Governance News

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

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Diversity

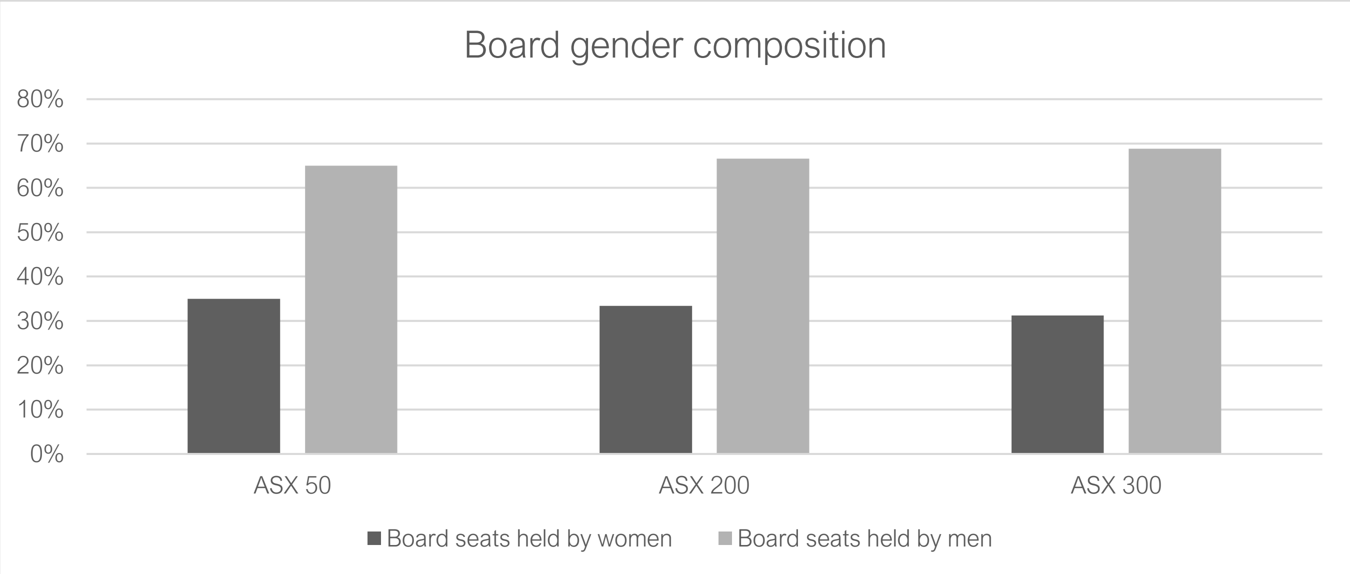
Yet to crack 40%: ACSI has called on boards to maintain their focus on achieving board gender parity

Key Takeouts

- Australia's largest listed companies are leading the way on board gender diversity with women holding over 35% of ASX 50 board seats
- However, progress toward increasing the number of women in CEO or Chair roles has stalled since 2015
- Overall, gender parity (40:40:20) across the ASX 300 is some distance away.
- Australian Council of Superannuation Investors (ACSI) CEO Louise Davidson has called on companies to maintain their focus on achieving board gender parity.

In 2019, the Australian Council of Superannuation Investors (ACSI) released a policy calling on listed companies to set a timeframe for achieving gender balanced boards ie 40% women, 40% men and 20% open.

ASCI has released data tracking progress towards this 40:40:20 target.



ACSI found that:

- Larger companies are leading the way on board gender diversity, but the 40:40:20 target is some way off. In aggregate:
  - Women hold more than 35% of seats on ASX 50 companies
  - Women hold 33.4% of board seats at ASX 200 companies
  - Women hold 31.2% of board seats at ASX 300 companies
- Looking more closely:
  - 54 ASX 200 companies have cracked the 40% target
  - 80 ASX 200 companies have yet to reach the 30% target
  - 124 ASX 300 boards have more than 30% women directors
- The number of all-male or 'one and done' boards has decreased:
  - Only one ASX 200 companies has an all-male board
  - 22 ASX 200 boards include only one woman director
- Progresss toward increasing the number of women in CEO or Chair roles has stalled. Since 2015:

- The proportion of women holding CEO roles at ASX 200 companies has not increased, remaining stable at around ten
- The proportion of women holding the role of board Chair has more than doubled from a low base of 11 to 24 in 2021

Commenting on the findings, ACSI CEO Louise Davidson welcomed the progresss that has been made but emphasised ACSI's expectation that boards continue to focus on the issue.

> 'It is very encouraging to see the number of women directors continuing to increase. But it is disappointing that the number of female chairs and CEOs continues to languish. The benefits of having more women in governance roles are well-established. More diverse boards make for better governed companies which is intrinsically linked to long-term shareholder value…
>
> In 2021, it is no longer acceptable to have zero women on the board of a large Australian company. For laggards, the time for excuses is well and truly over….While we are pleased to see boards improving, it's important that we maintain the momentum for change. Given that boards are still comprised of almost 70% men, gender representation on company boards is certainly not yet equal.'
>
> [Source: ACSI media release 07/03/2021]

Global study finds Australian companies 'dominate' the top 100 gender equality rankings

Key Takeouts

- A global study from Equileap has found that overall, workplace gender parity is a long way off.
- In terms of representation, only 0.2% or 10 of the 3702 public companies surveyed have achieved gender balance across all levels of their organisation.
- The only three countries with more than 20% or more (on average) of women in executive roles are Sweden (26%), Australia (24%) and Singapore (24%).
- Globally, women are paid 23% less than men. At the current rate of change the gender pay gap will not be closed until 2069
- 0.4% or fifteen of the 3702 public companies surveyed have closed their gender pay gap (across all levels of their organisation).

A report from Equileap - Gender Equality Global Report and Rankings - ranks over 3,702 public companies globally each with a market capitalisation above USD 2 billion, on gender equality based on 19 gender equality criteria (eg board gender representation, gender pay gap and parental leave/sexual harassment policies).

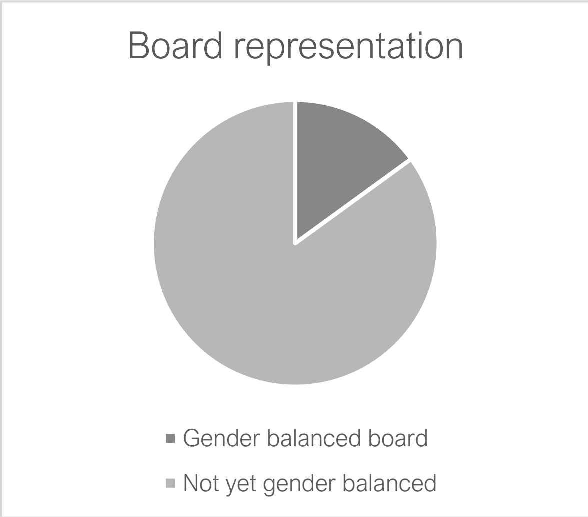
Some Interesting Findings

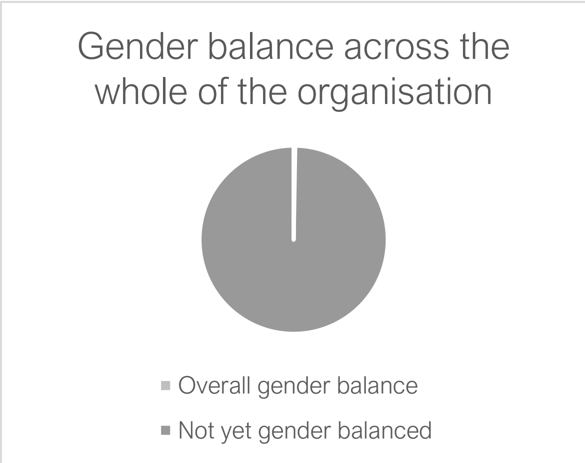
- The highest scoring countries for overall gender equality in the workplace are: 1) France (51%); 2) Spain (49%), 3) Sweden (47%), 4) the UK (46%); 5) Italy (43%); and 6) Australia (42%).
- The lowest scoring countries for overall gender equality in the workplace are: Japan and Hong Kong (both 27%); the US (30%); and Canada (33%).
- The top ranking sectors for gender equality (based on the average score of the companies in these sectors, globally) are: 1) utilities was the top ranking sector (38%); 2) consumer staples (36%); and 3) consumer discretionary (35%).
- Top 100 companies: The report found that Australian companies 'dominate' the top 100 ranking with 22 companies represented. Mirvac ranks second overall in terms of gender equality (behind Norway's DNB) (you can find the rankings in the report at p7).

Long way from gender parity

Female representation

- Overall, women hold only: 25% of the board positions, 17% of executive roles, 24% of senior management positions, and represent only 37% of the workforce.
- 15% of companies have gender balanced boards (up from 10% in 2019), and 7% have gender balanced executive teams (up from 6% in 2019).
- 0.2% or 10 of the 3702 public companies surveyed have achieved gender balance across all levels of their organisation – at board level, executive and senior management level and across their workforce.
- Disclosure of the proportion of women on board and executive teams is almost universal: only 8 of the 3702 companies surveyed do not publish data on the composition of their board and a fractionally higher number (11) do not publish information about the composition of their executive team.
- The report found that there has been an increase in the percent age of companies reporting on gender diversity at senior management level (from 48% to 59%) and workforce levels (from 51% to 67%).
- Geographical variation:
  - French boards have the highest proportion of female directors at 44% followed by Italian boards (38%) and Swedish boards (37%).
  - The only three countries with more than 20% or more (on average) of women in executive roles are Sweden (26%), Australia (24%) and Singapore (24%).
  - In terms of female representation at senior management level, Singapore (32%), Australia (40%), and France (30%) are the top three countries.





Gender pay gap

- Globally, women are paid 23% less than men. At the current rate of change the gender pay gap will not be closed until 2069.
- 0.4% or fifteen of the 3702 public companies surveyed have closed their gender pay gap (across all levels of their organisation).
- 85% of companies globally do not publish any gender pay gap information
- Three leading countries in gender pay gap reporting: 1) Spain (82% of companies publish gender-segregated pay information); 2) The UK (78% of companies publish information); and 3) Italy (55% of companies do so). The report comments that in each of these countries, publishing the information is a mandatory legal requirement.
- Laggards in gender pay gap reporting: 1) Japan (2% of companies report); 2) Hong Kong (5%) of countries report; and 3) Germany (10% of companiesreport).
- Australia? 20% of companies currently report, putting Australia fifth behind France on this measure.

Other Findings

- Parental leave: Only 12 of 3702 companies surveyed offer 26 weeks (6 months) of company-sponsored paid leave to both primary carers and secondary carers.
- Over half (51%) of companies do not publish an anti-sexual harassment policy. In contrast, in 2019 58% of companies did not publish this information.
- Only 19% of companies publish a flexible work policy (that is not an emergency COVID-19 policy) for all employees covering both hours and location 38% of flexible work cover only hours, and 24% include flexible work locations. Germany stands has the highest percentages of companies publishing policies for flexible work hours (87%) and location(65%).

