Governance News

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

30 June 2021

Contents

Diversity

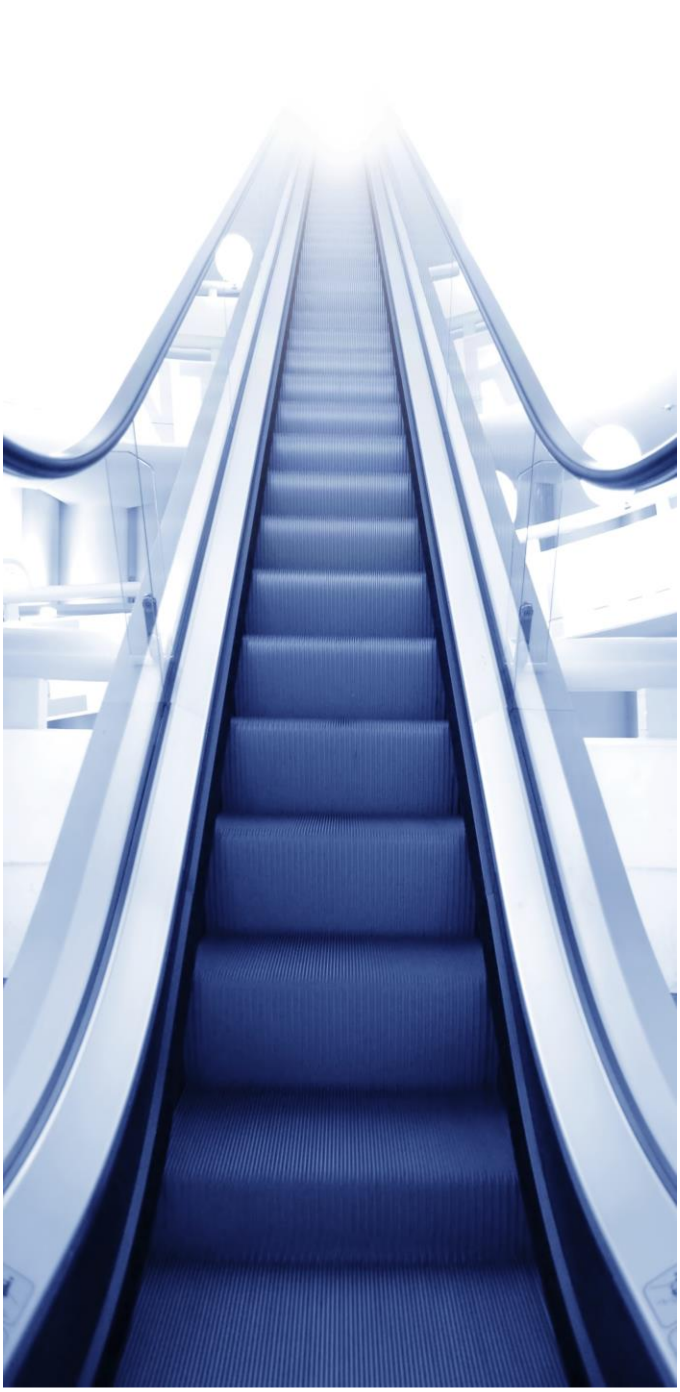
Could 2020 be a turning point for US board diversity? Analysis shows that progress remains slow

Key Takeouts

- Multi-year study finds that at the current rate of increase, equitable representation on Fortune 500 and Fortune 100 boards remains many years in the future
- The report suggests that looking ahead, the events of 2020, combined with increased focus on the importance and value of diversity (eg from investors, proxy advisers and legislative initiatives) may trigger an uptick in the pace of progress

A new multi-year study from Alliance for Board Diversity and Deloitte tracks progress towards increased diversity on the boards of America's largest publicly listed companies.

A key theme to emerge from the analysis is that while there has been some progress (which is more marked for certain demographic groups), the pace of change remains is extremely slow overall, and based on the current rate of change, the goal of achieving proportional representation (board representation that is proportional to the US population) remains a long way off. Looking ahead the report suggests that the events of 2020, and the increased focus on diversity by investors, the community and boards, may accelerate the rate of progress.



Some Key Takeaways

- Based on 2020 data, the report found that the representation of women and minorities on Fortune 100 boards stands at 42.2% for Fortune 100 boards and 38% for Fortune 500 boards. The report emphasises the significance of the gains made across the Fortune 500. Over the period 2010 to 2020, the number of Fortune 500 companies with 40% or more board representation of women and minorities has nearly quadrupled to 200 companies, with the rate of change picking up over the 2018-20 period.
- The report found that white women were the demographic group to have seen the greatest gains. According to the report, the proportion of board seats held by white women increased 15% in the Fortune 100 and 21% in the Fortune 500.
- However, the report found that despite these gains, equitable representation is still some distance away.
  - Men continue to hold the majority of board seats: For example, the report found that over the 2004 to 2020 period, though the proportion of board seats held by white men on Fortune 100 boards has decreased 11.3%, white men still hold the majority of seats (71.8%). The proportion of seats held by minority men (14%

in 2020) is significantly higher (more than double) the proportion of seats held by minority women (6.6%), though lower than the proportion of seats held by women overall (28.2%).
  - Most board seats are held by white directors: Looking at 2020 data, the report found that overall white directors hold 79.4% of Fortune 100 board seats. At the current rate of increase for the period 2004 to 2020, the report estimates that 40% minority board representation will not be achieved until 2074. Even assuming that slightly higher appointment rate for the 2018-20 period is maintained, 40% representation would not be achieved until mid-2055.

  The report comments that 'in either case, the events of the summer of 2020 make it clear that such “long road” paces for achieving equity are not acceptable to many Americans' and suggests that looking ahead, increased pressure from various groups (eg investors, proxy advisers and legislative initiatives) may accelerate the pace of change.

- New target: The Alliance for Board Diversity would like to see zero companies with less than 30% of board members who are women and/or minorities by 2022.
- Diverse directors appear to be being drawn from a small pool?
  - The report found that in 2020, more than a third (36%) of diverse board seats were held by directors who sit on multiple Fortune 500 boards.
  - Two in five African American/Black board members sit on multiple Fortune 500 boards.
  - 25% of Asian/Pacific Islander board members sit on multiple Fortune 500 boards.

  [Sources: Deloitte media release; Alliance for Board Diversity and Deloitte joint report: Missing Pieces Report: The Board Diversity Census of Women and Minorities on Fortune 500 Boards, 6th edition]

Disclosure and Reporting

Mandatory TCFD-aligned climate-risk disclosure in Australia by 2024? The IGCC has released a suggested roadmap

The Investor Group on Climate Change (IGCC) has released a report calling for the staged introduction of mandatory, TCFD aligned climate risk disclosure requirements in Australia by 2024 and has outlined the actions it considers the government and financial regulators should take to implement it.

