Governance News

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

31 March 2021

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Diversity

Top Story | Eliminating Australia's gender pay gap? Report concludes that a 'level of apathy' has set in

The latest WGEA/BCEC report tracking progress towards closing Australia's gender wage gap cautions that apathy has emerged as a key barrier to improvement

Bankwest Curtin Economics Centre and the Workplace Gender Equality Agency (WGEA) have released a report - Gender Equity Insights 2021: Making it a Priority – tracking progress towards closing the gender pay gap in Australia and highlighting the initiatives that have proven to be the most effective in driving improvement. Our key takeaways are below.

If current trends continue, it will take 26 years for the gender pay gap to close

Over the period since mandatory reporting to WGEA started in 2014 to the latest data collection in 2020, the gender pay gap in full-time remuneration has decreased from 24.7% to 20.1% across the workforce. Assuming this trend continues at the current rate, the report predicts that it will take 26 years until the gap is eliminated.

No date for eliminating the gap for some roles?

Looking more closely, the timeline for closing the gap differs depending on seniority of position/occupation.

For example:

- the gap is expected to close for 'managers' between 2031 and 2045 (depending on the role)
- for 'non-managers' the gap will take much longer to close. For example for:
  - 'professionals' the projected date is 2051
  - clerical and administrative employees the projected date is 2053
  - 'machinery operators and drivers' the projected date is 2060
  - 'labourers' the projected date is 2064
- Concerningly, for some roles - 'community and personal service', 'sales' and 'technical and trade' employees – there is no predicted date for eliminating the gap.

Table 1 at p15 of the report provides a summary of this information.

Female representation in senior roles is (slowly) increasing though women remain underrepresented

Since 2014 representation of women on boards as directors, and to a lesser extent in Chair roles, has increased across reporting organisations.

- Overall, women accounted for 23.7% of board positions in 2014. By 2020 this had risen to 28.1%.
- Overall, women accounted for 11.9% of Chair roles in 2014. By 2020 this had risen to 14.6%.

The report found that there the share of women on boards varies within wide limits across different industries.

For example in the health care and social assistance sector (where the workforce is 80% female), women hold 39% of board positions. In contrast, in the construction sector (where the workforce is 18% female), women hold only 11% of board positions.

This pattern is replicated with Chair positions.

What works? Evidence that consistent, sustained focus drives improvement

The report found that organisations that have consistently implemented a comprehensive suite of gender equality policies and actions make larger and faster gains than those that take a less focused/consistent approach.

For example:

- Between 2015-2020, the top 10% of companies assessed as the most consistent in implementing gender equality policies/actions achieved a 4.4% reduction in the gender pay gap for 'managers' and a 2.3% reduction in the gender pay gap for non-managers. In contrast, the least consistent organisations saw their managerial gender pay gap narrow by only 1.4% and made zero progress on narrowing the pay gap for non-managers over the same period.

- Between 2018 and 2020, organisations that consistently undertook pay gap audits saw their managerial gender pay gap narrow at a faster rate (up to 2.2%) as compared with other companies.
- Between 2015 and 2020, organisations that set consistent bard gender representation targets saw the proportion of women on their boards increase 7.3%. In contrast, boards that did not set targets achieved only a 3.5% increase over the same period.

Barriers to progress?

A theme running through the report is the conclusion that there is a level of 'apathy and complacency' setting in, at least at some organisations. This is acting as a brake on overall progress, and the report suggests that if it is not addressed, may result in gains (in terms of both pay parity and representation) being lost.

Some examples of this highlighted in the report include the following.

- **Not undertaking regular pay gap audits (and acting on the findings):** In the 2019-2020 reporting period, almost 54% of reporting companies did not undertake a regular pay gap analysis. Commenting on this, WGEA Director Libby Lyons states, 'As I have said many times before, if every organisation in Australia did a pay gap analysis and acted on the identified problems of that analysis, the gender pay gap in Australia would soon be consigned to history'.
- **Lack of focus on gender parity in female-dominated sectors:** Organisations in female-dominated sectors eg healthcare and education lag other sectors (eg mining) in terms of closely monitoring and taking action to address gender parity.
- **Failure to set representation targets:** From a board representation perspective, though setting gender representation targets has proven effective both in terms of increasing in the number of women on boards and accelerating the pace of change, only 8% of reporting companies set targets of this kind.