[Sources: Equileap media release 04/03/2021; Full text report: Gender Equality Global Report and Rankings]

The latest quarterly Financy Index predicts that financial gender parity is 101 years away

The latest Financy Women's Index covering the December 2020 quarter, tracks progress toward the achievement of gender financial equality in Australia.

The Index highlights gendered differences across seven areas: 1) unpaid work; 2) tertiary education; 3) employment; 4) underemployment; 5) wage disparity; 6) board representation; and 7) superannuation outcome.

Some Interesting Findings

A 'pink' recession: The impact of COVID-19

- The report found that though year on year, women did make financial progresss over the course of 2020 – overall the Financy Women's Index was up 1.3 points on 2019 - progresss slipped backwards 3% in Q4 2020.
- Q4 2020 was the 'worst performing quarter' in seven years in terms of women's financial progress. The report attributes this to the imapct of the COVID-19 downturn on women. The report comments

> 'The December quarter was dragged lower by relative weakness in the COVID-19 recovery of women in the workforce, combined with an increase in unpaid work prior to the pandemic and a marginal worsening of educational choices linked to lower paying careers'.

101 years to economic equality

- Based on the Q4 2020 results, Financy predicts that the timeframe to gender financial equality now stands at 101 years – ie 2122 (up one year on the Q3 index).
- Looking at the timeframe to reach parity on particular issues, the report estimates that it will take:
  - 21 years to achieve equality in the national gender pay gap
  - 33 years in employment
  - 18 years in underemployment
  - 7 years for women on boards
  - 38 years in superannuation

Women tend to 'self select' into lower paid roles

- The study found that women tend to 'self-select' into fields of study that lead to lower paid roles eg hospitality and health care.
- Commenting on this, Partner at Deloitte Access Economics Simone Cheung said that on the one hand there has been a push to encourage women into STEM areas, but on the other hand the issue of under-valuing traditionallyfemale dominated roles remains unaddressed.

Two 'positives'

- There was little improvement across five of the seven areas considered in the study.
- The two areas that saw improvement were:
  - An increase in the number of women being appointed to boards: Women accounted for nearly 43% of all new board appointments in 2020, which the report comments is the bet yearly result since record keeping began in 2011.

– A slight narrowing in the gender pay gap: The gender pay gap narrowed to 13.4% in November (down 0.6% on May), though the report comments that this improvement is at 'risk of reversing' due to the removal of temporary COVID-19 support (eg JobKeeper).

[Source: Financy women's index]

Federal Opposition leader Anthony Albanese has announced that if elected, a Labor government would enact gender pay gap legislation

Federal Opposition leader Anthony Albanese announced on Twitter that if elected, an Labor government would legislate to:

- introduce a mandatory gender pay gap reporting requirement for companies that employ more than 250 employees
- prohibit the use of pay secrecy clauses
- give workers the right to disclose their pay (if they wish to do so)
- strengthen the ability of the Fair Work Commission to order pay increases for workers in low paid, female dominated industries
- address the gender pay gap in the public service

[Source:Twitter @AlboMP 08/03/2021]

UK gender pay gap: London School of Economics research finds that Black women are the least likely group to be among the UK's top earners

The London School of Economics has identified the most highly paid groups in the UK - that is, the groups are most represented in the top 1%, 10% and 20% of earners.

The identification is based on analysis of the data from the Quarterly Labour Forces Survey from January 2003 to September 2020.

Some Key Findings

- Overall, men are consistently the top earners, regardless of race though white, UK-born men are the most represented group (1.3% of UK-born white men are in the top income bracket vs 0.6% of UK-born black men).
- 0.2% of UK-born white women fall into the top income bracket vs 0.1% of UK-born black women despite the fact that at early career stages, the researchers found that the two groups were equally likely to be top earners.
- The researchers found that mid-career (10 to 15 years after women enter the workforce) the gap between black and white women's earning capacity significantly widens. For example at this point, black women are 6.1% percentage points less likely than white women to be in the top 10% income bracket.
- The researchers also found that the issue is more marked in some industry sectors and is most marked in the financial services sector (banking, finance and insurance.)
- The researchers comment that the usual explanation for this difference - career interruptions due to children - does not 'carry much weight'. Rather, they suggest that discrimination on the basis of gender and race plays a role, citing the underrepresentation of women, and more particularly black women in leadership roles.
- The researchers comments that more research into the barriers to black women progresssing in highly skilled roles and the mechanisms to address them is needed to address the gap. Further research will identify actions to help companies address the issue.

[Sources: London School of Economics media release 03/03/2021; LSE Blog 03/03/2021]

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Disclosure and Reporting

Responding to increased stakeholder focus on HCM: Semler Brossy finds more US companies are providing HCM disclosure than previously

Semler Brossy has released the results of its analysis of a sample of human capital management (HCM) disclosure in 53 proxy statements filed in December 2020 and January 2021. The report includes a number of disclosure excerpts illustrating different approaches. The complete report is here.

Some interesting findings

- Almost half the companies in the survey (45%) provided details of some diversity and inclusion information eg demographics and quantitative goals, education and training programs, diversity and inclusion policies and initiatives

- The number of companies providing detailed HCM disclosure doubled as compared with last year: 62% of proxy statements in the sample included specific HCM-related information beyond 'boilerplate claims'. Having said this, the report found that the level of detail provided varied within wide limits.
- Most companies that previously provided HCM information, included more detail this year: 12 of the 14 companies that provided HCM disclosure last year expanded their disclosure by at least 20%
- Over a third of companies in the sample (34%) provided COVID-19 specific disclosures eg information around changes to wages/incentives for workers, COVID-19 leave policies, flexible work locations, on-site safety initiatives/policies.
- 23% of companies in the sample provided data on employee safety (eg the number or rate of recordable injuries or deaths)
- Only 19% of companies in the sample provided breakdowns of employee or new hire demographics and related quantitative goals.
- Only 17% of companies in the sample provided details around board oversight of HCM issues.
- There was wide variation in the approach to where companies provided the HCM information within the proxy.

[Sources: Harvard Law School Forum on Corporate Governance and Financial Regulation 08/03/2021; Semler Brossy report: Human Capital Management Proxy Disclosures March 2021]

Meetings and Proxy Advisers

Urgent action required: BCA calls for certainty on AGM requirements to avoid businesses being placed in an 'impossible position'

Context

Broadly, Treasury Laws Amendment (2021 Measures No. 1) Bill 2021 proposes to do two things:

- Schedule 1 of the Bill proposes to temporarily extend and expand on the measures in Corporations (Coronavirus Economic Response Determination (No. 3) 2020 to provide companies with legal certainty around the use technology in the context of holding and conducting meetings, distributing meeting related materials and executing and witnessing documents. It's proposed that these measures will apply until 15 September 2021.
- Schedule 2 of the Bill proposes to make permanent the temporary changes to continuous disclosure laws introduced in May 2020, which are intended to insulate directors from opportunistic class actions, and which would otherwise expire in March 2021.

The Bill has been referred to the Senate Economics Legislation Committee for report by 12 March. On 25 February the Senate voted to extend the reporting date to 30 June.

You can find our summary of the proposed measures in the Bill and the initial response from industry here.

Business Council of Australia's submission to the senate committee

The Business Council of Australia's (BCA) submission 'strongly supports all measures in the Bill and recommends its swift passage by the Parliament'.

Need for urgent action to avoid businesses being put in an 'impossible position'

The headline message in the BCA's submission is the urgent need for action to provide business with certainty around meeting requirements.

The submission calls on the senate to either:

- reconsider its decision to extend its reporting date until June; or if this is 'not possible'
- for the parliament and the government to 'consider measures that would enable the Treasurer to extend the existing temporary arrangements until such time as the Bill can be dealt with by the senate'.

The submission comments,

> 'The ability to hold "virtual meetings" has been necessary as a result of limits on the size of physical gatherings since the onset of COVID-19. It is likely that such limits will continue to apply in some form for the foreseeable future. As such, it is not tenable for the law to revert to the pre-COVID position, which will occur once the existing temporary measures expire in March 2021. If the Bill is not passed by this time, many businesses will be put in the impossible position of being required to conduct meetings in person but not being able to physically do so according to the law as it stands under the Act'.

Suggested 'targeted amendments'

The submission also recommends a number of 'targeted amendments' to improve the 'workability' of the Bill. These include:

- Electronic execution requirements:
  - clarification that a 'copy or counterpart to be signed does not need to include the entire document and that there is no need for a separate original when a copy or counterpart is being signed'
  - extension of provisions to foreign and statutory corporations
- Continuous disclosure:
  - amend the proposed section 674A to clarify that the provision is only contravened where the contravention is intentional, reckless or negligent
  - reinsert the due diligence defence in section 674(2B) (which will be omitted by the Bill) for the benefit of the entity itself to 'ensure that the "reasonable enquiries" defence, which is available for accessorial liability of officers under proposed section 674A, is also available to the entity under section 674'
  - further amendments to the misleading and deceptive conduct provisions in section 1041H of the Act and section 12DA of the ASIC Act to make the changes consistent

[Source: Business Council of Australia Submission to the Senate Legislation Committee on Economics on Treasury Laws Amendment (2021 Measures No. 1) Bill 2021 March 2021 (released 03/03/2021)]

Rethinking AGMs in the UK context: ShareAction outlines a suggested alternate framework to better meet the needs of all interested stakeholders

A working group convened by ShareAction has released a report highlighting the shortcomings of the current format of AGMs from an investor/stakeholder perspective, and putting forward an alternate suggested framework. The full text of the report is here.

Reframing the purpose of the AGM

The report argues that in its current form, the AGM has failed to adapt to 'the changing face of capitalism and shifts in societal values' and has lost its sense of purpose.

The report suggests reframing the purpose of the AGM to better serve the needs not only of companies and shareholders, but the needs of interested stakeholders more broadly. Central to this, is repositioning the AGM as part of a broader engagement process.

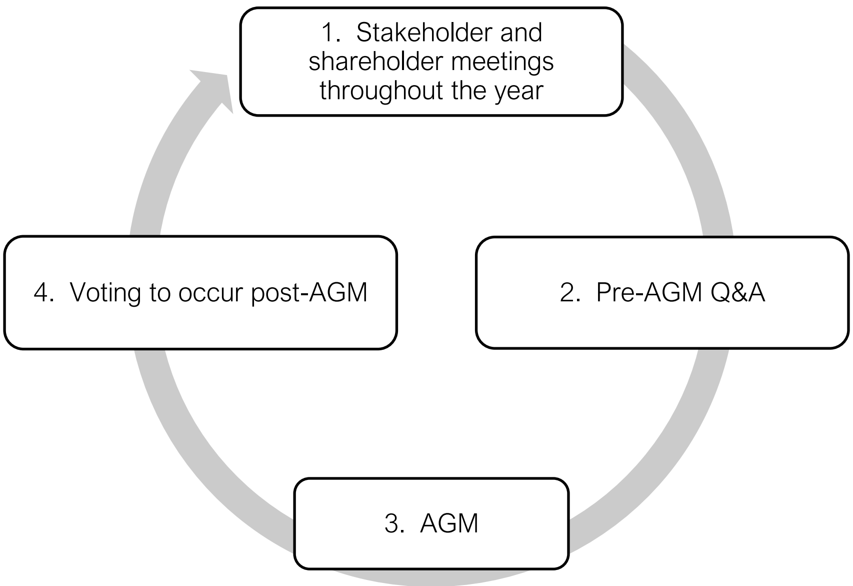
The report states,

> 'We believe that the AGM of the future should be regarded as a key component in an annual process that encourages robust engagement between shareholders, stakeholders and the company throughout the year. This process will align their interests in a sustainable way, and inform their respective decisions on key matters. In particular, the future AGM will be a discursive meeting, bringing together the events of the last year, with a particular focus on how the directors have fulfilled their responsibilities to both shareholders and stakeholders.'

