Governance News

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

23 June 2021

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Diversity

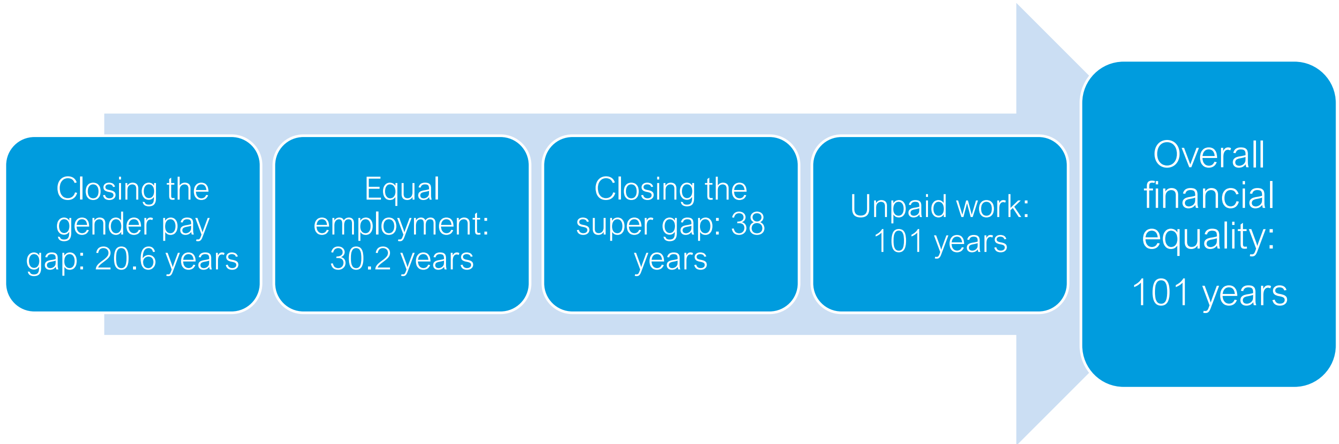
Still 101 years away from overall financial gender equality, Financy has called for comment on a proposed an Economic Equality Pact 2030

Financy Women's Index March 2021

Financy's has released its latest report tracking progress towards overall financial gender equality. The report focuses on progress in seven key areas: unpaid work; field of education; employment; underemployment; the gender pay gap; women on boards; and the superannuation pay gap.

Some Key Takeaways

- The report found that though progress was made over the last quarter in some individual areas, including paid workforce participation, the goal of overall financial gender equality remains stable at 101 years (based on the time needed to close the unpaid work gap).



- Increased paid workforce participation:
  - The report found that there was a 'significant and record increase' in the overall participation of women in paid work over the March quarter. The number of monthly hours worked by women of employment age rose 4.8% (in contrast monthly hours worked by men rose only 1.7% over the same period).
  - The number of women who were able to work to their desired capacity also improved in the March quarter: the female underemployment rate fell to 9.6% in March from 10.33% in December.
- A (slight) narrowing of the gender wage gap: The gender pay gap fell 0.6% to 13.4% in November 2020. The report comments that the result was influenced not by increases in women's pay but by the increase in the number of men taking up work in lower paid industries and to the impact of JobKeeper (which is set lower than men's average pay).
- Increased board representation: The proportion of board seats held by women also increased 2% over the quarter to 33.4%, (up from 32.6% in the December quarter). For context, in the 12 months to March 2021, the number of women on ASX 200 boards grew by 9%, compared to a 4% gain in the year to March 2020. The improvement is attributed in the report to a combination of increased 'social, corporate and investor pressure' to improve board gender diversity.
- Education: Though Australia 'is the envy of the world in educational attainment' women are not seeing the same economic benefits as their male peers. This is attributed in part to the fact that women continue (as they have done since 2015) to select fields of study that tend to be linked with lower career earnings. For example, of the five most popular fields of study for women, only two are in the top five in terms of highest earnings (for men, three of the most popular fields of study are in the top five for highest earnings).
- Superannuation pay gap: The superannuation pay gap persists. Australian Bureau of Statistics data for 2017-2018 shows that the average women retires with 31% less superannuation than the average man. The report comments that take up of the Federal government's early access to superannuation scheme could exacerbate this gap.

- Unpaid work is the biggest challenge:
  - Women continue to do more unpaid work than men with the gap largest in the 34-44 age category.
  - In 2019, women in this age group spent 45 hours per week on unpaid care/housework. In contrast, men of the same age spent 27 hours per week (unchanged from the prior year).
  - The report observes that the forced shift to flexible working practices as a result of the pandemic has demonstrated the effectiveness of flexible/remote work practices and suggests that it will be 'interesting' to see whether this has any ongoing impact in terms of narrowing the unpaid work gap going forward.

Call for comment on a proposed 'Economic Equality pact 2030'

Against this background, to accelerate progress towards overall gender equality, Financy has called for interested stakeholders, including businesses to comment on a proposed 'Economic Equality pact 2030' ahead of a planned formal signing process in the new financial year.

It's proposed that the Pact will require signatories to commit to actions in six key areas. The due date for feedback in 'prior to 1 August 2021'.

SIX KEY AREAS	COMMITMENT
Addressing the gender pay gap	▪ Employers commit to having a documented and 'proactive' policy to support reducing gender pay gaps where they exist within their organisation.
Addressing the superannuation gap	▪ Employers commit to providing superannuation guarantee payments on parental leave to all employees. ▪ Employers also commit to providing information and/or 'incentives to help female employees contribute more to their balances to help close the gender pay gap.'
Paid parental leave for both parents	To help address the issue unpaid work gap, employers commit to offering 'non-gendered and equal paid parental leave to both parents'.
Female workforce participation	Employers commit to: ▪ providing 'family-friendly work policies' eg flexible or remote work arrangements provide family-friendly work ▪ 'zero tolerance' for violence against women and/or gender discrimination against women in the workplace
Increasing female representation in leadership roles	Employers will ensure: ▪ 40% female representation in leadership roles ▪ there is a 'proactive' policy to increase gender diversity in leadership roles
Education	To support equal participation in education and mentor programs that support career development, employers commit to providing girls in the final years of high school and at university level with access to internships or mentor programs.

[Source: Financy Women's Index March Quarter 2021]

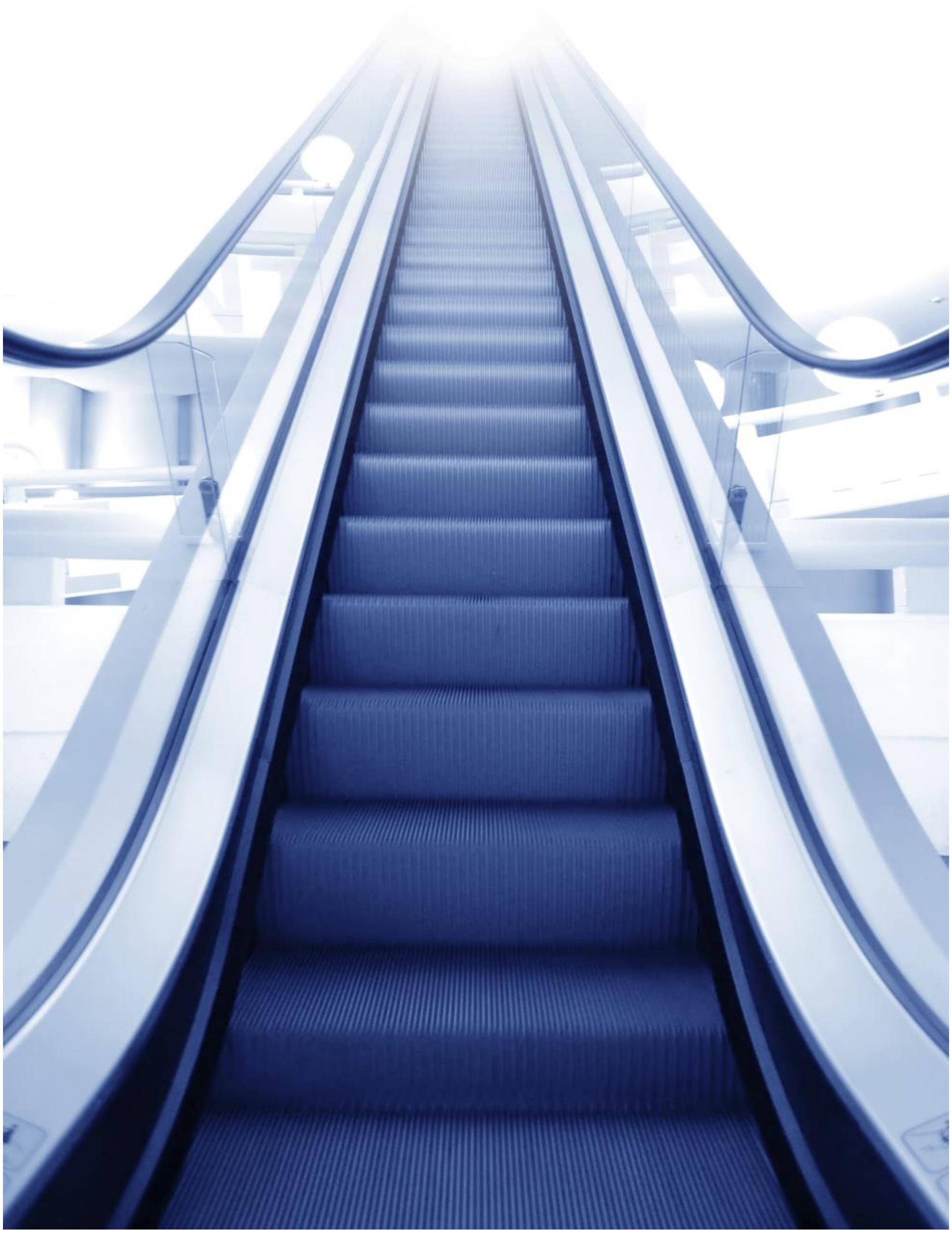
A broader 'trickle down' effect than supposed? New report finds a link between increased female board representation and reduced workforce gender segregation over time