WGEA Director Libby Lyons comments,

> 'As we navigate our economic recovery in the wake of a global pandemic, one thing is clear – we cannot afford to be complacent. Without ambition, target setting and consistency, we risk seeing a decline in all our hard-won gains in workplace gender equality. This in my view is simply unacceptable. All Australian employers must ACT.'
>
> [Source: Full text report: Gender Equity Insights 2021: Making it a Priority; WGEA media release 26/03/2021]

A question of 'value not just values': State Street's President and CEO outlines the importance of disclosure of detailed and reliable diversity information from an investor standpoint

In remarks to the Harvard Law School Program on Corporate Governance Virtual Roundtable Services, President and CEO of State Street Global Advisors Cyrus Taraporevala spoke about the important role that institutional investors play through their engagement and voting actions, in driving progress on diversity and inclusion in the broad sense.

Below are some key takeaways from his remarks.

Diversity is important from a value perspective

Mr Taraporevala emphasised that State Street's focus on ESG issues including diversity, is not a question of imposing particular 'values' on companies, but rather a question of driving value – a question of ensuring that risks are being appropriately managed as well as ensuring that companies are taking advantages of the opportunities on offer. Diversity, he observed is 'increasingly prominent' in this context because it is increasingly accepted that it has a material impact on companies/investors from a value perspective.

Mr Taraporevala comments,

> '…it would be a mistake to see the prominence of issues like diversity in asset stewardship efforts simply as a matter of values trumping value. Rather, I believe it is actually a reflection of an acceptance that intangible assets such as human capital are a critical value driver for companies. Think about it. We are increasingly seeing how a host of issues can contribute to the risks a company takes on…or the opportunities that they

can lean into…And let's be clear: for us as asset managers, this trend makes our jobs a lot harder. We now need to understand how these issues—which go well beyond the profit and loss statement and the balance sheet statement—can impact, or even drive, value.'

The importance of disclosure from an investor standpoint

Mr Taraporevala emphasised the importance of ensuring investor/stakeholder access to 'reliable, transparent and publicly available [diversity] data' to enable informed decision making and the current dearth of data. For example, he observed that at this point, only 6% of Russell 1000 companies share detailed EEO-1 data.

This he said, prompted State Street's call in August 2020, for companies to engage on their approach to racial/ethnic diversity including on: strategy, goals, metrics, board diversity, and board oversight.

State Street also set the expectation that:

- beginning in 2021, S&P500 and the FTSE 100 companies should disclose the racial/ethnic diversity of their boards to disclose the racial diversity of their Boards
- from 2022, the same companies should have at least one non-white director
- also from 2022 S&P500 should disclose data on the diversity of their workforce through the EEO-1 report

Observations: themes to emerge from engagements

Mr Taraporevala outlined some of the themes to emerge from State Street's engagement with companies through its engagement efforts to date. These include the following.

- Many companies are already aware of/accepting of the importance of diversity. For example:
  - companies reported that demand for diversity disclosure is high – a number of companies reported being 'flooded with requests' not only from institutional investors but from other stakeholders as well. Many were accepting of the need to provide EEO-1 disclosure.
  - one third of companies engaged with (so far) are committing to increase their diversity disclosure in line with State Street's expectations.
- Companies are increasingly open about the challenges their facing.
- A number are seeing the business case for racial and ethnic diversity.
- Some global companies are taking a more sophisticated approach to diversity. For example, one tech company with a large workforce in India is not only thinking about diversity in terms of gender, race/ethnicity but is also thinking about other dimensions of diversity (eg caste) that may be relevant.
- On the other hand, some companies are either unfamiliar with their EEO-1 disclosure or raised concerns that EEO-1 data could be misleading because it doesn't 'tell the whole story'. On this last point, Mr Taraporevala comments that State Street agrees that EEO-1 disclosure is limited, and encourages additional diversity disclosure for this reason, but maintains that disclosure of EEO-1 is still a useful starting point.

Release of a director diversity 'playbook' in H2 2021

Mr Taraporevala said that interviews with directors of the largest companies has provided State Street with insight into the approach different organisations are taking to identifying/addressing diversity-related risks as well as insight into how boards are approaching their oversight/monitoring role.

State Street intends to release a guide or 'playbook', informed by these engagements, to assist boards to strengthen their oversight of diversity issues later in the year.

[Source: Harvard Law School Forum on Corporate Governance and Financial Regulation 27/03/2021]

British Retail Consortium launches a Diversity and Inclusion Charter: 55 British retailers have committed to increasing diversity and inclusion practices

The British Retail Consortium (BRC) has launched a Diversity and Inclusion Charter that commits signatories to strengthening their oversight and reporting on diversity and inclusion efforts. Among other things the charter commits signatories to:

- 'Creating a respectful and inclusive work environment'

- Appointing diversity and inclusion executives as well as ensuring that 'all line managers are responsible for supporting equity in the workplace'
- Removing bias from recruitment practices and supporting career progression/opportunity for all
- 'Collecting and contributing diversity data'

So far, 55 retailers have signed the Charter.