The report observes that in the UK context, this approach will also enable companies to better execute their s172 duties.

Suggested changes

Broadly, the report advocates breaking up the AGM into four mutually reinforcing elements (as shown in the graphic).



1. A series of stakeholder and shareholder meetings throughout the year

- The report suggests supplementing the AGM with a series of other engagement sessions/meetings throughout the course of the year with registered stakeholder groups.
- A core list of stakeholder groups (based on the groups listed under s172) would be given a 'right to register' as stakeholders of a particular company. Companies would be required to maintain a list of registered stakeholders on their websites.
- The meetings would be led by the Chair and have at least one board member present (with other non-executive directors encouraged to attend).
- Companies would report on pre-AGM stakeholder meetings in a Section 172 statement in their annual report.

2. Pre-AGM Q&A

- The report suggests that following the publication of the annual report, stakeholder and shareholder participants would be invited to submit questions to the company via email.
- It's envisioned that these questions, together with the company's responses, would be published on the company's website in advance of the AGM. This is intended to 'both create a public domain overview of key questions to companies, and enable shareholders and stakeholders to continue the conversation on the day of the AGM, offering praise, challenge, and providing more valuable interaction between participants'.

3. AGM

- It's envisioned that AGMs will be held in a hybrid format.

- The AGM itself would be the 'culmination of a year-long period of transparent dialogue between companies, stakeholders and shareholders, and the start of the next cycle'.
- The AGM would provide an opportunity for all participants to meet and provide stakeholders with an opportunity to continue their dialogue with the board and with each other on key issues.
- The AGM agenda would be structured as follows:
  - company presentation on the annual report, including a report on s172 obligations, engagements and their annual learning review
  - questions from stakeholders on the presentation and company strategy
  - presentations from investors and stakeholders as well as company presentations with time for questions following each presentation
  - an anonymised poll (of all attendees including non-shareholders) on whether attendees consider the company has fulfilled its s172 obligations over the course of the year
  - a 'free discussion' session.
- Companies would post a summary of the discussion and a list of 'action points' on the company website following the AGM.

4. Voting after the AGM

- Voting on resolutions would occur after the AGM rather than in advance of it/during the meeting.
- This is intended to enable shareholders to have more opportunity to 'assess and interrogate company performance in advance of voting' as well as provide an opportunity for them to both gauge stakeholder views and listen to the board's responses to them.
- Voting would only be opened once a the 'AGM event summary' and action points were posted on the company website, to support shareholders unable to attend to make an informed vote.

[Sources: Oxford Law School Blog 03/03/2021; Full text report: Fit for Purpose? The Future of the AGM]

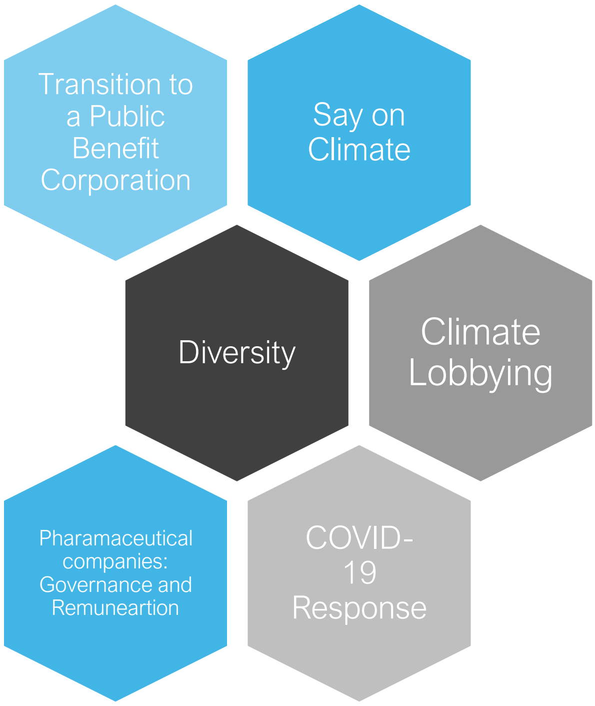
ISS report identifies racial/ethnic diversity and inclusion, climate risk and executive compensation among the key concerns for investors globally

Institutional Shareholder Services (ISS) has released a report - Top Governance and Stewardship Issues in 2021 – identifying the key concerns for investors globally heading into the 2021 proxy seasons.

These include the following.

- Climate risk:
  - The focus on climate change risk is expected accelerate with some large institutional investors signalling their intention to vote against directors who fail to provide meaningful oversight of climate change-related material risks.
  - Shareholder proposals are likely to address a mix of concerns including GHG emission goal-setting, net-zero strategies and climate related lobbying expenditures.
  - On the issue of lobbying, ISS comments that as a result of shareholder pressure in 2020, several companies in Australia and UK have resolved to regularly review their lobbying positions and those of their partners and to consider leaving those with incompatible policy positions.
  - 'Say on climate' proposals may also continue to gain traction. ISS suggests that 'the relative success of such "say-on-climate" proposals may set the future course of direction on the topic'.
- Improved racial and ethnic diversity at board, C-suite and workforce level will remain a key concern as will the continued focus on boosting gender diversity (especially at board and C-suite level).
- Executive remuneration: Changes implemented in response to the impact of the COVID-19 pandemic are expected to come under the spotlight. Investors will expect companies to provide a clear rationale for rewards

with many investors 'likely to show a healthy scepticism over one-time awards or mid-cycle changes to long-term incentives'. Companies will also be expected, especially where there have been widescale layoffs, to provide a clear explanation of how they considered the impact of the pandemic across their workforce when reconfiguring pay for senior executives.



- Human capital management (HCM): Companies should expect increased pressure to address a range of HCM issues eg health and safety in the wake of the pandemic.
- Electronic meetings will persist, shareholder participation is key: The continuing uncertainty caused by the COVID-19 pandemic will mean that meetings will continue to need to be held electronically. ISS comments that though a number of companies 'appear to have addressed problems in providing access to meetings, shareholders may not be as forgiving as last season if companies experience technical mishaps or hold bare-bones, audio-only meetings with limited opportunities for shareholders' questions and dialogue'.
- SPACs: ISS comments that the number of US special purpose acquisition company (SPAC) IPOs increased significantly in 2020 and that this trends looks set to continue into 2021, with signs that Europe will follow suit. ISS considers that

  > 'with more SPACs fighting among themselves and with private equity firms and other early-stage investors for a dwindling number of quality assets, the M&A scene appears ripe for a correction. When prevailing market prices are in excess of the IPO reference price, there is risk that such valuations cannot be sustained in the near term, especially when many of the targets are not profitable or have little to no revenue. SPACs often adopt poor governance structures at the behest of the founders of their acquisition targets that limit the avenues available to hold the board or management accountable should returns sour'.

- Deal activism: ISS comments that there are signs that investors have 'begun to "un-pause"' campaigns halted due to the COVID-19 pandemic which could result in a more active proxy season in 2021. In particular, ISS suggests that M&A and deal-driven activism are expected to increase. There may also be an uptick in contests driven by a range of ESG concerns. https://insights.issgovernance.com/posts/iss-releases-annual-outlook-report-on-top-governance-and-stewardship-issues-in-2021/

  [Source: ISS Top Governance and Stewardship Priorities 2021]

Proxy Season Preview – Glass Lewis flags ESG as the headline issue

Writing in Harvard Law School Forum, Glass Lewis provides: a) an overview of the key concerns for investors; b) the key topics of shareholder resolutions; c) a short discussion of its ESG policies.

Key concerns for investors

- Climate Risk: Glass Lewis expects to see an uptick in investor support for shareholder climate resolutions at both energy/resources companies and more broadly given the increasing frequency of natural disasters and the ongoing pressure from investors and activists on climate issues.
- Human Capital Management (HCM):

- **Workforce diversity:** Glass Lewis notes that in 2020, there was majority support for a record number of HCM-related proposals, many of which related to workforce diversity. Heading into 2021, Glass Lewis expects this trend to continue. In particular, Glass Lewis' expectation is that shareholders will continue to push companies for additional diversity disclosure and the steps they are taking to ensure a 'productive, inclusive and safe working environment for their employees'.
- **Board diversity:** Glass Lewis comments that in 2020 a number of investors adopted proxy voting policies aimed at encouraging companies to increase female board representation. Heading into 2021, this focus has broadened to include racial and ethnic diversity at board level and in senior management
- **Disclosure:** There is increasing pressure on companies to provide additional disclosure around the measures being implemented to promote women and minorities and the diversity considerations being taken into account when appointing new directors. Glass Lewis comments that a number of companies have adopted a 'Rooney Rule' for CEO and board appointments.

- **Executive Compensation:** Glass Lewis comments that 'reductions in performance goals or degradation in a pay program's structure are usually clear red flags for investors' but observes that early meetings have 'shown some tolerance' for adjustments in some (but not all) instances. Glass Lewis suggests that the approach investors will take will depend on the extent to which there are extenuating circumstances and/or 'thoughtful workarounds' in place.
- **Clawbacks:** Glass Lewis comments that there were a number of 'high profile cases' in the past year of boards opting not to use clawback and instead 'giving almost favourable treatment to departing, disgraced former leaders'. Glass Lewis suggests that there are signs that this approach may be shifting.
- **Executive Transitions:** A number of companies have announced leadership changes. Glass Lewis states that shareholders should expect to see 'large payments and big names in proxy statements and the news cycle as more details come to light—and more leaders announce their successors'.

