Governance News

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

3 March 2021

Contents

Boards and Directors

Boards are falling short on overall effectiveness: US survey finds executives want boards to be more prepared, more engaged and more willing to challenge management

Key Takeouts

- Despite the fact that most executives perceive their board to have a good grasp of company strategy, risks and company culture, 40% of executives surveyed consider that their board falls short in terms of overall effectiveness
- 82% of executives surveyed think that at least one director should be replaced
- The report suggests that the gap between perceptions of board skills/grasp of the business and perceived board effectiveness may be due to perceptions that directors are overburdened and/or that directors lack expertise in certain areas (eg IT).
- The survey found there is an appetite for boards to be more engaged, more prepared and more skilled in specific areas (ie areas outside of operations and finance).

PwC and The Conference Board have released a report – Board Effectiveness: A survey of the C-suite – presenting the findings of a survey of 550 US executives' views on board performance.

The headline finding is that though most executives consider their board to have a strong understanding of the business and broadly, to have strong skills/expertise, most executives do not consider that their board is executing its role effectively.

Key findings

Boards have a good grasp of the business

- Generally, executives consider their board to have a good grasp of the business. For example:
  - 94% of executives surveyed consider their board understands company strategy somewhat/very well
  - 89% of executives surveyed consider their board understands the company's key business risks

- the report also found that executives consider their board to have a good understanding of the company's shareholder base (87%), competitive landscape (86%), corporate culture (85%), and talent development and pipeline (85%)

Executives perceive boards to be ineffective

- 40% of executives surveyed consider that their board falls short in terms of overall effectiveness
- Executives in IT roles were the most critical of directors with 74% rating their board's effectiveness as 'fair' or 'poor'.

Appetite for board refreshment

- 82% of executives surveyed think that at least one director should be replaced, and 43% consider that two or more should be replaced.
- 31% of CEOs and CFOs and 40% of Chief Legal Officers support replacing two or more directors

Areas for improvement

The report suggests that the gap between perceptions of board skills/grasp of the business and perceived board effectiveness may be due to perceptions that directors are overburdened and/or that directors lack expertise in certain areas (eg IT).

The report highlights a number of areas in which executives would like to see improvement. These include the following.

- Most executives consider that directors come to meetings without being fully prepared: Only 37% of executives consider their directors come to meetings fully prepared dropping to 7% among executives in IT roles.
- Director expertise is lacking (outside of operations and finance)
  - Less than half of executives surveyed ranked director expertise as good or excellent in certain areas including: IT/digital/data privacy (48%), ESG (47%), cyber risk (46%) and crisis management (37%)
  - Executives rated director expertise in operations and finance more strongly at 65% and 63% respectively
- Most executives consider that their board is not able to respond well in a crisis:
  - 57% executives consider their board has a somewhat or very good grasp of the firm's crisis management
  - Less than a third (30%) of executives consider their board is able to respond well in a crisis
- Appetite for more rather than less engagement with management.
  - Only 9% of executives consider their board oversteps its authority
  - 25% consider that their board is reluctant to challenge management, particularly in the context of crisis preparedness/crisis management.
  - The primary area where executives consider boards need to challenge management more is crisis preparedness (48% of executives nominated this as the key area where more challenge is needed).
- Director age: 44% of executives consider that 'diminished performance due to director age is an issue on their board'
- Overboarding: 38% consider that directors are serving on too many boards.

The authors conclude from this that there is appetite for directors to: a) increase their expertise, especially in areas outside operations/finance; b) be more prepared to engage with management; and c) to be more prepared to challenge management on critical issues, including crisis preparedness.

It's suggested that boards may wish to consider reevaluatiing their own evaluation processes including engaging with management on how they can add value/the areas where improvement is needed.

It's also suggested that boards increase their engagement with management – for example, that boards consider reaching out to management ahead of meetings to seek clarification/additional information about particular issues/materials if needed – and generally, to take steps to ensure that management has more insight and undesrtanding of board operations. This will assist management in providing the board with the support it needs to execute its role effectively.

[Sources: Harvard Law School Forum 23/02/2021; Full text of the report: Board effectiveness: A survey of the C-suite]

Diversity

Findings of the fifth and final Hampton-Alexander Review released: FTSE 350 boards crack 33% target

The Hampton-Alexander review has released its fifth and final report into progress toward increasing the representation of women on FTSE 350 boards and in senior leadership.

Context

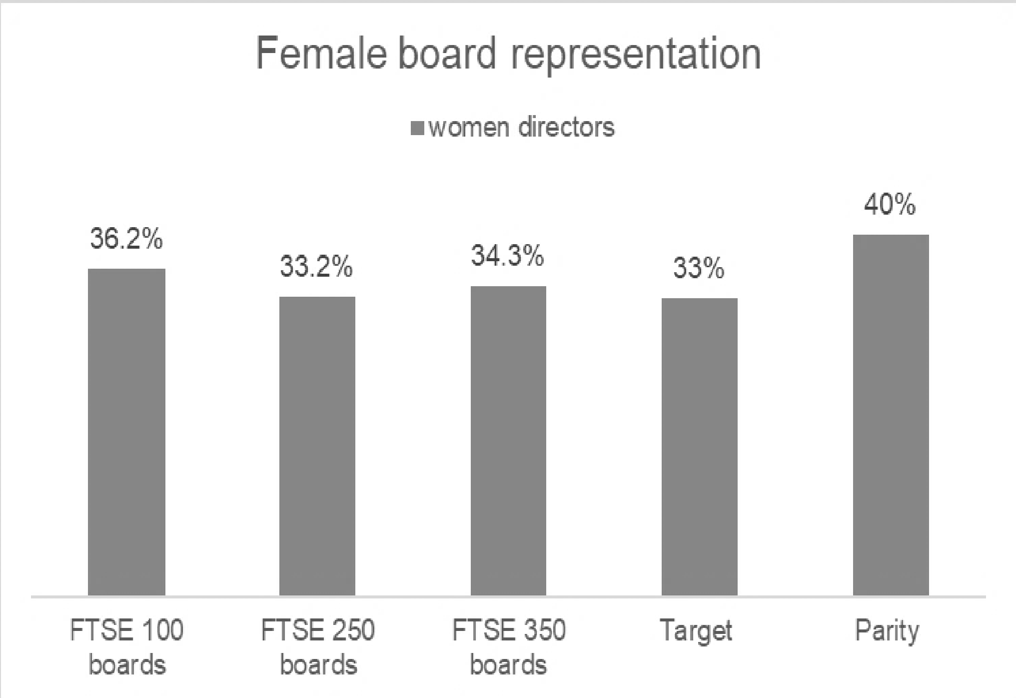
The 2016 Hampton-Alexander Review set two targets:

- FTSE 350 companies should aim for a minimum of 33% female representation on boards by 2020
- FTSE 350 companies should aim for a minimum of 33% female representation across their executive committee and in the direct reports to the executive committees by 2020

Some Key Findings

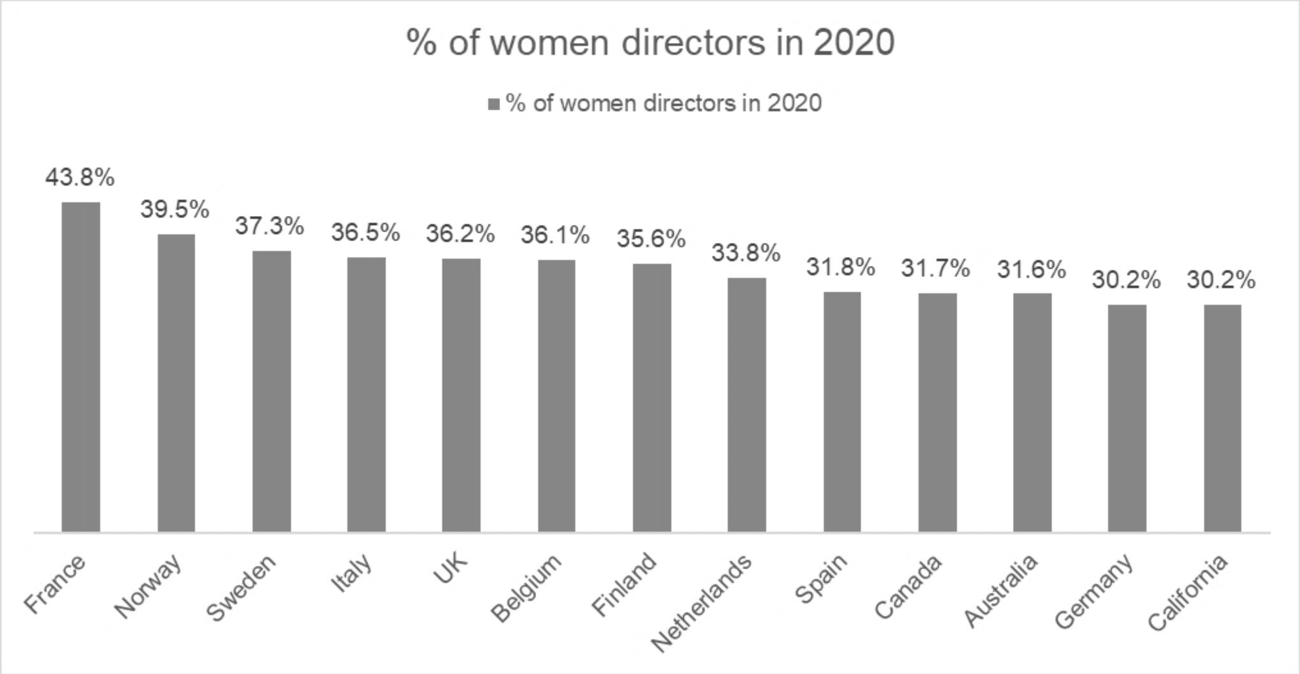
The 33% board representation target has been met

