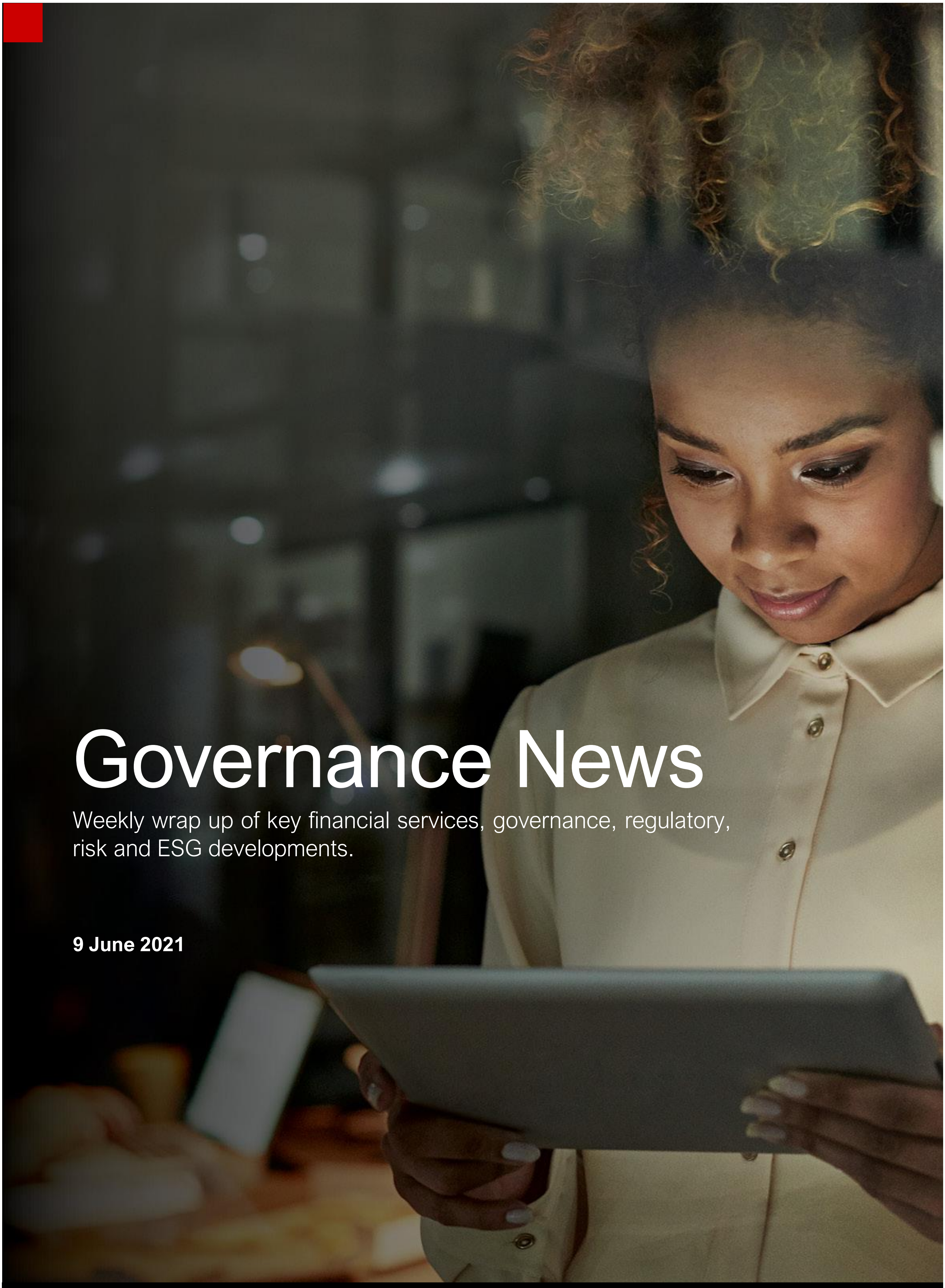


Governance News

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

9 June 2021

Contents

Diversity

Board gender quotas in Germany?

The World Economic Forum (WEF) has published an update on the German government's plans to improve gender parity in the workforce. According to WEF:

- Legislation is expected to be passed this summer which will mean that larger listed firms whose management boards have more than three members will need to include at least one woman
- Firms that fail to meet the requirement to report on whether/how they intend to meet the new quota will face fines

The legislation also:

- creates a legal right for board members to take up to three months of parental leave and time off to care for family members without having to give up their mandate
- sets out stricter gender equality rules for government-controlled companies, where boards with more than two members will have to include at least one woman

Proposed timing: Companies will be given a one-year transition period to select candidates.

[Source: WEF media release 03/06/2021]

Meetings and Proxy Advisers

SEC to reconsider Trump-era proxy advice reforms

On 1 June 2021, US Securities and Exchange Commission (SEC) Chair Gary Gensler announced that he has directed SEC staff to 'reconsider' Trump era proxy rules. Mr Gensler stated,

> 'In particular, the staff should consider whether to recommend that the Commission revisit its 2020 codification of the definition of solicitation as encompassing proxy voting advice, the 2019 Interpretation and Guidance regarding that definition, and the conditions on exemptions from the information and filing requirements in the 2020 Rule Amendments, among other matters'.

In light of this review, the SEC separately indicated that it will not recommend enforcement action based on the 2019 guidance.

Institutional Shareholder Services (ISS) has issued a statement welcoming this development. ISS President and CEO Gary Retelny commented,

> 'We welcome the SEC's announced decision to consider revisiting its proxy adviser rulemaking, which we believe was ill-conceived, inconsistent with the law, and pushed through under the previous administration against the wishes of investors the agency is meant to protect…We look forward to participating in the upcoming rulemaking process and encourage all good governance supporters to do the same.'

Two SEC Commissioners have raised concerns about initiating a further review so soon

In a statement, SEC Commissioners Peirce and Roisman said that while 'open to seeing what, if any, changes to our rules the staff recommends and to working with our colleagues to consider such recommendations' they are of the view that it is too early to propose further changes.

> 'We find it difficult…to imagine what has changed in the roughly ten months since the Commission last considered this issue that would call into question such recently adopted requirements. Indeed, the compliance date for the exemption conditions is still months away, which makes it challenging, if not impossible, for us to know how these requirements will work in practice. How can we evaluate the appropriateness of

further changes without considering such new data or experience? We find it even harder to understand how the Commission would justify a departure from its longstanding legal interpretation about proxy solicitation.

While it is true that certain groups expressed displeasure with various policy outcomes over the course of the rulemaking (a circumstance that occurs in every rulemaking), the Commission's process in adopting these amendments was beyond reproach…The rule we adopted reflected the broad range of input we received on the proposal'.

Australia?

- 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 here.
- The consultation was launched, in part, because of 'international developments' including those now under review in the US.
- Australian firm Ownership Matters, which has previously raised concerns about the proposed changes, has suggested (here and here) that the likely roll-back of the US rules, calls into question the justification for reform in Australia.

[Sources: SEC public statements 01/06/2021; 01/06/2021; ISS media release 01/06/2021; Commissioner Peirce and Commissioner Roisman's response to Chair Gensler's and the Division of Corporation Finance's Statements Regarding the Application of the Proxy Rules to Proxy Voting Advice 01/06/2021; Ownership Matters]

In Brief | Debate on possible options to tighten the regulation of proxy advisers in Australia continues: ACSI's submission to Treasury's consultation queries the basis for change and raises concerns about the options being put forward, iSignthis' submission calls for potential reforms to go further. Writing in The AFR, the AICD has outlined the case for tougher regulation

[Sources: ACSI submission to the department of Treasury Consultation Paper on greater transparency of proxy advice; ISignthis submission to the department of Treasury Consultation Paper on greater transparency of proxy advice 02/06/2021; [registration required] The AFR 07/06/2021]

Shareholder Activism

Top Story | New analysis of shareholder ESG resolutions in Australia released

A University of Melbourne study provides an overview of shareholder ESG resolutions in Australia over the 2002-2019 period, insights into how key stakeholders measure the value of these resolutions, and stakeholder views on the existing shareholder resolution framework. Our key takeaways are below.

Key Takeouts

- Analysis from University of Melbourne academics Ian Ramsay and Lloyd Freeman has identified that the vast majority of shareholder ESG resolutions in Australia over the period 2002-2019 have been climate-related, though exactly what proportion depends on how broadly or narrowly the category of 'climate-related' is drawn. Conservatively speaking, the researchers found that 57% of all shareholder ESG resolutions have been directly climate related.
- The researchers identified that there has been a sharp uptick in the volume of resolutions in recent years.
- Support for shareholder ESG resolutions remains relatively low (with some notable exceptions).
- An interesting finding is that shareholder ESG resolutions appear to be recognised by all stakeholders – those who have proposed the resolutions, organisations representing institutional shareholders and company directors, and the Australian Securities and Investments Commission (ASIC) - as a 'valuable corporate stakeholder engagement mechanism' capable of driving positive change in the companies targeted, even where the resolution fails to be carried.
- The study also found that though there is general acknowledgement among the stakeholders interviewed that the current shareholder resolution mechanism in Australia is flawed, there is no consensus on how it could be improved, or even on the need to improve it.