Shareholder Proposal Topics: six key categories to watch

- **'Say on Climate' proposals:** In 2021, 'Say on Climate' proposals have been filed at seven companies. So far, one proposal has been withdrawn leaving the remaining six proposals 'poised to go to a vote'. Moody's shareholders will have the opportunity to vote on the company's climate plans at the 2020 AGM.
- **Climate Lobbying:** A number of different investors, including the California State Teachers' Retirement System (CALSTRS) and the Interfaith Center on Corporate Responsibility (ICCR) have submitted proposals calling for additional disclosure around companies' direct and indirect lobbying activities and the extent to which they are aligned with boarder climate goals to a variety of companies in advance of their upcoming AGMs.
- **Diversity and inclusion:** Glass Lewis considers it likely that a number of comapnies will be targeted with proposals requesting additional information about their diversity initiatives and workforce composition (eg demands for companies to disclose their EEO-1 reports). Glass Lewis also expects to see a number of proposals requesting companies to commission a racial equity audit.
- **Companies' Response to COVID-19:** Shareholders have submitted proposals on a variety of issues seeking additional information from companies about their response to the COVID-19 pandemic. Proposals include: enhanced disclosure of worker safety measures and COVID-19 sick leave policies. Some pharmaceutical companies have been targeted with proposals seeking disclosure around how government funds, granted for the development of a COVID-19 vaccine, were deployed. Some retailers have been targeted with resolutions seeking information concerning the risks of sellingtobacco given the COVID-19 pandemic.
- **Transitions to a Public Benefit Corporation Structure:** Companies who signed the Business Roundtable's Statement on the Purpose of a Corporation have received proposals seeking that they implement the necessary changes to become Public Benefit Corporations under Delaware law.
- **Governance and executive remuneration proposals at pharmaceutical companies:** Investors for Opioid and Pharmaceutical Accountability (IOPA) and the ICCR continue to target companies considered responsible for the opioid epidemic. Heading into 2021, Glass Lewis expects to see shareholder proposals demanding governance and remuneration reforms including demands that companies: adopt an independent chair; strengthen clawback provisions; and implement deferral mechanisms for executive bonuses.

Glass Lewis Voting Guidelines

ISSUE	GLASS LEWIS' VOTING POLICY GUIDELINES
Board gender diversity	▪ For boards with more than six members: – Starting in 2021, Glass Lewis will 'note as a concern' boards that include fewer than two female directors – For meetings held after 1 January 2022, Glass Lewis will 'generally recommend' voting against the nominating committee chair of a board with fewer than two female directors ▪ Where boardshave six or fewer members, Glass Lewis' current voting policy requiring a minimum of one female director will remain in place. ▪ In addition to this, Glass Lewis will recommend in accordance with board composition requirements set forth in applicable state laws when they come into effect.
Disclosure of board diversity and skills	▪ Beginning in the 2021 proxy season, Glass Lewis' reports on S&P 500 companies will include an assessment of companies' disclosure of board diversity, board skills and the director nomination process. ▪ In conducting this assessment, Glass Lewis will consider how the company's proxy statement: a) presents information about the racial/ethnic composition of the board; b) whether the board's definition of diversity explicitly includes gender/race/ethnicity; c) whether the board has adopted a 'Rooney Rule' when selecting new director nominees; d) board skills disclosure. ▪ This assessment 'may be a contributing factor' in recommendations where there are additional board related concerns.
Diversity reporting	▪ Glass Lewis will 'generally support' shareholder proposals requesting companies to disclosure EEO-1 data. ▪ Given that HCM issues and workforce diversity issues are 'material to companies in all industries, we will no longer be incorporating a company's industry or the nature of its operations into the factors considered when evaluating diversity reporting proposals'.
Environmental and Social risk oversight	▪ From 2021, Glass Lewis will 'note as a concern' when S&P 500 boards do not provide clear disclosure about board level oversight of environmental and social issues. ▪ For meetings held after 1 January 2022, failure to provide explicit disclosure concerning the boards' role in overseeing these issues will 'generally' result in a recommendation against the governancechair.
Management proposed ESG resolutions	▪ Glass Lewis will take a case by case approach to determining whether to support management sponsored proposals dealing with environmental and social issues. Factors that Glass Lewis will take into account include (among others) whether there is a competing shareholder proposal on the same topic and the company's responsiveness to shareholders and emerging environmental and social issues.
Climate change resolutions	▪ Glass Lewis considers that climate change 'is an issue that should be addressed and considered by companies in every industry'. On this basis, Glass Lewis will not consider a company's industry when reviewing climate reporting resolutions. ▪ Climate disclosure resolutions: Glass Lewis will 'generally recommend supporting shareholder resolutions requesting companies to provide enhanced disclosure on climate-related issues eg requesting that a company undertake scenario analysis or report in alignment with the TCFD recommendations. ▪ Climate lobbying resolutions: Glass Lewis 'will generally recommend against any proposals that would require the company to suspend its memberships in or otherwise limit a company's ability to participate fully in the trade associations of which it is a member'.

ISSUE	GLASS LEWIS' VOTING POLICY GUIDELINES
Board refreshment	▪ From 2021 Glass Lewis will 'note as a potential concern' instances where the average tenure of non-executive directors is 10 or more years and no independent directors have joined the board in the past five years. ▪ Insufficient board refreshment may be contributing factor in recommendations where additional board concerns have been identified.
Virtual-only shareholder meetings	▪ Companies to elect to hold their meeting in a virtual-only format are expected to provide 'robust disclosure' around meeting participation including: a) details of how shareholders can ask questions at the meeting; b) procedures (if any) for publishing the questions asked during the meeting with the answers on the company's public website; c) logistical details for the meeting; and d) how to access technical support. ▪ Failure to provide disclosure will generally result in recommendations against the governance committee chair responsible.
Executive remuneration	▪ Short term incentives: – Changes to a company's short term incentives and/or lowering of performance goals from the previous year should be accompanied by clear justifications – Glass Lewis has also expanded its description of the application of upward discretion to include instances of retroactive pro-rated performance periods. ▪ Long term incentives: Glass Lewis has 'codified' additional factors it will take into account when assessing the structure of plans. This includes for example defining the granting of inappropriate performance-based awards as a criterion, which could, in the presence of other 'major concerns' contribute to a negative recommendation. ▪ Glass Lewis has provided additional information about its methodology for determining the peer groups used in its A to F pay for performance letter grades.

[Source: Harvard Law School Forum on Corporate Governance and Financial Regulation 06/03/2021]

Global report predicts investor focus on ESG will continue to intensify

Key Takeouts

- Globally, the focus on climate risk will continue to accelerate in the lead up to COP26. Boards should be aware of/prepared for 'say on climate' proposals.
- Diversity and inclusion, with particular focus on increased racial and ethnic diversity at the board, C suite and employee levels is predicted to be the 'number one trend' in the US heading into 2021, and a key concern in the UK and Canada (though not yet in the EU). Gender diversity is also predicted to remain a priority globally.
- In the Australian context, Russell Reynolds predicts that:
  - lack of ethnic/racial diversity on boards as well as lack of international experience are likely to be key concerns for investors
  - there may be an uptick in socially focused shareholder proposals as a result of the COVID-19 pandemic on a range of issues

Writing in Harvard Law School Forum, Russell Reynolds Associates outlines what it considers will be the key areas of concern for investors heading into the 2021 proxy seasons. The findings are based on interviews with 40+ global institutional and activist investors; pension fund managers; proxy advisors and other corporate governance professionals.

A high level overview of the key themes identified globally and in the Australian context is below.

Key concerns globally – issues for boards to consider

- Climate risk: Russell Reynolds predicts that the focus on the material financial risks associated with the changing climate will continue to gain traction globally, including in markets that have previously 'resisted' eg the US. Russell Reynolds suggests that boards should have both the November COP26 conference and the 'say on sustainability' (or 'say on climate') initiative on their radar.

- **Diversity and inclusion** (both in terms of increased representation and increased disclosure), with particular focus on increased racial and ethnic diversity at the board, C suite and employee levels is predicted to be the 'number one trend' in the US heading into 2021, and a key concern in the UK and Canada (though not yet in the EU). Gender diversity is also predicted to remain a priority globally.

- **Human Capital Management (HCM) and corporate culture:** The experience of the COVID-19 pandemic has led to an increased focus, including from the largest institutional investors, on board oversight/HCM and demands for HCM data (eg gender pay gap, safety records, employee turnover). A number of investors and proxy advisers have signalled they will support more shareholder proposals on this topic and hold directors individually accountable for insufficient disclosure.

- **ESG disclosure and reporting:** The global push toward a single, comprehensive framework for ESG if gaining pace. Russell Reynolds predicts that

  > 'investors will soon be able to gather a complete and comparable view of a company's material risks (including ESG). As with many of the trends this year, we expect private equity firms and other private companies to also increase their focus on ESG. All boards should expect to start being held more accountable for sustainability disclosure by their stakeholders'.

- **Board and shareholder meetings:**
  - Board meetings: Based on engagement with boards globally, Russell Reynolds predicts that many boards will continue to meet virtually (as well as in person) post-pandemic to leverage the advantages of the virtual model.
  - Shareholder meetings: Where there is the option, Russell Reynolds predicts that companies will opt to hold meetings in a hybrid format (ie to 'use some form of combined in-person and virtual shareholder meetings').

Key concerns in the Australian context

- **Climate risk:**
  - Russell Reynolds comments that there is 'arguably business consensus on carbon neutrality by 2050' and that state governments are of a similar position (with the Federal government the outlier on the issue). Business is moving to implement measures to align its operations with achieving the 2050 goal, despite the lack of legislative/policy clarity.
  - Companies are under increasing pressure to publicly articulate their stance on fossil fuels.
  - Russell Reynolds suggests that boards will need to sort through the various competing policies/goals and develop their own clear ESG policies.

- **Social issues:** Russell Reynolds suggests there may be an uptick in socially focussed shareholder proposals as a result of the pandemic on a range of issues.

- **Supply chain exposure**: Russell Reynolds suggests that Australian supply chain exposure to China will be a 'top risk on board agendas' in 2021 in light of tensions between the two nations and associated trade complexities.

- **Remuneration**: Russell Reynolds suggests that in the wake of the COVID-19 pandemic, investor scrutiny of remuneration arrangements is likely to intensify, particularly for companies that accepted JobKeeper support.

- **Ethnic and Racial Diversity on Boards**: Companies should expect increased focus from domestic and international investors around their lack of board ethnic and racial diversity. Lack of international experience on boards, for those companies that have gone global, is also likely to be a key investor concern.

  [Source: Harvard Law School Forum on Corporate Governance and Financial Regulation 03/03/2021]

Shareholder Activism

Activist Cevian Capital has called on European public companies to integrate appropriately rigorous ESG metrics into executive compensation plans

Activist Cevian Capital has released a statement calling on calling European public companies to develop (through consultation with their shareholders) proposals for the integration of 'significant, measurable and transparent' ESG targets into executive compensation plans, ready for the 2022 AGM season.

Rationale

Cevian considers that tying incentives to the achievement of appropriately rigorous ESG targets will spur companies into taking concrete steps toward realising their ESG commitments and importantly, push them to move beyond what is sometimes a 'half-hearted' or 'box checking' approach.

Cevian Capital Managing Partner and co-founder Christer Gardell commented,

> 'Asset owners, investors, management teams and board directors all look to management incentive plans to drive and direct performance - And yet today, only a tiny share of companies meaningfully incorporate ESG targets into their incentive plans. That makes no sense. To get away from ESG box checking and ensure that ESG considerations are truly embedded in corporate strategies, we need to incentivise management teams to embrace them.'