As at 11 January 2020 the report found that:



- Women hold more than a third (34.3%) of FTSE 350 board positions (an increase of 50% over the past five years). Put another way, 220 of the FTSE 350 companies now meet the Hampton-Alexander target of having at 33% female board representation.
- Drilling down larger companies are leading the way:
  - Women account for 36.2% of board positions on FTSE 100 boards (up from is 32.4% in 2019).
  - Women account for 33.2% of board positions on FTSE 250 boards (up from 29.6% In 2019).
  - Women account for 34.3% of board positions on FTSE 350 boards (up from 30.6% in 2019).
- The number of FTSE 350 all-male boards stands at zero (down from two in 2019)
- The number of boards with only one women has decreased from 116 to 16
- No evidence of overboarding among female directors: The majority of female directors on FTSE 350 boards (96%) hold only one or two board appointments in the FTSE 350.

UK vs peer countries



Comparing the level of female board representation in different 'peer countries' the report found that the UK ranks fifth behind France, Norway, Sweden and Italy (all of which have quotas in place) in terms of female board representation.

In first and second spot, France and Norway have both reached gender parity (over 40% female board representation).

Companies fell short of the senior leadership target

- FTSE 100 companies:
  - Women account for 30.6% of senior leadership roles in FTSE 100 companies (up from 28.6% in 2019). The report comments that this is the largest increase in the number of women in leadership in four years.
  - Women hold 70% of human resources director roles, 50% of company secretary positions, and 40% of combined general counsel and company secretary roles.
  - Women hold only 17% of finance director roles, and 16% of chief information officer roles.
- FTSE 250 companies:
  - Women account for 28.5% of senior leadership roles in FTSE 250 companies
  - Women hold 65% of human resource director roles, 55% of company secretary roles and 42% of general counsel positions.
  - Women hold only 16% of finance director roles, and 9% of chief information officer roles.
- Women account for 29.4% of senior leadership roles in FTSE 350 companies
- There are 28 all-male executive committees in FTSE 350 companies (down from 44 in 2019)
- There are only 17 female CEOs of FTSE 350 companies

Pressure to increase diversity

The report comments that stakeholder pressure on companies to increase board diversity is accelerating and lists a number of initiatives pushing for progress including:

- The FRC's Corporate Governance Report 2020 flagging companies failure demonstrate actions and outcomes on diversity, including a lack of targets at board and Executive Committee level as a concern
- Institutional Shareholder Services (ISS) recommending voting against FTSE 350 Nominations Committee Chairs with less than 33% women on the board
- Glass Lewis, Federated Hermes and Rathbones Crossman, all recommending voting against FTSE 350 Nominations Committee Chairs with less than 33% women on the board

- BlackRock Stewardship Expectations 2021: in the UK, large company boards should adopt the recommendations of the Parker and Hampton-Alexander Reviews with a view towards more voting action against boards not exhibiting diversity in 2022
- The Investment Association Shareholder Priorities 2021 include Red Top for FTSE 350 companies with 30% or less women on boards or 25% or less on Executive Committee & Direct Reports.

Sir Philip Hampton's recommendations going forward

Were another review established, Sir Philip recommends that it should: focus on increasing representation of women in executive roles (where progress has been the weakest) and potentially be expanded to include large private companies as well as listed companies.

Sir Philip Hampton makes four recommendations for driving progress on the issue going forward (whether or not another review is established). These are as follows.

- Women should hold at least one of the four roles of Chair, CEO, Senior Independent Director (SID) and CFO as a matter of 'best practice' and this should be supported by investors
- Companies should publish a gender pay gap for their board and their executive committee
- The Business, Energy and Industrial Strategy (BEIS) deparment and the Government Equalties Office (GEO) should coordinate as much as possible on government-based diversity initiatives
- The BEIS and GEO should also annually review (with the Investment Association and other investor groups) any voting sanctions (eg 'red top' advice to shareholders) applied to listed companies that fail to meet the gender targets they have set. Sir Philip futher suggest that public policy could be adjusted 'in the event of persistent concerns over diversity at senior levels in businesses'.

  [Source: Hampton Alexander Review 2020 Report]

WGEA has announced that the national gender pay gap has fractionally decreased over the past six months to 13.4%

The Workplace Gender Equality Agency has announced that that average national gender pay gap narrowed very slightly (0.6%) over the past six months to 13.4%. This means that, on average, full-time male employees earn an average of $242.20 per week more than their female counterparts.

Decrease driven by men earning less, not women earning more

Commenting on this, WGEA Director Libby Lyons, said that while welcome, the slight decrease is not due to structural changes in women's overall position in the workforce, but rather reflective of labour force volatility over the period. In particular, there has been an increase in the number of men moving into lower paid full time roles.

Ms Lyons suggests that as Australia's COVID-19 recovery progresses, male wages may increase (without a corresponding increase in female wages), potentially widening the gender pay gap.

WGEA calls on employers to maintain their focus on the issue

Ms Lyons urged employers to maintain their focus on progressing gender equality as a business priority.

> 'There are indications that the momentum towards gender equality in our workplaces is stalling. The challenge we now face is to ensure that all employers take immediate action to remedy this and reverse the indicative trend. I appreciate that 2020 was a very difficult year for many Australian businesses but we cannot allow the effects of the COVID-19 pandemic to be an excuse for inaction and inertia. Our economic recovery depends on women and men having genuine choice and equal access to re-engage and fully participate in the workforce. In fact, the business case is very clear. Improving gender equality outcomes in your business will improve your company's performance, productivity and profitability. Achieving workplace gender equality is not just a commercial imperative. It is also one of the most effective ways to close our nation's stubborn gender pay gap. Australian employers play a crucial role in this process. I urge all employers to pick up the pace and take action on pay equity to ensure the work of all female employees is fairly valued and rewarded, as is the case for men'.
>
> [Source: Workplace Gender Equality Agency media release 25/02/2021]

US Disability groups are urging SEC and Nasdaq to include people with disabilities in Nasdaq's board diversity proposal

Context

- In December 2020, Nasdaq filed a proposal with the Securities and Exchange Commission (SEC) to adopt new listing rules related to board diversity and disclosure.
- Under the proposal, all Nasdaq-listed companies will be required to publicly disclose board-level diversity statistics through Nasdaq's proposed disclosure framework and to meet minimum board diversity requirements or explain why not. For a brief overview of the proposal see: Governance News 9 December 2020 at p5.

Calls for the proposed new requirements to be expanded to include disability

- The proposal defines a diverse director as one who self-identifies as female, underrepresented minority or LGBTQ+.
- Not for profit group, Disability:IN and the American Association of People with Disabilities (AAPD) have jointly called on the SEC and Nasdaq to expand this definition to explicitly include people with disabilities.
- The groups argue that this would: a) be a step towards ensuring people with disabilities are represented on boards; b) positively impact the economic independence and quality of life for people with disabilities; and c) be in line with institutional investors' expectations around diversity on boards.

[Source: Disability:IN media release 23/02/2021]

2020 Study into gender diversity on US private company boards finds only 11% of seats are held by women

A joint Crunchbase, Him for Her and Kellogg School of Management study into the composition of the boards of the 350 most heavily funded US based private venture-backed companies has found that in 2020:

- 89% of seats are held by men:
  - Overall, of the 2,457 board seats included in the study, women held 11% of board seats (up from 7% in 2019)
  - Only 3% of seats are held by women of colour (compared with an estimated 18% held by men of colour)
  - Crunchbase comments that by comparison women account for 28% of S&P 500 board seats and 23% of Russell 3000 board seats.
- Almost half of boards include zero women
  - 49% of companies had all male boards (down from 60% in 2019)
  - 81% of companies do not include a woman of colour on their board
  - 18% of the boards studied included two or more women
  - 6% of the boards studied included at least three women
  - Crunchbase comments that by comparison, there are zero S&P 500 companies with all male boards and only 7% of Russell 3000 companies with all-male boards.