Overview

University of Melbourne academics Ian Ramsay and Lloyd Freeman have released their analysis of shareholder activist activity in Australia.

The analysis is based on two sources of data: the shareholder ESG resolutions filed with listed Australian companies over the period 2002 to 2019; and interviews with key stakeholders – those who have proposed the resolutions, organisations representing institutional shareholders and company directors, and the Australian Securities and Investments Commission (ASIC). Our key takeaways are below.

Some interesting statistics

- A recent spike in the number of ESG resolutions: Of the 82 shareholder ESG resolutions filed with ASX listed companies during the period 2002 to 2019, 79% (65 resolutions) were advanced in the three years between 2017 and 2019.
- So far, companies in industries with high exposure to climate change have been the key focus.
  - The study found that the number of companies targeted is fairly small (23 companies in total), with many companies facing multiple resolutions.
  - 79% of all shareholder ESG resolutions during the period 2002 to 2019 were targeted at companies in only four industries: energy, banking, insurance and materials (though companies in five other industry sectors were also targeted). The authors consider that this reflects both the companies' relatively high level of climate change exposure and the history of engagement by individual companies on the subject(s) of the resolutions.
- 84% of resolutions have been advanced by one of only two filers: Every shareholder ESG resolution since 2015 (69 resolutions in total) have been filed by one of two filers: the Australasian Centre for Corporate Responsibility (ACCR) or Market Forces.

Most resolutions concern climate risk

- Most resolutions are climate related (but exactly what the proportion is less straightforward to be definitive about).

- 57% of all ESG resolutions over the 2002-2019 period (47 of 82 resolutions) directly concerned climate change.
- However, the authors comment that this 'understates the proportion of resolutions that were climate related'. For example, if the 25 'governance' resolutions seeking constitutional amendments to enable shareholders to bring advisory votes are included (on the basis that these special resolutions are merely 'facilitative' of the clime-related resolutions that accompanies them) then the proportion of climate change related resolutions increases to 82% of the total.
- This figure would further increase depending on how broadly 'climate-related' resolutions is interpreted.

- Climate change resolutions advanced to date concern the following topics (among others):
  - disclosure of strategies/ targets for reducing their exposure to fossil fuel assets in line with the goals of the Paris Agreement;
  - disclosure around how their climate change-related risks comply with the TCFD recommendations
  - other resolutions concern methane emissions, deforestation and political lobbying (for a review of membership of industry associations to which the company belongs, based on the associations' stance on climate issues)

'Governance resolutions'

The next most common category of shareholder ESG resolutions after climate-related resolutions are 'governance resolutions'. 32% of the total number of resolutions (26 resolutions) fall into this category.

The report comments that 25 of 26 of these resolutions proposed an amendment to the companies' constitution to permit shareholders to bring advisory resolutions or request information.

For context:

- Under the current shareholder resolution framework in Australia, shareholders are not permitted to propose either an advisory resolution or a shareholder vote to express an opinion (unless permitted to do so under the company's constitution).
- In consequence, shareholder resolutions on ESG issues in Australia, tend to take the form of: a) a special resolution seeking constitutional change (allowing shareholders to bring advisory resolutions) which require a 75% vote in favour to be passed; and b) an accompanying ordinary (and contingent) advisory resolution or resolutions containing a substantive demand (eg a demand for Paris aligned disclosure). Ordinary advisory resolutions are only formally put to the meeting, if the constitutional amendment is passed.

The authors suggest that in light of this, 'governance' resolutions could be viewed as part and parcel of the accompanying substantive ESG resolutions:

> 'the inference is…open that governance-related resolutions proposing a constitutional amendment to allow for advisory resolutions by shareholders were facilitative or machinery-type resolutions. That is, such resolutions may not have been advanced as independent issues of corporate governance were such resolutions not required for other, substantive ESG resolutions to be voted on at shareholders' meetings'.

Other Resolutions

The remainder of ESG resolution advanced during the period related to workers' rights, human rights, gambling and 'free and informed consent' (fracking).

Support for shareholder ESG resolutions in Australia is typically 'modest' (with some notable exceptions)

- The authors comment that globally 'the norm is for social and environmental shareholder resolutions to fail to be passed'.
- The study found that typically in Australia, special resolutions to amend the constitution receive very little support and so far have a 100% failure rate. Overall, these resolutions have attracted only slightly more than 6% support.
- The level of support for substantive shareholder ESG resolutions, regardless of the topic, has also generally been modest with some 'notable' exceptions. The average level of shareholder support for all ESG resolutions over the period 2002-2019 was 10.05%.
- Having said this, the report comments that there have been some resolutions that have received much higher levels of support. For example, in 2020, for the first time in Australia, more than 50% of shareholders in a listed public company voted in support of a shareholder climate change resolution, against board recommendations

(though the resolution was not carried as it was contingent on the passage of a special resolution to amend the constitution that received only 6.28% of the vote).

- The report makes clear that though there are signs that the level of support for shareholder ESG resolutions in Australia is rising, and that this trend may continue, there is as yet 'insufficient information available to reach a definitive conclusion on this' (though the upward trend in support is clear in the US context).

Measuring the success of shareholder resolutions – a valuable driver of change (even where they are not carried?)

Interestingly, the report found that securing a high level of support for shareholder ESG resolutions is 'neither the principal objective of the proponents of the resolutions, nor a necessary determinant of success of the proposal'. Rather, the report found that proponents consider that shareholder resolutions have a positive impact on corporate ESG performance even where they fail to secure majority support - they are viewed as a valuable tool in driving change.

For example, the ACCR views shareholder ESG resolutions as a powerful way elevate ESG issues to the immediate attention of boards and management. According to the report,

> 'The principal objective of ACCR in putting forward shareholder resolutions is not necessarily to obtain large votes in support of its resolutions, but instead, because shareholder resolutions are a very powerful tool, to attempt to have the power of corporations exercised in a more responsible way: "we don't have any interest in just getting very large votes, because we don't think that very large votes alone will change things"'.

Similarly, Market Forces considers that the volume of votes in support for ESG resolutions is not necessarily reflective of their value. For example, Market Forces considers that some of its 'biggest achievements' have been the concessions secured from companies as a result of engagement on a resolution ahead of a meeting, and in exchange for the withdrawal of the resolution.

General agreement on the value of shareholder resolutions as an engagement mechanism

According to the report, there was general consensus from ASIC, the Australian Institute of Company Directors, the Governance Institue of Australia (GIA) and the Australian Council of Superannuation Investors (ACSI) that shareholder resolutions provide an important stakeholder engagement mechanism and that this has resulted in positive change in some companies that have been targeted.

Having said this, stakeholders were not unanimous in their views on the extent to which shareholder resolutions are responsible for/effective in driving positive change.

Stakeholders also raised a number of potential downsides. For example, ASIC considers the 'potential for shareholder resolutions to blur the fundamental distinction between the role of the board of directors and that of shareholders', and the potential for resolutions not to align with the long term interests of all the company's shareholders as a potential disadvantage.

Agreement that the current mechanism is 'clunky' but no consensus on whether or how it can/should be improved

Overall, the report found that the stakeholders interviewed broadly agreed that the current shareholder resolution framework in Australia (the inability for shareholders to advance and advisory resolution without a constitutional amendment) is flawed. However there was no consensus on how this could be improved or even on the need to improve it.

For example, according to the report, ACSI considers that despite the inefficiencies in the current process, the process does at least enable investors to express their views on key ESG issues.

> 'investors do not feel obligated to support constitutional changes because they know that they can vote on the advisory resolutions, which is the more important issue of substance. Given the general approach to publish the results of proxy votes, there is appropriate transparency on the advisory vote: 'So, it's not like [shareholders' views are] unimportant or ignored just because the first leg fails'.

ASIC suggested that though ultimately a question for parliament, enabling shareholders to bring advisory resolutions could be considered. The report sums up ASIC's position on this as follows:

> 'based on experience in other jurisdictions such as the United Kingdom, provided they remain non-binding, and not directive, permitting advisory resolutions without the need for an accompanying resolution to the amend the company constitution may be a valid mechanism for shareholders to engage on issues while preserving the responsibility of the board'.

[Source: Freeburn, Lloyd and Ramsay, Ian, An Analysis of ESG Shareholder Resolutions in Australia (October 5, 2020). University of New South Wales Law Journal, Vol. 44, No. 3, 2021, forthcoming, Available at SSRN: https://ssrn.com/abstract=3859264]

Three of the four activist nominees standing for election look to have secured their seats on the ExxonMobil board

ExxonMobil's 2021 AGM was held virtually on 26 May 2021. You can find a summary of the preliminary results of the meeting, including the results of votes on shareholder ESG proposals in Governance News 02/06/2021 at p8.

Director elections

Exxon Mobil has provided an update on the preliminary results of director elections.