Rigorous metrics

The statement makes clear that Cevian expects the new ESG targets to be appropriately rigorous, writing that currently, ESG metrics are often insufficient to drive real progress.

> 'Today, only a small minority of companies have a link between ESG and management compensation that is fit for purpose. Some companies have inserted ESG into a long list of items in opaque “individual performance” categories. Others have “ESG targets” that are focused specifically on important but narrow metrics such as employee health and safety. This is insufficient to meaningfully drive companies to capture the opportunities and address the challenges of ESG'.

Cevian's expectation is that,

> 'Just as for current non-ESG metrics in executive compensation plans, each company should develop and propose to shareholders ESG targets and incentives that it considers most relevant for its businesses and stakeholders. These should be significant, measurable and transparent, enabling meaningful assessment and engagement by shareholders'.

Voting behaviour

Cevian states that it plans to hold companies and individual directors to account through engagement ahead of the 2022 AGM season and 'if necessary a combination of voting on director elections and compensation plans, as well as advancing shareholder motions on this issue, as appropriate'.

Call for other investors to support their demands

Cevian states,

> 'We believe it is in the interests of all stakeholders, including asset owners and other long-term investors, for companies to create this alignment and transparency, and invite others to adopt this stance'.
>
> [Source: Cevian Capital statement 03/03/2021]

Board changes are not enough: Investors call on Exxon to do more

Activist Engine No 1 releases white paper calling on Exxon to do more

Exxon Mobil recently announced the appointment of two new directors to its board. Activist Engine No 1, backed by CALSTRS, has been pushing for changes to the board and for a shift in strategic direction at the company, and had put forward four board nominees ahead of Exxon's announcement. See: Governance News 3 March 2021 at p13.

Following Exxon's 'investor day' Engine No 1 issued a statement reiterating demands for the company to shift direction and emphasising the need for board change. Engine No. 1 states,

> 'ExxonMobil has now adopted the language of long-term net zero emissions and dramatically shifted its emphasis from production growth to investor returns, both of which are remarkable shifts since the start of our campaign last year. However, we believe that reacting to the threat of a shareholder vote is not the same as a coherent and value-enhancing long-term strategy, and that without real change these gains could be short-lived. More importantly, we believe that turning these newfound ambitions into action will require leadership, and that without a diverse mix of successful and transformative energy experience on the Board, ExxonMobil will risk continued long-term shareholder value destruction.'

Engine No 1 also released a white paper authored by Professor David Victor (who was a convening lead author for the Intergovernmental Panel on Climate Change (IPCC)), outlining the long term risks and opportunities facing Exxon and (and its peer organisations) that Engine No 1 considers lends weight to its demands. The full text of the white paper is here.

Other investors are also demanding change in leadership and strategic direction at the company

The Coalition United for a Responsible Exxon (CURE) – a coalition of 135 institutional members collectively representing $2.37 trillion in assets – has also been pushing for change at Exxon, including change in leadership. The full list of CURE coalition members is here:

In a statement responding to Exxon's announcement of new board candidates, CURE noted that one new director (Jeff Ubben) has climate and ESG experience which it said could indicate that Exxon 'may intend to change'. The statement also acknowledged that since the engagement of activist investors over the past six months the company has 'taken what appears to be initial steps in the right direction'. However, CURE considers that more is needed.

Specifically, CURE has called on Exxon to 'address its corporate governance concerns' including: a) splitting the CEO and Chair role; b) aligning executive remuneration with 'shareholder value creation'; c) ensuring alignment of its own lobbying efforts and those of the trade associations to which it belongs with the goals of the Paris Agreement; and d) 'adopting a uniform system of accountancy to meet basic tests of transparency'.

CURE also wants to see the company change its strategy. CURE states,

> 'Exxon needs to commit to a deeper, long-term shift of its capital allocation strategies to be consistent with the Paris Agreement, streamlining its upstream and downstream to focus on the highest-returning assets and pursuing credible pathways towards a 2050 net zero greenhouse target, which must include renewable energy, clean hydrogen and carbon capture'.

CURE says that it wrote to the Exxon board last month outlining the need for change and its support for 'multiple shareholder resolutions'.

CURE intends to continue to 'urge Exxon to further enhance its Board of Directors to address fiduciary and climate concerns'.

[Sources: Engine No 1 media release 03/03/2021; White paper; CURE Statement (published on the As You Sow website) 03/03/2021]

Obesity resolution: Tesco has announced a range of actions in response to a shareholder resolution, but ShareAction says concerns remain

'First ever' special shareholder resolution

ShareAction has coordinated a shareholder resolution backed by a 'coalition of institutional investors' and over one hundred retail investors calling on Tesco to:

- disclose what percentage of food and non-alcoholic drink sales comes from healthy products (defined in accordance with UK Department for Health guidance)

- set an 'ambitious target' to significant increase the share of sales from healthy products by 2030
- publish a strategy for meeting these targets by 2022 and report annually on progress

According to ShareAction, Tesco wields 'outsized influence' on the health of UK consumers because it holds 27% of the British grocery market. However, ShareAction considers that Tesco lags its peers in terms of disclosure around the steps it is taking to support healthier consumer choices.

The rationale behind the resolution, which ShareAction describes as the first ever health-related special shareholder resolution directed at a UK listed company, is to push the company to disclose the actions it is taking to help tackle the obesity crisis. ShareAction states,

> 'Through this special resolution, we hope to bring awareness to the rising investor expectations on the vital role that major food companies like Tesco can play in supporting healthy eating.'

You can access ShareAction's briefing on the resolution here.

Tesco announcement

On 5 March, Tesco released a statement outlining a range of actions aimed at assisting customers to eat more healthily. These include:

- setting a target to increase the proportion of sales from healthier products from 58% to 65% by 2025
- increasing sales of plant-based meat alternatives by 300% by 2025
- disclosing its strategy to achieve these targets and reporting annually on progresss

Response

In a statement ShareAction welcomed Tesco's announcement as an important step forward.

Head of Health at ShareAction Jessica Attard commented,

> 'Today's news demonstrates the power of investor engagement. Tesco's new plans are an important recognition of the role supermarkets play in shaping our diets, at a time when our health has never been more critical. We look forward to continuing to work with Tesco, and to seeing other supermarkets and food manufacturers step up to this challenge.'

Senior engagement specialist at Robeco Peter van der Werf added that Tesco's announcement 'shows once more that engagement with companies, and filing shareholder resolutions is a powerful tool to help companies moving in a more sustainable direction'.

The resolution has not been withdrawn

Despite the concessions made by Tesco, ShareAction says that it still has a number of concerns including that Tesco's commitments only cover Tesco-branded UK stores. In addition, the group is seeking more information about the definition used by Tesco to categorise products as 'healthier'.

Accordingly, the resolution has not been withdrawn. ShareAction states that it looks forward to 'continuing engagement with Tesco to address remaining questions about the scope of the supermarket's plans and the methodology it is using to categorise healthier products'.

[Sources: Tesco media release 05/03/2021; ShareAction media release 05/03/2021]

Danone splits combined CEO/Chair role following engagement with shareholders and other stakeholders

Danone has issued a statement confirming the board's decision to implement governance changes following engagement with shareholders, 'social partners' and other internal and external stakeholders.

Changes include separating the combined CEO/Chair role. This change will take effect following the appointment of a new CEO.

In the interim, existing Chair and CEO Emmanuel Faber will continue to hold the combined role with the 'full confidence and unanimous support of the board'.

Danone states that 'in the coming weeks' the board and Chair will continue to 'engage constructively with shareholders'.

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

Corporate Social Responsibility and Sustainability

In Brief | Surge in responsible investment: Data from the UK Investment Association shows that responsible investment funds under management now total over £56bn, an uptick of 66% over the past 12 months (vs 7% across funds overall)

[Source: IA media release 04/03/2021]

Institutional Investors and Stewardship

Supporting active stewardship: PRI to issue voting guidance to signatories

Principles of Responsible Investment (PRI) CEO Fiona Reynolds has written a blog post commenting on the work PRI is doing to 'toughen up our minimum requirements' to address the failure by some PRI signatories to genuinely integrate sustainability into their investment practices or to practice active stewardship, including through engagement and voting.

This work includes the launch of PRI's Active Ownership 2.0 program in 2019, which Ms Reynolds writes, 'highlights our belief that investors should be using all the stewardship tools available to them to their fullest potential—including voting—to advance progress on the systemic issues that are most critical to investors and their beneficiaries'.

As part of this program, Ms Reynolds writes that PRI is taking steps to assist PRI signatories to take a more 'principled approach' to voting on shareholder resolutions.

The PRI plans to:

- issue new guidance outlining how investors can strengthen their processes around proxy voting, and better align their approach to shareholder resolutions with 'Active Ownership 2.0'
- publish further guidance for the proponents of resolutions, explaining what makes proposals 'supportable' by institutional investors
- announce new minimum requirements, 'where we are actively considering the inclusion of engagement and/or voting requirements as part of our emphasis on stewardship'.

[Source: PRI Blog 27/02/2021]

Markets and Exchanges__

Hill Review: UK Listing Rules Review releases recommendations for the reform of the current listing regime

Key Takeouts

- The 15 recommendations in the report aim to increase the attractiveness of the UK as a listing destination by addressing the complexity and rigidity in the current regime, 'closing a gap' that has opened up between the UK and other global centres.
- Among other things the report recommends that:
  - premium listed companies be permitted dual class share structures (subject to certain conditions)
  - a review of the prospectus regime, including the relaxation of existing liability requirements relating to forward-looking information
  - lowering the minimum free float requirementto 15%

The UK Listing Review, led by Lord Hill, has made 15 recommendations to reform of the UK Listing Regime with a view to encouraging 'companies of the future' to opt to list in the UK.

Broadly, the recommendations aim to address overcomplexity, rigidity and duplication in the current regime, as well as 'unnecessary and burdensome requirements' which are all considered to be contributing factors in the decision by many companies to list elsewhere.

Lord Hill prefaces his report by stating,

> 'In recommending that we update our system, we argue in essence that we should take the best from what our competitors around the world are doing and combine that with London's traditional strengths. But our bottom line is this: it makes no sense to have a theoretically perfect listing regime if in practice users increasingly choose other venues'.

Key Recommendations

Key recommendations include the following. You can find the full list of recommendations at p11 of the report.

Making it more attractive to list in the UK

Recommendations 3-6 in the report are aimed at 'improving the environment for companies to go public in London' and in particular, to attract companies in innovative sectors (eg the technology sector).