Current status of diversity in retail

The launch of the Charter follows the release of a report tracking diversity and reviewing the approach taken to promoting/fostering diversity in the UK retail sector as well as the barriers/challenges retailers face in making progress on the issue (eg lack of leadership buy-in).

It's planned that future reports will provide updates on progress towards improving diversity in the sector, helping to drive change.

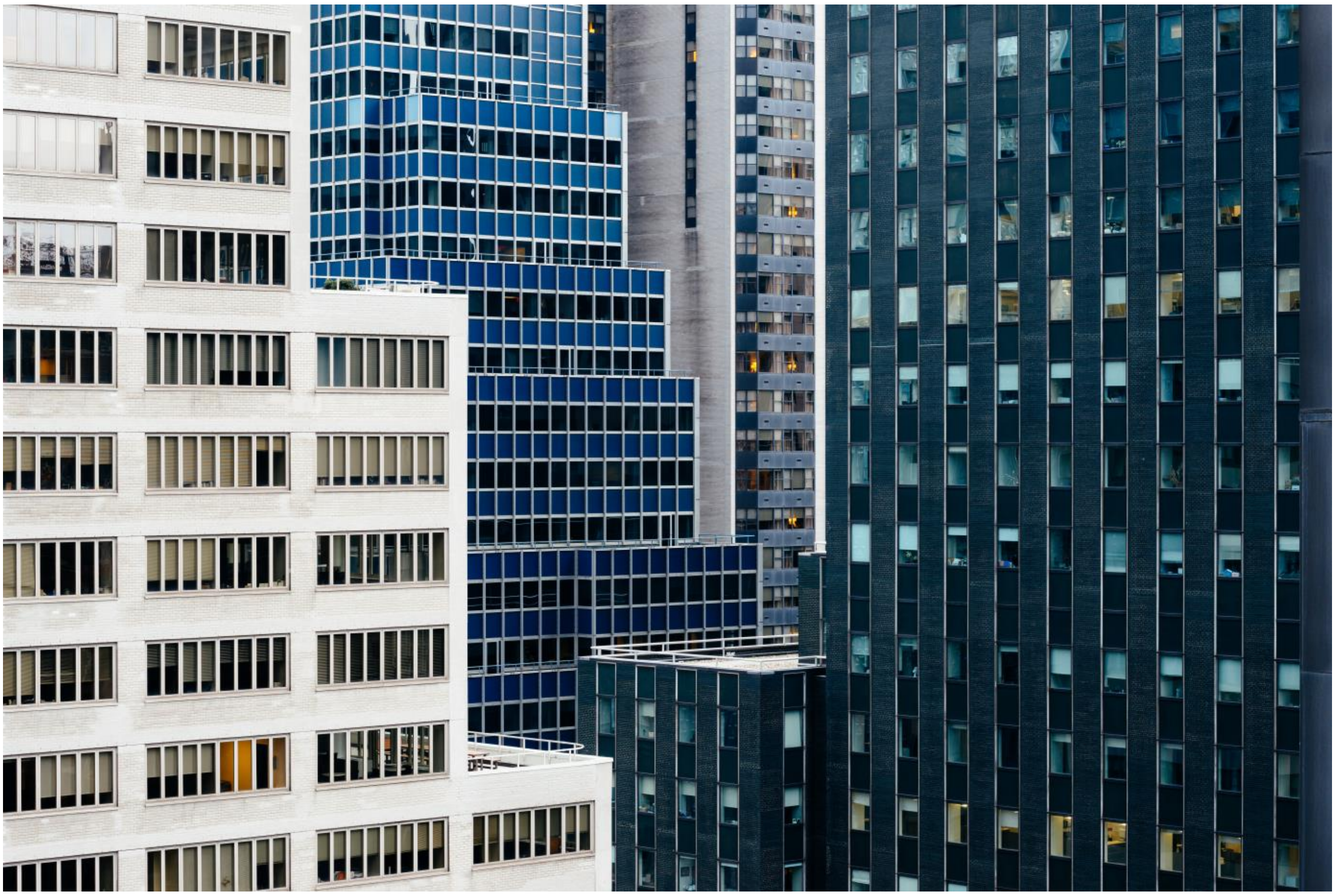
Improvement areas identified in the report

The report identifies a number of improvement areas. These include the following.