[Sources: Crunchbase media release 01/03/2021]

In Brief | The Governance Institute is launching its flagship directors course in a women's only format in a bid to boost senior leadership roles for women. Governance Institute CEO Megan Motto said that the aim is 'to encourage a new level of diversity at the top by helping equip, empower and inspire the next generation of female leaders'

[Source: Governance Institute of Australia media release 25/02/2021]

Corporate Social Responsibility and Sustainability

Addressing inequality: Could introducing a right for workers to appoint board representatives work in the US context?

Key Takeouts

- Broadly, the paper argues that the introduction in the US of a right for workers to appoint a certain proportion of directors to boards is unlikely to be effective (on its own and in the absence of the supporting frameworks in place in jurisdictions where codetermination is already established) in amplifying worker voices and ensuring their interests are factored into company decision making/distribution of financial returns.
- The paper puts forward a number of suggested policy measures that would support worker interests now, and lay the groundwork for the introduction of a form of minimal codetermination should it be introduced at some point in future.
- Among the suggested policy reforms is the suggestion that board compensation committees at all large companies be replaced with 'board workforce committees' which would have broad responsibility to ensure fair pay and working conditions for the company's entire workforce (not just full time employees) as well as oversight of policies on pay, workforce diversity, equity, inclusion, safety and corresponding disclosure requirements.

A new paper - Lifting Labor's Voice: A Principled Path Toward Greater Worker Voice And Power Within American Corporate Governance – looks at the potential for introducing a new right for workers to appoint a certain percentage of directors on company boards in the US context (as has been suggested by some US lawmakers – Part 1 of the article outlines the key current proposals), and what would be required to make the new requirement work as intended to amplify worker interests and ultimately to ensure workers receive a fair share of corporate gains.

Some Key Points

- Broadly, the article argues that board level representation is only one element of 'the comprehensive codetermination regulatory strategy as it is practiced abroad' for example, in Germany that enables it to be effective. The writers argue that in the absence of a similar supporting framework in the US, the introduction of a new board level representation requirement on its own, is 'unlikely to be successful'.
- As a practical matter, the writers consider that it would also be necessary to answer a number of questions around how the requirement would operate, before it could be implemented in the US. For example, it would be necessary to decide: a) which workers would be eligible to vote for directors; b) who would be permitted to serve as a worker director; c) how worker director campaigns and elections would be conducted; and how boards with worker directors would function.
- The article goes on to outline a number of policy reforms which the writers consider would serve to both amplify workers' voices and to facilitate/support the eventual adoption of 'an effective and efficient system of board-level representation for American workers' should it be introduced in future. The proposed changes are intended to work together to 'align corporate governance and labor law policies toward environmentally responsible, sustainable growth, fair profits for stockholders, and fair treatment of all stakeholders, and specifically workers'.

Suggested policy reforms

Suggested policy reforms include:

- Requiring all large US corporations (public or private), to respect the interests of all stakeholders, including workers, and to focus on sustainable growth
- Mandating the Securities and Exchange Commission (SEC) to require to require Employee, Environmental, Social, and Governance (EESG) disclosure from all large companies and institutional investors;
- Replacing board compensation committees at all large companies with 'board workforce committees'
  - these new board workforce committees would have broader responsibility to ensure fair pay and working conditions for all employees (ie the company's entire workforce), and have oversight of policies on pay, workforce diversity, equity, inclusion, safety and corresponding disclosure requirements

- the new board workforce committees would also be authorised to institute European style 'works councils' to increase worker voice and provide information to the board or, merely to monitor worker sentiment, oversee forums at which workers can be heard and ensure that there are protections from retribution against workers who participate.

  The writers comment that

  'The workforce committee would, in this model, become a centre of accountability. At companies that did not treat workers well, the members of the committee would have to bear the heat now applied only to management. And the requirement for worker director membership, and greater full board involvement in workforce issues, will give the worker directors more clout. Experimentation of this kind might lead to converging best practices that eventually make the implementation of a system of ground-up worker voice at all large companies feasible'.

- enacting labour law reform to 'reinvigorate workers' rights to join a union and authorise sectoral bargaining'
- ensuring institutional investors align their behaviour with 'the interests of the people whose capital they deploy' by:
  - ensuring all institutional investors are free to take into account key EESG factors (and requiring socially responsible mutual funds, index funds, pension and retirement funds to do so)
  - disclosing how they factor EESG considerations into their stewardship policies.

  [Sources: CLS Blue Sky blog 25/02/2021; Strine, Leo and Kovvali, Aneil and Williams, Oluwatomi, Lifting Labor's Voice: A Principled Path Toward Greater Worker Voice And Power Within American Corporate Governance (February 24, 2021). U of Penn, Inst for Law & Econ Research Paper No. 21-09, Available at SSRN: https://ssrn.com/abstract=3792492]

Institutional Shareholders and Stewardship

'Activist stewardship'? Engine No 1 pushes for board change at Exxon Mobil with support from CALSTRS

Engine No 1 is pushing for board change at Exxon Mobil to trigger a shift in strategy

Activist Engine No 1 is exerting pressure on Exxon Mobil to implement steps to address its financial underperformance, which the group attributes to Exxon's failure to adjust to and/or plan for the changes impacting the sector, including the transition to a net zero economy. Among other things, Engine No 1 argues that the company has failed to develop a long-term strategy to protect/increase value in the face of the rapid change and to 'install directors' with the necessary energy industry skills/experience to 'enhance long-term shareholder value'.

To help address these issues, Engine No 1 has been pushing since January for the company to appoint four independent director candidates to trigger what it considers to be the required shift in direction.

California State Teachers' Retirement System (CalSTRS) has put its support behind Engine No 1's nominees and behind the Reenergise Exxon campaign on the basis that:

> 'ExxonMobil's board must be strengthened to improve the company's underperformance linked to declining returns on capital expenditures and undisciplined capital allocation. As shareholders of ExxonMobil, we believe the ExxonMobil board requires significant change to fulfil these goals, and the candidates submitted by Engine No. 1 are equipped with the skills needed to address ExxonMobil's financial underperformance and prepare for the global energy transition'.

Exxon has appointed two new directors

Ahead of the company's investor day on 3 March, and AGM on 27 May, Exxon Mobil announced that two new directors (neither of whom are Engine No 1/CALSTRS backed nominees) have joined the board.

The new directors are:

- Michael Angelakis, the current chair and CEO of investment company Atairos, non-executive director of TriNet Group Inc and Groupon Inc and former chair of the Federal Reserve Bank of Philadelphia
- Jeffrey Ubben, co-founder of Inclusive Capital Partners and ValueAct Capital Partners and non-executive director of Appharvest Inc, Enviva Partners LP and Nikola Corporation) have joined its board of directors

Announcing the changes, Exxon Mobil Corporation Chair and CEO Darren Woods said that the new appointments will bring valuable experience and expertise to the board.

> 'We welcome these new directors as part of our ongoing board refreshment, which builds on the diverse global business experience of our current members. Michael and Jeff's expertise in capital allocation and strategy development has helped companies navigate complex transitions for the benefit of shareholders and broader stakeholders. Their contributions will be valued as ExxonMobil advances plans to increase shareholder value by responsibly providing needed energy while playing a leadership role in the energy transition'.

Exxon's statement goes on to say that the appointment of the new directors means that 12 of the 13 directors on the board are independent and brings director tenure down to less than five years (as seven directors have been appointed since 2016) which is substantially less than the eight year average tenure for S&P 500 companies.

Engine No 1 has previously stated that,

> 'While the Company has pointed to the frequency with which the Board refreshes itself, we believe it is telling that such refreshment over the years has not been accompanied by a new direction or material progress on these issues. We believe that enhancing the Company's long-term future requires a clean break with the past, and we look forward to continuing to make the case for real change at ExxonMobil'.

An example of activist stewardship

Writing in Harvard Law School Forum, Robert Eccles (Oxford University), Aeisha Mastagni (CalSTRS), and Kirsty Jenkinson (CalSTRS) frame the Reenergise Exxon campaign as an example of 'activist stewardship'.