- Dual class structures: Recommendation 3 recommends that rules should be changed to allow dual class share structures in the premium listing segment (with certain safeguards in place). These safeguards would include (among others): imposing a maximum duration of five years; a maximum voting ratio of 20:1, requiring holders of B class shares to be a director of the company, limits on the transfer of B class shares.
- Free flat requirements: Recommendation 5 recommends that current free float requirements be reassessed to 'provide a better measure of liquidity at and following listing'. Specifically, it's recommended that the current free float requirement be lowered to 15% and 'for companies of different sizes to use measures of liquidity other than an absolute free float percentage'.
- SPACs: Recommendation 6 recommends rethinking the current requirement for trading in the shares of special purpose acquisition companies (SPACs) to be suspended on announcement of a potential acquisition.
- Re-branding, renaming and re-marketing the standard listing segment: Recommendation 4 recommends changing the name of the standard listing segment and encouraging investor groups 'to develop guidelines on areas they see as particularly important to allow for companies on the rebooted segment to be index-eligible'.

A 'fundamental' review of the Prospectus Regime

- Relaxing existing requirements: Recommendation 7 recommends that Treasury consult on changes to the current prospectus regime including:

  - changing prospectus requirements so that in future, admission to a regulated market and offers to the public are treated separately
  - relaxing prospectus exemption thresholds so that 'documentation is only required where it is appropriate for the type of transaction being undertaken and suits the circumstances of capital issuance'
  - enabling the use of alternate listing documentation where appropriate.
- Recommendation 8 recommends that the existing regime within the Listing Rules for secondary and dual listing be retained. Recommendation 8 also recommends that as part of the review of the prospectus regime (recommendation 7), consideration should be given to whether prospectuses prepared to meet requirements in other justifications could be also be used to meet UK requirements.

Forward looking statements – changes to director and issuer liability

Recommendation 9 recommends amending the liability regime for issuers and their directors to 'facilitate the provision of forward-looking information by issuers in prospectuses'.

The report suggests that this might take the form of introducing a defence for directors to liability if they can demonstrate that they: a) exercised due care, skill and diligence in putting the information together; and b) that they honestly believed the information to be true at the time at which it was published.

The report comments that the change would help address the current lack of information being provided and increase efficiency. It's also suggested that, 'adjusting the level of liability associated with prospectuses under FSMA would allow directors of companies to publish and stand behind their forward-looking models'.

Historical information

- Recommendation 10 recommends that the current three-year track record requirement for the premium listing segment be maintained. Recommendation 10 also recommends that existing special provisions for scientific research based companies, be reviewed to ensure they remain fit for purpose and broadened to include 'other high growth innovative companies from other sectors who are also able to show that they are sufficiently mature in ways other than through having positive revenue earnings'.
- Recommendation 11 recommends that:
  - current Listing Rule eligibility requirements for the premium listing segment be changed so that the 75% test - the requirement that historical financial information has to cover 75% of the company's business for three years - is only applicable to the most recent financial period within the three year track record requirement. The report comments the requirement is 'unhelpful to investors and simply increases the burden on companies for no gain'.
  - exemptions to the requirement for short stub periods be clarified to 'give companies and sponsors confidence that the exclusion of such periods from the reported track record should not prevent compliance'.

Capital raising

Recommendations 12-13 are aimed at 'empowering retail investors and improving capital raising for existing listed issuers'.

- Recommendation 12 recommends that consideration be given to 'how technology could be used to improve retail investor involvement in corporation actions and their undertaking of an appropriate stewardship role'.
- Recommendation 13 recommends that consideration be given to how to 'improve the efficiency of further capital raising by listed companies by re-establishing the Rights Issue Review Group (RIRG). Reconsider its outstanding recommendations in terms of capital raising models used in other jurisdictions such as Australia, including in light of technological advances, in order to facilitate a quicker and more efficient process of raising capital for existing listed companies and more easily involve retail investors'.

Speeding up the listing process

- Recommendation 14 recommends a review of the rules in the FCA Handbook relating to the inclusion of unconnected research analysts in an IPO process, 'which in practice mean an extra seven days being added to the public phase of the process'.

Other recommendations

Other recommendations include:

- Recommendation 1: A requirement for the Chancellor to provide an annual report setting out the progresss that has been made toward improving the UK's competitive position over the previous period.
- Recommendation 2: For Treasury, in the context of the Future Regulatory Framework Review, to consider 'whether the current statutory objectives of the FCA provide it with sufficient scope to play its part in building an environment for companies looking to list which is not just well-regulated but also welcoming, supportive and dynamic – and in this context, it would be helpful if the FCA was also charged with the duty of taking expressly into account the UK's overall attractiveness as a place to do business'.
- Recommendation 15: Suggests some areas that could be considered in the context of strengthening the 'financial ecosystem as a whole' unlocking pension investment; competitive tax environment; SME research provision.

[Source: UK Listing Review]

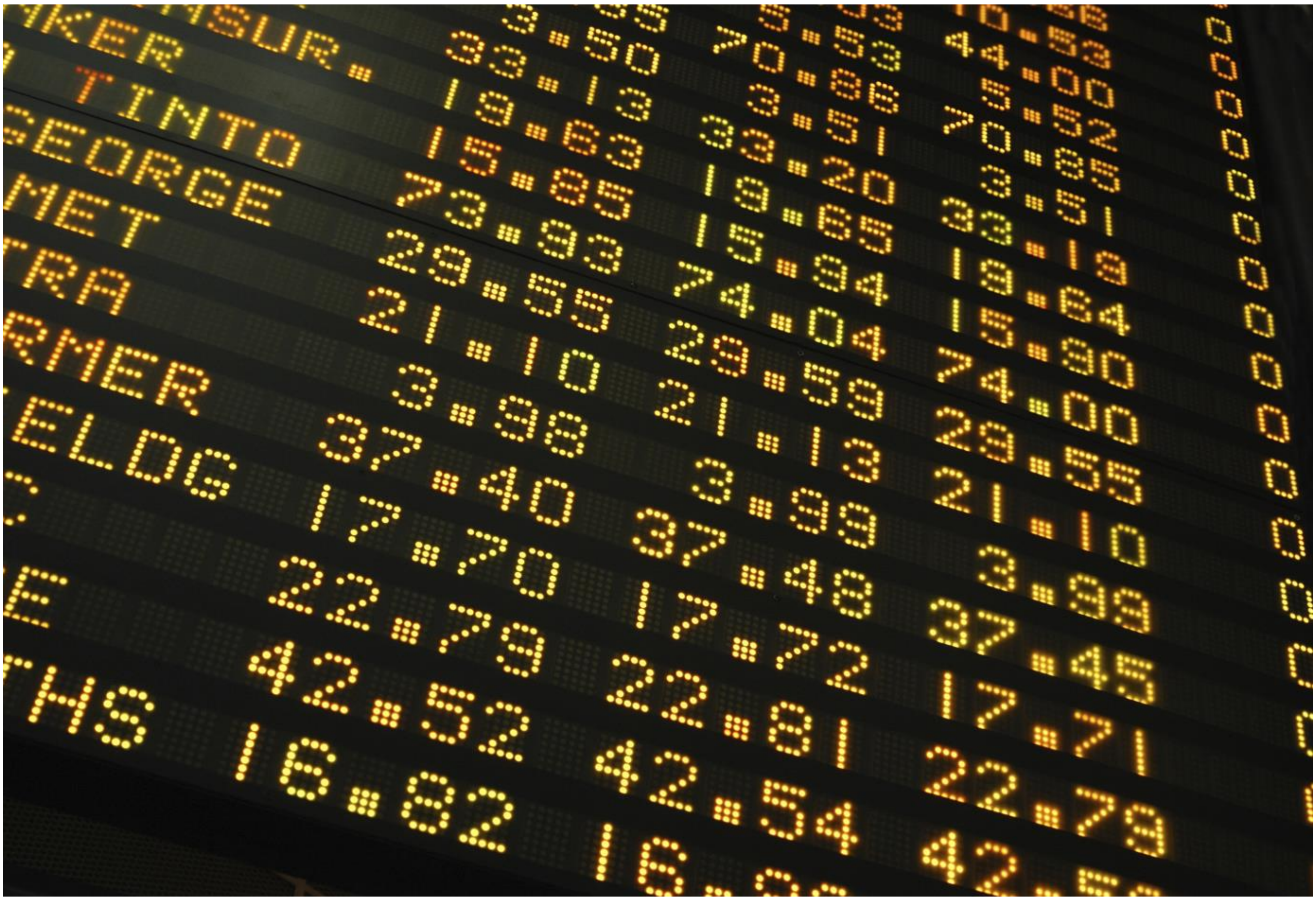
Response to the report

The UK Investment Association has welcomed the recommendations. The Investment Association's Chris Cummings said,

> 'The proposed reforms are an important first step to help re-energise capital markets and attract high-growth, innovative companies to set up, list, and grow their business operations in the UK, providing high value jobs that will benefit the economy…We look forward to working with the government and regulator on the review's proposal to allow dual class share structures and reduced free float in the premium segment, while ensuring there are appropriate investor protections for minority shareholders. The review should also ensure the UK is positioned as the leading global hub for sustainable investment, so those companies that list here deliver outstanding long-term returns for savers and investors.'

Schroders also expressed support for the recommendations and in particular the recommendations around allowing dual class shares in London's premium listing segment, reducing free float requirements and the proposed rebranding/re-positioning of the standard listing segment.

[Source: Investment Association media release 03/03/2021; Schroders 04/03/2021]



Regulators

Top Story | ASIC's new 'express investigation' approach to enforcement

Key Takeouts

- Australian Securities and Investments Commission (ASIC) Deputy Chair Karen Chester has signalled that ASIC will adopt a 'lighter but more impactful', quicker and more cost-effective approach to enforcement, based on cooperation (where possible).
- The new approach does not appear to signal a complete shift away from ASIC's 'Why not Litigate?' approach. Ms Chester cautioned that industry should, for example, expect to see more cybersecurity-related court actions. Ms Chester also flagged a 'pipeline' of non-Hayne related superannuation actions.

In her speech to the AFR Business Summit 2021, Australian Securities and Investments Commission (ASIC) Chair Karen Chester outlined the regulator's new 'express investigation' approach to enforcement and talked through ASIC's immediate regulatory priorities.

ASIC's regulatory approach

Mr Chester said that going forward, ASIC will adopt a 'lighter but more impactful', lower cost approach, based on cooperation and focused on addressing harmful misconduct rather than 'process breaches'.

Ms Chester said,

> 'ASIC will seek to maintain a regulatory spirit-level between incentives for good conduct and compliance; and targeted, swift action when we see misconduct and harm. For the firms we regulate (both big and small), it means that more often than not, we will work with you, not against you. We want to reward good performers with nudges, not grudges. We want to train ASIC's radar on harmful misconduct, not on harm-free process breaches. And we think that over time, this will deliver better outcomes for the economy, markets, business, shareholders and ultimately – consumers and investors.

ASIC's new enforcement approach: 'Express Investigation'

Ms Chester described ASIC's new 'express investigation' (EI) approach to enforcement as follows.

> 'EI is simple. At the earliest possible time, ASIC sets out our concerns to the entity. We then seek cooperation in the investigation through regular and consistent engagement. By cooperating, we reduce the time and expense of the investigation...If cooperation from the entity wanes, ASIC's investigation forges on. But slowly and with greater cost.'