Exxon has said that it expects that:

- A third Engine No 1 candidate Alexander Karsner, is expected to be elected (joining Gregory Goff and Kaisa Hietala). This means that only one of the four activist nominees standing for election was unsuccessful.
- A ninth ExxonMobil director is also expected to join the board. This means that of the 12 ExxonMobil candidates standing for election Daren Woods, Michael Angelakis, Susan Avery, Angela Braly, Ursula Burns, Kenneth Frazier, Joseph Hooley, Douglas Oberhelman and Jeffrey Ubben are now expected to join the board. Samuel Palmisano (former chief executive of IBM), Steven Kandarian (former CEO Met Life) and Wan Zulkiflee (Chair of Malaysia Airlines and former CEO of Petronas) were not elected.

[Source: ExxonMobil media release 02/06/2021]

Say on Climate: 91.88% of Total's shareholders, including BlackRock, have backed its climate strategy

91.88% of Total's shareholders have voted in support of the company's climate strategy at the AGM on 28 May 2021.

BlackRock backs 'say on pay' resolution

- BlackRock explains that it voted in support of the resolution 'because it [the resolution] meets our expectations that companies have clear policies and action plans to manage climate risk, and it provides a roadmap towards the company's stated climate ambitions and targets'.
- The voting bulletin also makes clear that though supportive of 'say on climate' resolutions as a mechanism for shareholders to provide feedback/accelerate progress on climate, it's support is not automatic - it will continue to take a case by case approach to determining whether to support individual 'say on climate' resolutions

Reclaim Finance and Greenpeace praise investors who voted against the resolution

In a statement, Reclaim Finance and Greenpeace said that they 'welcome the shareholders who voted against the "bogus" climate plan, while furiously condemning the large majority who backed Total's plan for increased fossil fuel extraction'.

Citing the findings of the International Energy Agency Report (summarised in Governance news 19/05/2021 at p32) the groups view support of the resolution as endorsement of a strategy that is not aligned with reaching the goal of carbon neutrality by 2050 because it includes the expansion of oil and gas production.

Lucie Pinson, Founder and Executive Director at Reclaim Finance, said

> 'By supporting Total's greenwashed strategy, shareholders have voted willingly for climate chaos. In blatantly disregarding the International Energy Agency's unambiguous recommendations and giving a green light to Total's oil and gas expansion plans, shareholders like AXA, BNP Paribas and Amundi have made a mockery of their own climate commitments. Nonetheless, we salute the investors, who defied Total to assert the demands of climate science. Unlike their peers, they have shown themselves to be concerned with the substance of climate action, not just the appearance of it.'

[Source: Total results of meeting 28/05/2021; BlackRock voting bulletin; Renew Finance media release 28/05/2021]

Disclosure and Reporting

Five ways SEC could mitigate the 'inevitable' increased costs of (potential) new ESG disclosure requirements?

In a recent speech, US Securities and Exchange Commission Commissioner (SEC) Elad L Roisman outlined his reservations around the potential introduction of new ESG disclosure requirements by the SEC and the associated challenges, should the SEC go down this path. In particular, he focused on the need for SEC to consider how the costs associated with increased ESG disclosure can be minimised for companies and the potential ways in which this could be achieved.

No need to prescribe ESG disclosure requirements?

Mr Roisman considers that the SEC disclosure framework already requires ESG disclosure by public issuers and questions the need for further rule-making on this basis.

> 'The Commission has explicitly interpreted our rules to require disclosure of the material effects of climate change on a business. We also amended Regulation S-K last year to require disclosures regarding human capital. To the extent that other material risks to a company can be categorized as “E,” “S,” or “G,” I do not see a legal justification for failing to disclose that information under our existing rules'.

Having said this, in light of the fact that the SEC Chair has 'made clear that further ESG disclosure is an area that the agency will pursue' he outlined some of the main questions that he considers the SEC will need to address as part of the process, including the question of how the Commission will 'tailor' any new requirements to balance the looked-for benefits of increased disclosure against the 'inevitable' increased costs to companies.

Five ways in which the 'inevitable' increased costs burden could be mitigated

In light of the fact that any new reporting requirement, and he suggests particularly any new ESG disclosure requirement, will cause companies to incur increased costs (eg costs of collecting, calculating, preparing and submitting the information as well as the costs of increased liability associated with increased disclosure), Mr Roisman suggests five ways in which SEC could tailor any new requirements to minimise the burden.

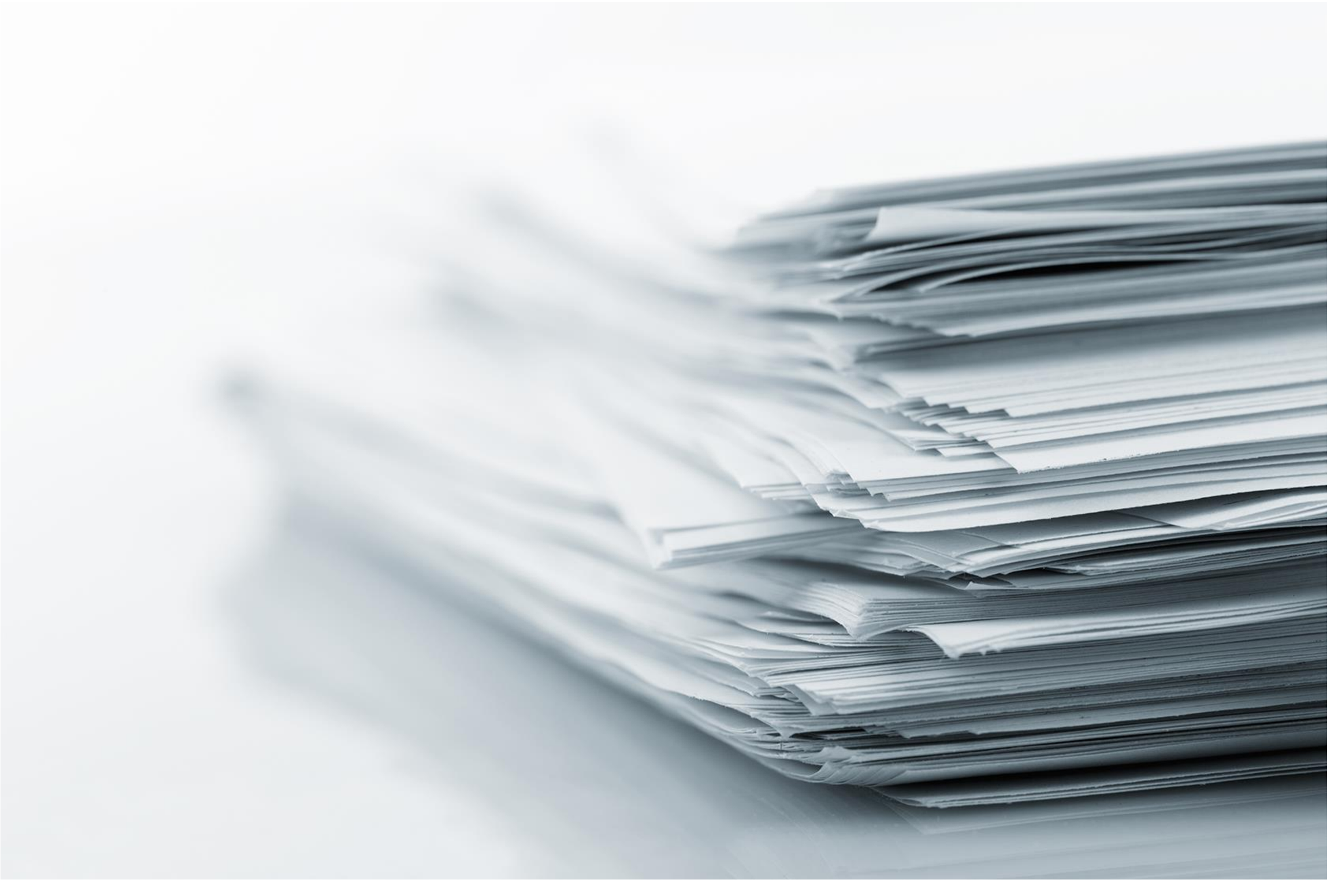
- Lighter reporting requirements for smaller entities: As the costs of any new ESG disclosure requirements will be proportionately greater for smaller companies, he suggests that, consistent with SEC's approach to existing disclosure requirements, any new reporting requirements should be lighter for smaller companies than for larger firms. He also considers that any new requirements should be limited for public companies.
- Agnostic on methodology/sources of information: Mr Roisman suggests that any new requirements should not be overly prescriptive around what sources of information or methodology are used.

  > 'We should not expect an unreasonable degree of precision in these disclosures (and therefore strict liability). I worry that, for most “E” information, companies will have to go to outside vendors to evaluate and obtain some of this information and that our regulations will inflate demand—and cost—for such data. I believe that we should allow issuers flexibility in how they present much of this new disclosure, recognizing these limitations. Similarly, I would have concerns about subjecting any such new requirement to heightened verification measures—such as an audit or an attestation.'