New research has been released looking at what (if any) impact women's board representation has on gender segregation in the broader workforce (below the executive level).

Two key takeaways

Broadly, the research which is based on six years of WGEA data (2014-2019) – found:

- That the 'trickle down' effect extends to non-management roles: The researchers found that where there is more than a 'token' presence of women on boards (ie where women make up more than 20% of the board or there are two or more women), gender segregation below executive level within organisations decreases. The paper suggests that this may be due to women directors:
  - being more likely to directly/indirectly advocate for gender diversity
  - being more likely to propose/implement diversity policies/practices
  - having an effect on the organisational culture/organisational attitudes around women's abilities/opportunities.
- Not instant: The research found that the reduction in non-managerial gender segregation was not instantly apparent but rather builds over time – it 'becomes significant and increases in magnitude with 1, 2 and 3 year lags'.



[Sources: Women on Boards media release 11/06/2021; Full paper: Does women's board representation affect non-managerial gender inequality

Fortune 500 board appointments: Walking the talk on diverse board appointments?

Key Takeouts

- Heidrick and Struggles finds that the proportion of Black appointees to Fortune 500 boards increased to 28% in 2020 (up from 18% on the previous year)
- Heidrick and Struggles also highlights that the proportion of other diverse appointees went backwards or remained more or less stable suggesting that boards may be 'trading one form of diversity for another' rather than taking a holistic approach to the issue.

Heidrick and Struggles has released a summary of its analysis of trends in non-executive director appointments at US Fortune 500 companies in the past year.

Some Key Takeaways

Increase in the number of new Black appointees in the wake of the events of 2020

- According to Heidrick and Struggles, the proportion racially/ethnically diverse appointees increased to 41% (up from 23% in 2019)
- Looking more closely, Heidrick and Struggles found that the increase was primarily driven by the uptick in the number of new Black directors:
  - 28% of board seats were filled by Black appointees (up from 10% in 2019).
  - Of this group, 75% were appointed after the 25 May 2020 murder of George Floyd and the public commitments made by a number of companies following this event.

Trading one form of diversity for another?

- Interestingly, Heidrick and Struggles highlights that the proportion of new Latinx, Asian and Asian American appointments was little changed from the previous year: the share of new Latinx directors fell from 5% in 2019 to 4% in 2020, the share of Asian and Asian American directors increased from 8% in 2019 to 9% in 2020.
- Heidrick and Struggles also found that the proportion of new women directors dropped to 41% (down from 44% in 2019).

Commenting on this, Vice Chair and Co-Managing Partner of the firm's global CEO and Board of Directors Practice said that it is important that companies adopt a holistic approach to board composition.

> 'We consider it crucial that boards not trade one form of diversity for another…There is clear value to having a variety of voices and life experiences around the table. The most forward-looking boards are looking comprehensively and strategically at board refreshment – which means building the most inclusive board possible.'

Increased willingness to appoint first time directors, less emphasis on previous CEO/CFO experience

- The proportion of new directors with CEO/CFO experience decreased from 62% of new appointments in 2019 to 51% in 2020
- Excluding CEOs and CFOs, 41% of new directors had previous experience in other C-suite positions (most often in either in profit and loss leadership roles (22% of the group) or in divisional leadership/regional CEO roles (15% of the group).
- The proportion of new directors with cybersecurity skills/knowledge/experience fell from 14% in 2019 to 8% in 2020
- The proportion of new directors with sustainability experience fell from 10% in 2019 to 6% in 2020
- The proportion of new directors with previous experience within the same industry increased.

[Source: Heidrick and Struggles media release 8/06/2021]

Remuneration

New report predicts that there may be a COVID-19 induced pause in the upward trend in executive remuneration

A joint report from ESGAUGE, The Conference Board and Semler Brossy analyses trends in executive compensation in Russell 3000 and S&P 500 companies.

Some Key Takeaways

- Analysis of 2020 filings shows that pay continued to trend upwards
- Based on analysis of proxy statements filed in the 1 January to 31 December 2020 period, median total compensation awarded to a board member in the fiscal year increased 4.6% in the Russell 3000 and 1.8% in the S&P500 (as compared with the previous fiscal year).
- The report identifies the rise in equity awards as the primary driver of these increases.
- For context the report comments that:
  - The figures 'reflect decisions made before the pandemic.
  - Median total compensation for board members grew at a lower rate than for CEOs or named executive officers (NEOs). According to the report, median total compensation for Russell 3000 CEOs increased 7.8% and 9% for NEOs. For CEOs and NEOs in the S&P 500, the increase in total median pay was 4.8% and 3.7% respectively.

Pay ceilings are becoming more prevalent

- According to the report, increased focus on board compensation from shareholders and proxy advisers has led to pay ceilings in equity plan documents becoming more prevalent. Based on a review of proxy statements over the last three disclosure years, the report found that:
  - the percentage of companies reporting some form of director pay ceiling has grown from 48.7% to 61.5% in the Russell 3000 and from 53% to 66.9% in the S&P 500
  - the share of companies setting limits on total director compensation (whether made of cash only or cash and equity) has risen from 16.1% to 26.9% in the Russell 3000 and from 18.9% to 28.9% in the S&P 500.
- The report suggests that in time, 'a ceiling for director equity pay may become a standard part of all or most director equity plans'.

A pandemic-induced pause on further increases?

In light of the decision by many boards to either temporarily reduce/forfeit their pay and pause planned increases in fees (in light of the pandemic), the report suggests that 'the current disclosure season is likely to reveal an end (or a pause?) to the trend of rising director compensation recorded in recent years', despite directors' increased workload.

Attracting new talent may exert upwards pressure?

The report suggests however, that attracting new directors with different experience/skill sets may put upward pressure on pay and/or require changes to the structure of awards. For example, it's suggested that new directors who are not former CEOs, 'having pay in the form of equity that is likely locked up until retirement may not be much of an incentive to join a board'.