Activist stewardship describes a situation in which a universal owner (in this case CALSTRS) faced with a company that has proven resistant to engagement efforts over a prolonged period (eg Exxon), and for whom divesting the stock is not an attractive proposition, opts to back an activist campaign for board change in order to trigger a necessary shift in strategy.

The aim of this approach from the perspective of universal owners like CALSTRS is both to address concerns about the individual financial performance of the company, and more broadly at a system level.

In this case for CALSTRS 'Exxon Mobil is problematic at both the company (loss of shareholder value) and the system (puling high carbon assets out of the ground) level. This is why it is supporting Engine No. 1's campaign'.

The authors write that CALSTRS is working on developing a scalable activist stewardship model to better enable it to address the various E and S issues threatening long-term financial returns across its portfolio.

'Our goal is to create Activist Stewardship capabilities at scale in order to ensure that companies deliver the returns required by those who depend upon them'.

[Sources: Exxon Mobil media releases: 01/03/2021; Engine No 1 Letter to the board of directors 22/02/2021; Reenergize Exxon campaign; CALSTRS media release 03/02/2021]

UK Investment Association outlines investors' expectations of companies ahead of AGM season

The UK Investment Association has outlined its expectations of companies on a range of issues including board diversity, remuneration and climate change, ahead of the AGM season.

Some Key Points

Diversity

- Board racial/ethnic diversity: For the first time, the Investment Associations' Institutional Voting Information Service (IVIS) will issue an 'amber top' to FTSE 350 companies that fail to disclosure either: a) the ethnic diversity of their board; or b) a 'credible action plan' to have at least director from an ethnic minority background by 2021 (the target set by the Parker Review).
- Board gender diversity
  - The IVIS will issue a 'red top' to companies whose boards comprise 30% or less female directors (up from 20% last year) FTSE SmallCap companies will receive an 'amber top'.
  - The IVIS will issue a 'red top' to companies where women hold 25% or less of roles in the executive committee and its direct reports. FTSE Small Cap companies will receive an 'amber top'.

Director for Stewardship and Corporate Governance at the Investment Association Andrew Ninian commented,

> 'The UK's boardrooms need to reflect the diversity of modern-day Britain. With three-quarters of FTSE 100 companies failing to report the ethnic make-up of their boards in last year's AGM season, investors are now calling on companies to take decisive action to meet the Parker Review targets. Those who fail to do so this year will find themselves increasingly under investors' spotlight.'

Climate disclosure

Investors expect all listed companies to report in line with TCFD recommendations.

For the first time, the IVIS will issue an 'amber top' to companies in high-risk sectors (sectors identified by the TCFD as 'potentially most impacted by climate change'), that fail to address 'all four pillars' of the TCFD recommendations.

Mr Ninian commented,

> ' As stewards of the economy, investment managers have an important role to play in supporting companies transition to a more sustainable future. Having clear and consistent data on the climate-related risks faced by companies is vital to achieve this, and investors will now be placing additional pressure on those that fail to provide this information'.

[Source: IA media release 24/02/2021; IA 2021 Shareholder Priorities]

In Brief | What good looks like: ShareAction has released a best practice guide to responsible investing that brings together a set of case studies showcasing leading practice by mainstream asset managers on four responsible investment topics: responsible investment governance, climate change, human and labour rights and biodiversity. The aim is to encourage all companies to improve their investment practices across all four topics, given that at present though there are pockets of strong practice, no company 'achieves full marks' in every topic

[Sources: ShareAction media release 28/02/2021; Guide: ShareAction Point of No Returns Part V – Leading Practice A guide to current leading practices by asset managers on responsible investment March 2021]

In Brief | BlackRock has released more detail on its approach to engagement on climate risks/opportunities and the transition to a low carbon economy. Among other things, BlackRock flags that it expects individual directors to have 'sufficient fluency in climate risk and the energy transition to enable the whole board—rather than a single director who is a "climate expert"— to provide appropriate oversight of the company's plan and targets'

[Sources: Harvard Law School Forum on Corporate Governance and Financial Regulation 02/03/2021; BlackRock: Climate risk and the transition to a low-carbon economy]

In Brief | Factoring in the risks and opportunities of the 'green' transition: BlackRock is building energy transition into its capital market assumptions as part of a series of actions to prepare for a net-zero world

[Source: BlackRock report: Launching climate aware asset class return expectations February 2021]

In Brief | BlackRock's annual CEO letters work: New study confirms that BlackRock's annual CEO letters are effective in prompting companies to adapt/expand their disclosure to reflect the topics in the letters and to more closely align their lobbying efforts with the issues highlighted in the letters

[Source: Pawliczek, Andrea and Skinner, Ashley Nicole and Wellman, Laura, A New Take on Voice: The Influence of BlackRock's 'Dear CEO' Letters (January 2021). Available at SSRN: https://ssrn.com/abstract=3763042]

Shareholder Activism

Successful engagement: As You Sow has withdrawn a climate resolution at Citigroup, the bank has announced a net-zero by 2050 commitment

As You Sow has announced that it has withdrawn a resolution at Citigroup calling for disclosure of 'whether the bank is considering setting Paris aligned, net zero targets, such as Science Based or other targets, and on what timeline, to reduce the carbon footprint of its financing activities' following successful engagement by a number of investors - Mercy Investment Services, Boston Common Asset Management, Arjuna Capital, Presbyterian Church USA, and the School Sisters of Notre Dame Cooperative Fund – on the resolution.

Net zero by 2050 commitment

Citigroup announced that it will:

- Publish an initial net zero plan by 2050 plan 'within the next year'.
  - The plan will include emissions reduction targets for 'carbon intensive sectors that also have low carbon transition opportunities' including interim 2030 emissions targets for the bank's energy and power portfolios.
  - After an initial implementation period, the plan will be reviewed to assess 'which additional sectors to include and how best to incorporate additional areas of our business in a way that achieves meaningful emissions reductions in the real economy as part of a just transition'.
- Report on progress against the plan.
- Commit to a net zero greenhouse gas emissions by 2030 target for its own operations.

As You Sow and investors have welcomed Citigroup's commitment

As You Sow President Danielle Fugere applauded Citigroup's commitment, adding that the group looks forward to seeing more detail around the commitments. Ms Fugere went on to comment that Citigroup's commitment brings it into alignment with four of the top six US banks that have so far set emissions targets and agreed to disclose progress against them.

Progress with other large banks

Ms Fugere said that investors are now increasingly concerned that Wells Fargo and Goldman Sachs are 'lagging their peers'. She added that while discussions with Goldman Sachs are continuing, Wells Fargo has applied to the Securities and Exchange Commission to keep the shareholder climate proposal calling on the bank to measure, disclose and set targets off its proxy. Ms Fugere states,

> 'Not only has Wells Fargo failed to take responsibility for its financed emissions by setting a reduction target in line with the Paris Agreement's net-zero goal, or even take the first steps of measuring and disclosing its financed emissions, it is challenging shareholders' basic right to ask the bank about these critical issues'.

Arjuna Capital, Boston Common Asset Management and The School Sisters of Notre Dame Cooperative Investment Fund also welcomed the bank's commitment. The School Sisters of Notre Dame Cooperative Investment Fund called for other financial institutions to follow suit.

[Source: As You Sow media release 01/03/2021; Citigroup blog 01/03/2021]

In Brief | Net zero commitment not enough: ShareAction has released an investor brief making the case for backing the shareholder climate resolution at HSBC calling on the bank to publish a strategy to reduce its exposure to fossil fuel assets on a timeline aligned with the Paris climate goals at the May AGM

[Source: ShareAction report: HSBC investor brief]

Financial Services

Top Story | New voluntary BNPL Code now in effect

Key Takeouts

- The new voluntary Buy Now Pay Later Code of Practice includes nine 'customer commitments' which AFIA states are designed to promote a 'customer-centric approach to the design, marketing and distribution' of BNPL products and services; lift industry standards; and supporting compliance with legal obligations
- The Code Compliance Committee will have power to impose sanctions on members for code breaches, including the power to 'name and shame' members and a requirement to impose 'mandatory sanctions' for 'significant' breaches
- Consumer groups have raised concerns about the likely effectiveness of the Code in protecting consumers and have called for the government to follow the UK's lead and regulate BNPL products like other credit products.

What's in the new BNPL Code?

The Australian Finance Industry Association (AFIA) has launched a new, voluntary buy-now-pay-later (BNPL) Code of Practice with the aim of promoting a 'customer-centric approach to the design, marketing and distribution' of BNPL products and services; lifting industry standards; and supporting compliance with legal obligations. AFIA states that the Code 'goes above and beyond the law in Australia, setting best practice standards for the sector and strengthening consumer protections'. The Code was developed following consultation with industry, with the Australian Securities and Investments Commission (ASIC) and with other stakeholders. The commitments in the Code are contractually enforceable on Code Compliant members by customers through the Australian Financial Complaints Authority (AFCA).