- Safe Harbors: To help address the increased costs for companies resulting from the 'inevitable litigation risk' that will attach to new ESG reporting requirements, Mr Roisman considers that there should be 'a safe harbor for companies that are earnestly trying to provide this new information, along the lines of that which is available for companies’ forward-looking statements. We would be asking companies to tell us what they know, as best as they can discern it'.
- 'Furnished, not filed': In light of the increased litigation risk attaching to new ESG disclosure requirements, Mr Roisman suggests that SEC should consider 'whether such disclosures should be furnished to the agency, rather than filed'. This approach would give investors the benefit of the increased disclosure without imposing on the company 'the level of liability that filing with the SEC presents'.

- **Extended implementation period:** Mr Roisman suggests that any new disclosure regime should be phased in over an extended implementation period.

  [Source: Putting the Electric Cart before the Horse: Addressing Inevitable Costs of a New ESG Disclosure Regime speech by SEC Commissioner Elad L Roisman 03/06/2021]



Institutional Investors and Stewardship

Global investor group launches engagement initiative to push Asia's power generating companies to cut emissions

- The Asia Investor Group on Climate Change has launched an engagement initiative aimed at pushing Asia's 'systemically important' electric power companies to improve their disclosure and governance of climate-related risks.
- Specifically, in the first year of the program, investors will target five utility companies - China Resources Power Holdings (China), CLP Holdings (Hong Kong), Chubu Electric Power Co. (Japan), Electric Power Development Co (J-POWER) (Japan) and Tenaga Nasional Berhad (Malaysia).
- These companies are being targeted because they: a) produce substantial greenhouse gas emissions; b) have large coal-fired power capacity; or c) have a strategic role in driving the net zero emissions transition. As the initiative is intended to 'complement and run in parallel with the global Climate Action 100+ initiative', companies that are already a focus of Climate Action 100+ were excluded from consideration.
- The focus of engagement discussions with the utility companies will be on:
  - strengthening the board's accountability of climate risk;
  - action to reduce emissions across the value chain (including coal phase-out consistent with the Paris Agreement goals);
  - enhancing disclosure; and
  - identifying physical risks and ensuring companies are supporting policy in line with achieving net zero emissions by 2050.
- Members of the initiative have committed to engage with at least one focus company during each year of the initiative as part of a collaborative group.

AIGCC Executive Director, Rebecca Mikula-Wright said,

> Asian utilities are responsible for 23% of the world's total carbon emissions. The average age of coal-fired power plants in Asia is only 13 years when compared to an average life of 40 years. This new program will complement the current engagement effort of Climate Action 100+ in Asia and assist investors to increase the effectiveness of their work with Asian utility companies to manage and mitigate climate risk.'

[Source: Asia Investor Group on Climate Change media release 07/06/2021]

UK investment managers call on the G7 to implement mandatory climate risk reporting, G7 finance ministers have expressed support

In a letter sent to the UK ambassadors and High Commissioners of the countries taking part in this year's G7 Summit, the UK Investment Association (IA) called on the G7 countries to do more to tackle climate change by committing to improve companies' reporting on climate risk.

Broadly, the letter includes the following four 'recommendations for international collaboration' on climate action.

- Support for the development and implementation of global standards: The letter calls on leaders to support the work of the IFRS Sustainability Standards Board in developing global reporting standards and calls for increased cooperation between national regulators to endorse and implement them
- Mandatory TCFD reporting: The letter calls on national regulators to commit to implementing 'mandatory economy wide reporting' against the TCFD recommendations
- Pathway to meeting Paris goals: The letter calls government to 'set out at a high level sector specific pathways to meet the Paris Agreement goals and prioritise providing further detail to reduce the risk of stranded assets'.
- 'International common standards to be agreed on green gilts by governments and national regulators'.

Investment Association CEO Chris Cummings commented, 'The meeting of the G7 is a prime opportunity for the world's largest economies to take a coordinated, global approach to tackling climate change. As an industry which invests in companies around the world on behalf of both UK and overseas savers and investors, investment managers have a vital role to play in the shift to a more sustainable global economy. Ensuring high-quality and comparable data on the risks that companies face from climate change is key to achieving this and meeting the net zero targets.'

[Sources: UK Investment Association media release 01/06/2021; Full text letter]

G7 supports moves towards mandatory TCFD disclosure

Following two days of talks, G7 finance ministers (representing the UK, USA, Canada, Japan, Germany, France and Italy, plus the EU) have agreed on a range of actions to 'deliver the significant structural change needed to meet our net zero commitments'. These include:

- embedding 'climate change and biodiversity loss considerations into economic and financial decision-making, including addressing the macroeconomic impacts and the optimal use of the range of policy levers to price carbon'
- 'supporting' the move towards 'mandatory climate-related financial disclosures that provide consistent and decision-useful information for market participants and that are based on the Task Force on Climate-related Financial Disclosures (TCFD) framework, in line with domestic regulatory frameworks'
- climate finance: The group reiterated the 'collective developed country goal to mobilise US$100 billion annually for developing countries from public and private sources, in the context of meaningful mitigation actions and transparency on implementation. We commit to increase and improve our climate finance contributions through to 2025, including increasing adaptation finance and finance for nature-based solutions'.
- tackling 'environmental crimes' through /'implementing and strengthening registries of company beneficial ownership information to provide timely, direct and efficient access for law enforcement and competent authorities to adequate, accurate and up-to-date information, including through central registries'.

The group also expressed support for the development of global reporting standards and for the development, by the FSB, of an 'ambitious roadmap that identifies and addresses climate-related financial risks, including through steps to promote comparable disclosures, address data gaps, enhance vulnerabilities assessments and promote consistent regulatory and supervisory practices'.

Tax reforms

The finance ministers have also agreed to require large multinationals to pay tax in countries in which they operate (not just in the countries in which they are headquartered) as well as the principle of at least 15% global minimum corporation tax. The details will be discussed further at the upcoming G20 Financial Ministers and Central Bank Governors meeting in July 2021. G7 climate ministers subsequently agreed, following talks,

[Sources: G7 UK 2021 media release 05/06/2021; G7 Finance Ministers and Central Bank Governors Communiqué 05/06/2021]

In Brief | Is common ownership limiting competition in Australia? Research suggests that in 49 of Australia's 443 industries (including commercial banking, explosives manufacturing, fuel retailing, general insurance and iron ore mining), the major firms are owned by common investors, predominantly BlackRock and Vanguard. it's suggested that this should be enough to persuade policymakers and regulators to look 'more deeply into common ownership' and to monitor changes. 'Only if we "follow money" can we get a true account of what that money does'

[Source: The Conversation 07/06/2021; IZA DP No. 14287: Common Ownership of Competing Firms: Evidence from Australia, Andrew Leigh and Adam Triggs]

Other Shareholder News

Rio Tinto appoints new director

Rio Tinto has appointed former WA Treasurer and Aboriginal Affairs Minister Ben Wyatt as a non-executive director. Mr Wyatt will join the Board on 1 September 2021.

Commenting on his appointment Mr Wyatt said,

> 'I have deep respect for the resources sector in Australia and have long been impressed with the professionalism and commitment demonstrated by Rio Tinto. I was deeply saddened and disappointed by the events at Juukan Gorge but I am convinced that Rio Tinto is committed to changing its approach to cultural heritage issues and restoring its reputation, particularly in Australia and Western Australia. I am looking forward to working with the Board in building on the momentum for change generated by the new leadership team.'
>
> [Source: Rio Tinto media release 04/06/2021]

Financial Services

Senate estimates: Key takeaways from ASIC's appearance

On 2 June 2021, Australian Securities and Investments Commission (ASIC) representatives appeared before the Senate Economics Legislation Committee (transcript here). Among other issues, questions to the regulator touched on the following themes: a) ASIC's position on potential proxy reform options; b) ASIC's use/approach to using the product intervention power; c) ASIC's short selling guidance and approach to taking action against short sellers; d) ASIC's position on responsible lending; and e) ASIC's enforcement approach post-Hayne.

Some key takeaways are below.

Statement from ASIC's Chair

In a short opening statement, ASIC Chair Joe Longo said that the aftermath of the Hayne Commission and the pandemic have 'had a profound impact on ASIC and how we engage as a regulator'. Mr Longo also acknowledged that ASIC has been 'buffeted' by internal changes. Mr Longo said that in his first months he plans to engage widely with ASIC staff and stakeholders to gain an understanding of ASIC's current strategy and approach to regulation and enforcement to assist in shaping and developing ASIC's longer term strategy. Mr Longo also said that he planned to work collaboratively with other regulators and in particular with the Australian Prudential Regulation Authority (APRA).

Proposed proxy reforms

Senator Walsh directed a number of questions to ASIC around the government's proposed proxy reform options (summarised here). He suggested that there is no evidence of any 'systemic issue' in relation to proxy advisers.

ASIC Commissioner Cathie Armour confirmed to the Committee that:

- ASIC's 2018 review of proxy adviser practices (ASIC report 578: ASIC review of proxy adviser engagement practices) identified 'no particular concerns'. You can find a short summary of the findings in report 578 in Governance News 02/07/2018 at p23
- The view expressed in report 578 that proxy advisers play an important role in the market by assisting shareholders in making voting decisions and promoting a focus on corporate governance is essentially unchanged.
- Since 2018, ASIC has received a low volume of complaints about proxy advisers – two reports of misconduct, both of which are under investigation by the regulator.