[Source: Full text report: Director Compensation Practices in the Russell 3000 and S&P 500 2021 Edition]

Companies are increasingly tying pay to D&I: New report identifies a 19% uptick in the prevalence of D&I metrics in S&P 500 companies' incentive plans

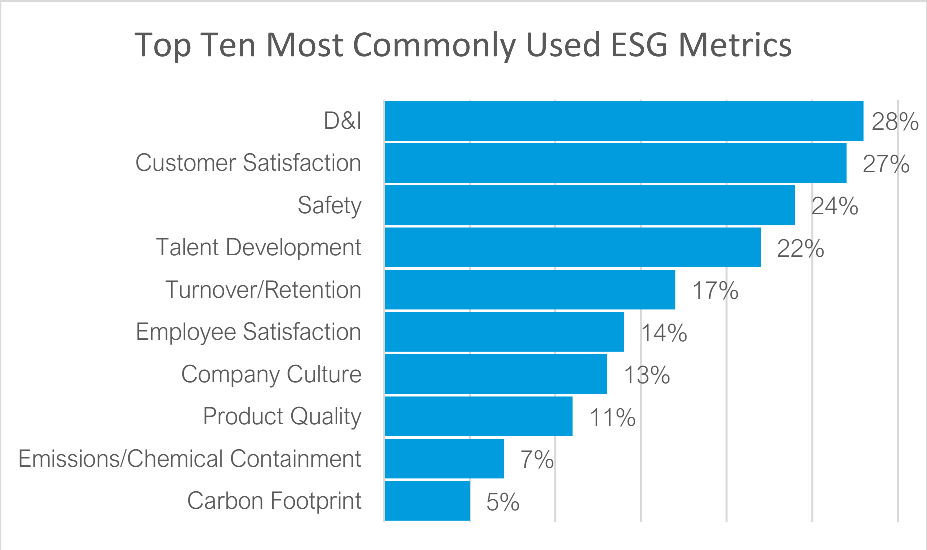
Semler Brossy has released a report highlighting trends in the use of ESG metrics in incentive plans at S&P 500 companies over the twelve months to March 2021.

The report finds that usage of these metrics is trending upwards (and this is expected to continue). The report attributes it in the main to investor and stakeholder pressure - companies are seeking to demonstrate their commitment to progress on ESG through tying it directly to compensation.

Some Key Takeaways

Prevalence of ESG metrics?

- Based on their analysis of public disclosures between March 2020 and March 2021, the report found that overall, 57% of the S&P 500 companies include an ESG metric in either their annual or long term incentive plan (LTIP).
- Looking more closely, larger companies are leading the way: 62% of the largest 200 companies incorporate ESG, compared to 55% for the smaller 300.



Human Capital Management (HCM)

- 28% of companies include some form of Diversity and inclusion (D&I) metric making it the most commonly used ESG metric in compensation plans
- According to the report, there was a 19% year-over-year increase in the prevalence of D&I metrics for proxies filed between January and March (2021 vs 2020).
- The report suggests that the rapid increase in the integration of D&I metrics could be a response to the events of 2020 and further suggests that that that the use of these metrics is likely to continue to rise in light of continuing investor and community attention on the issue.
- Other HCM metrics – talent development (22%) and turnover/retention (17%) – also rank 4 and 5 in the list of top five most commonly used ESG metrics overall.
- Overall, 41% of S&P 500 companies include some form of Human Capital Management (HCM) metrics in their compensation plans.

Worker safety was a key focus

- The report suggests that the relatively high prevalence of safety metrics overall is largely tied to the pandemic given that 89% of safety metrics were explicitly tied to the pandemic response.
- The report suggests that this increased focus on worker safety may be transitory.

Environmental metrics still not widely used:

- The report found that specifically environmental metrics were far less commonly used than other types of ESG metrics with only 14% of companies using them, though this is expected to increase as investors become 'more focused in their demands'.
- Emissions reduction/chemical containment and carbon footprint are the only environmental metrics within the top 10.

[Source: Semler Brossy report: 2021 ESG & Incentives Report – Issue 1 14/06/2021]

Shareholder Activism

Microsoft: Shareholder resolution calls for independent and transparent assessment of sexual harassment

Following reports of inappropriate behaviour by Microsoft CEO Bill Gates, Arjuna Capital has filed a shareholder resolution at Microsoft calling on the company to report annually on the effectiveness of its sexual harassment policies/procedures, including the 'results of any comprehensive, independent audit/investigations, analysis of policies and practices and commitments to create a safe and inclusive work environment'.

Arjuna Capital Managing Partner Natasha Lamb commented,

> 'Microsoft is under intense public scrutiny due to numerous claims of sexual harassment and an alleged failure to address them adequately and transparently. Reports of Bill Gates' alleged inappropriate relationships and sexual advances towards Microsoft employees have only exacerbated concerns, putting in question the culture set by top leadership, and the board's role holding those culpable accountable. Investors are concerned Microsoft may be facing a culture of systemic sexual harassment, putting at risk the company's ability to attract and retain talent.'

The supporting statement accompanying the resolution also emphasises that ensuring that the issue is being dealt with effectively is a question of preserving value. Arjuna states:

> 'We urge Microsoft to independently investigate and confront these issues transparently, as sexual harassment and gender discrimination can harm shareholder value — resulting in higher turnover, lower productivity, increased absenteeism, and higher sick leave costs… While Microsoft has conducted prior internal investigations into sexual harassment and gender discrimination allegations, it has failed to report transparently on any independent investigations to employees and investors. To avoid legal and reputational risk and maintain shareholder value, Microsoft must create a culture of accountability and transparency, protecting employees from harassment and discrimination'.
>
> [Sources: Arjuna Capital media release 16/06/2021; Arjuna Capital resolution]

Independent report concludes Toshiba's 2020 AGM was 'unfair', activist Effisimo condemns company's response as inadequate ahead of the 2021 AGM

- In March 2021, Toshiba shareholders voted, against board advice, to approve a proposal put forward by foreign activist Effissimo Capital Management (Effissimo) to appoint independent investigators to examine whether the company's 2020 AGM (including voting and shareholder participation during the meeting) was conducted fairly.
- The investigators' report was released publicly (English translation here) on 10 June 2021. Broadly, the report concludes that Toshiba worked with the industry ministry to 'devise a plan to effectively prevent shareholders [and in particular foreign activists] from exercising their shareholder proposal right and voting rights at the AGM' and as such, that the AGM was conducted unfairly.
- In a statement on 17 June 2021, Effisimo said that the report provides a 'sobering insight into dysfunctional corporate governance' at the company and dismissed Toshiba's immediate actions in response - to remove two of three incumbent Audit Committee members - as inadequate to address its governance concerns. Effisimo states, 'this latest reactive move does nothing more but add to the list of unresolved governance and compliance shortcomings at Toshiba that its Board continues to not remedy. Therefore, we view the current Board to be ineffective'.
- On 18 June 2021, in an open letter to shareholders, Toshiba Chair Osamu Nagayama expressed 'deep regret' about what he termed 'unacceptable events at the company' and outlined the actions being implemented to strengthen corporate governance and rebuild trust. Broadly, these actions include (among others): an independent review/assessment into the governance issues at the company, a commitment to 'accelerate the selection process' for a successor to the current CEO 'in the medium term', and a commitment to accelerate the search for 'additional independent board members with strong experience'. Mr Nagayama said that the company will hold an EGM as soon as the candidates are selected to seek shareholder approval. In addition, he flagged that the company has appointed Makinson Cowell, an independent global investor study firm, to 'gather non-attributable feedback to provide us with a broad and transparent set of shareholder opinions as we make important strategic decisions'.

- Toshiba's 2021 AGM will be held on 25 June 2021.

[Sources: Effisimo media releases 17/03/2021; 17/06/2021; Toshiba media release 18/06/2021; Investigators' report [English translation]

Say on climate resolution earns 56.4% at Booking Holdings

- According to As You Sow a say on climate resolution filed with online travel services provider Booking Holdings has earned a majority vote of 56.4%
- As You Sow observed that shareholders voted in support of the resolution, despite the company's recent announcement that it planned to become carbon neutral through purchasing offsets. As You Sow's David Shugar commented that the result underscores investor expectations that companies actively reduce their own emissions. He commented,

> 'We can't continue kicking the can down the road on climate. Relying on carbon offsets – essentially asking somebody else to reduce emissions -- is no longer acceptable to investors. Company emissions must come down across the board.'