Why mandatory disclosure is needed

- Climate risk disclosure is necessary information: The IGCC takes as its starting point the view that effective and credible climate risk disclosure is necessary for the effective management of the associated financial risks. For investors, the information is necessary to enable climate risk to be managed and priced across their portfolios. For regulators, it is important from the point of view of ensuring ongoing financial stability. The group points to the fact that this is recognised in the TCFD recommendations and is increasingly recognised and accepted by regulators in Australia and overseas. A table summarising the regulatory actions on climate-related risks in Australia (2017 – 2021) is included in the report at page 19.
- Voluntary reporting is not working: The IGCC considers that voluntary reporting (in combination with existing legal requirements) has essentially proven to be inadequate from the point of view of ensuring access to sufficiently detailed, decision-useful information - in practice, many climate risk disclosures remain a 'tick the box' exercise. A table summarising the 'gaps' in current reporting from an investor perspective, and the challenges for companies undertaking TCFD reporting is included at page 23 of the report.

  The IGCC comments,

  > 'The quantity and quality of disclosures is currently inadequate for investors to effectively respond to and manage material climate risks and opportunities, and for governments and financial regulators to address systemic risks to financial stability…
  >
  > Given the urgency of the climate threat and need for transparency, consistency and comparability of disclosures for informed and efficient asset allocation, and an orderly transition to net zero emissions, a voluntary approach to climate-related financial disclosure has proven to be insufficient'.

- Regulatory certainty will deliver multiple benefits: The IGCC argues that:

  > 'setting clear, mandatory requirements will help to align regulation with industry expectations and global standards, and reduce existing burdens by reducing and streamlining decision-making by making it apparent what needs to be done. Clear regulatory expectations and mandated requirements for TCFD-aligned disclosure with additional guidance where needed, including in relation to scenario analysis and Scope 3 emissions, creates multiple economic benefits and helps to facilitate the efficient investment in low carbon and climate-resilient transition'.

  The report observes that other jurisdictions have already taken steps to implement, or are considering implementing, mandatory reporting on this basis and argues that it is in Australia's interests to keep pace with these international developments. Page 5 of the IGCC report includes a table summarising the position in various other jurisdictions. A more detailed table outlining the different approaches to implementation of mandatory TCFD-aligned disclosure in different jurisdictions is included at page 12.

What is being proposed?

- Phased implementation:
  - The report recommends that new TCFD-aligned climate disclosure requirements should be phased in starting with an 'if not, why not' approach before becoming mandatory requirements by 2024.
  - Initially, the new requirements would cover ASX 300 and large unlisted non-financial companies; and large financial institutions (including banking, superannuation, asset management and insurance) before expanding to cover other entities over time.
  - Minimum expectations for climate reporting would also increase over time.

- **Rapid implementation**: Though the IGCC recommends that the new requirements should be phased in, it's also recommended that this should occur fairly rapidly. For example it's suggested that the appropriate timeframe for extending the new requirements from ASX 300 companies to all ASX-listed companies would be one year.
- **Additional guidance:** The quality of TCFD-aligned disclosure would be supported by the roll-out of further guidance across governance, strategy risk management and targets and metrics by financial regulators and other relevant bodies.
- **Establish a taskforce to oversee implementation:** The IGCC suggests that the Council of Financial Regulators could provide a 'solid foundation' for establishing a joint taskforce to coordinate the phased implementation of TCFD-aligned disclosure and 'mainstream climate-related disclosures in companies' audited financial statements' by 2024.

No reason to wait

In making these recommendations, the IGCC acknowledges that the International Financial Reporting Standards (IFRS) Foundation is in the process of establishing a Sustainability Standards Board that will focus on developing global climate disclosure standards. The IGCC considers that though alignment of reporting expectations across major jurisdictions is important, particularly for companies subject to multiple regulatory regimes 'this should be considered proactively and iteratively, and is not a good reason to delay action'.

> [Sources: IGCC media release 28/06/2021; Full text report: Confusion to clarity: A plan for mandatory TCFD aligned disclosure in Australia]

Global IFAC report flags low quality sustainability assurance as 'presenting a significant global investor protection issue' and an emerging financial sustainability risk

The International Federation of Accountants (IFAC) and the AICPA & CIMA (representing the Association of International Certified Professional Accountants) have released a report analysing the current state of ESG reporting and the extent to which companies globally are obtaining assurance over their ESG reports. The report analysed reporting practices at 1400 companies across 22 jurisdictions.

Key Takeaways

Most companies provide some level of ESG disclosure

- 91% of companies report some level of sustainability information
- The majority (57%) of ESG disclosures are contained in sustainability reports, 18% are located in annual reports and 16% in integrated reports.
- Of the companies that provided ESG disclosure, 68% referenced multiple disclosure frameworks/standards. The frameworks/standards most often referenced were the global reporting initiative (GRI) 69% and/or the UN Sustainability Development Goals (SDGs) 62%. Interestingly, only 24% of ESG reports referenced the Task Force on Climate-related Financial Disclosures (TCFD) recommendations.

Only just over half of companies reviewed provided any level of assurance over their ESG disclosure

- Of the companies that provided ESG disclosure, only 51% provided any level of assurance over it and in most cases, assurance reports did not cover all reported information: 83% of assurance engagements result in limited assurance reports.
- Where some level of assurance was provided, it is most often (63% of cases) provided by an audit firm/audit affiliated firm. However, in 37% of cases assurance is being provided by consultants or others, that are not audit firms/affiliated with audit firms. This is flagged as a significant risk in the report.

> 'With investors increasingly incorporating sustainability matters into their asset allocation decisions, low-quality sustainability assurance is presenting a significant, global investor protection issue. The International Organization of Securities Commissions (IOSCO) is leading the way to understand the potential ramifications for investors. Further, with the Financial Stability Board (FSB) and the Network for Greening the Financial System (NGFS) articulating the link between climate risk and financial stability, low-quality sustainability assurance is emerging as a financial stability risk as well'.

Variation in reporting practices across jurisdictions

Looking more closely, ESG disclosure and assurance practices were found to vary widely across different jurisdictions. For example:

- In the EU the prevalence of ESG disclosure and the extent to which companies obtain assurance is higher than in other regions. Drilling down, France leads the way. 100% of companies reviewed provided some level of ESG disclosure, usually using the SDG (66%), GRI (60%) or TCFD (42%) framework/standards. 96% of this group provided some level of assurance over their ESG reporting.
- At the other end of the spectrum, only 52% of Saudi Arabian companies reviewed disclosed ESG data and of this group, only 8% obtained limited assurance over it.

Where does Australia stand?

- The prevalence of ESG reporting was found to be higher in Australia than the global average, and the highest in the Asia-Pacific region: 100% of the 50 companies reviewed disclosed some ESG data, with reports most often referencing the GRI (70%), SDG (62%), or TCFD (54%) frameworks/standards.
- However, of the 50 Australian companies that provided ESG disclosure only 56% (28) obtained limited assurance over it. Though higher than the global average of 51%, this is far lower than in South Korea where 93.5% of companies obtain some level of assurance over ESG reporting.

[Sources: IFAC media release 23/06/2021; IFAC report: IFAC-Benchmarking-Global-Practice-Sustainability-Assurance.pdf]

Expert Panel recommends Japan's FSA act to support the transition to net-zero

Japan's Financial Services Agency (FSA) has released a summary in English of a report by an expert panel that includes a number of recommendations for the FSA to implement that are intended to enhance financial institutions' existing approach to managing sustainability risk (including climate risk) and more broadly, to support Japan's transition to a net-zero economy.