- Lack of gender diverse leadership:
  - One in five retailers have all-male boards
  - 15% of retailers have all-male executive committees
  - In 69% of retail firms, the Chair CEO and CFO roles are held by men. Only 4.3% of Chair roles, 9.6% of CEO roles and 11.4% of CFO roles are held by women.
- Lack of racial/ethnic diversity in leadership: Though people from an ethnic minority background make up 12.5% of the UK population, this is not reflected in leadership within the retail sector. For example:
  - 81% of retailers have no NEDs from ethnic minority backgrounds, and 68% have all-white executive committees.
  - Only 4.5% of NEDs, 5.8% of executive committee members and 6.0% of direct reports to board are from an ethnic minority background.
- Harassment/discrimination on the basis of gender or ethnicity:
  - 13% of female retail employees have experienced or seen sexual harassment at work
  - 14% of female retail employees have experienced gender discrimination
  - One in four retail employees workers from ethnic minorities has experienced or witnessed racism in the workplace.
- Workers do not feel that commitments are being given sufficient priority:
  - Though most retailers (89% of companies) either have or are developing a diversity and inclusion (D&I) strategy, and though most (84%) report that D&I is a priority, less than half of retail workers feel that D&I is being accorded sufficient priority (49%), and less than half (47%) agree that D&I is sufficiently communicated.
- D&I strategies are not sufficiently broad: The report found that certain aspects of diversity are more likely to be included in strategies than others. For example:
  - 100% of D&I strategies cover gender
  - 90% cover race and ethnicity
  - 68% cover LGBTQ+
  - 50% cover disability
  - 20% cover social mobility
  - 23% cover age

[Sources: BRC media release 25/03/2021; Full text report: Diversity and inclusion in UK retail: where are we now and what comes next?]

Remuneration



Mastercard ties executive pay to the achievement of sustainability goals

Mastercard has announced that sustainability targets relating to the company's ESG initiatives – carbon neutrality by 2050, financial inclusion and gender pay parity - have been integrated into the compensation plans for the four most senior executives at the company (Executive Vice Presidents and above) as a means of accelerating process.

Mastercard comments,

> 'We believe these ESG goals, which our senior leaders have the ability – and responsibility – to influence, will help our business grow and thrive for years to come. This change further reinforces our commitment to deepen our culture of inclusion, and ensure people can reach their potential, economic growth is inclusive, and the planet can thrive. We've seen firsthand how our commitment to environmental and social responsibility – and our core values of operating ethically, responsibly and with decency – is directly connected to our continuing success as a business. This is our starting point, and we will continue to evolve, expand and adapt these priorities to ensure they address the changing marketplace and our corporate objectives'.

The statement makes clear that the introduction of the sustainability targets will not displace financial targets. Mastercard states, 'financial goals, of course, as well as strategic goals that lay the foundation for our future success'.

[Source: Mastercard media release 24/03/2021]

In Brief | Pay for performance (or not so much)? MSCI has released a study tracking the pay and performance of 235 US CEOs who began and completed their tenure as CEO between 2006 and 2020. A key finding is that higher CEO pay did not necessarily correlate with stronger financial performance

[Sources: Full text report: CEO Pay from Start to Finish; MSCI blog 21/03/2021]

Disclosure and Reporting

The UK government is consulting on proposals to implement mandatory TCFD reporting

The UK government has released a consultation paper – Consultation on requiring mandatory climate-related financial disclosures by publicly quoted companies, large private companies and Limited Liability Partnerships (LLPs) – outlining its proposed approach to implementing mandatory climate-related financial disclosures including its proposed approach to monitoring and enforcement.

Some Key Points

Which entities would need to report?

It's proposed that the following entities would need to report in line with the proposals set out in the paper:

- All UK companies that are currently required to produce a non-financial information statement – that is, 'UK companies that have more than 500 employees and have transferable securities admitted to trading on a UK regulated market, banking companies or insurance companies (Relevant Public Interest Entities (PIEs))'
- UK registered companies with securities admitted to Alternative Investment Market (AIM) with more than 500 employees. The paper seeks views on whether this group should be expanded to include other unregulated markets and Multilateral Trading Facilities.
- UK registered companies, which have more than 500 employees and a turnover of more than £500m
- Limited Liability Partnerships (LLPs) which have more than 500 employees and a turnover of more than £500m