[Source: As You Sow media release 16/06/2021]

Expectation of Paris alignment: Ceres says majority votes on a string of climate lobbying shareholder resolutions evidence a step change in investor expectations

According to Ceres, similar shareholder climate lobbying proposals, seeking transparency around how companies' direct climate lobbying and indirect lobbying (through industry associations) aligns with the goals of the Paris Agreement, have now earned majority votes at five companies.

- Phillips66: a resolution filed by California State Teachers Retirement System secured 64.4% backing
- Norfolk Southern Corp: a resolution filed by Friends Fiduciary Corp secured 76.4% backing
- ExxonMobil: a resolution filed by BNP Paribas Asset Management secured 63.8% support;
- United Airlines: a resolution filed by Presbyterian Church USA secured 65.4% support;
- Delta Airlines: a resolution filed by BNP Paribas Asset Management received majority support (the exact percentage has not yet been reported).

Ceres cites these results as evidence that the expectation of alignment of lobbying with the goals of the Paris Agreement is becoming the 'norm' for investors.

Effectiveness of engagement efforts

Ceres cites the six resolutions withdrawn after the companies - CSX, Duke Energy, Entergy, First Energy Corp, General Motors and Valero Energy - each agreed to improve disclosure of their climate lobbying activities as evidence of the effectiveness of its engagement efforts on the issue.

[Source: Ceres media release 17/06/2021]

Institutional Investors and Stewardship

Investors seek to have Trump-era changes to the rule governing the filing of shareholder proposals ruled invalid

Investors, including the Interfaith Center on Corporate Responsibility (ICCR) and James McRitchie (who is described as 'one of the most active individuals submitting shareholder proposals related to corporate governance in the US') – have filed a complaint, seeking to have the Securities and Exchange Commission's (SEC's) recent amendments to the rule governing the filing of shareholder proposals (rule 14a-8) in the US District Court for the District of Columbia declared invalid.

Broadly, they argue that the recent amendments that increased requirements for the amount of stock that needs to be held and the duration of stock ownership necessary in order to be able to file a resolution, as well as changes to the votes required to be able to resubmit proposals, operate to impede 'shareholders' ability to raise issues of material concern through resolutions filed with public corporations'.

The groups also argue that the SEC's justification for the rule and the process followed were flawed.

You can find the full text of the complaint here.

CEO of the Interfaith Center on Corporate Responsibility Josh Zinner commented,

> 'The new rule guts the existing shareholder proposal process, which has long served as a cost-effective way for shareholders to communicate their concerns to management…The rule provides little serious economic analysis supporting the need for these substantial changes. It is instead based on the wholly unsupported assumption that shareholder proposals are simply a burden to companies with no benefits for companies or non-proponent investors when there is 50 years of evidence to the contrary.'

According to the ICCR the action has broad support among institutional investors.

> [Source: ICCR media release 15/06/2021; As You Sow media release 15/06/2021]

168 investors back the CDP's 2021 campaign to urge high carbon emitters to disclose environmental data

- 168 global investors and finanical institutions (full list here) have joined the Climate Disclosure Project's (CDP) 201 campaign to push (through engagement) 1320 of the world's largest carbon emitting companies globally, to disclose their environmental data through CDP (a non-profit global environmental disclosure platform).

Companies are primarily being asked to provide disclosure on climate impact

- According to CDP, the companies being targeted are estimated to collectively emit more carbon dioxide annually than the entire European Union. These companies include (among others) Amazon, Facebook, Apple and Samsung. A full list of companies being targeted is here.
- Of the companies being targeted:
  - 58% are being asked to provide disclosure on climate change
  - 21% are being asked to provide disclosure on more than one theme (climate change, forests or water security)
  - 20% already disclose through CDP on one theme (climate change, forests or water security) but have nevertheless been included because investors consider that they 'do not yet disclose data' on another theme that investors consider is material to the company.

Increased investor support

- According to CDP, last year's Non-Disclosure Campaign resulted in a doubling of the number of companies disclosing (as compared with 2019). CDP considers this demonstrates the effectiveness of direct engagement on the issue.
- CDP comments that investor support for the non-disclosure campaign has increased on average 38% every year since it was first launched in 2017, with a 56% uptick in the level of support this year (as compared with last year). CDP attributes this to 'the growing momentum, particularly in the lead up to COP26, of net-zero commitments and investment in sustainable products'.

- Commenting on the increased levels of investor support and the effectiveness and importance of the campaign in accelerating the rate of change, Emily Kreps, Global Director of Capital Markets at CDP said,

  > 'Investor engagement is critical to driving disclosure, and disclosure is the first step to environmental action…As demonstrated by the continued growth and success of this annual campaign, investors require decisive data that is consistent, comparable and comprehensive. To make this possible and support them in setting and meeting their own net-zero ambitions, they expect companies to fully engage with TCFD-aligned standards on environmental disclosure and reporting. We are delighted that this year's campaign has achieved record levels of investor support. Rather than diverting attention, the COVID-19 pandemic is focusing investors on the need to meet global systemic risks such as climate change and the tide is rapidly turning against companies not taking note of investor demands.'

  [Source: CDP media release 21/06/2021]

Stepping up the pressure: LGIM to divest from four new companies because of their 'insufficient action' on climate change

Asset manager, Legal & General Investment Management (LGIM), has issued a statement underlining its ongoing commitment to supporting the transition to a net zero economy. LGIM states,

> 'Climate change is one of the most critical sustainability issues we face and we fully support efforts to align the global financial system with a pathway well below 2°C…Progress cannot be made by acting in isolation and we, as investors, have a real role to play in the responsible allocation of capital and acting as stewards to our investee companies to encourage greater progress to meet our overall sustainability goals'.

The statement highlights a number of key actions LGIM it will take/has taken to support this goal. These include:

- The success of LGIM's engagement on climate issues – LGIM states that 22% of companies on its 'priority list' have now set a net-zero target
- Backing up its demands for climate action through voting: For example, LGIM states that 130 companies are currently subject to 'voting sanctions' for failing to meet LGIM's minimum climate-change standards.
- Divesting from companies that fail to meet expectations on climate action:
  - LGIM has announced it will divest this year from four new companies - Industrial and Commercial Bank of China, AIG, PPL Corporation and China Mengniu Dairy – due to what it considers to be 'insufficient action' on their part to address the risks posed by climate change.
  - These companies join the eight companies - China Construction Bank, MetLife, Japan Post, KEPCO, ExxonMobil, Rosneft, Sysco, Hormel and Loblaw – already on LGIM's 'exclusion list'.
  - LGIM also announced that US food retailer, Kroger, which was previously included on the 'exclusion list' has been 'reinstated in relevant funds' following 'improvements in its deforestation policies and disclosure, as well as efforts to promote plant-based products which have a lower climate impact'.

  [Source: LGIM media release 15/06/2021]

Disclosure and Reporting

TCFD disclosure: The FCA in consulting on extending TCFD-aligned disclosure requirements

The UK Financial Conduct Authority (FCA) is consulting on proposals to:

- Extend the application of its existing TCFD-aligned Listing Rule for premium-listed commercial companies (finalised in PS20/17) to issuers of standard listed equity shares. This is consistent with commitments in the November 2020 UK joint regulator and government TCFD Taskforce: Interim Report and Roadmap outlining the UK's approach to implementing the TCFD recommendations.

  The consultation paper also seeks views on issues related to ESG labelled debt instruments and the increasingly ESG data and rating providers to help inform the FCA's future policy position on these issues.

- Introduce new TCFD-aligned disclosure requirements for asset managers, life insurers and FCA regulated pension providers. Key proposals include:
  - Entity-level disclosures: A new requirement for firms to publish an entity-level TCFD report on how they take climate related risks/opportunities into account in managing/administering investments on behalf of clients and consumers on an annual basis
  - Product or portfolio-level disclosures. A new requirement for firms to 'produce…a baseline set of consistent, comparable disclosures in respect of their products and portfolios, including a core set of metrics' on an annual basis.

Timing

The deadline for submissions to both consultations is 10 September 2021. The regulator intends to confirm its final policy on climate related disclosures 'before the end of 2021'.