Recommendations include the following (among others):

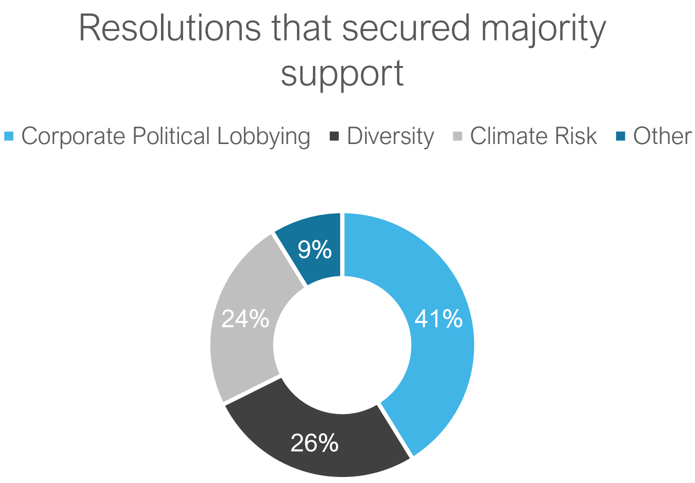
- improving ESG disclosure (including climate disclosure):
  - the report recommends active support/participation in the IFRS Foundation's process of developing shared, global sustainability reporting standards
  - the enhancement of climate related disclosure requirements
- introducing a code of conduct for ESG rating and data providers
- rolling out an ESG platform to provide both information on ESG-related bonds, including green bonds and a 'mechanism' for providing 'objective certification of the eligibility of ESG-related bonds'
- monitoring of asset managers to ensure that they 'carefully explain the characteristics of an ESG-related investment trust at its establishment and distribution, and be accountable for ESG aspects of the selected issues on an ongoing basis'.
- setting the expectation that financial institutions take steps to ensure they have the necessary skills/knowledge to integrate sustainability risks/opportunities into the decision-making and to support the broader transition to a net-zero economy. In particular, the panel recommends that the FSA consider issuing supervisory guidance on climate transition support and risk management (including the effective use of scenario analysis).

[Sources: Report by the Expert Panel on Sustainable Finance (Overview) [English Translation] 18/06/2021]

Shareholder Activism

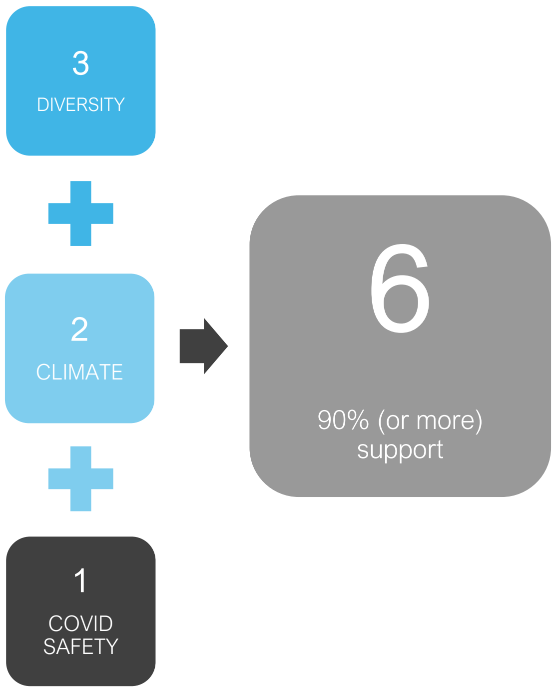
Analysis by Proxy Preview confirms that support for shareholder ESG proposals has already hit record levels in 2021

- Analysis from Proxy Preview has found that the number of shareholder ESG proposals receiving majority support has spiked: 34 shareholder ESG proposals so far in 2021 have received majority votes (up from 21 shareholder ESG proposals last year).
- Diversity not climate risk is the top category: According to Proxy Preview, of the 34 shareholder ESG proposals that have so far received majority support in 2021:
  - most (41% or 14 proposals) related to corporate political lobbying.
  - 9 related to diversity
  - 8 related to climate risk
  - 3 related to other topics.



The level of support for shareholder ESG resolutions has dramatically increased

- So far in 2021, 17 shareholder ESG proposals have received 70% (or more) support. In contrast, only two proposals broke 70% last year.
- Significantly, six proposals so far this year have received 90% or more support.
- Three diversity-related proposals:
  - IBM resolution (94.3% support): resolution sought disclosure around the effectiveness of diversity, equity and inclusion programs
  - Paycom Software resolution (93.7% support): executive diversity
  - First Solar (91.2% support): board diversity
- Two climate-related resolutions:
  - Bunge (09.9% support): reporting on supply chain deforestation impacts
  - General Electric (98% support): disclosure of net zero goals
- One COVID-19 worker safety resolution at Wendy's received 95.2% support.
- Increased willingness to vote against board recommendations? Proxy Preview points out that though four of these six proposals had board endorsement, importantly the remaining two (and a number of other proposals that secured majority support) did not.



  Executive Director of the Sustainable Investments Institute (Si2) and co-author of Proxy Preview Heidi Welsh commented that the findings suggest that 'investors at large see ESG as material'. Ms Welsh further commented that the high levels of support for shareholder ESG resolutions also appear to run counter to the intent of new SEC rules that will make it more difficult for shareholders (especially smaller shareholders) to file and/or resubmit shareholder proposals in 2022.

[Source: Proxy Preview media release 24/06/2021]

Successful engagement: Activists welcome further announcements of specific reduction targets for the use of virgin plastic

- Context: As You Sow and Green Century Management agreed to withdraw a resolution filed at Target Corporation in May 2021, following agreement by Target to set a 'virgin plastic elimination goal' for its private brand packaging to be announced at a later date.
- Target has now announced (as reported by CNBC here) its commitment to reduce annual total virgin plastic in its owned brand packaging by 20% by 2025. As You Sow's Senior Vice President Conrad MacKerron welcomed this development and expressed the hope that Target will continue to build on it, and that other companies will follow suit. Mr MacKerron stated:

  'We are pleased that the company set a significant goal to reduce plastic by one-fifth. We hope PepsiCo and Walmart will at least match these cuts when they announce the size of their commitments later this year. We would like to see Target build toward absolute cuts in plastic use across all its private brands in the future. Many more companies need to step up and make significant cuts in use of plastic for single-use packaging if we are to make meaningful progress in reducing the flow of plastic wastes into oceans.'

- Broader campaign: Target's announcement follows similar commitments from a number of other companies as a result of engagement efforts led by 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 22/06/2021]

In Brief | Toshiba shareholders have voted to remove the Chair and separately to remove an audit committee member at the company's AGM following governance concerns at the company

[Note: You can find a short overview of the issues raised ahead of the AGM in Governance News 23/06/2021 at p10]

[Source: Toshiba media release 28/06/2021]

In Brief | According to BankTrack, nearly a quarter (23%) of MUFG shareholders have voted in support of a shareholder climate resolution calling on the bank to adopt and disclose a plan to align its financing and investments with the goals of the Paris Agreement. BankTrack has credited the resolution with triggering a policy shift at MUFG, including a commitment from the bank to achieve net zero financed emissions by 2050

[Source: BankTrack media release 29/06/2021]

Meetings and Proxy Advisers

Top Story | New consultation launched: Draft Bill would permanently modernise meeting and execution requirements

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.