TCFD Reporting: proposed timing and level of detail required

- Reporting at 'pillar' not recommendation level: Broadly, it's proposed that certain entities (detailed below) will be required to report in line with all four pillars – ie governance, strategy, risk management, and metrics and targets - of the TCFD recommendations from 2022 (it's proposed that the new reporting obligations will apply for accounting periods starting after 6 April 2022). Feedback is sought on both the proposed timing and whether requiring disclosure at the 'four pillar' rather than at the recommendation level is 'suitable'.
- Scenario analysis: It's not proposed that companies or LLP's will be required to include scenario analysis

Monitoring and enforcement

The paper does not propose to introduce new monitoring or enforcement powers to ensure compliance with the new requirements. Rather, it's proposed that existing provisions would be extended to the new reporting obligations.

The paper argues that this is appropriate 'because the new duties will form part of the strategic report or the energy and carbon report'. In consequence, it's not proposed that new monitoring or enforcement powers will be introduced.

The role of auditors

The paper does not propose to 'alter the role of auditors in relation to climate related financial disclosures' and feedback is sought on this approach.

Regulatory oversight of the new obligations

It's proposed that:

- The new requirements will be monitored and regulated by the Financial Reporting Council (FRC).
- The Financial Conduct Authority (FCA) will have primary responsibility for the supervision/enforcement of compliance with the relevant listing rule (that requires commercial companies with a UK premium listing to include a compliance statement in the annual report stating whether they have made disclosures consistent with the TCFD's recommendations and recommended disclosures in their Annual Report or providing an explanation if they have not done so).
- Likewise, information disclosed outside of the Annual Report and reporting by in scope listed companies that are headquartered overseas will also fall within the Financial Conduct Authority's (FCA) remit.

Location

- It proposed that this disclosure would be provided by companies in the non-financial information statement (within the Strategic Report). Feedback is sought on whether this is the best place for disclosure of climate related financial information.
- Limited Liability Partnerships (LLPs) would be required to report in either the non-financial information statement (within the Strategic Report) or the Energy and Carbon Report (within the Annual Report).

Timing

- The closing date for submissions is 5 May 2021.
- The paper proposes that regulations introducing the new requirements will be made by the end of 2021 and come into force on 6 April 2022 (ie be applicable for accounting periods starting on/after that date).

The paper includes a number of specific questions on each of the proposals. You can find the full list of these at p32 of the consultation paper.

[Source: Consultation on requiring mandatory climate-related financial disclosures by publicly quoted companies, large private companies and Limited Liability Partnerships (LLPs)]

Global sustainability standards: KPMG has released its analysis of the key themes to emerge from investor responses to the IFRS consultation

Context

In 2020, the IFRS released a consultation paper seeking views, on a global approach to sustainability reporting including views on the creation of a new Sustainability Standards Board (SSB) to coordinate the standard setting process.

The IFRS Foundation has signalled its intention to publish a roadmap and timeline for establishing a Sustainability Standards Board in H2 2021.

Investor views on the proposed approach

KPMG has reviewed comment letters from 20 of the largest institutional investors who responded to the consultation paper to gauge their views on the proposed approach.

Overall, KPMG concluded that there is general agreement that:

- there is a need for global and mandatory sustainability standards. KPMG comments that a number of submissions highlighted the need for the IFRS to act quickly to build on/enhance, rather than entirely replace, voluntary disclosure frameworks.
- the IFRS Foundation is the appropriate body to coordinate standard settings activity.

Beyond this, KPMG found that there were a range of views on other issues including the appropriate definition of 'materiality' (what information should be treated as 'material' for the purposes of reporting under the new standards) among others.

On the issue of materiality, KPMG found that:

- 'most investors' agreed that the proposed new sustainability standards board should initially focus on disclosure likely to have the greatest impact on expected financial returns (with the option for the board to expand its focus to include impacts on non-financial returns at a later date)
- 'several' others took the view that both financial and environmental/social impacts should be incorporated into the standard setting process from the outset both to align with existing regulatory initiatives (eg the EU non-financial reporting directive) and to 'reflect the changing nature of what is financially material'
- 'a number' of others expressed support for an industry-specific approach to materiality (which could build on the work of existing frameworks)

On the issue of assurance, KPMG concluded that there was agreement (from all investors included in the sample) on the need for sustainability information to be subject to external assurance, though views varied on the appropriate level of assurance.

Many investors expressed the view that it would be 'desirable' for sustainability disclosures to eventually be subject to the same level of assurance as financial statements (though it was acknowledged that the introduction of a mandatory assurance regime would not be immediately appropriate).

