and the Hayne Commission recommendation that industry codes become enforceable.

[Note: This appears to be a reference to Hayne recommendation 4.9 which recommended that 'In respect of the Life Insurance Code of Practice, the Insurance in Superannuation Voluntary Code and the General Insurance Code of Practice, the Financial Services Council, the Insurance Council of Australia and ASIC should take all necessary steps, by 30 June 2021, to have the provisions of those codes that govern the terms of the contract made or to be made between the insurer and the policyholder designated as 'enforceable code provisions'.]

Financial Rights Legal Centre CEO Karen Cox said

'Replacing the objective of an enforceable code with a couple of "papers" sends a message to consumers, governments and the public that the superannuation industry is not serious about creating and improving standards that consumers can rely on…What the industry needs is a robust independent monitoring of their culture through a mandatory industry wide code, reliance on current structures is insufficient to improve consumers experiences'.

[Sources: Joint media release: The Association of Superannuation Funds of Australia (ASFA), the Australian Institute of Superannuation Trustees (AIST) and the Financial Services Council (FSC) 01/07/2021; AIST, FSC, Financial Rights Legal Centre media release 01/07/2021]

Open banking: Treasury is consulting on draft amendments to the CDR Rules

Treasury has released exposure draft amendments to the Consumer Data Right rules for consultation. The proposed changes include:

- giving consumers the option to share their CDR data with 'trusted advisers' (eg their lawyer, accountant, tax practitioner, BAS agent, licensed financial adviser or planner, financial counsellor or residential mortgage broker) or to share limited 'insights' obtained from CDR data
- broadening access to the system by allowing an accredited person to sponsor other parties to become accredited or to allow their agents to participate in the system
- establishing a single consent data sharing model for joint accounts

Timing: The deadline for submissions is 30 July 2021.

Announcing the consultation, Minister for Superannuation, Finaincal Services and the Digital Economy Jane Hume said that the changes will 'accelerate the benefits' of open banking for consumers and to reduce cost barriers to participation for service providers.

Ms Hume emphasised that open banking is only the first phase of an 'economy wide reform' with the CDR set to expand to energy consumers next.

[Sources: Treasury Consultation: Consumer Data Right rules amendments (version 3); Draft amendments: Competition and Consumer (Consumer Data Right) Amendment Rules (No. 1) 2021; Explanatory materials; Exposure draft rules – markup to current rules; Minister for Superannuation Financial Services and the Digital Economy Jane Hume media release 01/07/2021]

The volume of AFCA complaints overall has fallen 12%, though complaints about personal transaction accounts and electronic banking increased 48% and 76% respectively according to AFCA data

The Australian Financial Complaints Authority (AFCA) has provided an update on complaints received over the 12 months to 30 June 2021.

Key Takeaways

- AFCA received 70,510 complaints over the period. This is a 12% fall in the number of complaints in the previous year.
- Banks were the most complained about category of financial firm with 26,281 of the total 70,510 concerning banks.
- The number of COVID-19-related complaints received has slowed:
  - Complaints involving financial difficulty fell almost 40% on last year. AFCA Chief Ombudsman David Locke attributes this to the 'positive response from government and industry to the impact of COVID.
  - An average of 692 COVID-19 related complaints were received each month in 2020-21, down from an average of 1253 a month during the period March to June 2020.
  - Over the past 12 months, 165 COVID-19 related business interruption insurance complaints were received. AFCA expects that this will increase over the coming year once the second test case is decided.
  - The number of travel insurance complaints fell 22% over the last 12 months, which AFCA attributes to COVID-19 related travel restrictions.
  - The number of superannuation related complaints fell 31% over the 12 months to 30 June 2021, following a jump in complaints last year associated with the government's early release of super scheme.
- The top three most complained about products over the last 12 month period were: 1) credit cards (accounting for 14% of complaints); 2) home loans (9% of complaints); and personal transaction accounts (8% of complaints).
- The top five most complained about issues with credit cards were: 1) complaints concerning default listing (3,738 complaints); 2) failure by firms to respond to requests for assistance (2678 complaints); 3) service quality (2554 complaints); 4) incorrect fees/costs (1894 complaints); and 5) 'responsible lending' (1698 complaints).
- AFCA highlights that over the last twelve months there was an increase in both:
  - complaints concerning personal transaction accounts (up 48% on last year)
  - complaints about electronic banking increased (up 76% on last year)
- Pattern of 'poor conduct': Mr Locke flagged the 'pattern of poor conduct' connected with the sale of funeral insurance in regional and remote Indigenous communities as an troubling. AFCA observes that 98% of funeral insurance complaints concerned the same funeral insurance provider.