The deadline for submissions is **16 July 2021.**

Key Takeaways

Electronic execution

The draft Bill proposes to permanently enable electronic execution of company documents. This would mean that, when a company executes a document:

- persons signing would be able to do so electronically provided that: 1) that the copy includes the entire contents of the document; 2) 'a method must be used to identify the person and indicate their intention to sign the document'; and 3) 'the method must be as reliable as appropriate for the purposes for which the document was generated or proven in fact to have indicated the person's identity and intention'.
- split execution would be allowed ie persons required to sign a document, could sign separate copies of the document. The document would not need to include the signature of any other person.
- the document could be executed by the sole director of a proprietary company that does not have a company secretary.
- the fixing of the seal could be witnessed electronically. The person witnessing could do this by using technology (eg videoconferencing) to observe the fixing of the seal, signing the document (or a copy or counterpart of the document) and annotating it with a statement confirming that they have observed the fixing of the seal electronically.

Electronic meetings

The draft Bill also proposes to permanently give companies the option to hold hybrid meetings should they wish to do so. Companies would only have the option to hold wholly virtual meetings, where this is 'expressly permitted or required' in their constitution.

Participation

The draft explanatory memorandum states:

> 'The new law is not prescriptive about how a meeting should be conducted. It does not mandate a particular format for a meeting or a particular way in which a show of hands or a vote on a poll is to be conducted. It recognises that the meeting rules apply to a broad range of companies, from small not-for-profit companies to large listed companies, and allows each company to select the format for the meeting that is most appropriate for that company'.

However, it makes clear that 'members as a whole' must be afforded a 'reasonable opportunity' to participate, with a court able to declare a meeting invalid where it considers that 'a substantial injustice has occurred' and where this cannot be remedied by a Court order.

The draft explanatory memorandum includes a non-exhaustive list of factors relevant to considering whether 'members as a whole' have had a reasonable opportunity to participate. These include (among other considerations):

- whether the meeting is held at a 'reasonable' time and place
- where the meeting is a hybrid or virtual meeting, that the technology used is reasonable
- whether, where members have a right to speak/comment/ask questions at a meeting (eg under sections 250S and 250T of the Corporations Act 2001 (Cth)), they are able to do so 'either orally or in writing'

- whether documents tabled in meetings are made 'reasonable accessible to members as a whole either before or during the meeting'.

The draft explanatory memorandum states that other factors may also be relevant, suggesting for example, that 'directors should consider in what circumstances the right to participate also includes a right to be seen'.

Distribution of meeting-related documents

- The draft Bill proposes to make permanent the changes in Treasury Laws Amendment (2021 Measures No. 1) Bill 2021 relating to distribution of meeting-related documents. That is, to permanently enable any documents relating to meetings to be signed and given electronically (regardless of the format in which the meeting will be held).
- It's proposed that a document may be provided electronically either by: a) giving the document to the person by using electronic means (eg by email); or b) providing the person with details 'sufficient to allow them to view or download the document electronically' eg by giving them a card, emailing them a link to a website.
- Importantly, it will not be compulsory to receive documents in electronic form. Documents will only be able to be provided electronically if: a) it is reasonable to expect the document will be 'readily accessible so as to be useable for subsequent reference at the time the document is given'; and b) the individual receiving the document has not opted to receive it in hardcopy.

Minutes

It's proposed that minutes may be recorded and kept electronically 'if it is reasonable to expect that the information would be readily accessible so as to be usable for subsequent reference'.

Two year review

The draft Bill proposes a review of the changes to meeting and electronic communication requirements 'no later than the earliest practicable day after the end of two years'.

Independent scrutiny of polls

- The draft Bill also proposes to enable a member or group of members with 6% or more 'voting power' to 'require a listed company or registered scheme to appoint an independent person [eg the auditor of the company or registered scheme unless they would have a conflict of interest] to observe or report on a poll'.
- If the request relates to the observation of a poll then the request would need to be made no later than five business days before the meeting.
- If the request relates to a report on a poll, it's proposed that the request could be made up to five business days after the meeting.
- Companies/responsible entities would be bound to take 'reasonable steps' to action the request.
- Once completed, the independent report would need to be made available to members 'within a reasonable time'. In line with the requirements for keeping a record of meeting minutes, the company or responsible entity would be required to keep a record of the report.
- The company or responsible entity of the registered scheme would be responsible for paying any fees associated with appointing the independent person.
- Failure to take reasonable steps to: a) appoint an independent person; b) provide access to information to that person if requested; c) publish the report; or d) keep a record of the report would be a strict liability offence. The maximum penalty would be 40 penalty units. The draft explanatory memorandum states that this is appropriate because 'it is necessary to strongly deter misconduct that can have serious detriment for members'.

Proposed timing – how would these changes fit with the proposed changes already before parliament?

- If passed in its current form, Schedule 1 to the Treasury Laws Amendment (2021 Measures No. 1) Bill 2021 (TLA 1 Bill) which is currently before parliament, would temporarily enable companies and registered schemes to hold virtual or hybrid meetings and to electronically sign documents until 15 September 2021. You can find a summary of the Bill here. A short overview of the current status of electronic meetings/execution is here.
- The proposed changes in Schedule 1 of the draft Bill (if passed) would not alter this – ie companies would continue to be able to hold wholly virtual meetings until the sunset date in TLA 1 Bill (if the TLA 1 Bill is passed).

- It's proposed that the measures concerning hybrid meetings and use of technology to facilitate meetings in the draft Bill (if passed), would apply permanently from 15 September 2021.
- The explanatory memorandum states 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'.
- It's proposed that the changes to extend the statutory mechanism for the execution of company documents to all single director companies in Schedule 2 of the draft Bill will apply to documents that are executed on or after the commencement of the draft Bill.

  [Source: Treasury Consultation: Using technology to hold meetings and sign and send documents; [exposure draft] Treasury Laws Amendment (Measures for Consultation) Bill 2021: Use of technology for meetings and related amendments; [exposure draft] explanatory memorandum]

The PRI has added its voice to the list of organisations voicing strong opposition to the possible tightening of the regulation of proxy advisers in Australia

Context

- On 30 April 2021, Treasury released a consultation paper seeking views on possible options to tighten the regulation of proxy advisers. You can find our summary of the potential options under consideration here.
- As previously reported, the potential options in the paper have proven to be controversial. ISS, Glass Lewis and The Stockbrokers and Financial Advisers Association (SAFAA) have each separately voiced concerns. On the other hand, both the AICD and the Business Council of Australia have expressed support for tighter regulation.
- The consultation was launched, in part, because of 'international developments' including those now under review in the US (discussed in Governance News 09/06/2021 at p5). It remains to be seen what (if any) impact this may have on the eventual outcome. Australian firm Ownership Matters which has previously raised concerns about the options being put forward has suggested that the likely roll-back of the US rules calls into question the justification for reform in Australia (here and here).