Ms Chester observed that the 'opportunity cost of lost time in protracted litigation' serves no-one and that the new EI approach, piloted in the wake of the Hayne Commission, has proven to be both time and cost effective.

Going forward, Ms Chester said that ASIC plans to 'work with firms and the ABA to share respective methodology on how to measure the benefits of EI. We will also start rolling out EI across a broader cohort of firms we investigate'.

ASIC's 'Year of Deployment': Key enforcement priorities

Ms Chester described 2021 as the 'Year of Deployment' for ASIC – the year in which ASIC has resolved to 'do things differently' with pilot programs rolled out quickly and of necessity in 2020, becoming 'regulation as usual'.

Key priorities include the following.

- DDO pilot program: New design and distribution obligations (DDO)s are set to commence on 5 October. Ahead of this, Ms Chester said that ASIC will launch a DDO pilot program, starting with Buy Now Pay Later (BNPL) firms. Ms Chester said that ASIC will hold meetings with the Chairs, CEOs and Boards of 'regulated cohorts', where ASIC considers that DDOs could prevent current and future harm. This is intended to provide a 'firm pre-emptive nudge' and 'reduce legacy trails of litigation, loss of shareholder value, and consumer harm.'
- Superannuation:
  - Ms Chester flagged that industry should expect a number of new non-Hayne Commission related superannuation actions.

- Specifically, Ms Chester said that ASIC's 'superannuation pipeline' comprises: eight matters in litigation; two briefs of evidence in support of criminal charges with the CDPP; more than 20 enforcement investigations; and multiple surveillances about potential super trustee misconduct.
- Broadly, the 'misconduct themes' ASIC has identified are: a) trustee competence and oversight; b) complaints handling processes; and c) mischarging fees.
- Ms Chester added that in addition to enforcement, 'nudges like DDO will apply to parts of the super system. As will the new complaints handling requirements, which come into effect on 5 October 2021 alongside DDO'.

- Cyber risk:
  - ASIC's current cyber supervisory projects include: a) 'raising awareness of cyber resilience' for regulated entities; b) 'helping our regulated entities get prepared with their self-assessment'; and c) taking 'deterrence-based enforcement action' where necessary.
  - Ms Chester cautioned that ASIC's 2020 case against RI Advice Group (the first cybersecurity action taken by the regulator against a licensee) 'won't be the last'.
  - ASIC also sees 'much potential for collaboration among large firms to develop a standard of resilience (a pilot path) for their many, smaller service provider firms. Lifting the cyber resilience tide for all. And we're initiating a dialogue to that end'.

- Consumer/investor harms – 'true to label' pilot: Ms Chester flagged that ASIC will continue to focus on addressing the consumer/investor harm caused by funds that market themselves as safer, lower risk, or more liquid than they are. So far, under the 'true to label' pilot, ASIC has 'dealt with' 30 funds.

  [Source: Regulation for recovery: when pilots become enduring practice, A speech by Deputy Chair Karen Chester, to the AFR Business Summit 2021 10/03/2021]

Fee hike: Industry associations have expressed concern about increases in the ASIC industry funding levy and have called for a review of the funding model

The Australian Securities and Investments Commission (ASIC) has released its final 2019-20 Cost Recovery Implementation Statement (CRIS) which provides regulated entities with details of ASIC's forecast regulatory costs and activities by industry and subsector for FY19/20, ahead of issuing levy notices.

COVID-19: Waivers will be considered on a case by case basis

ASIC states that,

> 'ASIC is acutely aware of the challenges facing many businesses due to COVID-19 and is committed to working with regulated entities facing difficulties paying industry funding levies. ASIC will consider waivers due to the impact of COVID-19 on a case-by-case basis'.

'Shameful': Industry associations have called for a review of ASIC's industry funding model

Five industry associations – the Financial Planners Association, CPA Australia, Chartered Accountants Australia and New Zealand, Institute of Public Accountants, SMSF Association – have issued a joint statement raising concerns about what the group considers to be a 'shameful' increase in financial adviser licence fees and calling for an immediate review of the ASIC's industry funding model.

According to the statement, the group's top concerns are that the current funding model: a) does not account for changing industry dynamics; b) is contributing to the exodus of financial advisers; and c) places disproportionate cost burden on remaining advisers.

The statement also raises concerns that:

- ASIC's preliminary cost estimates are often inaccurate, making budgeting difficult
- penalties are fines are 'diverted to consolidated revenue rather than off-setting ASIC's costs'.

To address these concerns, the group is calling for the government to: a) review the industry funding model; b) reduce/remove the latest industry funding levy increase; c) ensure ASIC has sufficient funding to undertake its functions; and d) ensure ASIC's industry funding levy reflects the 'cost of regulation' rather than funding 'other budgetary measures'.

[Sources: ASIC media release 04/03/2021; Joint media release Financial Planners Association, CPA Australia, Chartered Accountants Australia and New Zealand, Institute of Public Accountants, SMSF Association media release 08/03/2021]

Law reform: In a speech marking the ten year anniversary of the ACL, ACCC Chair Rod Sims called for further reform

In his address at the Monash University National Commercial Law Seminar, Australian Competition and Consumer Commission (ACCC) Chair Rod Sims said that:

- The introduction of the Australian Competition Law (ACL) ten years ago was a 'game changer that allowed the ACCC and State and Territory regulators to collaborate much more easily on consumer issues'. In particular, Mr Sims emphasised the importance of the introduction of civil pecuniary penalties for consumer law contraventions from an enforcement and ultimately, from a compliance perspective. Likewise, Mr Sims said that the ability for the ACCC to issue infringement notices and to issue public warning notices to alert consumers to a suspected breach were significant. Mr Sims commented, 'In my strong view having well intended laws that are hard to enforce is corrosive to society. Fortunately the ACL corrected this in the case of consumer protection'.
- Looking forward, Mr Sims said that though the ACCC has made 'good progresss in enforcing the consumer guarantee and unfair contract terms provisions, further reforms are still required to ensure that these provisions can be effectively enforced'.
- Law reform: The ACCC is advocating the following reforms.
  - Making failure to comply with the consumer guarantee and/or unfair contract terms provisions a contravention of the ACL and subject to penalties.
  - The introduction of a prohibition on unfair trading practices. Mr Sims commented observed, 'I am convinced that such a prohibition would remove or avoid the need for some intrusive industry-specific regulation. That is, it can help lessen the overall regulatory burden'.
  - The introduction of a general safety provision, prohibiting suppliers from supplying unsafe products.
- The ACCC is also 'exploring merge law reform options'. Mr Sims observed,

  'In recent years we have become increasingly concerned as to whether Australia's merger control regime remains fit for purpose and, in particular, whether it is achieving the balance required to ensure good outcomes for consumers and the economy… It appears that insufficient weight is placed on the risks to competition, such as potential competition being lost, barriers to entry raised or competitors being foreclosed. As a result, our merger control regime is skewed towards clearance, which presents real challenges for our economy given the damage that can be done by anticompetitive mergers. We therefore consider that the approach to merger control needs to be rebalanced'.
  - Mr Sims concluded by cautioning against 'divergence in consumer law across jurisdictions'. He also emphasised the need for continued, and increased cooperation between jurisdictions.

  [Sources: ACCC media release 03/03/2021; [registration required – accessed via LexisNexis Capital Monitor] Full text speech: ACCC Chair Rod Sims speech, Reflections on the 10th anniversary of the Competition and Consumer Act 2010, Monash University National Commercial Law Seminar Series Session 03/03/2021]

APRA reiterates climate plans

The Australian Prudential Regulation Authority (APRA) has reiterated its intention to:

- **Develop its first cross-industry prudential practice guide (PPG) on the management of climate-related financial risks.** APRA plans to release a draft prudential practice guide (PPG) in H1 2021, with a view to having it finalised 'before the end of 2021'. APRA states that the guide will draw on aspects of the TCFD as well as other regulatory initiatives/precedents and support the financial sector 'to effectively address climate-related risks'.
- **Conduct stress tests**:
  - APRA will commence a series of 'Climate Vulnerability Assessments' (CVAs), starting with the five largest banks. APRA expects to have its analysis of these CVA results completed by Q4 2021.
  - The CVA's will then be rolled out to the rest of the banking sector, the insurance and superannuation sectors. The timetable for this is not yet confirmed.
  - In developing the CVAs, APRA is engaging with both the Australian Securities and Investments Commission (ASIC) and the Reserve Bank of Australia (RBA) to ensure a consistent approach is taken to recommendations based on the CVAs, and to disclosure of climate-related risk information.

APRA states that these initiatives will 'help the Australian financial sector to better understand climate-related financial risks, address some of the data and standardisation challenges in climate risk assessment and reporting, and support market participants as they respond to the policy, investment and insurance challenges of climate change'.

[Source: APRA Insight Issue 1 2021]

SEC Climate and ESG taskforce to zero in on 'material gaps or misstatements' in disclosures

After flagging an 'enhanced focus on climate-related risks' among its examination priorities for 2021, the US Securities and Exchange Commission (SEC) has established a new Climate and ESG Task Force in the Division of Enforcement to 'proactively identify ESG-related misconduct' working closely with other SEC divisions and offices.

The taskforce's immediate focus will be on the accuracy and completeness of ESG disclosures – specifically, the taskforce will focus on identifying 'any material gaps or misstatements in issuers' disclosure of climate risks under existing rules', and analysing 'disclosure and compliance issues relating to investment advisers' and funds' ESG strategies'.

The Taskforce will also evaluate and pursue tips/referrals and whistleblower complaints on ESG-related issues as well as provide expertise to other SEC teams working on ESG-related matters.