Asked outright whether ASIC is 'of the view that there is a systemic issue in relation to proxy advisers' Ms Armour did not answer directly, responding that:

> 'ASIC's view is that we're doing our job, monitoring the activities of proxy advisers to the extent those activities are licensed. We're on the job, and that's what we're doing. Whether or not there should be a change to aspects of the regulatory environment really is a matter that government is consulting on'.

The product intervention power (PIP)

A number of questions to ASIC concerned the way in which it has chosen to deploy the product intervention power (PIP) and in particular, ASIC's decision not to make a product intervention order to address the consumer detriment resulting from the sale of both motor vehicle add-on insurance and extended warranties (at least for now).

ASIC Deputy Chair Karen Chester explained that essentially ASIC's planned action had been overtaken by events in the form of: 1) the slowdown in sales of motor-vehicles and extended warranty products because of the pandemic (Ms Chester said that this impacts ASIC's ability to demonstrate the scale of consumer detriment); and b) the government's decision to bring forward the implementation of the industry wide add-on insurance deferred sales model by three months to 5 October 2021. The combined effect of this, she said, is that ASIC is in a position where 'we would be implementing something that the government was then just about to legislate to address more directly' and permanently.

Asked whether ASIC considers that 'the significant consumer detriment test needs to be met within a particular time frame' Ms Chester said that ASIC takes a case by case approach.

> 'We can be challenged if our data is dated. If we were relying on data from the year pre COVID for a product intervention order, sales and significant consumer detriment fell away and we then put in place a product intervention order, we could reasonably expect that would be subject to challenge'.

Ms Chester confirmed that the government's deferred sales model will not cover extended warranties but emphasised that and ASIC will be 'closely monitoring what happens'. Ms Chester said that 'there would be nothing precluding us, if we thought that there was a re-emergence of significant consumer detriment as it applies to the extended warranty arrangements, from stepping in at that time in the future' should it be necessary'.

Asked to confirm that those offering extended warranties should 'consider themselves on notice' Ms Chester agreed stating:

> 'Absolutely. We've made that clear to those providers, Senator, in no uncertain terms, and I would mention that one has indicated that they will voluntarily adopt the deferred sales model that the government is proposing. So we welcome that very positive one outlier, and we're nudging and encouraging others to follow. We're on the record, we've written and it's on our website that we are encouraging them to voluntarily adopt the deferred sales method'.

Asked whether there are 'any learnings' about the product intervention power/deploying the product intervention power, Ms Chester said that access to data has emerged as the key challenge for the regulator.

> 'it's the data that's killing us, Senator, and it's in areas where we do not have recurrent data. It's an issue we've raised with the government, we've raised with Treasury and the Treasurer and we're waiting for an answer on. If we were to have recurrent data in some of these areas, we could implement product intervention orders in a much more decisive and quicker way so we can realise the aspirations that we all had for the product intervention order power'.

Short selling guidance

Senator Scarr directed a number of questions to ASIC around its actions to address misconduct by activist short sellers and ASIC's new information sheet on short selling (INFO 255) (You can find our summary of INFO 255 in Governance News 2 June at p12). Describing the information sheet as 'underwhelming' Senator Scarr asked ASIC to explain why it is not taking stronger enforcement action, for example against Texas based short seller Bonitas.

> [Note: In Rural Funds Management Limited as Responsible Entity for the Rural Funds Trust and RF Active v Bonitas Research LLC [2020] NSWSC 61 (our case note here) the NSW Supreme Court ruled that attacks in the form of tweets and reports by US-based short seller Bonitas Research LLC (Bonitas) and Bonitas' CEO and founder Matthew Wiechert on Australian company Rural Funds Management Limited (RFM) that caused 'a significant drop' in the traded price of units listed on the ASX, were known by Bonitas to be 'false'.]

Senator Scarr commented,

> 'I've got to tell you that, from my perspective, it's [the information in INFO 255] pretty underwhelming. What is ASIC doing to enforce Australian law against short sellers who are totally oblivious to any concern and totally disregard any of the suggestions you provide in the information sheet with respect to engagement with companies and not using inflammatory or emotive language? What are you doing about short sellers based in overseas jurisdictions—in this case, Texas in the United States—who are just flouting Australian laws?...The question I have is: can't we move forward, beyond speaking to the overseas regulator, and actually take enforcement action to send a message to short sellers? I suggest you read Bonitas's latest Twitter feed. I don't think they're going to change their inflammatory language because of ASIC's information sheet. Can't we have an actual strategy to send a strong message to short sellers overseas that we're not going to cop this in the Australian market? Isn't there more we can do?'

ASIC Commissioner Cathie Armour responded that the information sheet is not representative of all the work ASIC is doing in this area and that ASIC 'absolutely committed' to dealing with the issue.

Responsible lending

Senator McKim directed a number of questions to ASIC around responsible lending obligations. Asked to comment on whether ASIC has observed the current responsible lending obligations having any impact on the growth of credit since the onset of the pandemic, ASIC Commissioner Sean Hughes said that 'at this point, we are yet to see any empirical evidence that would suggest that responsible lending has impeded the flow of credit to consumers'.

Asked to comment on whether ASIC is aware of any lenders who are 'holding back on making loans given any uncertainty regarding the future of the responsible lending obligations' Mr Hughes declined to answer stating,

> 'I couldn't answer that question. I do know that lenders applying a prudent banker test may well be deciding not to approve a loan because it's not a good credit risk. But I'm not aware of lenders not approving loans because of uncertainty about future reforms'.

Asked whether there has been any change in ASIC's approach to enforcing responsible lending obligations in light of the government's proposed reforms (ie the changes in the National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020), Mr Hughes responded that the full Federal Court's decision in the Westpac case (in which ASIC was unsuccessful) has had an impact.

> [Note: This appears to be a reference to Australian Securities and Investments Commission v Westpac Banking Corporation [2020] FCAFC 111. The Court dismissed ASIC's appeal against the finding in the 'Wagyu and Shiraz' decision. You can find our case note here]

As a result of the decision, Mr Hughes said that ASIC has undertaken a 'stocktake' or reassessment of the responsible lending actions being prepared for court. As a result of this exercise, he said that ASIC has matters that are 'in the pipeline that do not go to the issues that were raised in the Westpac case'.

Mr Hughes said that ASIC is 'not blind to the realities of the proposed reforms' and stands ready to implement them is they are passed. For now, ASIC is 'enforcing the laws as they exist today'.

Approach to enforcement post-Hayne

Senator Roberts directed a number of questions to ASIC around whether it had changed its enforcement approach post-Hayne. ASIC Commissioner Sean Hughes responded

> 'I don't believe that we would say we have changed our enforcement. What we have done is prioritised matters that give rise to significant consumer detriment or hardship or which relate to egregious misconduct, including matters that might undermine confidence in the market. So there has been a refocus, or a swinging, of our prioritisation of matters specifically to address those strategic enforcement priorities'.

Superannuation

Senator Bragg asked a number of questions about what actions ASIC could/would take to address the issue of member contact data being shared by a fund with another organisation (without members' permission that the data be shared).

ASIC Commissioner Danielle Press responded that questions of privacy and data collection should be directed to the Privacy Commissioner. Commenting on the issue of members being subscribed to the New Daily (without their consent that their contact details be shared) Ms Press confirmed that APRA is investigating the issue and would be the 'lead regulator' on it.

Asked to confirm how any fines awarded by the courts are paid by superannuation funds, Ms Press responded that it is difficult to give a definitive answer as 'it will turn on the facts of the case', though from 1 January 2022 the position will be clearer.

> [Source: Transcript 2021-22 Budget Estimates: Senate Economics Legislation Committee hearing 02/06/2021]

Senate estimates: Key takeaways from APRA's appearance

On 2 June 2021, Australian Prudential Regulation Authority (APRA) representatives appeared before the Senate Economics Legislation Committee (transcript here). Among other issues, questions to the regulator touched on the following themes: a) proposed changes to responsible lending obligations; b) APRA's progress on extending heatmaps to include Choice products; c) APRA's progress on the advertising in superannuation review and separately the actions being taken by the regulator on the issues raised by Senator Bragg concerning the New Daily; and d) climate change and the release of APRA's draft guidance (draft Prudential Practice Guide CPG 229 Climate Change Financial Risks (CPG 229).

Some key takeaways are below.

Key areas of focus for APRA

In his opening statement to the Committee APRA Chair Wayne Byres highlighted APRA's work on improving member outcomes in the superannuation sector. The consolidation in the sector and the continued decline in fees were given as two indications of the effectiveness of this.