Key takeaways from PRI's submission to the consultation

- The Principles of Responsible Investment's (PRI) submission takes as its starting point the view that the provision of independent analysis and voting recommendations by proxy advisory firms plays a crucial role in enabling institutional investors to fulfil their fiduciary obligations. The submission opines that 'without confidence in the impartiality of proxy firms' recommendations, investors - particularly smaller and mid-size investors - would lack the capacity required to synthesize all relevant information to vote their proxies and would thus have difficulty fulfilling their fiduciary duties'.
- In essence, the PRI's position is that existing regulatory requirements in Australia are appropriate and that there is no justification for, or benefit in, adjusting them as suggested in the consultation paper.
- With respect to options 3 and 5 in the consultation paper, the PRI is strongly of the view, that both should be dropped. For context:
  - Option 3 proposes to introduce a new requirement for proxy advisers to provide their report (ie the report containing their research and voting recommendations for resolutions at a company's meeting) to the relevant company five days before providing it to investors/making it publicly available. The consultation paper suggests that this timeframe would enable sufficient time for both the company and the proxy adviser to comment, and for the proxy adviser to 'amend the report in response if warranted'.
  - Option 5 proposes to introduce a new requirement for proxy advisers to obtain an Australian Financial Services Licence (AFSL) in order to provide proxy advice/recommendations to institutional investors.
- The PRI considers that there is no justification to support option 3 and that option 5 would not have any 'material impact on the standard of proxy advice'.

[Source: PRI Response to the Australian Treasury consultation on Greater Transparency of Proxy Advice June 2021]

Financial Services

Top Story | Business Interruption Insurance for COVID-19: First Australian Test Case

The High Court has rejected an application for special leave to appeal the NSW Court of Appeal's judgment in HDI Global Specialty SE v Wonkana No. 3 Pty Ltd [2020] NSWCA 296 concerning the interpretation of pandemic exclusions in some business interruption insurance policies (BI policies).

You can find a detailed discussion of the decision and the implications on our website here.

Initial response to the decision: Insurance Council of Australia

In a statement acknowledging the High Court's decision, Insurance Council of Australia (ICA) CEO Andrew Hall said:

> 'While we are disappointed, this decision on the first test case provides us with certainty and allows the industry to focus on the issues to be resolved through the second test case underway in the Federal Court of Australia. We encourage policy holders who are considering lodging a claim to contact their broker or insurer, and make sure they are keeping all the necessary paperwork. Once finalised, insurers are committed to applying the courts' decisions in both test cases in an efficient, transparent, and consistent way when assessing claims'.

Calls for small businesses to submit their claims

In a subsequent statement the ICA expanded on Mr Hall's initial comments urging small businesses who believe they are eligible to make a claim under their BI policies, to submit their claims now.

The ICA also cautioned that 'many claims' may not be finalised until the Federal Court hands down its decision in a second, separate test case. This second case is set to determine the meaning of policy wordings including wordings around disease definition, COVID outbreak proximity, the impact of government mandates.

ICA CEO Andrew Hall said that it is in policy holders' interests to commence the claims process as soon as possible.

> 'It is the position of the ICA that policyholders affected by COVID shutdowns are entitled to lodge a claim with their broker or insurer against their business interruption cover. As we are also nearing the end of the financial year, lodging a claim in this matter can be complex and requires gathering evidence – that's why policyholders should start that process now. While many claims will have to wait until the outcome of the second test case, lodging a claim now means that once that outcome is known a resolution can take place quickly, providing certainty for policyholders'.
>
> [Sources: ICA media release 26/06/2021; 25/06/2021]

Providing customers with a single point of contact: NZ insurers partner with the Earthquake Commission on a new Natural Disaster Response Model

- Eight insurers representing more than 20 insurance brands have partnered with the Earthquake Commission (EQC) on a new Natural Disaster Response Model.
- Under the new model, insurers will manage claims for the EQC's natural disaster insurance cover, providing policy holders with a single point of contact (their insurer) for the entire claims process. That is, insurers will assess, manage and settle the entire claim - including the EQCover portion - up to the statutory capped level of damage, and then any claim under their private insurance to cover additional losses up to their sum insured.
- In addition, insurers will report location data to the EQC (ie information about where insured homes are located) to enable better modelling/understanding of natural hazard risks.
- The new model will apply from 30 June 2021.

CEO of the Insurance Council of New Zealand Tim Grafton commented

> 'The new collaborative partnership between EQC and insurers delivers a world-first scheme - putting the customer at the heart of one of the most unique and responsive natural disaster response platforms globally.'
>
> [Source: Insurance Council of New Zealand media release 24/06/2021]

Top Story | Running behind: 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.

Implementation of Hayne recommendation 2.10: Bill to establish new disciplinary system for financial advisers introduced

Context

- Hayne Commission recommendation 2.10 recommended the establishment of a new disciplinary system for financial advisers including: a) the introduction of a requirement for all financial advisers who provide personal financial advice to retail clients to be registered; b) establishing a single, central disciplinary body; c) requiring Australian Financial Services Licence (AFSL) holders to report 'serious compliance concerns' to the new disciplinary body; and d) allowing clients and other stakeholders to report information about the conduct of financial advisers to the disciplinary body.
- On 19 April 2021 Treasury released draft legislation for consultation - Financial Sector Reform (Hayne Royal Commission Response - A New Disciplinary System for Financial Advisers) Bill 2021 – proposing to implement the government's response to Hayne recommendation 2010. Consultation closed on 14 May 2021. You can find a short overview of the draft Bill in Governance News 21/04/2021 at p15.
- The Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Bill 2021 (Bill) was introduced into the House of Representatives on 24 June 2021 and referred to committee for report by 28 July 2021. The Committee is accepting submissions on the Bill until 9 July 2021.

Overview of the Bill

Broadly, if legislated, the Bill will do four things.

1. Establish a single disciplinary body as recommended by the Hayne Commission

- The Bill would expand the role of the Financial Services and Credit Panel (FSCP) within the Australian Securities and Investments Commission (ASIC) to operate as the single disciplinary body for financial advisers.
- A panel would be convened where ASIC 'reasonably believes' than an adviser has breached their obligations under the Corporations Act 2001 (Cth) (the Act).
- Each panel would comprise of a Chair (who is an ASIC staff member) and a minimum of two other members drawn from a list of eligible persons appointed by the Minister, though there is no limit on the number of members that can be appointed to a particular panel.
- It's proposed that regulations will set out the circumstances in which ASIC may be required to convene an FSCP.

2. Introduce additional penalties/sanctions for financial advisers who have breached their obligations under the Corporations Act 2001 (Cth) (the Act).

3. Introduce a new two stage registration system for financial advisers (a change from what was proposed in the consultation).

- Stage 1: Stage one would require financial services licensees to apply to ASIC to register their financial advisers on the existing Register of Relevant Providers (the Financial Advisers Register). The proposed commencement date for this one-off registration process is 1 January 2022.
- Stage 2: New annual registration requirements for individual advisers (individuals will need to apply to the registrar to register themselves annually) would then commence either on a day set by proclamation, or if no proclamation

is made within the specified period, four years after the Act receives Assent. The intention is that this will coincide with the roll out of the new Australian Business Registry Service.

4. Wind up and transfer functions from the Financial Adviser Standards and Ethics Authority (FASEA) to the Minister responsible for administering the Act and to ASIC.

- It's proposed that on 1 January 2022, FASEA will be wound up and its functions transferred to the Minister and to ASIC. The Minister will have responsibility for making education and training standards for financial advisers and approving foreign qualifications. ASIC will have responsibility for administering the financial adviser examination in accordance with the principles approved by the Minister.