The new Code took effect from 1 March 2021.

Coverage

The Code is binding on Code Compliant Members (members) of the AFIA BNPL Providers Group. The current code compliance members are: Afterpay, Brighte, Humm, Klarna, Latitude, OpenPay, Payright and Zip.

According to AFIA, this group represents over 95% of the BNPL market.

Oversight: Code Compliance Committee

The Code Compliance Committee (CCC) is an independent three person Committee, established by AFIA to monitor Code Compliance, investigate alleged breaches of the Code; and impose sanctions for non-compliance (as appropriate).

Sanctions:

- Where the CCCC determines that a member has breached the Code, it has the power to impose a series of sanctions, including certain mandatory sanctions for breaches deemed 'significant' eg for systemic breaches which require reporting to ASIC.
- The sanctions include for example: a) publicly naming a non-complying BNPL provider in a media release, in a notice of non-compliance on AFIA's website and/or in AFIA's Annual Review; b) requiring a code compliance audit of the provider at their expense; c) directing a provider to stop 'portraying itself as a 'Code Compliant Member' eg directing a provider to using the accreditation symbol and suspending/revoking the provider's certification as a Code Compliant Member; and d) recommending that the provider's membership of AFIA be reviewed, suspended or terminated.

The composition, duties, operation and administration of the Code Compliance Committee are detailed in the Terms of Reference.

Nine commitments to BNPL customers

The Code includes nine customer commitments.

1. Focus on customers

- Vulnerable customers: The Code commits members to 'take extra care' of vulnerable customers (as described in ASIC's 2019-23 Corporate Plan), provided that customers inform them of their circumstances' or it is 'otherwise reasonable' for the member to be aware of them. This includes, committing to: provide staff with training to 'act with sensitivity and respect' toward vulnerable customers and adhering to best practice guidance on dealing with vulnerable customers (eg AFCA approaches)

Code members also commit to (among other things):

- ensuring that BNPL services/products 'are suitable' and that appropriate safeguards are in place
- only providing BNPL services/products to customers aged 18 years or older
- acknowledging 'all complaints within one day (or as soon as practicable)' and to providing an initial response within ten days from the date of the complaint
- taking 'reasonable and appropriate steps' to ensure that merchants/retail partners do not provide BNPL services/products for online gambling, retail gambling, gambling at domestic or offshore casinos and the purchase of firearms.
- proactively engaging with customers to obtain feedback and to review the reasons for customers contacting their provider with a view to improving BNPL services/products

2. Commitment to be fair, honest and ethical

Members commit to 'always act fairly and honestly, be ethical and treat you [BNPL consumers] reasonably in all our dealings, as part of this commitment'.

3. Commitment to keep consumers 'properly informed' about products/services

The Code commits members to ensuring that:

- terms and conditions are 'fair, clear and transparent and written in plain language' and 'distinguishable from our marketing material' and to comply (where relevant) with ASIC's guidance on advertising.
- advertising and promotional material is clear and not misleading or deceptive'.
- prospective customers are provided with access to 'clear and prominent information' about repayment obligations and fees (including fee amounts or how they will be charged)
- customers receive 'relevant and useful reminders' about repayment obligations
- customers are able to access their statement, see each purchase and the total outstanding balance of their purchases online
- reasonable steps are taken to exclude customers with financial hardship arrangements in place, from receiving promotional material
- information about how to close/deactivate an account is available online in a 'readily available and simple manner'
- contact details for members are available on their website and electronic forms
- Late fees:
  - members commit to either: a) contacting customers who are late with making a payment before charging a late fee; or b) to reversing any late fees that have been charged where the customer makes a catch up payment within two days of the missed payment
  - members agree where late fees are charged, the fees will be 'fair, reasonable and capped' (though no hard amount is specified)
- Members agree to give consumers 'at least 40 days' notice in writing, before introducing new fees/increasing existing fees and to provide notice 'as soon as is reasonably possible' and 'at least 30 days notice' where other material changes are made to terms/conditions

4. Ensuring the product/service is 'suitable'

The Code commits members to assessing new customer's suitability before providing them with a product/service, as well as to assessing existing customers' ongoing suitability.

New customers

- The Code commits members to conducting an 'upfront assessment' of new customers, to assess their suitability, before providing a BNPL service/product to them.
- Clause 11.3 of the Code lists the criteria that members need to 'be reasonably satisfied' that a new customer meets before providing them with a BNPL goods/service. These criteria include (among other things) that the member is satisfied that the customer is not a vulnerable customer and meets the suitability criteria set out at clause 12 (which commits members to ensuring that their BNPL products/services are meeting customer needs and are 'are not being used by customers for whom it is not suitable'). Members will also need to be satisfied that the repayment term is 'determined as suitable and is consistent with our suitability assessment and internal risk management processes'.
- Where a customers does not meet all of the criteria in clause 11.3 and the transaction amount is $2000 or less, members will check 'at least one indicative data source' (eg information about the customer's income/expenses such as bank statements or conduct a credit check) before providing the service.
- Where the transaction amount for new customers is in the $2001-$15,000 dollar range, members will need to be satisfied that the customer meets all the criteria in clause 11.3 and customers will also need to undergo two additional checks (the member will check information about income/expenses and conduct a credit check) to ensure the product/service is suitable.

Existing customers

- Members will assess all new Transaction Amounts for existing customers to ensure that the service/product remains suitable prior to providing a new transaction amount (eg an increase to an existing limit).
- Existing customers will need to meet the criteria in clause 11.11 including (among other things) that: a) they are up to date with payments; b) they 'have shown appropriate repayment ability'; c) the repayment term is 'still determined as appropriate'; c) they are not a 'vulnerable customer'; and d) 'internal in-life data shows' that the BNPL product/service is not been used 'inappropriately'.
- Members will not provide any additional products/services or increase the Transaction Amount of the current product or service where a customers is behind in payments at the time of undertaking the existing customer assessment process.
- Where the new transaction amount is over $3000, in addition to meeting the requirements in 11.11, customers will need to undergo additional checks to ensure the product/service remains suitable. The amount of additional data required will depend on the size of the new Transaction Amount.

5. Undertake an ongoing review of the suitability of products/services

- Members commit to reviewing their BNPL products/services to ensure they remain suitable, including ensuring that products/services are not being used by customers for whom they are not suitable.
- This ongoing suitability assessment includes: a) monitoring products/services to 'ensure they remain suitable for our customers; b) monitoring how customers are using products/services to identify whether they are meeting their needs/whether they remain suitable; c) taking reasonable steps 'that will likely result in the distribution' of BNPL products/services being appropriate; d) monitoring/reviewing the outcomes of distribution arrangements on an ongoing basis including how merchants/retail partners use BNPL products/services and considering whether changes are required.
- Clause 12.3 lists various types of information – eg complaints data, consumer feedback, hardship data, the percentage of sales to consumers who are not in the target market, information collected from consumers and consumer advocates and AFCA - that members will take into account to ensure that this commitment is being met.

6. Dealing fairly with complaints

The Code commits members to:

Having a complaints policy that it readily accessible on their website.

- Having in place complaints resolution procedures that comply with ASIC's internal dispute resolution standards - ie the 'same ASIC standards and requirements that Australian Financial Service Licensee holders…except where we promise to improve on those standards and requirements'.

- Resolving complaints as quickly as possible:
  - Complaints will be acknowledged within one day/as soon as is practicable
  - An initial response will be provided within ten days from the date of the complaint
  - Upon completion of an investigation into a complaint, members will provide consumers with a written response including the outcome of the investigation and their right to take the complaint to AFCA and AFCA's contact details (unless the complaint has been resolved to the customers' satisfaction within five days or an 'appropriate explanation and/or apology' has been given and there are 'no further actions we can take to reasonably address the complaint').
- Escalating a complaint:
  - Members agree to be a member of the Australian Financial Complaints Authority (AFCA) and be subject to AFCA's rules to enable customers to lodge a complaint with AFCA if dissatisfied with members' own response
  - Complaints will also be able to escalated to the Code Compliance Committee (CCC) and members undertake to cooperate and comply with all 'reasonable requests' by the performance of its monitoring and investigative functions.

7. Financial Hardship Assistance

The Code commits members to:

- Providing their staff with training to ensure diverse and vulnerable customers are treated with appropriate 'sensitivity, respect and compassion'.
- Ensuring customers are aware that they have the option to request Financial Hardship Assistance eg by including information on how to do so, with contact information on their websites. Customers will have the option to inform members that they are experiencing financial hardship in writing, electronically or by phone.
- Informing customers in writing of the outcome of their hardship request within 21 days receiving the hardship request (or where additional information was sought from the customer, within 21 days of receiving the additional information).