[Source: Harvard Law School Forum 27/03/2021]

In Brief | Central record: SASB has published a list of companies across the world, that are now reporting in line with the SASB standards. The list includes links to each company's report

[Source: SASB: Companies Reporting with SASB Standards]

Meetings and Proxy Advisers

Top Story | ASIC's temporary no action position on virtual meetings

Key Takeouts

- Following its 23 March announcement, ASIC has released details of its no-action position on noncompliance with requirements concerning the holding/convening of electronic meetings held between 21 March 2021 and 31 October.
- The no action position may be withdrawn if relevant legislation – for example, Treasury Laws Amendment (2021 Measures No. 1) Bill 2021 (summary here) - is passed by Parliament. The earliest this could occur is May 2021. You can find a summary of the current position on the Bill here.
- The no-action position does not extend to electronic execution of documents

ASIC has released details of its temporary (and conditional) no-action position on electronic meetings

In light of the ongoing uncertainty around COVID-19 restrictions, and following the expiry of relief under Corporations (Coronavirus Economic Response) Determination (No. 3) 2020 (the Determination) on 21 March 2021, the Australian Securities and Investments Commission (ASIC) has adopted a temporary 'no-action' position on non-compliance with requirements around holding/convening electronic meetings.

This 'no-action' position will be reviewed in September 2021 (or earlier if relevant measures are introduced by Parliament).

Details

(Conditional) no-action position on holding virtual meetings

The no-action position applies to electronic meetings held between the date at which relief under the determination expired (21 March 2021) and the earlier of: 31 October 2021; and the date that any relevant measures are passed by parliament.

ASIC states that reliance on this position is conditional on:

- companies ensuring the technology used enables members 'as a whole' to have a 'reasonable opportunity to participate' in the meeting, including ensuring that those not physically present are able to ask questions and/or make comments at the meeting
- voting at the meeting occurring by a poll rather than a show of hands
- ensuring that all participants entitled to vote at the meeting have the opportunity to do so 'in real time' as well as 'where practicable' in advance of the meeting
- the notice of meeting including sufficiently detailed information about participating in the meeting. ASIC states that this should include how participants can vote, ask questions, make comments/speak at the meeting, as well as the 'extent they are entitled to do so'.

ASIC advises entities who opt to rely on the no-action position to review the following guidelines: ASIC guidelines for investor meetings using virtual technology which have been updated to reflect ASIC's current position.

No action on meeting-related communications

ASIC has also adopted a 'no-action' position on non-compliance with requirements for sending a notice of meeting, sending supplementary information about the meeting and/or using technology to communicate with those entitled to receive the notice of meeting.

The position applies to communications relating to meetings held between 21 March 2021 and the 31 October 2021 or the date at which any relevant measures are passed by Parliament, whichever is the earlier.

ASIC states that reliance on this position is conditional on:

- the Notice of Meeting or supplementary information about the meeting (whether provided electronically or in hardcopy) including either the electronic location from which the relevant information can be viewed/downloaded or the contents of the notice or the supplementary information
- instructions for accessing the contents of the notice being provided to anyone who has not nominated an electronic address being provided 'personally or by post'
- supplementary instructions for online participation in the meeting being given at least two business days before the meeting is held by:
  - electronic message (if the member has provided the relevant details);
  - a notice on the entity's website; and
  - a market announcement if the entity is listed on a market.

The no-action position is intended to cover any failure of the supplementary instructions to comply with sections 249J of the Corporations Act.

No action for AGMs held within 2 months after their due date

ASIC has also adopted 'no-action' position for public companies with a financial year end between 7 January 2021 and 7 April 2021 that do not hold their AGMs within five months after the end of the financial years, where these meetings are held up to seven months after year end.

No further relief from financial reporting obligations

While ASIC has given a 'no-action' position for AGMs up to financial years ending 7 April 2021, ASIC states that it is 'not currently intending to extend the class relief for financial reports to entities with financial years that end between 8 January 2021 and 7 April 2021'.

ASIC states that entities may apply for individual financial reporting relief 'should that be necessary in their circumstances'.

Electronic execution is not covered by the no-action position

ASIC's no-action position does not apply to electronic execution of documents. ASIC explains that this is because 'these measures as they are primarily concerned with the capacity of companies to enter arrangements with third parties rather than Corporations Act obligations administered and enforced by ASIC. ASIC does not have the power to modify the operation of these provisions in a way that affects third party rights and our no-action position similarly does not affect third party rights'.