Provision of tax (financial) services

Finally, the Bill also proposes that tax (financial) advisers will no longer be regulated by the Tax Practitioners Board but instead be regulated only under the Corporations Act 2001 (Cth). 1 in line with the government's response to recommendation 7.1 of the Tax Practitioners Board Review. That is, the Bill proposes to introduce a single registration and disciplinary system under the Corporations Act for financial advisers who provide tax (financial) advice services.

If passed, the changes will mean that in order to provide tax (financial) advice services, a person will either need to be a registered tax agent, or be a financial adviser who has met the additional education and training standards to provide tax (financial) advice services under the Act.

Proposed Timing

- Subject to the passage of the Bill in its current form, the new disciplinary system and stage 1 of the new registration system for financial advisers would apply from 1 January 2022.
- Individual annual registration requirements would commence either on a day set by proclamation, or if no proclamation is made within the specified period, four years after the Act receives Assent.

[Source: Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Bill 2021]

Status update: Key Bills and related changes

LEGISLATION TITLE	KEY CHANGES	COMMENCEMENT
▪ The Financial Regulator Assessment Authority Bill 2021 and the Financial Regulator Assessment Authority (Consequential Amendments and Transitional Provisions) Bill 2021 received Assent on 29 June 2021.	▪ **Hayne implementation:** The Bills implement the government's response to Hayne recommendations 6.13 and 6.14 by establishing the Financial Regulator Assessment Authority to assess the effectiveness and capability of APRA and ASIC.	▪ 1 July 2021
▪ Treasury Laws Amendment (2021 Measures No. 4) Bill 2021 passed both houses on 24 June 2021	▪ **Product Intervention Power:** 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.	▪ Schedule 4 will commence the day after Assent
▪ Treasury Laws Amendment (2021 Measures No. 5) Bill 2021 was introduced into the House of Representatives on 24 June 2021	▪ **Insolvency changes:** Schedule 2 of the Bill makes consequential amendments to integrate the corporate insolvency reforms across the Commonwealth statute book.	▪ The proposed commencement date for Schedule 2 is the day after Assent

LEGISLATION TITLE	KEY CHANGES	COMMENCEMENT
▪ Treasury Laws Amendment (Miscellaneous and Technical Amendments) Regulations 2021	▪ **Hayne implementation – fee disclosure requirements:** Schedule 1 of Financial Sector Reform (Hayne Royal Commission Response No.2) Act 2021 implements the government's response to recommendations 2.1 (annual renewal and payment). ▪ Treasury Laws Amendment (Miscellaneous and Technical Amendments) Regulations 2021 provide (among other things) that fee disclosure statements given to clients during the transition period need only include a reasonable estimate of the amount of any ongoing fees paid and services expected to be provided for the 60 day period immediately before the fee disclosure statement is provided rather than the exact amount.	▪ Schedule 1 of Financial Sector Reform (Hayne Royal Commission Response No.2) Act 2021 commences 1 July 2021. ▪ The changes to fee disclosure requirements in the Regulations likewise apply from 1 July 2021.
▪ The Treasury Laws Amendment (Your Future, Your Super) Bill 2021 received Assent on 22 June 2021. ▪ Treasury Laws Amendment (Your Future, Your Super) Act 2021 was registered on 24 June 2021.	▪ **Superannuation reform:** The Act contains measures in the Your Future, Your Super package of reforms announced in the 2020–21 Budget	▪ Schedules 1-3: 1 July 2021
▪ Treasury Laws Amendment (More Flexible Superannuation) Bill 2020 received Assent on 22 June 2021. ▪ Treasury Laws Amendment (More Flexible Superannuation) Act 2021 was registered on 24 June 2021.	▪ **Superannuation reform:** The Act contains amendments to extend the bring forward rule by enabling individuals aged 65 and 66 to make up to 3 years of non-concessional superannuation contributions from 1 July 2020, remove excess concessional contributions charges and allow recontribution of COVID-19 early release superannuation amounts outside of contribution caps.	▪ Schedules 1-3: 1 July 2021
▪ Treasury Laws Amendment (Self Managed Superannuation Funds) Bill 2020 received assent on 22 June 2021. ▪ Treasury Laws Amendment (Self Managed Superannuation Funds) Act 2021 was registered on 24 June 2021	▪ **Superannuation reform:** The Act increases the maximum number of SMSF members from 4 to 6, applicable from 1 July 2021.	▪ 1 July 2021

DDO preparation and implementation of SPS515 the key topics of discussion at the inaugural Superannuation CEO Roundtable

The Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC) held a joint roundtable - the inaugural Superannuation CEO Roundtable - on 30 April 2021. The regulators have now released the notes from the discussion.

The event was attended by eleven superannuation trustee CEOs, representing all sectors of the industry. The focus of the discussion was implementation of SPS 515 Strategic Planning and Member Outcomes and the upcoming Product Design and Distribution Obligations (DDOs).

Key Takeaways

- APRA and ASIC consider the requirements in SPS515 and the DDOs to be 'complementary' and 'challenge trustees to have a continuous improvement mindset'. The regulators acknowledged however that 'there will be an evolution in sophistication of approach over time in both regimes'.
- SPS515 implementation:
  - APRA said issues identified with SPS515 implementation so far include: 'a lack of specificity, justification and rigour in methodologies, strategic projections and objectives'. APRA said it expects to share its findings on SPS 515 'in the coming months'.
  - The notes indicate that CEOs consider that the work their organisations have undertaken to meet SPS 515 has so far been valuable in the context of their strategic planning process and has 'encouraged new ways of thinking at the senior executive and board level about metrics and strategic outcomes'.
- DDO preparation:
  - ASIC has so far observed a 'wide variation in DDO readiness' across industry. ASIC considers better practices include 'focusing beyond target market determinations to overall product governance'.
  - The CEOs noted that work is currently underway on implementing DDO requirements within their funds with a number observing that this has prompted deeper consideration of 'how to better match product design and member needs'.
  - CEOs flagged that there are 'challenges in applying the legislation'. These include lack of clarity around: the definition of a product vs an investment option, how the MySuper exemption applies in practice and whether clearing houses were captured or exempt under DDO. CEOs requested 'further clarity and guidance on these matters'.
  - In response to these concerns, ASIC confirmed that clearing houses 'are caught by the DDOs', but welcomed views from the industry on this. ASIC also indicated that it would continue to communicate with industry on the various issues raised by the implementation of the DDO requirements. More broadly, ASIC encouraged trustees to take 'a holistic approach to the DDOs, noting that there can be benefits in applying this thinking across all their products'.
- Data and data governance
  - The importance of data and data governance is identified in the notes as a 'common thread throughout the discussion'. Both regulators agreed there are opportunities to work with the industry on the issue.
  - CEOs would like to see APRA provide more frequent, consistent and richer data.
  - APRA noted that it is currently transforming its data collection and working closely with ASIC and the industry on this project.
  - In the context of measuring member outcomes, there was discussion around whether there is a future for the use of risk adjusted returns to account for different investment strategies. It was noted that measurement of member outcomes is an area of ongoing development and APRA and ASIC are keen to work with the industry to refine measures over time.
- Open Forum: The roundtable included an 'open forum'. Discussion touched on the Financial Accountability Regime as well as upcoming changes to trustee indemnity. On this last point, APRA flagged that a discussion paper focussing on trustee reserving and resilience, which will touch on the trustee indemnity changes, is planned for release in mid-2021.
- Future roundtables? There was consensus on the value of the roundtable. On the basis of this success, APRA and ASIC plan to arrange another Roundtable in H2 2021 with a different theme and attendee list.