Where a financial hardship claim is denied, members are required to:

- provide customers with the reasons/details as to why a hardship request was denied and provide them with contact details for AFCA, as well as contact information for financial support services
- work with customer representatives (eg family member, financial or legal representative or financial counsellor0 instead of directly with customers if this is the customer's preference
- cease 'normal collection activity' and freeze late fees while financial hardship claims are being assessed
- refrain from listing the default on a customer's credit reference file while considering a request for financial hardship.

Where a financial hardship claim results in agreement to provide assistance members are required to:

- provide written confirmation of what has been agreed, including the customer's obligations and the end date for providing the assistance
- not charge additional late fees while the customer is meeting the conditions of the Financial Hardship arrangement
- 'make reasonable efforts' to contact a customer before activating/reactivating enforcement action if they breach the conditions of hardship assessment and give them at least five days' notice. If a new repayment arrangement cannot be agreed, customers will be provided with AFCA's contact details and also be referred to financial support services.

Recovering a debt - the Code commits members to:

- complying with the ACCC's and ASIC's Debt collection Guideline for Collectors and Creditors and with the Code of Operation: Recovery of Debts, published by the Federal Government
- not sell a customer's debt to a debt collector except in certain circumstances
- not to initiate/not to let their agents initiate bankruptcy proceedings against customers

8. Compliance with legal and industry obligations

Clause 15 of the Code states that members will comply with their obligations under the law and the Code and 'act fairly and in a way which is consistent with good practice' including, among other things, taking reasonable steps to ensure that personal and financial information is protected from misuse/loss/unauthorised access.

9. Members will 'support and promote' the Code

The Code commits members to promoting the Code to raise awareness of the protections under it through making it available via their websites, showing an 'accreditation symbol' on their websites, engaging with key stakeholders, including via AFIA and ensuring their staff, agents and representatives receive the training they need to understand the Code and how to comply with it.

Minimum standards for merchants and retail partners

The Code also sets out minimum standards members will require their merchant/retail partners to meet. These include:

- acting 'lawfully, fairly and ethnically' in their dealings with customers
- communicating clearly when dealing with consumers and in marketing/advertising material relating to BNPL products/services
- safeguarding customer confidentiality
- responding to customer complaints on a timely basis
- requiring their employees/agents to be trained in the minimum standards/understand the minimum standards
- providing customers with clear information about BNPL services, fees, charges

Members will have monitoring processes and policies in place to ensure that their merchant/retail partners meet these minimum standards on an ongoing basis.

Members are also required to report instances of material non-compliance with their minimum standards (including any proposed consequences) to the CCC on a quarterly basis.

Consumer groups have raised concerns

In a statement, consumer groups – Financial Rights Legal Centre, Financial Counselling Australia, Consumer Action Legal Centre and CHOICE - raised concerns about the effectiveness of the Code in protecting consumers and called for the government to follow the UK's lead and regulate BNPL products like other credit products.

Financial Rights Legal Centre CEO Karen Cox commented,

> 'These services are growing at a breathtaking rate, and ASIC's research has shown that at least one in five consumers are missing payments. As this industry continues to grow, we will see increased debts and increased financial hardship. Sadly, many people including Aboriginal and Torres Strait Islander people who are lured into BNPL are becoming embroiled in unsustainable, long-term debt…Right now, there is no obligation for BNPL providers to assess a person's ability to repay debt or handle a consumer's complaint fairly. We are glad to see the new Code requires membership in AFCA, but that is no replacement for proper regulation'.

Director of Campaigns and Communications at CHOICE, Erin Turner added,

> 'Self-regulation of the Buy Now, Pay Later sector will not be enough to fix the issues we're seeing like high fees, inappropriate lending and pushy marketing of debt to Australians…The Code will see businesses that fail to comply with basic standards face "naming and shaming" rather than the penalties or legal action other lenders face for significant breaches of consumer credit protections. This sets an inappropriately low bar for a growing industry'.
>
> [Sources: AFIA media release 01/03/2021; BNPL Code of Practice; Financial Right Legal Centre media release 24/02/2021]

Proposed changes to ASIC remediation guidance: SAFAA has raised concerns that ASIC is adopting a 'one size fits all' approach that is not suited or appropriate to smaller organisations

The Stockbrokers and Financial Advisers Association (SAFAA) has released its submission in response to Australian Securities and Investments Commission (ASIC) Consultation Paper 335: Consumer Remediation: Update to RG 256. For a brief summary of ASIC's proposals see: Governance News 9 December 2020 at p21.

SAFAA submission

SAFAA's submission raises a number of concerns about ASIC's proposed changes, chief among them, that the proposed approach adopts a 'one size fits all' approach that is more 'suited to large financial institutions' rather than to organisations in the stockbroking and investment advice industry.

Flowing from this concern, SAFAA's submission raises objections to a number of the proposed changes including (among others): a) the proposed two tiered approach to initiating a remediation; b) the proposal to alter the relevant remediation period; and c) the use of an assumption-based approach for financial services licensees.

SAFAA's position is that the current guidance in Regulatory Guide 256 is both 'functional and appropriate'.

The submission states that,

> …'changing it [RG 256] in the ways that have been suggested will create uncertainty and added costs for licensees and will add to their regulatory burden with no real benefit for investment clients. Any extra costs imposed on the industry will ultimately force up the cost of providing investment advice and services to clients…
>
> SAFAA recommends that ASIC takes into account both the escalating regulatory burden and costs impacting our members — which in turn adds to the cost of accessing financial advice — and the very low number of customer complaints made against our members each year when considering whether changes to regulatory guidance are appropriate for the stockbroking and investment advice industry'.

[Source: SAFAA submission 26/02/2021]

APRA data shows that the number of loans subject to repayment deferral continues to decrease

The Australian Prudential Regulation Authority (APRA) has released its monthly update on loans subject to temporary repayment deferral.

According to APRA, as at 31 January:

- $37 billion worth of loans or 1.4% of total loans outstanding, were subject to temporary repayment deferrals, down from $50bn worth of loans in December 2020.
- The majority of deferred loans are housing loans ($32bn)
- In January, $14 billion in loans either expired or exited deferral vs $1bn either entering deferral or granted an extension.
- Victoria has the highest proportion of loans subject to deferral, at 2% as compared with the rest of the country at 1% (though APRA comments that the difference is narrowing).

APRA will release monthly updates until loans subject to repayment deferrals are 'no longer a notable component of the ADI industry's total loan portfolio'.

[Source: APRA media release 26/02/2021]

Hayne Bill aimed at protecting against 'fee for no service' conduct receives assent

Financial Sector Reform (Hayne Royal Commission Response No. 2) Bill 2020 passed both houses on 25 February and received Assent on 2 March 2021.

The legislation implements the government's response to four Hayne Commission recommendations: 2.1 (annual renewal and payment); 2.2 (disclosure of lack of independence); recommendation 3.2 (no deducting advice fees from MySuper accounts) and recommendation 3.3 (limits on deducting fees from choice accounts).

Details

- **Annual renewal of ongoing fee arrangements:** Schedule 1 introduces a requirement for financial services providers that receive fees under an ongoing fee arrangement to: a) provide clients with a single document each year outlining the fees that will be charged and the services that the client is entitled to receive in the following 12 months as well as seeking annual renewal of all ongoing fee arrangements; and b) obtain written consent under an ongoing fee arrangement before deducting fees from a client's account. These changes will commence on 1 July 2021.
- **Disclosure of lack of independence:** Schedule 2 introduces a requirement for financial services licensees or authorised representatives to provide written disclosure of their lack of independence where they are authorised to provide personal advice to a retail client.
- **Advice fees in superannuation:** The changes in Schedule 3 increase the visibility of advice fees for all superannuation products and prohibit the charging of ongoing advice fees from MySuper products. These changes commence on apply from 1 July 2021, with a 12 month transitional period commencing 1 July 2021 for arrangements entered into before 1 July 2021.

In a joint statement announcing the passage of the legislation, Treasurer Josh Frydenberg and Minister for superannuation, financial services and the digital economy Jane Hume said that the changes will 'further protect Australian households from hidden fees and unexpected expenses' and help to restore trust and confidence in the financial system.

Consumer group CHOICE has also welcomed the passage of the Bill.

CHOICE Finance Policy Adviser Patrick Veyret described the passage of the Bill as 'an important step forward in improving consumer outcomes in the financial advice industry'.