Legal status of the no-action position

The 'no action' position is a 'statement of regulatory intention'. As such, it does not either preclude either:

- third parties (eg the Office of the Director of Public Prosecutions) from taking action in relation to the conduct covered by the no-action position
- a Court from holding that particular conduct infringes the relevant legislation.

Further, though the position may remain in place until 31 October 2021, it may be withdrawn earlier should Parliament pass relevant measures (for example: Treasury Laws Amendment (2021 Measures No. 1) Bill 2021).

The position also does not cover electronic execution of documents, meaning that pre-COVID requirements now apply.

As such, though ASIC has said the position provides business with 'certainty in the current environment', this is somewhat limited.

In a short statement, the Governance Institute has said that it 'will continue to advocate for resolution of this uncertainty. We remain committed to working collaboratively with the Government, the Opposition, the crossbench and all industry stakeholders to enhance the digital shareholder experience'.

[Source: ASIC no-action position on virtual AGMs 29/03/2021]

Shareholder Activism

Doing enough on diversity already? Shareholder proposals have been filed with a number of US banks calling on them to conduct racial equity audits in the wake of BLM protests, the banks have advised shareholders to vote against the proposals

Following BLM protests sparked by the death of George Floyd in 2020, Ctw Investments Group together with SEIU have filed shareholder racial equity proposals at several large financial services firms - Bank of America, Wells Fargo, Citi, Goldman Sachs, Morgan Stanley, JP Morgan (among others)– calling on them to commission independent racial equity audits and report publicly on the results.

Ctw Investments and SEIU argue that independent racial equity reporting would ensure investors have access to information around the way in which the banks are managing a key risk. They state,

> 'racial equity audit is fundamentally about risk management. Investors need an objective evaluation of how these issuers are measuring their progress on addressing these structural risks. And any such analysis needs to be about more than just compliance; it needs to be about increasing racial justice in the market in line with each issuer's public statements.'

They suggest that the racial equity reports produced by Facebook, Starbucks and Airbnb are examples of how firms might approach reporting.

The proposal is reproduced in full in each of the banks' proxy statements (which are referenced below).

Citigroup, Bank of America, Wells Fargo and Goldman Sachs have each separately advised shareholders to vote against the proposal

The boards of Citigroup, Bank of America, Wells Fargo and Goldman Sachs have each separately advised their shareholders to vote against the proposal on the basis that each organisation considers it is already taking sufficient steps to address the issue.

- The Citigroup board states that the proposal 'is not necessary since Citi has clearly demonstrated that it has in place initiatives and programs intended to address racial inequity, including the racial wealth gap, and Citi has publicly reported on its efforts to identify, prioritize and remedy racial inequity in the financial sector'. You can find full details in Citi's proxy statement here.
- Similarly, the Bank of America (BofA) board states that the 'actions and focus in making progress on the issue of racial equality, and reporting on our progress regularly, render the proposal's requested audit unnecessary'. You can find full details in BoFA's proxy statement here.
- The Wells Fargo board states, 'The Board believes that the Company's significant and ongoing diversity, equity, and inclusion initiatives and its existing and planned future disclosures about its diversity, equity, and inclusion initiatives, including to report on the results of its Human Rights Impact Assessment which is being conducted by a third party and includes a focus on racial equity, are fully responsive to the proposal'. You can find full details in Well Fargo's proxy statement here.
- The Goldman Sachs board states, 'We share the proponent's focus on advancing racial equity…In light of our ongoing commitment to these important issues, we believe that the adoption of the proposal is unnecessary, and therefore not in the best interest of our firm or our shareholders'. You can find full details in Goldman Sachs' proxy statement here.

[Sources: Ctw Investments Group: Racial Equity Audit; 2021 Proxy statements: Citigroup, Wells Fargo, Goldman Sachs, Bank of America]

'Say on climate' initiative continues to gain momentum: Oil Search voluntarily adopts a 'Say on Climate' at the company's 2022 AGM, the ACCR has welcomed the announcement

Oil Search has announced that following engagement with the Australasian Centre for Corporate Responsibility (ACCR), the company has agreed to give shareholders a non-binding advisory vote on its climate report at the 2022 AGM (ie it will give shareholders a 'say on climate' vote). The ACCR's 'say on climate' resolution has been withdrawn in consequence.

Announcing the measure, Oil Search Chair Rick Lee commented,

> 'The non-binding, advisory vote complements the commitments Oil Search made following its Strategic Review last year. In addition to our leadership in climate change disclosure and community engagement, we have set meaningful and measurable GHG targets and we are committed to assessing the opportunities associated with the energy transition. Oil Search aims to be a net zero energy company by 2050 and we look forward to engaging with our Members and discussing our climate change approach.'