[Source: APRA media release 29/06/2021]

Consumer Credit: The Federal Court has dismissed ASIC's payday lending case, separately the Full Federal Court has upheld ASIC's first Product Intervention Order

- The Federal Court has dismissed the case brought by the Australian Securities and Investments Commission (ASIC) seeking orders to restrain payday lenders BHF Solutions Pty Ltd and Cigno Pty Ltd from engaging in credit activities, finding that the lending model they operate does not contravene the National Consumer Credit Protection Act 2009 (Cth) as alleged.
- The key takeaway from the decision is the Court's acceptance [150] that: 1) 'the fees charged by Cigno were in exchange for, or the quid pro quo for, providing the services pursuant to the Morrow Services Agreement [ie for

provision of 'application, management and collection services'], not for the provision of credit' ; and 2) 'it is not possible to ignore the terms of the Morrow Services Agreement and "the reality that Cigno provided services pursuant to that agreement, and the reality that the fees paid to Cigno were fees for providing those services"'.

- In reaching this conclusion, Justice Halley commented [160] that

  > 'On one view, given the beneficial and protective purpose and object of the Code, it might be thought that this produces a result that could not have been intended, but as the High Court stated in Cooper Brookes (Wollongong) Proprietary Limited v The Commissioner of Taxation of the Commonwealth of Australia (1981) 147 CLR 297; [1981] HCA 26 at 305 (Gibbs CJ), when construing a provision "it must be given its ordinary and grammatical meaning, even if it leads to a result that may seem inconvenient or unjust"'.

- ASIC has not yet indicated whether it intends to appeal the decision but both the Consumer Action Law Centre and Financial Counselling Australia have jointly called on the regulator to do so arguing that it applies an unnecessarily narrow interpretation of the National Consumer Credit Protection Act 2009 (Cth).
- Separately, the Full Federal Court has dismissed an application by Cigno Pty Ltd seeking to quash ASIC's first product intervention order in relation to short term credit, supporting ASIC's application of the product intervention order provision. ASIC has welcomed this outcome.

  [Sources: ASIC media release 23/06/2021; Australian Securities and Investments Commission v BHF Solutions Pty Ltd [2021] FCA 684; Financial Counselling Australia media release 23/06/2021; Cigno Pty Ltd v Australian Securities and Investments Commission [2021] FCAFC 115; ASIC media release 29/06/2021]

Smaller banks set to be quizzed by Committee on Hayne implementation and their approach to the pandemic

The Australian Banking Association, Bank of Queensland, Beyond Bank, HSBC Australia, ING Australia, Volt, Judo Bank, Teachers Mutual Bank Ltd and Unity Bank will appear before the House Economics Committee on 1 July 2021 as part of the Committee's ongoing Review of the Four Major Banks and other Financial Institutions The hearing will mark Judo and Volt Bank's first appearance before the Committee.

Committee Chair Tim Wilson MP indicated that the banks' progress toward implementation of the Hayne recommendations and their approach to the COVID-19 pandemic will be two areas of focus at the hearing. Mr Wilson added that the Committee is 'looking forward to hearing from Volt and Judo Bank on their experience and role in the future of Australia's banking sector'.

[Source: House of Representatives Standing Committee on Economics: Inquiry into the Four Major Banks and other Financial Institutions, Smaller Banks program 1 July 2021; media release 30/06/2021]

ASIC has advised that additional AFSL conditions imposed on SGSAPL have been removed

- In June 2020, the Australian Securities and Investments Commission (ASIC) imposed additional Australian Financial Services Licence (AFSL) conditions on Societe Generale Securities Australia Pty Ltd (SGSAPL).
- The conditions were imposed following an investigation by ASIC into reports (by SGSAPL) of breaches of the 'client money' provisions of the Corporations Act 2001 (Cth).
- The conditions required SGSAPL to appoint an independent expert to assess, test and report on the adequacy and effectiveness of its controls, systems and processes.
- ASIC has issued a statement advising that SGSAPL had fulfilled these additional conditions and that they were removed on 3 June 2021. ASIC has also released a summary of the independent expert's final report.

  [Source: ASIC media release 24/06/2021]

In Brief | Deferred again? Senate Committee has heard that legislation to establish the compensation scheme of last resort (as recommended by the Hayne Commission) having been deferred already due to COVID-19, has been deferred again for budgetary reasons

[Source: Transcript: Parliamentary Joint Committee hearing: Oversight of the Australian Securities and Investments Commission, the Takeovers Panel and the Corporations Legislation No. 1 of the 46th Parliament, 18/06/2021]

In Brief | A new General Insurance Code of Practice will come into effect from 1 July 2021. The new Code will replace the existing 2014 Code

[Source: General Insurance Code of Practice]

In Brief | The ABA says banks stand ready to assist customers impacted by COVID-19 lockdowns and has urged customers in hardship to be proactive in contacting their lender to discuss options for assistance. The type of assistance offered will vary according to individual circumstances but could include for example: adjustments to loan payments, waiving fees/charges and/or offering interest free periods or no interest rate increases

[Source: ABA media release 29/06/2021]

In Brief | The Banking Code Compliance Committee has released its 2021-24 Strategic Plan and 2021-22 Business Plan. Priorities over the 2021-22 period include: conducting targeted inquiry into deceased estates and separately a follow up inquiry into financial difficulty to identify instances of serious/systemic non-compliance. Longer term strategic priorities include a focus on holding banks to account and applying sanctions for Code breaches and stepping up monitoring activity 'ensure banks remediate customers and improve practices'

[Sources: BCCC media release 28/06/2021; BCCC Strategic Plan 2021-24; Banking Code Compliance Committee 2021–22 Business Plan]

In Brief | Review of financial regulation: New article discusses how the proliferation of delegated legislation in the context of financial services legislation has 'created or contributed to the excessive complexity, inconsistency, and inaccessibility' of the Ch 7 regime

[Source: [registration required] Tess Van Geelen, Delegated Legislation in Financial Services Law: Implications for Regulatory Complexity and the Rule of Law, (2021) 38 C&SLJ 296]

Risk Management

Respect@Work reform Bill introduced

The Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 was introduced by the government into the Senate on 24 June 2021 and has been referred to the Senate Education and Employment Legislation Committee for report by 6 August 2021. The closing date for submissions is 9 July 2021.

If passed in its current form the Bill would:

- implement the government's response to Respect@Work recommendations 16, 20, 21, 22, 29, and 30 (consistent with the government's implementation roadmap).
- vary the existing entitlement to compassionate leave in the Fair Work Act to include miscarriage. This would enable an employee to take up to two days of paid compassionate leave (unpaid for casuals) if the employee or the employee's partner (spouse/de facto partner) has a miscarriage.