[Source: FCA media release 22/06/2021; CP21/18: Enhancing climate-related disclosures by standard listed companies; CP21/17: Enhancing climate-related disclosures by asset managers, life insurers and FCA-regulated pension providers]

Committee again hears mixed views on the proposed permanent relaxation of continuous disclosure laws

Key Takeouts

- The Senate Economics Reference Committee heard that though proposed changes to meeting and execution requirements in Schedule 1 of Treasury Laws Amendment (2021 Measures No 1) Bill have 'general support', views on the proposed changes contained in Schedule 2 (concerning changes to continuous disclosure requirements) are mixed.
- Senator Patrick considers it is unclear whether the Bill has the necessary support to be passed as it currently stands. He noted that the Labor Party has indicated that they are not inclined to support the changes in Schedule 2, and that he shares this view.
- It remains to be seen whether the government will elect to split the Bill in the interests of passing the changes in Schedule 1.

Context: Bill proposes to permanently relax existing requirements

- Treasury Laws Amendment (2021 Measures No. 1) proposes to:
  - Temporarily extend and expand on the measures in Corporations (Coronavirus Economic Response Determination (No. 3) 2020 to provide companies with legal certainty around the use technology in the context of holding and conducting meetings, distributing meeting related materials and executing and witnessing documents. It's proposed that these measures will apply until 15 September 2021 (Schedule 1).
  - Schedule 2 proposes to make permanent the temporary changes to continuous disclosure laws intended to insulate directors from opportunistic class actions introduced in response to the COVID-19 pandemic.
- You can find our brief summary of the proposed changes in the Bill here and a brief status update on the Bill here.

- Public hearings on the Bill were held on the 9-10 June 2021. You can find a short summary of the key takeaways from the 9 June hearing in Governance News 16 June 2021 at p12.
- The Senate Economics Reference Committee again heard mixed views during the 10 June public hearing on the need for/merits of proposed changes to continuous disclosure obligations. There was broad support for the proposed changes to meeting and electronic execution requirements in Schedule 1. You can find the full transcript here. An overview of some of the key points to emerge from the hearing is below.

Meeting and execution requirements: broad support for the proposed changes

Not every entity appearing before the Committee expressed a view on the proposed changes in Schedule 1 (instead focusing their comments on the proposed changes to the continuous disclosure regime). However, the Australian Institute of Company Directors (AICD), the Governance Institute of Australia (GIA), the Australasian Investor Relations Association (AIRA) and the Australian Shareholders' Association (ASA) each expressed broad support for the proposed changes in Schedule 1.

In addition, there were calls for the extension of the proposed changes and/or for the changes to be made permanent.

- Calls for the measures to be extended to the end of the year: The AICD called for 'further consideration of extending temporary relief to provide certainty for companies through the complete 2021 reporting season, given the continued disruption risks of the pandemic and the need for junior-end companies to commence planning for their annual meetings'.
- Calls for the changes to be made permanent:
  - Chair of the Corporations Committee of the Business Section of the Law Council of Australia Shannon Finch emphasised the need for urgent action 'to provide a framework for continued use of virtual meetings, electronic communications and document execution' to provide businesses with necessary certainty. Ms Finch also argued that the 'the use of technology in meetings should be made on a permanent basis and in advance of the run-up to the significant AGM season from September to November 2021' and should not be delayed by 'debate over nuances of stakeholder management for certain segments of the corporate world'.
  - CEO of the Australasian Investor Relations Association (AIRA) also argued that the changes should be made permanent and that 'the virtual meeting format should be included as an option for all listed companies and entities without the need to change their constitutions'.

Continuous Disclosure: Arguments against the proposed changes

In light of the broad support for the proposed changes to meeting and electronic execution requirements in Schedule 1 of the Bill, the majority of questions to those appearing before the committee focused instead on proposed changes to continuous disclosure requirements included in Schedule 2.

Speaking strongly against the proposed reforms were Dr Sean Foley (Associate Professor, Macquarie University) and representatives from Bank Reform Now, as well as representatives from Litigation Funders of Australia. Fiona Balzer (Policy and Advocacy Manager) at the Australian Shareholders' Association (ASA) also expressed concerns.

The key arguments against the proposed changes can be broadly summed up (broadly) as follows:

- **Australia's existing continuous disclosure regime underpins international and domestic confidence in Australia's markets.** Dr Foley considers the existing continuous disclose regime to be a key contributor to the 'unrivalled confidence in our market' because it 'ensures all investors are fully informed, minimises opportunities for insider trading and ensures equity market prices are efficient'. Chair of the Litigation Funders of Australia John Walker broadly appeared to share this view, stating that existing continuous disclosure arrangements are 'critical' to attracting investment.
- **The changes would increase the difficulty in undertaking shareholder class actions (a necessary means of redress for shareholders).** The Committee heard that the proposed introduction of a fault element will increase the difficulty in establishing a breach of continuous disclosure obligations and operate as an additional and substantial hurdle for shareholders in bringing a justified action.
  - This was the primary reason put forward by the ASA for opposing the proposed changes. The ASA considers that the 'removal of the strict liability offence would reduce the access to justice that retail shareholders have at this time and would return to an unlevel playing field.'
  - Similarly, Dr Foley argued that the introduction of the fault element 'will further increase the difficulty of undertaking shareholder class actions'. He commented,

    > 'Shareholder class actions are a necessary component of a strong regulatory system. Any actions taken to remove the credibility of the threat posed by shareholder class actions or the ability of shareholders to pursue justice in the face of misleading or deceptive conduct will have deleterious consequences for Australians. Shareholder class actions pursued in this country have not been opportunistic pursuits as a result of share price falls, but rather based on material misstatements and omissions causing real harm to shareholders'.
  - Mr Walker also argued that the introduction of the fault element would result in a 'material' decrease in the number of shareholder class actions because of the difficulty associating with proving 'fault' and the associated increased time and cost of doing so. He added:

    > 'From my experience of being a lawyer for 10 years and a funder for 20 years, if you add this mental element to these two clauses in the Corporations Act, then you will gut their capacity to assist in the policy considerations under the Corporations Act - namely, to provide compensation and to deter this type of conduct'.
- **The reduced litigation risk for companies will disadvantage market participants (including retail investors):** Dr Foley argued that the proposed changes are likely to have unintended consequences including, a negative impact on disclosure practices. Dr Foley cited a 'well developed academic literature' on the US, UK and Canadian experience which has 'shown a link between reduced litigation risk and increased earnings management, poorer firm performance, decreased investment efficiency, increased cost of debt and increased cost of equity' in support of this point. Dr Foley also argued that there is 'evidence showing a link between reduced litigation risk and increased managerial entrenchment, as well as an increased profitability and probability of illegal insider trading'.
- **The proposed reforms will not reduce directors and officers insurance premiums:**
  - Dr Foley cast doubt on whether the proposed changes will be effective in lowering directors and officers insurance premiums. He commented that

    > 'It is true that directors and officers insurance costs have increased over time. However, to claim causation between shareholder class actions, increased settlement sizes and higher premiums ignores numerous other risk factors that are just as likely to increase fees as shareholder class actions. Reliance on anecdotes and vested interests to unravel this puzzle will likely produce suboptimal outcomes.'
- **The proposed changes are being implemented without sufficient justification/consultation:** A number of questions from the committee concerned the lack of formal or extensive consultation on the substance of the proposed

changes and the alleged flaws in the process that was followed. Concerns were also raised by some entities/individuals appearing before the Committee:

- Dr Foley called for a 'thorough analysis of the effect of the temporary COVID-19 changes' to 'assess whether key objectives where achieved during this period of uncertainty' before they are made permanent.
- Chair of the Litigation Funders of Australia John Walker similarly raised concerns stating:

> 'The continuous disclosure component of the change was ushered in under the cloak of the COVID pandemic, and now the misleading and deceptive conduct component has been proposed, all without consultation and, in particular, without the thorough investigation proposed by the ALRC into the relevant evidence to ground any changes to our market protection laws in informed policy. In my respectful opinion, there is simply insufficient evidence of the potential costs and benefits that will flow from this bill to change the balance in public and private policing of corporate conduct that has been built up over the decades that our market protection laws have been in place…
>
> Without an inquiry to provide a sound evidence basis for Corporation Act reforms, as called for by the ALRC, we could run the risk of diminished capital supply and of the capital provided being at a higher cost and being misallocated in an uninformed and inefficient market, all for the relatively small and questionable objective of fewer class actions'.