[Sources: AFCA media release 05/07/2021; AFCA complaints snapshot 1 July 2020 to 30 June 2021]

Online YourSuper comparison tool launched

- The government's YourSuper online comparison tool (part of the Your Future, You Super reform package) is now live and can be accessed via MyGov and/or on the ATO website.
- Rationale: The tool has been designed to make it easier for consumers to assess and compare the performance of various MySuper products, to facilitate consolidation of multiple accounts, and to support consumers in making informed decisions about where their superannuation is invested.
- The tool ranks 80 MySuper products by fees and net returns (based on APRA data). Consumers who use the personalised version through MyGov have access to links to assist in the consolidation of their accounts. There are plans for the scope of products included to be expanded next year.
- The 'easy to use' measure has been welcomed by Super Consumers Australia CEO Xavier O'Halloran. Mr O'Halloran also flagged the group's intention to monitor how consumers use the tool, with a view to making recommendations for improvement. The group also flagged that 'important factors like risk and bundled insurance' would be areas of research focus going forward.

[Sources: Your Super comparison tool on the ATO website; Super Consumers Australia media release 01/07/2021]

ASIC is consulting on amendments to Market Integrity Rules

Overview: ASIC consultation paper CP 342 Proposed amendments to the ASIC market integrity rules and other ASIC-made rules

The Australian Securities and Investments Commission (ASIC) is consulting on proposed amendments to the ASIC Market Integrity Rules (Securities Markets) 2017 and the ASIC Market Integrity Rules (Futures Markets) 2017. ASIC also proposes to make other amendments to market integrity rules made under s798G of the Corporations Act 2001 (Cth).

The deadline for submissions is 6 August 2021.

Proposed changes

ASIC PROPOSALS		RATIONALE FOR THE PROPOSED CHANGE
Securities Markets Rules	**Education requirements for accredited derivatives advisers** ▪ ASIC proposes to replace Part 2.4 of the Securities Markets Rules with principles-based rules requiring market participants to ensure that: a) their financial advisers are 'suitably qualified and experienced before providing personal advice to retail clients in relation to derivatives; and b) their qualifications relevant to providing advice on derivatives is noted on ASIC's Financial Advisers Register. ▪ The effect of this is that market participants will take on responsibility for assuring themselves that any individuals involved in providing derivatives advice on their behalf to retail clients has the relevant skills, knowledge and experience to perform their role.	▪ ASIC states that the removal of prescriptive requirements is aimed at reducing the administrative burden on market participants while still ensuring derivatives advisers are adequately trained.
	Changes to pre-trade transparency exceptions: trades with price improvement ▪ ASIC proposes to amend Rule 6.2.3 of the Securities Markets Rules to clarify that a trade with price improvement: a) cannot include orders from more than one client on both sides of the transaction; and b) cannot have multiples parties on both sides of the transaction where the participant is acting as 'principal'.	▪ ASIC states that the proposed change is intended 'provide greater certainty to participants and reduce the risk of inconsistent application of the rule'.
	Confirmations for non-retail clients in respect of derivatives market contracts ▪ ASIC proposes to amend Rule 3.4.3 of the Securities Markets Rules to remove the requirement for market participants to give the notifications required by Rule 3.4.3(1)(b) if the market transaction is in respect of a financial product which is a derivatives market contract. ▪ The change would made permanent the effect of ASIC Market Integrity Rules (Securities Markets) Class Waiver 2018/303.	▪ ASIC states that the proposed change should 'ensure that market participants do not incur unnecessary costs or regulatory burden associated with complying with client reporting obligations that have no demonstrable regulatory benefit'.
	Confirmations for non-retail clients in respect of derivatives market contracts ▪ ASIC prposes to amend Rule 7.4.4 of the Securities Market rules to make clear that 'intermediary ID data is required for all orders and transactions: a) submitted by the AFS licence holder as intermediary for the underlying client; and b) if there is an arrangement in place under which the AFS	▪ The proposed change is intended to remove any uncertainty around when the intermediary ID is required to be provided by participants.

ASIC PROPOSALS		RATIONALE FOR THE PROPOSED CHANGE
	licence holder is permitted to submit trading messages into the market participant's system as intermediary for its own clients'.	
Futures Markets Rules	**Replacing the prohibited employment rule with a 'good fame and character' test** ▪ ASIC proposes to replace the existing prohibited employement condition in Rule 2.2.3 of the Futures Markets Rules with a 'good fame and character test'. This would 'mirror' Rule 2.1.4 of the Securities Markets Rules. ▪ ASIC also proposes to extend the 'good fame and character test' to include employees and other persons involved in the business of a market operator (Rule 4.4.1).	▪ ASIC considers that the current drafting of Rules 2.2.3 and Rule 4.4.1 does not relfect the objective of the rules 'to promote due diligence by market participants and market operators in the employment of their staff'. ASIC considers that the proposed introduction of the 'good fame and character test' will 'better satisfy the objective of Rule 2.2.3 and ensure that appropriate obligations attach to futures markets participants in the employment and retention of staff'. ▪ With respect to the changes to 4.4.1, ASIC considers that the proposed extension of the 'good fame and character test' to market operators 'formalises ASIC's expectations with respect to market operators and provides consistency in our approach across market participants and market operators'.
	New suspicious activity reporting requirements ▪ ASIC proposes to add Rules 3.6.1 and 3.6.2 to the Futures Markets Rules. These new rules would introduce new requirements for market participants to notify ASIC (in a prescribed form) as 'soon as practicable' if they have reasonable grounds to suspect that someone is: a) trading with inside information; or b) engaging in manipulative trading. ▪ The new reporting requirements would apply unless the same information has already been reported to AUSTRAC. ▪ It's proposed that market participants would be required not to disclose to other parties that they have notified ASIC of suspicious activity.	▪ ASIC considers that 'reproducing the current suspicious activity reporting requirements across both the securities and futures markets will result in standardised reporting requirements for participants of both markets'.
	Modernising client authorisation rules for block trade and exchange for physical transactions ▪ ASIC proposes to remove the requirement in Rule 3.4.4 of the Future Markets Rules requiring client authorisations to be 'in writing' and that authorisation must include acknowledgements from the client. ▪ ASIC also proposes to amend Rule 3.5.3 of the Futures Markets Rules to remove the requirement that client authorisations must be 'in writing'.	▪ The proposed changes are intended to update 'legacy rules' which impose an 'unnecessary impediment' to the 'efficient operation of the market in circumstances where other means of communication may be used by a client to provide instructions'.
Merits review of ASIC	▪ ASIC proposes to amend the Securities Markets Rules to provide that certain decisions (listed in Appendix 1) would be subject to	▪ ASIC considers that, consistent with the 1999 guidance issued by the Administrative Review Council and the Attorney-General's Deparment,