Implementing the government's response to six Respect@Work recommendations: overview of key changes

<table>
<tr><th colspan="2">RESPECT@WORK RECOMMENDATION</th><th>PROPOSED MEASURES IN THE BILL</th></tr>
<tr>
<td>Recommendation 16</td>
<td>Recommendation 16 recommends that the Sex Discrimination Act be amended to ensure:
the objects include ‘to achieve substantive equality between women and men’
sex-based harassment is expressly prohibited
creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex is expressly prohibited
the definition of ‘workplace participant’ and ‘workplace’ covers all persons in the world of work, including paid and unpaid workers, and those who are self-employed
the current exemption of state public servants is removed.</td>
<td>The Bill proposes to:
introduce a new object clause to make it clear that the Sex Discrimination Act 'aims to achieve, so far as practicable, equality of opportunity between men and women'.
introduce a new provision in Division 3 of Part II of the Sex Discrimination Act to make it expressly clear that it is unlawful to harass a person on the grounds of sex. The explanatory memorandum states that this would 'merely clarify the existing case law which shows that sex-based harassment can already be found unlawful'. The explanatory memorandum also makes clear that the proposed change is not intended to 'capture mild forms of inappropriate conduct based on a person’s sex that are not of a sufficiently serious nature to meet the threshold of offensive, humiliating or intimidating, as well as seriously demeaning'.
Coverage:
The Bill adopts the concepts of ‘worker’ and ‘PCBU’ (persons conducting a business or undertaking) used in the model Work Health and Safety law to ensure that persons not previously covered under the Sex Discrimination Act (eg interns, volunteers and self-employed workers), are protected from harassment.
The Bill also includes changes intended to clarify that the scope of the Sex Discrimination Act extends to members of parliament, their staff, and judges at all levels of government. The changes would also remove the existing exemption for state public servants.</td>
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RESPECT@WORK RECOMMENDATION		PROPOSED MEASURES IN THE BILL
		▪ The explanatory memorandum makes clear that the proposed changes are also intended to ensure that 'a person who causes, instructs, induces, aids or permits someone else to engage in sexual harassment, or sex-based harassment, can also be found to have engaged in the unlawful conduct under the ancillary liability provision in the SD Act'.
Recommendation 20	Recommendation 20 recommends that s105 of the Sex Discrimination Act be amended to ensure it applies to sexual harassment.	▪ The Bill proposes to extend the coverage of s105 to Division 3 of Part II of the Sex Discrimination Act which would prohibit both sexual harassment and harassment on the ground of sex (as a result of amendments made by the Bill). ▪ Section 105 currently does not extend to Division 3 (sexual harassment) of Part II, unless the conduct also amounts to unlawful discrimination or victimisation. This means that a person who causes, instructs, induces, aids or permits another person to engage in sexual harassment would not be liable under the Act unless they are also an employer. ▪ The proposed change in the Bill is intended to ensure that people who cause, instruct, induce, aid or permit another person to engage in sexual harassment or another provision included in Division 3 are also liable under the Sex Discrimination Act. The explanatory memorandum suggests for example, that under the changes: – if a manger were to encourage one of their junior staff to sexually harass another staff member, the manager may be held liable as an accessory to the harassment – if an employee encourages a fellow employee to sexually harass a person (but does not engage directly in the conduct themselves) they may also be held liable as an accessory to the harassment
Recommendation 21	Recommendation 21 recommends that the Australian Human Rights Commission Act be amended to 'make explicit that any conduct that is an offence under section 94 of the Sex Discrimination Act can form the basis of a civil action for unlawful discrimination'.	▪ The Bill proposes to clarify that victimising conduct can form the basis of a civil action for unlawful discrimination in addition to a criminal complaint under the Sex Discrimination Act.
Recommendation 22	Recommendation 22 recommends that the Australian Human Rights Commission Act be amended 'so that the President's discretion to terminate a complaint under the Sex Discrimination Act on the grounds of time does not arise until it has been 24 months since the alleged unlawful discrimination took place'.	▪ Under the changes in the Bill, a complaint under the Sex Discrimination Act could only be terminated by the President of the AHRC, if it is made more than 24 months after the alleged unlawful conduct took place. ▪ The explanatory memorandum makes clear that the President would retain their existing

RESPECT@WORK RECOMMENDATION		PROPOSED MEASURES IN THE BILL
		discretion to consider a complaint beyond this timeframe.
Recommendation 29	Recommendation 29 recommended that the Fair Work Act be amended to introduce a 'stop sexual harassment order' (equivalent to a stop bullying order).	▪ This Bill would amend the existing anti-bullying jurisdiction in the Fair Work Act to clarify that the Fair Work Commission can make an order to stop sexual harassment in the workplace. ▪ The explanatory memorandum makes clear that 'just as is the case with the existing jurisdiction, orders are intended to prevent the risk of future harm. The FWC must be satisfied that the harassment has occurred to make an order, and orders would not be available in cases where there is no risk of harassment occurring again, for example when the person who harassed the worker is no longer employed at the workplace'.
Recommendation 30	Recommendation 30 recommended that the Fair Work Act be amended to 'clarify that sexual harassment can be conduct amounting to a valid reason for dismissal in determining whether a dismissal was harsh, unjust or unreasonable'.	▪ The Bill proposes to introduce a new legislative note into the Fair Work Act informing readers that sexual harassment in connection with the employee's employment can be a valid reason for dismissal.

Proposed timing

The proposed commencement date is the day after Assent.

[Source: Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021]

Mandatory reporting requirements for employers? The Victorian government is seeking feedback on potential options to address sexual harassment in Victorian workplaces

The Victorian government has launched a public consultation (full text of the consultation paper here) seeking views on potential options to better address sexual harassment in Victorian workplaces and inviting comments/ideas on other options.

More particularly, the consultation seeks feedback on: a) what steps can/should be taken to prevent sexual harassment from occurring; b) how complainants can be better supported; c) how compliance with existing occupational health and safety duties can be better enforced; and d) what steps can be taken to raise awareness/promote accountability.

Among other things, the consultation paper seeks feedback on:

- the possible introduction of new reporting requirements for employers to report workplace sexual harassment incidents to Worksafe (Victoria's occupational health and safety regulator).
- the possible introduction of penalties for employers who fail to provide a workplace free from sexual harassment as well as penalties for employees to sexually harass co-workers

The deadline for submissions is 26 July 2021.

Mandatory reporting?

- In a media release, Premier of Victoria Daniel Andrews said that the launch of the consultation coincides with the third meeting of the Ministerial Taskforce on Workplace Sexual Harassment, which is responsible for exploring ways to strengthen the state's occupational health and safety framework to address sexual harassment.
- According to the media release, a key focus for the taskforce is both:
  - the possible introduction of 'mandatory reporting that would require employers to report incidents of workplace sexual harassment to Worksafe'

- measures to prevent 'the misuse of non-disclosure agreements in sexual harassment matters – better supporting those who experience or witness unacceptable behaviour to speak up'.

  [Sources: Victorian Department of justice and community safety consultation: Addressing sexual harassment in Victorian workplaces; Consultation paper; Premier Daniel Andrews media release 25/06/2021]

In Brief | Building a more complex understanding: Australian survey finds 60% of women who identify as women of colour, have experienced discrimination at work, with 79% believing that they have faced (57%) or may have faced (22%) challenges in their workplace related to their identity as a woman of colour eg racism, tokenism, sexism, and/or a combination of these

[Sources: Women of Colour Australia Workplace Survey Report 2021]

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