ASIC's view: Continuous disclosure is a 'cornerstone' of Australia's markets

- ASIC General Counsel Chris Savundra confirmed that ASIC remains of the view that the existing continuous disclosure regime 'remains a cornerstone of maintaining the integrity of ASIC's markets and confidence in those markets'.
- Expanding on this, ASIC Executive Director, Markets Greg Yanco explained that the continuous disclosure regime is a 'cornerstone' because it operates to ensure that investors are kept up to date with important information about the securities they are investing in – 'virtually in real time, companies are required to advise the market when an important change occurs' he said.
- Asked to comment on whether ASIC has undertaken any analysis of the impact that the proposed changes (had they been in place at the time) would have had in terms of ASIC's past enforcement actions in this area, Mr Savundra said that ASIC is currently undertaking a review of past civil penalty actions to see 'whether we were likely to be able to prove the fault element'. He said that his 'initial view' based on the work completed so far, is that the number of actions where ASIC would not have been able to prove the fault element would be 'relatively few'. He agreed to provide a list of the actions where ASIC would not have been able to do so on notice.
- Mr Savundra also clarified that ASIC enforcement actions are 'focused on penalising the company, or at least, through other means, changing their behaviour' as opposed to securing recompense for shareholders for the financial loss caused by the breach of continuous disclosure obligations.

The case for change to the existing continuous disclosure regime

In contrast, representatives from the Corporations Committee of the Law Council Law of Australia, the Australian Institute of Company Directors (AICD), the Governance Institute of Australia (GIA) and the Australasian Investor Relations Association (AIRA) spoke in support of the proposed changes to continuous disclosure obligations.

- The Law Council of Australia:
  - The Committee heard that though the Law Council 'represents a broad church of views within the legal profession, and some of these divisions hold varying views on these issues and have differing interests in the subject matter', the Corporations Committee of the Law Council 'strongly supports' the reforms.
  - Chair of the Corporations Committee of the Business Law Section of the Law Council of Australia Shannon Finch said that

    > 'The corporations committee is of the view that these reforms will not lead to a lower standard of conduct. They do not change the disclosure test. It will not lead to more limited disclosure. It will not lead to an inability to successfully prosecute cases of significant concern. It is rather suggested by my committee that these reforms may redress the technical imbalance in continuous disclosure laws that have contributed to inflated insurance costs. My committee also notes that the reforms are unlikely to adversely affect the integrity of markets, because knowing or intentional disclosure decisions will not be protected. To suggest that these reforms could impact what is disclosed or could impact the integrity of markets is illogical'.
  - Having said this, Ms Finch noted that these views are not universally shared within the legal profession or the law council.

- **The AICD**: Arguing along similar lines, the AICD also argued strongly in support of the proposed reforms arguing that the evidence put forward by those opposing the reforms does not 'stack up'.
  - AICD Head of Policy Christian Gergis said:

    'The proposed amendments, in our view, do not change the obligations on continuous disclosure placed on companies and their offices. Directors who are reckless or negligent in respect of their disclosure obligations or who knowingly seek to breach them will continue, under the proposals, to be subject to the full force of the law, as they should be. In our view, the current class actions regime leads to adverse outcomes for Australian businesses and shareholders. On continuous disclosure, a strict liability approach is not appropriate for obligations that involve time-sensitive and complex judgement calls, and it is currently too easy to launch or to threaten securities class actions for alleged breaches of these strict liability provisions'.
  - Mr Gergis also suggested that the temporary disclosure relief implemented in response to COVID-19 is evidence that making the changes permanent will not result in either a deterioration of disclosure standards or to loss of confidence in Australia's capital markets as alleged by the Bill's detractors. He argued,

    'The bill's opponents have not been able to point to instances where the temporary measures have left shareholders without remedy, which they alleged would occur. The AICD is of the view that the changes proposed in the bill will improve the effectiveness of the current securities class action regime without weakening Australia's strong disclosure standards'.
- Both the **AIRA** and the **GIA** separately expressed support for the proposed changes to continuous disclosure obligations on the grounds put forward in the explanatory memorandum. In both cases, the Committee heard that the organisations are each primarily focused on the proposed changes enabling electronic execution/meetings in Schedule 1, rather than those in Schedule 2.

Views on splitting the Bill?

Senator Patrick sought views on whether, given the prospect that 'prospect that the bill will fail' because of the inclusion of proposed changes to continuous disclosure requirements in Schedule 2, whether the Bill should be split in the interests of passing the changes to meeting/execution requirements contained in Schedule 1 (which he considers have 'general support').

GIA CEO Megan Motto said that having canvassed members on the issue, the GIA would support splitting the Bill.

> 'Schedule 1 is so important to our members in terms of providing the certainty that they need to get on with business and that they need to be efficient and innovative in the way that they do that business, that we would be prepared to split the bill.

AICD General Manager Advocacy Louise Petschler stated that though it is, up to parliament to determine, the AICD's preference is for the whole of the Bill to be passed.

> 'Given our support for the bill as a whole, and as we've just discussed, our view that the continuous disclosure measures are modest and appropriate, our view would be: pass the bill as a whole. They're all important issues. As we've alluded to in a previous answer, there's a whole range of broader issues with the securities class action market, with the D&O market, that warrant further review. We've flagged the need for some relief to extend through the reporting period. We're not suggesting that this legislation would solve all the issues, but we think that the bill is worth passing on its merits, and there are other matters that will still need further exploration. So we'd say: pass the whole thing'.
>
> [Source: Transcript of public hearing: Senate Economics Reference Committee: Treasury Laws Amendment (2021 Measures No.1) Bill 2021, Provisions (Public), 10/06/2021]

Markets and Exchanges

In Brief | Following consultation, ASIC has released new Market Integrity Rules for capital which will replace the existing separate rule books for securities market participants and futures market participants. Market participants will be required to comply with the new rules from 17 June 2022

[Source: ASIC media release 16/06/2021]

In Brief | Global index provider FTSE Russell, has announced that 208 existing constituents of the FTSE4Good All World are at risk of deletion from the FTSE4Good All World indexes having failed to meet new climate performance standards. The companies now have until the June 2022 semi-annual index review to meet the required standards

[Source: FTSE Russell media release 16/06/2021]

Regulators

ASIC Chair flags a 'new phase' of enforcement and regulatory work for the regulator

In his opening statement to the Parliamentary Joint Committee on Corporations and Financial Services Australian Securities and Investments Commission (ASIC) Chair Joe Longo flagged a potential shift in ASIC's approach to regulation and enforcement.

Mr Longo stated,

> 'ASIC is also entering a new phase of its enforcement and regulatory work. We are finalising enforcement actions arising from the Financial Services Royal Commission and are working towards implementing the last of the law reforms emerging from the Royal Commission's recommendations. I believe that ASIC's strength and effectiveness as an institution can and will be enhanced. This includes further improving our governance structure to support the Commission and our senior executives to be more effective decision makers. I have begun engaging widely with ASIC staff and stakeholders to further understand ASIC's current strategy and approach to regulation and enforcement. This engagement and collaboration will assist me and the Commission to shape and develop ASIC's new strategic priorities and longer-term strategy'.

Mr Longo also flagged that he has also commenced work on reviewing ASIC's internal 'infrastructure'.

> 'I want to consider ASIC's operating model and organisational structure in our key internal operations and processes, including corporate services, information technology, finance, people and development, and compliance'.

Broader context – a new statement of expectations, new oversight body

- Legislation to establish a new oversight body for ASIC (and the Australian Prudential Regulation Authority (APRA) – the Financial Regulator Assessment Authority Bill 2021 - is currently before parliament.
- The government has previously indicated that the new body (FRAA) will be tasked undertaking a capability review of ASIC within its first year of operation. The Treasurer said that this is intended to assist Mr Longo in ensuring the regulator is operating effectively and consistently with the government's Statement of Expectations.
- The government has also indicated that it intends to issue a revised Statement of Expectations to ASIC which will 'make clear that the government expects ASIC to support Australia's economic recovery from the COVID pandemic'.