Mr Byres went on to acknowledge that there was still more to do. Some initiatives currently underway include:

- APRA's work to extend the heatmaps to include Choice products: Mr Byres said that APRA's preliminary work has shown that 'Choice products are producing more variability in outcomes and often at higher costs than MySuper products, and the tail of underperforming multi-sector Choice products is large'.
- APRA's review of trustee expenditure eg on advertising campaigns. Mr Byres said that this is 'well progressed'. He added that 'without pre-empting the results, it is fair to say that industry practice, in terms of demonstrating

how certain expenditure translates to quantifiable benefits to members, varies considerably'. In terms of a timeframe for determining next steps (including determining whether any enforcement action is appropriate), Mr Byres said that APRA expects to be in a position to do so 'in the coming months' and also plans to release a report on its findings (at an aggregate level) following the completion of the review.

Mr Byres commented that much of APRA's regulatory work is closely aligned with government's proposed Your Future, Your Super reform package and gave a number of examples of this.

Finally, he flagged two other 'important releases APRA has made' since last appearing before the Committee: the release of the draft Climate Change Financial Risk Prudential Practice Guide; and consultation on APRA's draft practice guidance on remuneration.

Responsible lending

A number of questions from Senator McAllister concerned the availability of household credit and the proposed changes to responsible lending laws (ie the changes in the National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020). Asked to comment on whether APRA had seen any indication of a decline in the supply or demand for credit in the household lending market APRA Chair Wayne Byres said that there is no indication of a decline in supply and a 'pickup in demand for credit'. The 'slightly below trend growth rate in household credit' was attributed to the economic shocks associated with the pandemic. APRA expects that as 'confidence improves' this will also 'pick up again'.

Asked to provide an update on the work APRA is undertaking to implement the government's proposed changes to responsible lending laws APRA Deputy Chair John Lonsdale said that the 'key thing' APRA has done is to refresh APS 220. Mr Lonsdale said that if the government's Bill is passed, APRA will bring forward the standard to align it with the start date of the reforms (rather than coming into place at the beginning of next year).

Asked whether APRA would make any changes to prudential standards 'around household lending more generally' if the Bill is not passed, Mr Lonsdale said that the only difference will be in the commencement date of APS 220.

The extension of heatmaps to include CHOICE products

A number of questions from Senator McAllister concerned the progress of APRA's work to extend the heatmaps to include Choice products. Asked to provide an overview of APRA's plans for the next 12 months, APRA Deputy Chair Helen Rowell said APRA intends to take a phased approach to the extension, commencing with multisector Choice products and will further extend the heatmaps from there. Ms Rowell said that ASIC intends to apply a 'similar approach to what we've used in the MySuper space with a range of different metrics looking at investment performance over different time periods, expenses and the like'.

In terms of timing:

- APRA intends to release an information paper with some 'initial summary insights' and outlining the regulator's approach 'in the middle of the year' with the exact date still to be determined.
- APRA intends to release the first heatmap for multisector Choice products in the last quarter of 2021.

Asked to provide some insight into the preliminary findings around the performance of Choice products, Ms Rowell said that based on preliminary analysis of existing data available on the Choice sector, 'there are some relatively expensive choice products out there that are underperforming. They will be the products that will be clearly highlighted in our heat map when we release it later this year'.

Asked to comment on the relative performance of Choice products as compared with MySuper products, Ms Rowell said that 'relative to a MySuper product, you've got a wider range or variation in performance, a wider range of fees, and a tale of higher fees of products' though this is 'not across the board'.

Ms Rowell made clear that a general statement that MySuper products perform more strongly than Choice products is an oversimplification. She observed that preliminary analysis indicates that 'there are some choice products that are quite competitive, perform quite well and are quite reasonably priced'.

Asked what proportion of the Choice sector APRA anticipates will be covered in the first round of heatmaps Ms Rowell said that APRA expects it to be 'relatively high', noting that the first data under the new APRA data collection is not due to be submitted until September.

Advertising in superannuation review

Senator Bragg directed a number of questions to APRA around the progress of the review being undertaken by the regulator into superannuation funds' advertising expenditure.

APRA General Manager, Superannuation Adrian Rees said that so far, APRA has received information from a dozen funds (both profit to member and retail funds) and that the regulator intends to follow up with a number of them. Mr Rees said that APRA's focus is on the governance processes in place around the way in which expenditure decisions are made (and how they have considered their legal obligations under the Superannuation Industry (Supervision) Act)); the development and identification of the metrics used to determine whether the programs are successful; and the success of the programs.

Mr Rees said that APRA intends to publish some information for industry 'in general terms on this issue and should APRA identify any 'examples that we think are inappropriate' will consider taking action. Asked whether APRA's review will include findings on the use of 'political advertising', Mr Rees said that APRA is

> 'not envisaging our report will comment on the nature of the advertising or whether it's of a political nature…If there are particular situations or circumstances that we feel need further follow up, inquiry or investigation, we would do that'. That's perhaps a matter we wouldn't talk about in the public domain'.

APRA confirmed that its inquiries into issues concerning the New Daily (the issues are described by Senator Bragg in a separate statement here) are being undertaken separately. APRA Executive Director, Superannuation Suzanne Smith confirmed that APRA is gathering information and is also liaising with the Privacy Commissioner on the matter. The Committee heard that as yet there is no timeframe for the completion of the investigation.

On the issue of the treatment of member money directed to The New Daily, the Committee heard that no superannuation funds currently invest directly in the New Daily, but rather are shareholders in ISH (the owner of the New Daily). On this basis, whether superannuation funds chose in the past to invest directly in the New Daily is an 'historical position'. The Committee also heard that in the past, some of the funds treated their investment as marketing expenditure while others treated it as an investment. APRA's focus will be on the decision-making processes used and 'whether that investment is appropriate'.

Climate change

Senator McDonald raised concerns that APRA's climate stance and recent draft guidance have 'closed down a lot of the lending into northern Australia' because of a desire (by lenders) to limit/mitigate their climate-risk exposure.

Mr Byres made clear that this is not APRA's intent. He stated,

> 'it is not the intent to close down credit to any part of the country—or insurance or investment…The actual practice guide starts by saying that APRA's expectation is that financial institutions will want to support their customers and that, in fact, the financial system, and the financial institutions within it, have an important role to play in supporting customers through a period of transition. So, that is the starting point, if you like, and the foundation for what we are saying. There is nothing in that standard that says banks should be cutting back exposures. What we are asking banks to do, though - and our obligation is first and foremost to bank depositors and for bank safety and financial system stability - is make sure that when you are making decisions you are making well-informed decisions'.

Mr Byres said that APRA is currently working on two key pieces of work in the climate space:

- finalising the, as yet draft, climate risk guidance 'before the end of the year'; and
- the climate vulnerability assessments program with the four major banks and Macquarie. Mr Byres said that as yet this is ' still very much a work in progress', and given the complexity of the project, 'I wouldn't expect to see a report until very much towards the end of the year'.

[Source: Transcript 2021-22 Budget Estimates: Senate Economics Legislation Committee hearing 02/06/2021]

Should ASIC review its stance on activist short selling?

Writing in The Conversation, UNSW Professor of Economics Richard Holden has raised concerns that Australian Securities and Investments Commission's (ASIC's) information sheet 255: Activist short selling campaigns in Australia (INFO 255) (our summary in Governance News 02/06/2021 at p12) will lead to 'less efficient markets' because it is aimed at discouraging activist short selling.

An important check

Professor Holden considers that short selling improves market efficiency:

> 'Short selling punishes speculation by putting a check on out-of-control markets. It motivates investors to keep an eye on fundamentals, not just get carried away with what John Maynard Keynes labelled "animal spirits" – the impulses that help drive speculative bubbles and busts'.

In illustration, he suggests that had there been an 'easy way to short the housing market earlier' then the housing bubble in the US in the 2000s may never have 'gotten out of control' and the 2008 global financial crisis may have been averted.

Regulatory capture?

In his view, both the better practices in the information sheet, and the list of possible actions ASIC may take against short sellers

> 'constitute a (very) thinly veiled message that overseas hedge fund managers should knock it off with activist shorting in Australia. This combines, to a remarkable degree, ugly nativism and regulatory capture – the phenomenon by which a regulator, even without malicious intent, comes to represent the interests of those it regulates, rather than the public good'.

Call for ASIC to 'reconsider its stance'

Professor concludes with a call for ASIC to review its position on activist short selling.

> 'We all have a big interest in ensuring the informational efficiency and market transparency. Bubbles are bad for regular investors. Regulations and securities laws play a crucial role in achieving those goals. So do activist short sellers. ASIC should reconsider its stance. It will only serve to damage the credibility of Australian securities markets, the Australian public, and their own reputation as a wise regulator'.
>
> [Source: The Conversation 04/06/2021]

Financial Market Infrastructure regulatory reform package announced

- In 2019, the Council of Financial Regulators (CFR) consulted on a range of measures to enhance the regulation of Financial Market Infrastructures (FMIs).
- The CFR describes FMIs as 'the key entities that enable, facilitate and support trading in Australia's capital markets'. Examples of FMIs are: market operators, benchmark administrators, clearing and settlement facilities and derivative trade repositories.
- Following the consultation process, the CFR provided advice to the government. The advice recommended a package of 16 recommendations for regulatory reform. The CFR's advice to the government together with its response to the consultation have now been publicly released.
- In response, to the CFR's recommendations, the Treasurer has announced that the government plans to:
  - introduce a crisis management regime that will allow the Reserve Bank of Australia (RBA) to manage a failure at a domestic clearing and settlement facility. Mr Frydenberg said that these new powers will be 'supported by a $5 billion standing appropriation, with Ministerial agreement, to provide temporary funding to a CS facility if that were necessary to ensure continuity of services"
  - 'enhance the supervisory and licensing powers of the Australian Securities and Investments Commission (ASIC) and the Reserve Bank of Australia (RBA)'
  - 'streamline and clarify certain regulatory powers'
- The Treasurer noted that the FMI regulatory package was included in the 2021-22 Budget.
- In a statement, the CFR expressed strong support for the reforms.