ASIC PROPOSALS		RATIONALE FOR THE PROPOSED CHANGE
decisions under the Securities and Futures Markets Rules	merits review by the Administrative Appeals Tribunal (AAT). Appendix 2 sets out the decisions that ASIC proposes would not be reviewable. ▪ ASIC also proposes to amend the Futures Markets Rules to provide that a decision listed in Appendix 3 would be subject to merits review by the AAT. Appendix 4 sets out the decisions that ASIC proposes would not be reviewable.	administrative decisions that 'will or are likely to affect the interests of a person should be subject to merits review'. On this basis, ASIC considers that 'most decisions' (except 'legislation-like' decisions') made by ASIC under the Securities Markets Rules and the Futures Markets Rules shoujld be subject to merits review.
Granting relief	▪ ASIC proposes to amend Rule 1.2.1 of the Market Integrity Rule Books to clarify that ASIC may, by way of disallowable legislative instrument, relieve a person from the obligation to comply with the market integrity rules or withdraw that relief.	▪ ASIC considers that amending the rule to require relief to be made only by way of registered legislative instrument will have two main benefits: a) it will remove any doubt as to whether s14(2) of the Legislation Act is engaged; and b) it will increase transparency around waivers granted by ASIC as they will be publicly available.
Penalty amounts	▪ ASIC proposes to repeal outdated references to penalty amounts under each of the ASIC-made rules and all notes stating that there is no penalty for breach of an ASIC-made rule.	▪ The penalty amounts specified in the ASIC-made rules have been superseded by the penalties under the Corporations Act.

[Sources: ASIC media release 30/06/2021; ASIC consultation paper CP 342 Proposed amendments to the ASIC market integrity rules and other ASIC-made rules]

Risk Management

Members urge super fund to strengthen its management of climate risk

The Australian Conservation Foundation has issued a statement announcing the two QSuper members have written (through their legal representatives) to the QSuper board Chair Don Luke, calling on the fund to strengthen its climate risk management policies. Specifically, the members have called for:

- clarification of the steps the fund is taking to achieve net zero emissions across its portfolio (including plans to divest from existing assets)
- an explanation for the delay in quantifying the fund's carbon exposure
- a commitment to fully disclosure the entirety of its equity holdings by 31 December 2021

This follows a letter sent by 141 QSuper members to the fund in March 2021, urging action on climate risk, including divestment of high-emitting assets; disclosure of the fund's emission reduction strategies and climate engagement strategies; and disclosure of the analysis the fund has conducted on climate change risk.

The calls on QSuper to step up their actions to manage climate risk also follow the recent case against REST (full text of decision here, summary/discussion of implications on our website here) which resulted in the fund committing to align its portfolio with net-zero by 2050 and to take active steps to measure and manage material climate and other ESG-related risks.

[Source: Australian Conservation Foundation media release 01/07/2021]

In Brief | Minister for the Environment Sussan Ley has announced the launch of the new Australian Climate Service, partnership between the Bureau of Meteorology, Geoscience Australia, CSIRO and Australian Bureau of Statistics which is designed to 'connect and leverage the Commonwealth's extensive climate and natural hazard information' into a single national view' and enable better preparation and management of natural disasters.

[Sources: Minister for the Environment Sussan Ley media release 01/07/2021; Australian Climate Service website]

In Brief | The government has announced the commencement of the first phase of a staged ban on exports of plastic waste. From 1 July 2021, exporting mixed waste plastics is banned. That is, only waste plastics that have been sorted into single resin or polymer type or processed with other materials into processed engineered fuel will be able to be exported.

[Sources: Minister for the Environment Sussan Ley media release 01/07/2021; Department of Agriculture, Water and the Environment: Plastic Waste]

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