ASIC will review of NUIX float, Mr Longo has defended the regulators' initial assessment

Mr Longo also briefly responded to comments made in parliament concerning the NUIX IPO.

> [Note: This appears to be a reference to comments made (and reported in The Australian and The AFR) by Labor Minister Deborah O'Neill concerning ASIC's handling/assessment of the NUIX prospectus and subsequent complaint and then Acting ASIC Chair, now Commissioner Karen Chester's (alleged) involvement.]

Mr Longo made clear that it is not ASIC's role to consider the 'merits of an offer when reviewing a prospectus' and emphasised that ASIC procedures/processes were followed in this case. He stated:

> 'The NUIX prospectus was reviewed by a specialist team at ASIC. We take all complaints and intelligence we receive very seriously. This was no exception. We considered the complaint and requested further information from the company in accordance with our usual procedures'.

In this case, he said, 'it did not appear that the prospectus was misleading or deceptive or contained any material omissions'.

Mr Longo made clear that

> 'ASIC's role and approach to the review of prospectuses is ASIC does not consider the merits of an offer when reviewing a prospectus. The market needs to assess the merits of the offer. ASIC's reviews are limited to disclosure. We may intervene if we believe a document makes material misleading statements or omits information that is required for an investor to make an informed investment decision'.

Mr Longo also stated that ASIC has procedures in place for the disclosure and management of conflicts of interest by ASIC Commissioners and he is satisfied that then Acting Chair Karen Chester had no conflict, and that ASIC's processes and procedures were properly followed by staff in this case.

Mr Longo stated that ASIC is 'very aware of the current market concerns' and is currently 'conducting a review of the NUIX IPO'.

[Source: Opening statement to the Parliamentary Joint Committee on Corporations and Financial Services by ASIC Chair Joe Longo 18/06/2021]

In Brief | SEC's latest annual regulatory agenda lists ESG disclosure and cybersecurity risk governance among the priorities

[Source: SEC media release 11/06/2021]

Financial Services

Status update on the progress of key Bills

- Hayne implementation: The Financial Regulator Assessment Authority Bill which will establish a new oversight body to assess the effectiveness and capability of ASIC and APRA as recommended by the Hayne Commission has progressed to second reading stage in the Senate . The Financial Regulator Assessment Authority (Consequential Amendments and Transitional Provisions) Bill 2021 (which was introduced at the same time), passed both Houses on 22 June 2021.
- Superannuation reform: Three superannuation Bills: Treasury Laws Amendment (Your Future, Your Super) Bill 2021; Treasury Laws Amendment (More Flexible Superannuation) Bill 2020; and Treasury Laws Amendment (Self Managed Superannuation Funds) Bill 2020 have been passed by both Houses.
- Product intervention power: Treasury Laws Amendment (2021 Measures No 4) Bill 2021 has progressed to second reading stage in the Senate having passed the House. Among other things, Schedule 4 to the Bill proposes to amend the Corporations Act 2001 and the National Consumer Credit Protection Act 2009 to make clear that ASIC is not prohibited from making a product intervention order that has conditions relating to fees, charges or other consideration payable by a retail client or consumer in relation to a financial product or a credit product

In Brief | Hayne implementation: ASIC has made an instrument extending existing AFS licensing relief for public offer trustees to include all registrable superannuation entities 'to ensure that non-public offer trustees are regulated consistently with public offer trustees'. The exemption will apply until 31 December 2022. After 31 December 2022, it may be 'removed or continued subject to the outcome of this consideration, which will include consultation with industry'

[Sources: ASIC media release 18/06/2021; ASIC Corporations (Amendment) Instrument 2021/550]

Risk Management

Conduct risk

Top Story | AHRC report recommends eight ways ASX 200 companies can do better on workplace sexual harassment

Building on the landmark Respect@Work report, a new report from the Australian Human Rights Commission analyses ASX 200 companies' current approach to tackling the issue of workplace sexual harassment and sets out eight recommendations (six directed at boards, and two directed at investors) around how this can be improved.

Key Takeouts

- A key finding in the report - Equality across the board: Investing in workplaces that work for everyone - is that it is not always clear in ASX 200 companies that the board bears primary responsibility (and accountability) for overseeing and monitoring the effectiveness of their organisation's approach to dealing with workplace sexual harassment.
- This lack of clarity is evident in the information flows around the issue and the way in which the data collected is being used (not used).
- Further, many boards continue to take a reactive (as opposed to proactive) approach.
- The report includes six recommendations for boards and two directed toward investors to support improvement.

Overview

An Australian Human Rights Commission (AHRC) report, commissioned by the Australian council of Superannuation Investors analyses how ASX 200 companies are currently tackling the issue of workplace sexual harassment and puts forward eight recommendations (six aimed at boards, and two aimed at investors) for improvement.

The report builds on the recommendations in the landmark Respect@work report and is based on a survey and interviews conducted with ASX 200 companies. A high level overview of some key findings and the accompanying recommendations is below.

Key Findings

An accountability gap?

The report takes as its starting point the view that 'the board has primary responsibility and accountability for ensuring that the entity has in place a governance framework for the prevention of and response to sexual harassment, and for monitoring performance across the entity'.

Against this background, the report identified that it is not universally clear within ASX 200 companies where responsibility rests and more particularly, that it is not clear in most cases that it is a board responsibility.

A survey (of ASX company secretaries or investor relations leads in ASX 200 companies) found that:

- 50% of those surveyed consider responsibility rests with either the Head of Human Resources or the CEO
- Less than 20% (19%) consider primarily responsibility rests with the board
- Other respondents nominated the Head of Legal (14%), or another part of the organisation (17%)

The survey found that this lack of clarity is reflected in the internal information flows within organisations.

Boards may not be getting the information they need?

The survey found that a range of information relevant to the issue of sexual harassment tends not to be reported directly (or possibly even indirectly) to the board, but rather is more usually shared with the executive management team.

For example most survey respondents indicated that workplace sexual harassment incidents and separately, reports of worker misconduct are usually reported to executive management (63% and 68% respectively). In both examples, less than half of respondents indicated that the information would be reported to the board or to a board sub-committee.

Using, reporting and acting on the data being collected

The report found that though the majority of companies are collecting data around corporate culture, and in most cases (78%) are collecting information specifically about the prevalence (or not) of workplace sexual harassment complaints, the approach to using, analysing and acting on this (and related information) varies considerably.

The need for improvement in the way in which data is used and reported (both internally and externally) is emphasised in the report as an area for improvement.

Boards continue to take a reactive approach

The report highlights as well, that some boards continue to take a reactive approach to the issue, with board discussion of workplace sexual harassment often prompted by concerns about an issue within the organisation (31.4%) or by media reports (29%). Despite 41% of respondents indicating that their boards expected to discuss the issue of sexual harassment on a regular basis, 43% indicated that sexual harassment is not a regular board agenda item.

Most (but not all) companies have some measures in place to identify, prevent and address workplace sexual harassment

The survey found that the majority of ASX 200 companies employ a risk-based approach to addressing sexual harassment and that most have taken some steps to identify and mitigate the risk. For example:

- 64% of respondents reported that they have developed some form of 'mechanism' to identify high risk factors for sexual harassment (eg male dominated workplaces, workplaces with overnight shift work) and adopted measures to mitigate these risks. Interestingly, of the 36% of respondents that did not already have a mechanism in place, only half (18%) reported they were willing to establish such a mechanism. 5% reported they were unwilling to do so.
- 79% of companies have tied the executive management team's remuneration and performance incentives to culture and conduct standards. Over a quarter of companies (27%) reported that they have nonfinancial performance metrics relating specifically to sexual harassment for their executive management team.
- Training on sexual harassment was also fairly widespread, but the survey indicated that it tends to be focused on staff and the executive leadership team, rather than also focused on boards.
  - 60% of respondents indicated that the executive management team was required to undergo training on good governance and sexual harassment.
  - 69% indicated that staff were required to undertake training.
  - In contrast, only 19% of respondents indicated that directors were required to undergo education on good governance and sexual harassment

Most companies have multiple avenues available to report complaints

The survey found that the majority of companies have in place a range of avenues to enable reporting of sexual harassment eg anonymous reporting mechanisms (78%) and whistleblower reporting options (85%) (among other options).