Mr Veyret added that the planned review of financial advice in 2022 will 'be an important opportunity to assess whether industry practices are helping people receive quality financial advice. The review will need to look at the existing conflicts in the industry including asset-based fees and the influence that companies that sell products can exert on any advisers they employ'.

[Sources: Financial Sector Reform (Hayne Royal Commission Response No. 2) Bill 2020; Joint media release Treasurer Josh Frydenberg and Minister for superannuation, financial services and the digital economy Jane Hume 25/02/2021; CHOICE Media release 26/02/2021]

Insurance: Second business interruption test case has commenced in the Federal Court

The Insurance Council of Australia (ICA) has issued a statement welcoming the commencement of proceedings in the Federal Court to test the application of further issues in relation to pandemic coverage in business interruption policies.

The second test case consists of nine separate small business claims, from a range of jurisdictions, lodged with the Australian Financial Complaints Authority (AFCA) as part of its dispute resolution process.

The case will determine the meaning of policy wordings in relation to the definition of a disease, proximity of an outbreak to a business and prevention of access to premises due to government mandate. The case will also consider policies with a 'hybrid' of these wordings.

The case is expected to provide the necessary clarity and certainty to enable decisions to be made on similar issues arising in other disputes.

CEO, Insurance Council of Australia Andrew Hall commented,

> 'Insurers want this second test case brought to the court as quickly as possible so the process can be started to give certainty to policyholders and the insurance industry. The nine cases included have been agreed following thorough negotiations with AFCA, which reviewed 14 cases presented by insurers for consideration. Once final rulings have been obtained, insurers are committed to applying the relevant principles in an efficient, transparent, and consistent way when assessing customer claims'.

This second test case follows an initial test case heard in the NSW Court of Appeal last year regarding the application of the Quarantine Act exclusion to business interruption policies. An application for special leave to appeal in the first test case is currently before the High Court.

You can find an expert summary of the decision here.

[Source: ICA media release 24/02/2021]

APRA tells bushfire inquiry that maintaining the accessibility and affordability of insurance requires investment to address the underlying causes of the pressure on the system

Key Takeouts

- The inquiry heard that Australia's insurance sector remains robust, but in order for insurance to remain accessible and affordable, it's necessary that the underlying causes of pressure on the system are addressed including through government investment in measures to mitigate the physical risks of climate change

- Ensuring that the financial sector is effectively managing the financial risks of climate change remains a key focus for the regulator

The Australian Prudential Regulation Authority (APRA) has released the opening statement to the Senate Standing Committee on Finance and Public Administration, Inquiry into the lessons to be learned in relation to the Australian bushfire season 2019-20, Australian Prudential Regulation Authority (APRA) Executive Director, Cross-Industry Insights and Data Division by Sean Carmody.

Some Key Takeaways

- **Australia's insurance sector 'remains robust':** Mr Carmody said that 'notwithstanding recent events' eg the recent bushfires, 'the prudential soundness of the general insurance industry remains robust'. Mr Carmody cited data from the Insurance Council of Australia showing that despite more than $5 billion in insured losses from four declared catastrophes between November 2019 and February 2020, general insurers had adequate capital, liquidity and reinsurance arrangements to meet their obligations to policyholders in support of this.

- **Affordability and accessibility of insurance is a focus for APRA.** Mr Carmody said that the regulator has a 'strategic focus on addressing and mitigating underinsurance given the likely social and economic impacts which may have broader implications on the stability of the financial system'. Importantly, Mr Carmody said that APRA's view is that 'an enduring solution to insurance affordability and availability challenges needs to focus on the underlying causes'.

- **Ensuring the ongoing availability and affordability of insurance requires a collective response** with a role for 'all levels of government, households, insurers, and businesses' Mr Carmody said. Among other things, this should include funding for 'pre-emptive infrastructure work, risk mapping, land-use rezoning and robust building codes'. Though these measures will come at a cost, APRA considers that 'this cost is lower than both the financial costs of recovery and the impact to people's lives'.

- **APRA remains focused on ensuring the financial sector is effectively managing the financial risks of climate change.** Mr Carmody said,

  'Looking ahead, climate change is forecast to drive an increase in the frequency and severity of extreme weather events in the future and will also drive regulatory developments here and internationally. APRA has a number of initiatives underway to ensure financial sector is effectively managing the financial risks of climate change, including providing all APRA-regulated entities with guidance via a dedicated Prudential Practice Guide (PPG), conducting a climate vulnerability assessment (CVA) beginning with the major banks and increasing the focus on these risks through APRA's regular prudential supervision'.

  [Source: APRA Executive Director, Cross-Industry Insights and Data Division Sean Carmody, Opening statement to the Senate Standing Committee on Finance and Public Administration, Inquiry into the lessons to be learned in relation to the Australian bushfire season 2019-20, 02/03/2021]

In Brief | APRA has confirmed it has revoked Xinja Bank's ADI licence after the bank announced its intention to exit the banking sector in December 2020 and the completion of its return of deposits process

[Source: APRA media release 26/02/2021]

In Brief | APRA data shows that superannuation assets have increased $3.0 trillion over the twelve months to 31 December 2020, a 2.2% increase over the period. Minister for Superannuation, Financial Services and the Digital Economy, Jane Hume said that this is a 'clear indicator' of the resilience the system but cautioned that the government considers there is room for improvement to address high fees, persistently underperforming funds and too many duplicate accounts. 'The Morrison Government is determined to continue our arc of reform ensuring the superannuation system is working harder for all Australians'

[Sources: APRA media release 02/03/2021; Minister for Superannuation, Financial Services and the Digital Economy, Jane Hume media release 02/03/2021]

In Brief | Treasury Laws Amendment (Reuniting More Superannuation) Bill 2020 passed the Senate with amendments on 25 February 2021

[Sources: Joint media release Treasurer Josh Frydenberg and Minister for Superannuation, Financial Services and the Digital Economy Jane Hume media release 25/02/2021; Treasury Laws Amendment (Reuniting More Superannuation) Bill 2020]

In Brief | Responsible lending Bill: National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020 has progressed to second reading stage in the House. The Senate Economics Legislation Committee is due to report on 12 March

[Source: National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020]

In Brief | APRA releases finalised reporting standard for ARS 115.0 Capital Adequacy will will apply for reporting periods ending on or after 1 January 2023 to align with the Basel Committee on Banking Supervision's decision to delay the international start date of the Basel III standards

[Sources: APRA media release 03/03/2021; Letter to ADIs: Release of final Reporting Standard ARS 115.0 Capital Adequacy - Standardised Measurement Approach to Operational Risk (ARS 115.0); Reporting Standard ARS 115.0 Capital Adequacy: Standardised Measurement Approach to Operational Risk in markup]

In Brief | Sustainable finance: IOSCO's 2021-22 work programs highlights 'the urgent goal of improving the completeness, consistency, and comparability of sustainability reporting', greenwashing and ESG ratings as priorities

[Sources: IOSCO media release 26/02/2021; Work program]

Risk Management

Culture

Top Story | Start managing sexual harassment in the workplace differently

Safework Australia has released its guide on preventing workplace sexual harassment. The MinterEllison has published a review the Guide's key processes to minimise the risks of sexual harassment in the workplace and what business should do.

You can find the full text here.

ESG

UN Secretary-General calls for the cancellation of all global coal projects in the pipeline to 'end the deadly addiction to coal'

In his address to the Powering Past Coal Alliance, UN Secretary-General António Guterres' said that though progress is being made globally to reduce emissions, significantly more ambitious measures/commitments are needed if the goal to limit global warming to 1.5 degrees is to be met.

> 'We have a long way to go. But major emitters have a chance to present or re-submit more ambitious national climate plans in the next few months [ahead of the COP26 conference] with credible emissions cuts aligned with the 1.5-degree objective'.

The key priority, to meet the 1.5 degree goal is to end the world's reliance on coal for electricity.

Mr Guterres called on governments, private companies and local authorities to implement three steps to keep the 1.5 degree goal within reach:

- **The cancellation of all global coal projects in the pipeline.** Mr Guterres called on all OECD countries to commit to phasing out coal by 2030 and for non-OECD countries to do so by 2040.
- **Ending the international financing of coal plants and shift investment to renewable energy projects.** Mr Guterres called on all multilateral and public banks, investors, commercial banks and pension funds to shift their investments now in the new economy of renewable energy.
- **Prioritising and taking concrete steps toward ensuring a just transition:** Mr Guterres said that the needs of coal communities need to be recognised and emphasised the need for 'concrete solutions' to be implemented to support them at a local level. He called on all countries to 'embrace the International Labour Organization's Guidelines for a just transition and adopt them as minimum standard to ensure progress on decent work for all'.