[Sources: Treasurer Josh Frydenberg media release 08/06/2021; CFR media release 08/06/2021]

LIBOR transition: Regulators expect firms to cease the use of LIBOR in new contracts before the end of 2021

In a joint media release, the Reserve Bank of Australia, the Australian Prudential Regulation Authority and the Australian Securities and Investments Commission (ASIC) have underlined their expectation that Australian institutions 'cease the use of LIBOR in new contracts before the end of 2021' and 'accelerate the conversion' of legacy LIBOR contracts. This is in line with expectations/guidance from the FSB and the US Banking Supervisors.

The regulators consider that

> 'Continued reliance on LIBOR poses significant risks and disruptions to the stability and integrity of the financial system. Firms themselves may also face financial, conduct, litigation, and operational risks associated with inadequate preparation'.

[Source: ASIC, APRA, RBA joint media release 04/06/2021]

Community groups call on major banks to respond to the IEA report

Community groups including the Australasian Centre for Corporate Responsibility (ACCR), the Australian Conservation Foundation and the Australian Youth Climate Coalition (among others), have written to the heads of the big four banks, calling on them to: a) refuse to finance new oil and gas projects; and b) exit their existing oil and gas investments by 2030 in line with their net-zero by 2050 commitments.

The groups note that the recent International Energy Agency (IEA) report: Net Zero by 2050: A roadmap for the global energy sector (summarised in Governance news 19/05/2021 at p32) states that investment in new fossil fuel supply is inconsistent with achieving the net zero by 2050 goal. In light of this, they argue that the major banks should immediately review their current lending policies.

ACCR Director of Climate and Environment Dan Gocher commented,

> 'The IEA has made it clear that we can no longer expand the fossil fuel industry if we are to limit global warming to 1.5C degrees. Banks that facilitate any further fossil fuel expansion from now on are putting at risk their customers, staff and communities.'

The groups have requested that the banks nominate a time to meet to formally discuss their demands in more detail.

[Sources: Australian Conservation Foundation media release 02/06/2021; Full text letter]

UK FCA cautions that a 'significantly high number' of cryptoasset businesses are not meeting AML standards

The UK Financial Conduct Authority (FCA) has announced that it will extend the end date of the Temporary Registrations Regime for existing cryptoasset businesses from 9 July 2021 to 31 March 2022 due to the 'significantly high number of businesses' that are failing to meet the required standards under the Money Laundering Regulations.

The extension will allow cryptoasset firms to continue to carry on business 'while the FCA continues with its robust assessment'.

The FCA also cautioned consumers about investing in cryptoassets.

The FCA states that that:

> 'many cryptoassets are highly speculative and can therefore lose value quickly. The FCA does not have consumer protection powers for the cryptoasset activities of firms. Even if a firm is registered with the FCA, it is not responsible for making sure cryptoasset businesses protect client assets (ie customers' money), among other things. Cryptoassets are considered very high risk, speculative investments. If consumers invest in cryptoassets, they should be prepared to lose all their money'.

[Source: FCA media release 03/06/2021]

In Brief | The Treasury Laws Amendment (Your Future, Your Super) Bill 2021 is headed to the Senate having been amended in the House. The amendments remove the regulation making power to prohibit a trustee of a registrable superannuation entity from making certain payments or investments

[Source: Treasury Laws Amendment (Your Future, Your Super) Bill 2021]

In Brief | APRA has published further information, and will make a test environment available from 17 June, to assist entities in to prepare for APRA Connect before the 13 September 'go live' date

[Source: APRA media release 04/06/2021]

In Brief | APRA has released a response letter to submissions on the draft Reporting Standard ARS 220.0 Credit Exposures and Provisions

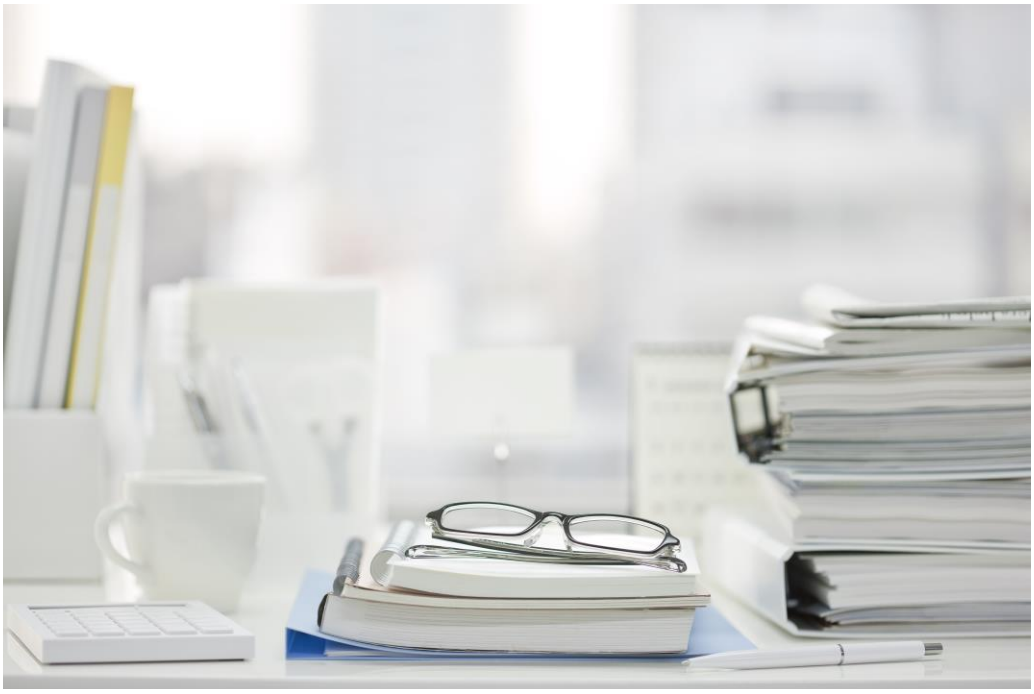
[Source: Proposed revisions to the credit risk management framework for authorised deposit-taking institutions: APRA's response to submissions 08/06/2021]

In Brief | Roadmap for implementation of capital framework reforms: APRA has written to ADIs setting out a timeline for finalising the consultation on capital framework reforms which will come into effect from 1 January 2023

[Source: APRA letter to ADIs 02/06/2021]

Accounting and Audit

Australian first: Halifax auditors face criminal charges over (alleged) breach of auditing standards



As a result of an Australian Securities and Investments Commission (ASIC) investigation into Halifax Investment Services Pty Ltd (Halifax), criminal charges have been brought against its auditors - an authorised audit company (EC Audit Pty Ltd (EC Audit)) and its director and registered auditor - in connection with audits of the profit and loss statements and balance sheets of (Halifax) for the financial years ended 30 June 2016, 30 June 2017 and 30 June 2018.

Allegations

Broadly, ASIC alleges that EC Audit failed to conduct each of the audits in accordance with auditing standards and that the lead auditor (and EC Audit director), failed to ensure that each of the audits were conducted in accordance with auditing standards in breach of sections 989CA(1) and (2) of the Corporations Act.

If successful, both EC Audit and its director could face financial penalties.

According to ASIC the action is significant because it marks the first time in Australia auditors have faced criminal charges over (alleged) breaches of auditing standards.

[Source: ASIC media release 08/06/2021]

Progress update: The Monitoring Group has provided an update on work to implement recommendations to strengthen the international audit and ethics standard setting system

- In July 2020 the Monitoring Group - - a group of international financial institutions and regulatory bodies including the Basel Committee on Banking Supervision, the European Commission, the Financial Stability Board, and the International Association of Insurance Supervisors - issued a report outlining recommendations aimed at strengthening the international audit and ethics standard setting system.
- The Monitoring group has released a brief progress update on work towards implementing the recommendations. The key takeaway is that in the nine months since the publication of the Recommendations, the Monitoring Group has developed a transition plan establishing workstreams to address key components of the reforms. The current focus is on the 'appropriate sequencing of activities to implement the recommendations and on establishing a sustainable funding model'.

[Source: Monitoring Group media release 03/06/2021]

Misconduct and Liability

Top Story | ACCC loses first contested criminal cartel case

The ACCC has been handed a significant loss in its first criminal cartel case taken to trial, with the jury acquitting the defendants on all counts. MinterEllison provides insights into the implications of the decision. You can find the full text of the article here.