However the report identified monitoring of outcomes and evaluation of the effectiveness of the complaints process as areas for improvement:

- only 31% of respondents indicated that their company monitors the outcome of sexual harassment complaints by following up with the complainant six months after the conclusion of the matter. Only 16% typically follow up with the (alleged) perpetrator)
- 31% of survey respondents indicated that there is no formal evaluation system in place within their company to facilitate continuous improvement of complaints handling policies/procedures

Eight recommendations for improvement

Recommended actions for boards

Recommendation 1: Demonstrate 'visible leadership and appropriate oversight and governance over culture, sexual harassment and gender equality'

- The report emphasises the importance of boards making clear that responsibility rests with them. That is, that boards need to ensure there is understanding within their organisation that they have responsibility for ensuring the necessary governance framework is in place within the organisation to prevent and respond to workplace sexual harassment as well as responsibility for actively monitoring performance against this framework to ensure its effectiveness.
- The report suggests that boards can demonstrate and 'display leadership and commitment' on the issue through (for example): 'prioritising corporate culture in the context of board discussions, setting gender equality related targets in strategic plans and demonstrating zero tolerance to workplace sexual harassment'.
- The report suggests board subcommittees can be helpful in managing the board's responsibilities in this context, but cautions that where this approach is adopted, the Terms of Reference (or equivalent) for the subcommittee should be formally documented.

Recommendation 2: Boards should ensure that the organisation has the 'skills and experience to effectively prevent and respond to workplace sexual harassment'

- The report calls on boards to 'deeply consider whether their skills and experience matrices appropriately address gender or workplace culture expertise'.
- The report emphasises that every director should take active steps to ensure that they have an understanding/are educated on the prevention/management of workplace sexual harassment including knowledge of issues related to 'gender, safety and trauma', noting that boards reported that having a member with a 'sophisticated and specialist expertise' on the issue is of benefit.
- The report also recommends that to ensure all executive management team members have a baseline understanding of the issue, completion of training on understanding sexual harassment, gender safety and trauma should be requirement. It's further suggested that some executive management team members eg HR executives, should receive additional targeted training.to support them in carrying out their roles effectively.

Recommendation 3: Boards should make 'gender equality a priority and set gender diversity targets' as part of promoting and building strong culture

The report recommends boards consider:

- Setting a timebound board gender diversity target: The report recommends that boards set 40:40: 20 diversity targets ie 40% men, 40% women and 20% open, and a timeframe for achieving this goal
- Setting organisational gender diversity targets: The report further recommends that achieving 'gender equality' across the organisation eg through setting diversity targets for every level of the organisation, should be a strategic goal.

Recommendation 4: Boards should ensure 'systems and frameworks are in place to collect, analyse and use data to effectively manage the risks related to sexual harassment'.

- The report underlines the importance of clearly allocating responsibility/accountability for data collection
- Further it's emphasised that any data collected should be used to 'identify, measure and monitor systemic trends and patterns with respect to corporate culture, including sexual harassment'.
- The report makes clear that boards have responsibility for making clear what data it expects to be collected, what information the board requires, and how and when it should be reported (in order to discharge their oversight/monitoring responsibilities)

Recommendation 5: 'Align appointment, expertise and performance management of the CEO and EMT with the entity's values to ensure that EMT demonstrates and displays visible leadership on culture, sexual harassment and gender equality'

- The report recommends that gender equality and the promotion of 'positive corporate culture' should be treated as a strategic priority and reflected in the board's approach to oversight of the CEO and executive management team.

- In practical terms, the report suggests that this could include for example:
  - including demonstrated experience of inclusive leadership/gender equality as a selection criterion for new appointments
  - tying incentives to culture/conduct and the ability to 'prevent and respond to sexual harassment and advance gender equality' in the workplace.

Recommendation 6: Report internally and externally to 'measure and track the effectiveness of systems and frameworks to prevent and manage sexual harassment'

- The report recommends organisations report information through existing public disclosure mechanisms eg reporting against the ASX Corporate Governance Principles.
- The report also recommends that organisations 'engage in industry led initiatives and industry-based reporting on corporate culture and sexual harassment'.

Recommended actions for investors

In addition to the six recommendations outlined above, the report includes two additional recommendations aimed specifically at investors given this group also 'have an ongoing responsibility to protect and enhance investment value'. In light of this responsibility the report makes the following two recommendations:

- **Recommendation 7 recommends that investors 'seek information on investee entities systems and process to prevent and address sexual harassment'.**
  - The report recommends that investors 'actively seek information from investee entities on its approach to addressing sexual harassment' drawing on publicly available information eg information on companies' websites, WGEA reporting, industry reporting, annual reports and Corporate Governance Statements etc
- **Recommendation 8 recommends that investors 'advocate for improved transparency and public disclosure on sexual harassment'.**
  - The report recommends for example, that investors advocate for 'stronger and more specific metrics on sexual harassment in existing mechanisms' eg annual reporting and WGEA reporting.

[Sources: ACSI media release 16/06/2021; Full text report: Equality across the board: Investing in workplaces that work for everyone]

Implementation of Respect@Work recommendations - Attorneys General agree actions to progress some recommendations

An extraordinary meeting of State and Territory Attorneys-General, led by Commonwealth Attorney General Michaelia Cash was held on 9 June 2021. The group agreed on a number of actions to progress the government's response to the recommendations in the Australian Human Rights Commission's Respect@Work report.

These actions included:

- **Progressing implementation of recommendation 49 (women's centres):** The group agreed to task officials with conducting a 'review by 30 June 2021' of the scope of services provided by working women's centres and like services, and to 'consider the feasibility of funding for services including under the National Legal Assistance Partnership'.
- **Progressing implementation of recommendation 53 (legal assistance)**: The group agreed that states and territories would 'come back prior to 30 June 2021 on whether they will provide increased legal assistance funding through responses to the Respect@Work Report to deliver dedicated front-line legal support for people experiencing sexual harassment in the workplace'.
- **Agreeing 'to take specific action' to progress certain other recommendations** including:
  - the harmonisation of human rights and anti-discrimination legislation relating to sexual harassment (recommendation 26)
  - protections for alleged victims of sexual harassment who are witnesses in civil proceedings (Recommendation 39)
  - resources for judicial officers (recommendation 40):
- **Coercive control and the criminal justice response to sexual assault**:
  - The group agreed to 'co-design national principles to develop a common understanding of coercive control and matters to be considered in relation to potential criminalisation, and to their public release, and tasked officials to work with women's safety officials to settle the terms of reference'.

- The group also agreed to 'task officials to work together to develop a plan of work on criminal justice responses to sexual assault'.

[Sources: Attorney General Michaelia Cash media release 16/06/2021; Communique: Meeting of Attorney's General 16/06/2021]

Cybersecurity, Privacy and Technology

Labor Bill proposes to mandate new ransomware reporting requirements

- Following a number of recent ransomware attacks, Shadow Assistant Minister for Communications Tim Watts has introduced a Bill - Ransomware Payments Bill 2021 – that if passed would make it mandatory for entities (Commonwealth entities, State or Territory agencies, corporations, and partnerships) who make a ransomware payment to report key details of the attack, the attacker and the payment to the Australian Cyber Security Centre (ACSC).
- The information would then be used by the ACSC to: a) 'share de-identified information' via the ACSC threat sharing platform with the private sector; b) collect/share information that may be used by law enforcement; and c) collect/share information 'to inform policy making and to track the effectiveness of policy responses'.
- The explanatory memorandum states that the new measures are intended to provide 'an important foundation for a comprehensive national ransomware strategy which is needed to deal with the onslaught of ransomware attacks on Australian organisations' the cost of which is considerable (eg the cost of ransomware attacks is estimated to be $1 billion for 2019).

[Source: Ransomware Payments Bill 2021]

In Brief | Scam alert: ASIC has issued a warning that some websites are linking/displaying fake ASIC company registration certificates, apparently as a means of promoting the business/services offered on the website. ASIC cautions that this may be an indication that the website is a scam and further cautions that 'registration does not guarantee the quality of a company and does not represent ASIC endorsement'. ASIC's announcement includes examples of the fake documents

[Source: ASIC media release 22/06/2021]

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