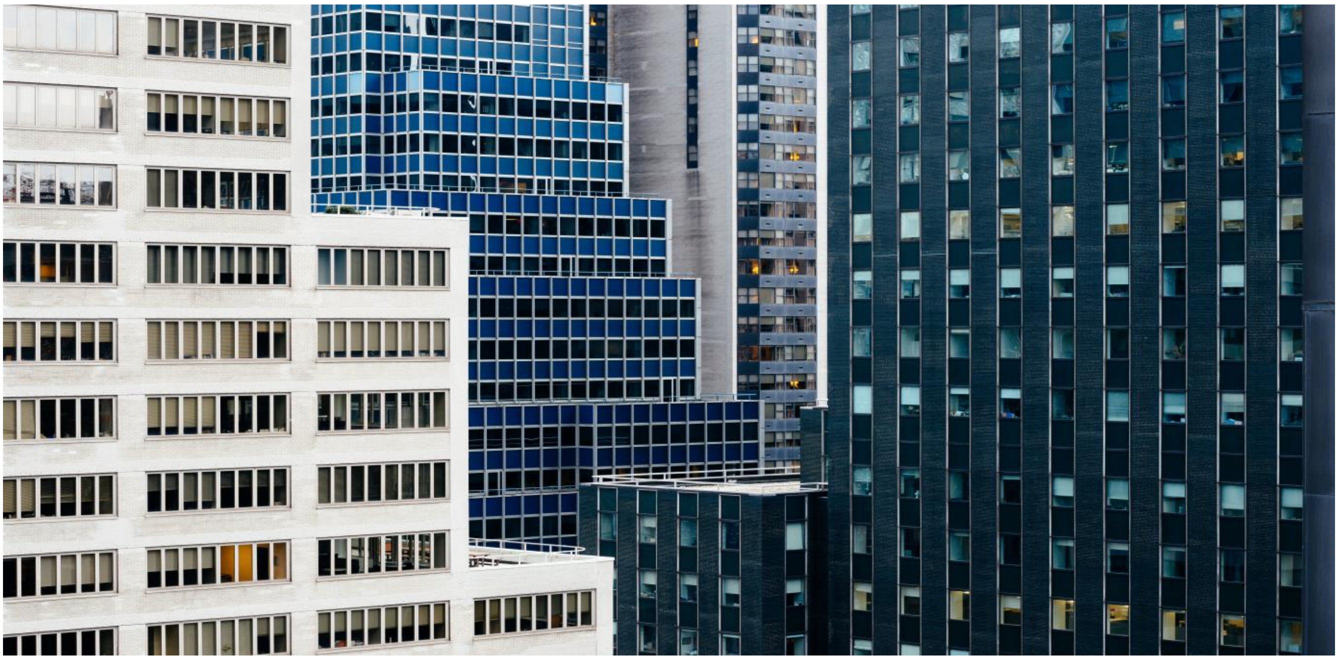
SEC considers that the new taskforce will 'complement the agency's other ESG-related initiatives eg the recent appointment of Senior Policy Adviser for Climate and ESG Satyam Khanna.

Acting Deputy Director of Enforcement Kelly L Gibson, who will lead the new task force commented,

> 'Proactively addressing emerging disclosure gaps that threaten investors and the market has always been core to the SEC's mission. This task force brings together a broad array of experience and expertise, which will allow us to better police the market, pursue misconduct, and protect investors.'
>
> [Sources: SEC examination priorities 2021; SEC media release 04/03/2021]

Financial Services

Insurance in super: APRA sounds a warning bell on premiums



Australian Prudential Regulation Authority (APRA) Deputy Chair Helen Rowell has written to life insurers and registrable superannuation entity (RSE) licensees expressing concern about certain developments that APRA considers may adversely impact both the availability and sustainability of life insurance through superannuation if left unaddressed.

In particular, the letter flags the 'significant deterioration in group life insurance claims experience in 2019 and 2020' and the 'potential for the re-emergence of unpredictability and volatility in insurance premiums' as areas of concern.

APRA's expectations

APRA expects life insurers and RSE licensees to 'take steps to ensure that insurance offerings and benefits are sustainably designed and priced, provide appropriate value for members, and adequately reflect the underlying risk and expected experience'.

The letter calls for:

- superannuation trustees to develop and maintain 'clear insurance strategies' that 'reflect a scheme design for default insurance which carefully considers and appropriately balances their members' needs and the cost of insurance'
- superannuation trustees to provide insurers with the necessary 'high quality and sufficiently granular data' to enable sustainable insurance design and pricing. The letter comments that RSE licensees are obliged under (SPS 250) to maintain sufficient records to form a basis for insurers to assess and price insured benefits and that where data is incomplete/inadequate, the issue should be 'escalated and addressed'.
- adjustments to be made to current 'undesirable tender processes' (eg insufficient timeframes) to 'support sustainable insurance benefit design and pricing'. APRA's expectation is that tenders should be conducted 'in such a way that insurers are given adequate time to consult on scheme designs and appropriately price the risks and benefits. New data that becomes available during the tender process should be provided to all participants, with sufficient time for the impact of any changes to be assessed'.

APRA states that it will monitor progress against these expectations through its supervision activities and consider taking 'further action' if it does not see evidence that the issues are being addressed..

[Sources: APRA media release 09/03/2021; APRA letter to RSE Licensees and group life insurance CEOs 09/03/2021]

Risk Management

NSW has announced a $750 million plan to reduce emissions and drive investment in green technologies

NSW Minister for Energy and the Environment Matt Kean has announced a new $75 million program – the Net Zero Industry Innovation Program – aimed at reducing carbon emissions and driving the development of low emissions technologies.

Funding will focus on three areas:

- $380 million to 'support existing industries to re-tool with low emissions alternatives and future proof their businesses'
- $175 million to establish low carbon industries eg green hydrogen
- $195 million for research and development into clean technologies

Expressions of interest for the program will open in April. Businesses are encouraged to register their interest in the plan online.

The program is part of the government's Zero Plan Stage 1: 2020-2030 and is intended to complement other initiatives including the Renewable Energy Zones, and Special Activation Precincts.

[Source: NSW Minister for Energy and the Environment Matt Kean media release]

In Brief | The Federal government has appointed Dr Alan Finkel to serve in the newly created role of Special Adviser for Low Emissions Technology

[Source: Minister for Energy and Emissions Reduction Angus Taylor media release 05/03/2021]

In Brief | High alert: The Australian Cyber Security Centre has confirmed 'extensive targeting' and 'confirmed compromises' of Australian organisations using Microsoft Exchange. The ACSC comments that if left unpatched, it may be possible for an 'unauthenticated attacker' to upload web shells to 'maintain persistent access' to systems and 'to write files and execute code with elevated privileges'. The ACSC has urged businesses to urgently deploy the necessary security patches and to undertake specific detection steps outlined by Microsoft

[Source: ACSC media release 09/03/2021]

Insolvency and Restructuring

Top Story | Webinar: How funds and financiers can take advantage of distressed debt opportunities

In this webinar, MinterEllison's restructuring, insolvency and financial services experts will explore the activity that debt funds, special situations investors and superannuation funds should undertake now to take advantage of imminent opportunities. They'll look at key trends and considerations in a continually evolving environment, including:

- The legal framework for dealing with financial distress
- The problems with works outs: dealing with distressed businesses outside formal insolvency process
- Evolving options for dealing with financial distress using formal processes
- Some lessons learned:
  - What is the best time to get involved?
  - The need for speed.
  - How to structure a bid so that it is most likely to be accepted and least likely to be contestable.
  - The challenges and opportunities for superannuation funds as the long term economic fallout of COVID-19 becomes clearer

Timing

Wednesday 31 March 2021 at 12:00pm-1:00pm.

Registration

You can register here.

In Brief | ASIC has issued a reminder to businesses about the 31 March 2021 deadline to apply for temporary restructuring relief

[Source: ASIC InFocus March 2021 - Volume 30 Issue 2]

Other News

Cultural review: The AHRC has been tasked with conducting an independent Review into the workplaces of Commonwealth parliamentarians

The Australian Human Rights Commission (AHRC) has been tasked by the government with conducting an Independent Review into the workplaces of commonwealth parliamentarians.

The aim of the review is to

> …'ensure all Commonwealth Parliamentary workplaces are safe and respectful and that our national Parliament reflects best practice in the prevention and handling of bullying, sexual harassment and sexual assault'.

The Review will be led by Australia's Sex Discrimination Commissioner, Kate Jenkins.

Terms of Reference

Broadly, the Review will:

- consider the experiences of current/former staff working within the workplaces of Commonwealth parliamentarians
- assess the 'adequacy, effectiveness, independence, resourcing and awareness of current supports available to enable a safe and respectful workplace, in particular preventing and responding to workplace bullying, sexual harassment and sexual assault'
- consider the 'drivers' of workplace bullying, sexual harassment and sexual assault in parliamentary workplaces including workplace culture
- consider the barriers to reporting incidents and current response/reporting mechanisms
- assess the extent to which current legislation, policies, practices 'promote or impede safe and respectful workplaces'

The terms of reference state that as the review will 'inquire into systemic issues' it will not investigate or make findings about individual allegations of bullying, sexual harassment or sexual assault.

The Review is expected to consult widely, especially with current and former staff.

The full terms of reference are here.

Timeline

- The Review will provide a public report by November 2021.
- A progresss update will be provided in July 2021 and interim recommendations may be included at that time.

In a statement welcoming the establishment of the Review, Commissioner Jenkins said,

> 'I acknowledge the importance and urgency of this Independent Review (Review) into the workplaces of Parliamentarians and their staff, established by the Federal Government, in consultation with the Presiding Officers, the Opposition, minor parties and independents. The Australian Human Rights Commission's work to establish this Review will begin immediately, and we will soon outline the process of how staff members can engage with the Review. We recognise the significant public interest in this issue and the need to ensure matters will be treated with sensitivity, confidentiality, and trauma-informed'.

Commissioner Jenkins added that the review will build on the landmark findings of the 2020 Respect@Work national inquiry into sexual harassment in Australian workplaces.

> [Sources: Independent Review into Commonwealth Parliamentary Workplaces; Australian Human Rights Commission, Sex Discrimination Commissioner Kate Jenkins media release 05/03/2021]

Grattan Institute report finds women has been disproportionately impacted by the COVID-19 downturn

The Grattan Institute has released a report – Women’s work: The impact of the COVID crisis on Australian women – looking at the impact of the COVID-19 pandemic on Australian women.

The headline finding is that women have been disproportionately impacted. For example the report found that:

- Women lost more jobs at double the rate that men did (8% for women vs 4% for men)
- Women's unpaid workload increased (eg supervising children learning remotely, childcare) more than men's did
- Women were less likely to receive government support eg JobKeeper (as the JobKeeper program excluded short-term casuals)

A key conclusion is that the COVID-19 downturn has not only had a disproportionately negative impact on women in the short to medium term, but is likely to exacerbate existing structural gendered inequalities. The report states,

> 'The COVID recession dealt a heavier blow to women than men, but women also began the crisis on an uneven footing. The recession came on top of existing economic vulnerabilities for women: women are more likely to be in casual and insecure work, more likely to be employed part-time, and typically earn less per hour. The downturn will widen the lifetime earnings gaps that result from these vulnerabilities, and is expected to further extend the already glacial timeframe for achieving gender equality'.

Recommendations

The report includes a number of recommendations to ensure COVID-19 recovery plans take the needs of women into account.

Recommendations include (among others):

- Providing additional targeted support to those sectors most heavily impacted by the pandemic to reduce unemployment. For example:
  - Extending the JobMaker wage subsidy scheme to more employers and job seekers.
  - Offering government incentives (eg vouchers or consumption subsidies) to boost demand in sectors most impacted by the pandemic (eg tourism, hospitality and the arts)
- Increasing JobSeeker and Commonwealth Rent Assistance, to support the most vulnerable Australians, including single mothers.
- Making early childhood education and care cheaper to support women's workforce participation
- Establishing an independent inquiry to 'review Australia’s care industries, including worker pay, future workforce needs, and financing models'.
- Applying a 'gender lens' to policy development: 'Governments should make gender analysis part of their budget development processes, to reduce the risk of women being overlooked or suffering unforeseen consequences from policy decisions'.

[Source: Grattan Institute report: Women’s work: The impact of the COVID crisis on Australian women]

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