Risk Management

Top Story | Perspectives on Cyber Risk 2021

Now in its sixth year, Perspectives on Cyber Risk 2021 discusses key regulatory changes relating to privacy and data protection, and how ASIC and other regulators are increasing their attention and enforcement action in this area.

You can find the full text of the report here.

Record losses: Australians lost over $850 million to scammers in 2020 according to the ACCC's latest report

According to the Australian Competition and Consumer Commission's (ACCC's) latest Targeting Scams Report, Australians lost a record $851+ million to scams in 2020.

Some Key Findings

- Scams that caused the most financial loss:
  - Investment scams caused the most financial loss, resulting in $328 million in losses
  - Romance scams caused $131 million in financial losses
  - Business email compromise scams caused $128 million in financial losses
- COVID-19 scams: The ACCC found that the 'COVID-19 environment led to an increase' in reported losses in several different scam categories. For example, compared with 2019:
  - losses resulting from threat based scams increased more than 178% to $11.8 million
  - losses resulting from remote access scams increased more than 74% to $8.4 million
  - losses resulting from online shopping scams increased more than 52% to $7.4 million
- Superannuation scams: Following the announcement of the government's COVID-19 early release of superannuation measure, there was an immediate increase in the volume of phishing scams reported to Scamwatch, targeting people aged between 18 and 55 and aimed at gaining access to personal information (specifically superannuation details)
- Puppy scams: The volume of reported puppy scams and the resulting losses spiked in 2020. Reported losses to puppy scams increased from $375,510 in 2019, to over $2.2 million in 2020.
- Vehicle sale scams: There was a 220% increase in the volume of reports of vehicle sales scams and a 322% uptick in reported losses (losses totalled over $1 million).
- Bushfire scams: The ACCC opened a hotline for people to report bushfire related scams, which received more than 1,000 calls between its opening on 6 January 2020 and closure on 27 March 2020. Scamwatch also received over 330 bushfire related Scamwatch reports. Most bushfire scam related web reports concerned fake charity scams.
- Romance baiting: $15.4 million (from 414 reports) was lost through romance baiting scams. By far the common romance baiting scam type, accounting for 57% of scams reported to Scamwatch, involved luring the victim into meeting the scammer through a dating app, with the aim of persuading them to invest in a cryptocurrency investment scam. Younger people aged between 25 and 34 years lost the most money to scams using this technique ($7.3 million).
- Chinese authority scams: $7,044,098 was lost to Chinese authority scams (these scams usually take the form of 'robocalls' where scammers impersonate a courier company or various Chinese agencies with the aim of pressuring people into paying money, trading on their fear of the pandemic).
- Celebrity endorsement scams: Australians reported $1.8 million lost through celebrity endorsement scams (up from $1 million in 2019). These scams usually involve scammers using the image/name and personal characteristics of a celebrity to sell a product. In 2020, the ACCC reports that scammers moved away from this approach instead using fake news articles impersonating well-known media sites (eg ABC news) to lure people into scams.

Scam victims

- Individuals:

  - Men lost $88 million and women lost approximately $87 million to scams in 2020
  - Men reported the highest losses to investment scams ($44.6 million), while women reported the highest losses to romance scams ($28 million).
  - People aged 65 years and over reported higher losses than any other age group, with almost $38 million lost.
- Businesses:
  - Scam losses reported by businesses increased by 260% in 2020, to $18 million from $5 million in 2019. This was due to scams resulting in particularly high losses.
  - Businesses made the most reports about false billing and phishing scams. These scams typically involve a request for payment for a service or item that wasn't ordered or a scammer diverting money by impersonating the intended recipient of a payment.

Location

- For the first time, Victoria experienced the highest losses of all the states and territories, with reported losses to Scamwatch of $49,096,516. This was almost double the losses from 2019. The ACCC considers that the uptick is likely linked to the fact that Victorians were in lockdown for the longest period.
- NSW and Queensland experienced increasing losses and reports, while other states had less financial loss.

The payment and contact methods

- Bank transfer remained the most common payment method used in scams, with just over $97 million lost (a 40% increase).
- Bitcoin was the second highest payment method, with $26.5 million lost.
- Phone continued to be the most commonly reported contact method, with 103,153 reports and $48.2 million in financial loss (an increase of 48% above 2019).
- $21.6 million was reported lost to scams over mobile apps. This was an increase of 213% above 2019.
- Despite an increase in reports, losses to internet based scams decreased from $31.6 million in 2019 to $27.6 million in 2020.

ACCC Deputy Chair Delia Rickard commented,

> 'Last year, scam victims reported the biggest losses we have seen, but worse, we expect the real losses will be even higher, as many people don't report these scams. Unfortunately scammers continue to become more sophisticated and last year used the COVID-19 pandemic to scam and take advantage of people from all walks of life during this crisis…Victoria, which was significantly impacted by the second wave of the virus, recorded the highest losses nationwide for the first time and Victorians reported $49 million in losses to Scamwatch, more than double those in 2019. We saw scammers claiming the government restrictions meant people could not see items in person before purchase. This was a common ruse in vehicle sale and puppy scams, which both had higher reports and losses'

[Sources: ACCC media release 07/06/2021; Targeting scams: report of the ACCC on scam activity 2020]

ASIC scam alert

- The Australian Securities and Investments Commission (ASIC) has issued a warning about fake Qantas Airways Ltd corporate bonds being offered directly to consumers via email/phone by scammers.
- According to ASIC, the scammers are using the legitimate Qantas bonds listed on the ASX which have a coupon rate of 7.75%, by Equity Trustees Limited as a point of reference. Rather than offering a 7.75% per annum coupon rate, the scam offers this same per annum rate as the interest rate.
- ASIC's caution follows previous warnings about other forms of investment scams.
- The regulator directs consumers to ASIC's Moneysmart website for information on how to avoid being scammed.

[Source: ASIC media release 03/06/2021]

Insolvency and Restructuring

Regulations made to implement a permanent increase in the statutory demand minimum threshold

The Corporations Amendment (Statutory Minimum) Regulations 2021 permanently increases the dollar amount at which a creditor can issue a statutory demand to a company that owes the creditor money from $2,000 to $4,000.

However, the statutory minimum for companies eligible for temporary restructuring relief under section 458E of the Corporations Act 2001 (Cth) (the Act) is unchanged. On 1 January 2021, in response to the economic impact of the COVID-19 pandemic, amendments to the Corporations Regulations 2001 commenced that prescribed a figure of $20,000 for companies that are eligible (under s458E of the Act) for temporary restructuring relief. The provisions that prescribe the temporary $20,000 threshold end on 31 July 2021.

The Regulations commence on 1 July 2021, and apply in relation to statutory demands served on or after 1 July 2021.

[Source: Corporations Amendment (Statutory Minimum) Regulations 2021]

Other News

Top Story | New governance requirements for Queensland incorporated associations

Changes to governance requirements for incorporated associations in Queensland are due to come into effect by June 2022. MinterEllison discusses the key changes and provides insight into the actions associations incorporated in Queensland should be taking to prepare.

The full text of the article is here.

COVID-19 Disaster Payment: Temporary support for workers affected by state lockdowns

The government has announced that eligible workers impacted by state-imposed lockdowns will have access to a 'temporary COVID disaster payment'.

Eligible recipients will receive up to $500 per week for losing 20 hours or more of work a week. Those who would usually work less than 20 hours will be eligible to receive $325 per week.

The payment will be made in respect of the second and any subsequent weeks of restrictions.

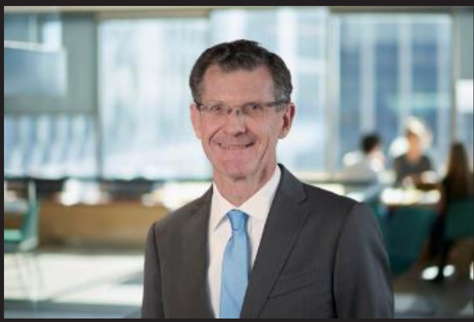
Eligibility

The weekly payment will be available to workers who:

- live or work in a Commonwealth declared 'hotspot' who are unable to work, because of state-imposed health restrictions that last for more than one week
- are Australian citizens, permanent residents or eligible working visa holders
- have exhausted any leave entitlements (other than annual leave) or other special pandemic leave
- do not have liquid assets of more than $10,000
- are not already receiving income support payments, business support payments of the Pandemic Leave Disaster Payment

[Source: Joint media release: Treasurer Josh Frydenberg, Prime Minister Scot Morrison, Minister for Agriculture David Littleproud, Minister for Government Services Linda Reynolds 03/06/2021]

Contacts



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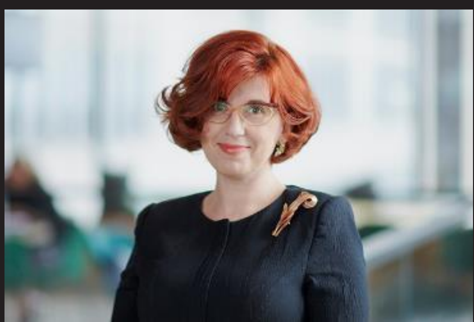

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