[Source: Transcript, UN Secretary-General António Guterres' video message to the Powering Past Coal Alliance Summit 02/03/2021]

Pressure on business to lead on the green transition: Ceres CEO letter calls on leaders to take concrete steps to realise and to publicly support measures to put the US on a path to net zero emissions by 2050

Ceres has released an open letter to the CEOs of US companies calling on them to take a leadership role in climate policy.

Broadly, the letter calls for:

- all businesses to adopt a science-based climate advocacy agenda aligned with the ambition to limit average global temperature increase to 1.5˚ C above pre-industrial levels
- business leaders to 'use every opportunity' to publicly support policies that put the US on a path to net zero by 2050

- business leaders to publicly support 'an ambitious 2030 goal (Nationally Determined Contribution) for the United States under the Paris Agreement'
- business leaders to advocate for legislation/regulations to cut climate pollution in line with the net zero by 2050 goal
- business leaders to:
  - ensure that their trade associations' lobbying efforts align with the net zero by 2050 goal, and act promptly to address any misalignment (eg by 'withholding dues if necessary')
  - ensure spending on lobbying or 'other channels of political influence' is allocated to support the net zero by 2050 goal

[Source: Ceres letter to US CEOs 01/03/2021]

Climate litigation: Sharma v Minister for the Environment

A class action has been launched by eight young people (under the age of eighteen) with the assistance of litigation guardian Sister Brigid Arthur) against the Federal Minister for the Environment Sussan Ley.

The group is seeking an injunction to prevent the Minister from allowing Whitehaven's proposed coal mine extension project (the Vickery Extension Project) to go ahead on the basis that allowing it would constitute a breach of the Minister's duty to protect young people from the impacts of climate change.

Further detail about the case can be found in the amended concise statement and amended originating application. The minister's concise statement is response is here.

The applicants' barristers are Noel Hutley SC, Emrys Nekvapil, Katherine Brazenor, and Stephanie C B Brenker.

[Sources: Equity Generation Lawyers]

In Brief | Australia's emissions have fallen but there is disagreement over why: A government report has found that emissions are at their lowest level since 1995. Minister for Energy and Emissions Reduction Angus Taylor says that the result primarily reflects the 'significant long-term structural declines in emissions from the electricity and agricultural sector'. The Climate Council argues that the result is due to the efforts of the states and territories as well as due to the impact of the pandemic (rather than to the efforts of the Federal government)

[Sources: Minister for Energy and Emissions Reduction Angus Taylor media release 26/02/2021; Report: Quarterly Update of Australia's National Greenhouse Gas Inventory: September 2020; Climate Council media release 26/02/2021]

In Brief | UK ETS: The Intercontinental Exchange Inc (ICE) has published an auction calendar for the UK's new emissions trading scheme. Subject to regulatory approval, the first ETS auction will take place on 19 May. UK Energy Minister Anne-Marie Trevelya described the publication of the auction calendar as a 'crucial step towards our target of eliminating our contribution to climate change by 2050…today's publication will give businesses and operators clarity over this year's supply of emissions allowances, enabling them to plan ahead, build back greener and better prepare for the transition to a low-carbon economy'

[Source: ICE media release 26/02/2021]

Hacked: Oxfam has announced that a database containing supporter information was unlawfully accessed in January

Oxfam Australia has issued a statement announcing that 'supporters' information' on one of its databases was unlawfully accessed by an external party' on 20 January 2021.

Details

- **When the breach occurred:** Oxfam became aware of the incident on 27 January. A nearly month long investigation concluded on 23 February that the database was accessed on 20 January.
- **The number of people impact has not been disclosed:** Oxfam states that 'In the interests of ensuring the ongoing security of our database and our supporters' privacy and protection and to reduce the risk of attempts by scammers to target Oxfam supporters, we are not releasing details of the number of people who may have been impacted'.
- **Data that was accessed**:
  - The database that was accessed included the names, addresses, dates of birth, emails, phone numbers, gender and in some cases, donation history of Oxfam supporters who may have signed a petition, taken part in a campaign or made donations/purchases at Oxfam shops.
  - In the case of some supporters, the database also included additional contact information.
  - A 'small group' of supporters' payment information – bank name, account number and BSB or part of credit/debit card details – were also accessed.
  - Passwords were not compromised.
- **Supporters have been alerted:** Oxfam states that its supporters were alerted to the potential risk on 4 February and that it has commenced notifying all supporters about the steps they can take to protect their information.
- **Authorities notified:** The Office of the Australian Information Commissioner and Australian Cyber Security Centre have been notified.

- **Supporters warned of risk of scams:** The statement cautions that given the nature of the information accessed, there may be 'risks relating to scam communications via unsolicited emails, phone calls or text messages. We recommend people remain vigilant and refrain from actioning unsolicited requests to provide information, including actioning links and opening attachments'.

Oxfam CEO Lyn Morgain expressed regret that the incident occurred and sought to assure supporters that the organisation is cooperating with authorities and continuing to prioritise its response.

> 'The privacy and protection of our supporters has been our paramount consideration during this process, which has involved a thorough and complex investigation. Oxfam supporters are at the heart of our organisation and their confidence is critical to our ongoing work in tackling the inequality that causes poverty around the world. We sincerely regret this incident has occurred.'

[Source: Oxfam media release 01/03/2021]

OAIC has released COVID-19 Vaccinations privacy guidance for employers

The Office of the Australian Information Commissioner (OAIC) has released new guidance for employers to assist them in understanding their privacy obligations in the context of collecting, using, storing and disclosing employee health information related to the COVID-19 vaccine.

[Source: OAIC guidance: Coronavirus (COVID-19) Vaccinations: Understanding your privacy obligations to your staff 23/02/2021]

OAIC review of privacy guidance

The Office of the Australian Information Commissioner (OAIC) has launched a review of its guide to securing personal information (the current guide is here).

To inform the development of an updated guide, OAIC is seeking stakeholder views on whether the current guide could be improved/enhanced. For example, whether the current guide meets entities' needs in terms of understanding their information security and privacy obligations, the practicality, clarity and general relevance of the information, whether certain topics in the guide should include case studies and whether more visual aids to understanding (graphics, flow charts etc) should be included.

The deadline for submissions is 5pm 12 March.

OAIC will provide an opportunity for stakeholders to provide feedback on a draft updated guide in 'late 2021'.

[Source: OAIC media release 22/02/2021]

Other News

The Bill to establish a mandatory media and digital platforms bargaining Code has received Assent

Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021 passed both houses, with amendments on 25 February 2021 and received assent on 2 March.

Announcing the passage of the legislation, Treasurer Josh Frydenberg and Minister for Communications Paul Fletcher said that it will 'ensure that news media businesses are fairly remunerated for the content they generate, helping to sustain public interest journalism in Australia'.

Response

- Ahead of the passage of the Bill, the Media, Entertainment and Arts Alliance (MEAA) President Marcus Strom cautioned that the new Code 'alone will not be the salvation of Australian journalism', and that a range of other reforms is required. MEAA also called for media companies to commit to spending the money raised from the digital platforms on journalism – 'news content not dividends or corporate bonuses'.
- Commenting on the amendments made to the legislation, Director of The Australia Institute's Centre for responsible technology Peter Lewis said that 'on face value, it seems the integrity of the code remains'. Mr Lewis goes on to comment that 'once the news bargaining Code becomes law, it is important that the governemnt moves ofn the balance of the ACCC recommendations regarding privacy, disinformation and ad tech'.

[Sources: Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021; Treasurer Josh Frydenberg media release 25/02/2021; MEAA media release 24/02/2021; (registration required - accessed via LexisNexis Capitol Monitor) The Australia Institute Centre for Responsible technology media release 23/02/2021]

In Brief | The Royal Commission into Aged Care Quality and Safety's Final Report - Care, Dignity and Respect - has been tabled in the Australian Parliament. The five volume report includes 148 wide-ranging recommendations to fundamentally reform the aged care system. The Commission has recommended that the government report to Parliament by 31 May 2021 on its response to their recommendations. The government has said it will give 'careful consideration' to the report and outline 'the path to transform aged care in the budget'. The government has also announced a range of 'immediate measures' as a starting point for further reform

[Sources: Royal Commission into Aged Care Quality and Safety media release 01/05/2021; Final Report: Care, Dignity and Respect; List of Report Recommendations]

Contacts

Mark Standen
Partner

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mark.standen@minterellison.com
T +61 2 9921 4902 | **M** +61 412 104 902

Siobhan Doherty
Partner

—

siobhan.doherty@minterellison.com
T +61 2 9921 4339 | **M** +61 413 187 544

Kate Hilder
Consultant

—

kate.hilder@minterellison.com
T +61 2 9921 8785