In a statement welcoming Oil Search's announcement, ACCR Director of Climate and Environment Dan Gocher commented,

> 'We welcome Oil Search's commitment to transparency and its acknowledgement of the need for a decarbonisation strategy. We will continue to engage with the company over the coming weeks about a recurring annual vote beyond 2022'

Commenting more generally on the say on climate initiative, Mr Gocher emphasised the value of a 'say on climate' vote from a shareholder perspective and called on other ASX listed companies to consider voluntarily adopting the measure. He said,

> 'Say on Climate is quickly becoming an industry standard. Other ASX companies would be wise to get ahead of the curve, and voluntarily commit to providing shareholders with an annual vote on their climate reporting. Due to the rapid transition taking place in the energy sector, it is imperative that shareholders are provided with the information required to assess the future earnings and value of these companies. The Say on Climate framework will provide shareholders with the opportunity to send a clear signal to the board about whether the company is effectively managing the risks of climate change.'

[Sources: Oil Search ASX Announcement 25/03/2021; ACCR media release 25/03/2021]

Related News: Say on Climate supporters

Oil Search's announcement follows similar commitments from a number of other companies including: Santos, Woodside, Rio Tinto and Glencore (among others).

You can find a full list of the number of 'say on climate' supports (ie those companies that have voluntarily adopted a say on climate vote) on the Say on Climate website here

'Feel good' statements aren't enough: Sumitomo Corporation faces a shareholder climate resolution calling for disclosure on how it will achieve its net-zero by 2050 commitment

Activist Market Forces has filed a shareholder resolution with Sumitomo Corporation, calling on the company to disclose its strategy for achieving its net-zero by 2050 commitment.

Specifically the resolution calls on Sumitomo to ' adopt and disclose in its annual reporting a plan outlining the company's business strategy, including metrics and short-, medium-, and long-term targets, to align its business exposure to coal, oil and gas assets with the goals of the Paris Agreement'. You can find the full text of the resolution in English here.

Market Forces argues that the resolution is necessary because despite announcing a net-zero by 2050 goal, the company has yet to set/disclose how it will be achieved. For example it is yet to set/disclose interim targets, conduct scenario analysis or announce coal, oil or gas phase out/decarbonisation plans as other organisations have done.

Market Forces Campaigner Megu Fukuzawa commented,

> 'By aiming for carbon neutrality, Sumitomo acknowledges its destination. Unfortunately, it appears to have no plan for how to get there, and its current targets are out of line with the latest scientific findings. Indeed, its current practices, such as the on-going construction of coal-fired power stations, indicate it is still heading in the wrong direction. When it comes to managing climate risks, the time for feel-good statements is over. Investors are judging companies on what they do, not what they say. And today, Sumitomo is not matching words with action.'

[Sources: Market Forces media release 29/03/2021, Full text of the resolution]

In Brief | Shareholders have filed a resolution with Japan's largest bank, demanding that it align its financing and investments with the goals of the Paris Agreement and disclose its strategy for doing so

[Sources: Market Forces media release 29/03/2021; Full text of the resolution]

Institutional Investors and Stewardship

Accelerating the transition to net zero: Asset managers representing $32 trillion in assets under management are now signatories to the Net Zero Asset Managers Initiative (with more expected to sign on ahead of COP26)

What is the Net Zero Asset Managers Initiative?

- The Net Zero Asset Managers Initiative commits asset manager signatories to a range of actions to support the transition to net zero emissions by 2050 (or sooner) in order to limit warming to 1.5 degrees Celsius. You can find the list of actions signatories commit to undertake here.
- Importantly, the initiative does not (necessarily) commit signatories to divesting entirely/rapidly from high carbon companies. According to the Q&A published by the initiative,

> 'The commitment aims to ensure signatories are managing an increasing proportion of the assets in line with net zero goals. This does not necessarily mean asset managers need to divest a given asset. As set out in the commitment, engagement and stewardship are key levers and managers have to ensure assets that they manage are themselves decarbonising in line with net zero goals and may have more impact on real economy emissions than simply divesting. That said we expect asset managers to be factoring in assessment of the alignment or potential alignment of assets in their investment decision making processes, which may result in decisions not to allocate capital to high carbon investments'.

Gaining ground: Asset managers representing 36% of the total assets under management globally are now signatories

- Following the launch of the initiative in December 2020, a total 73 global asset managers representing $32 trillion in assets under management, or more than a third (36%) of the total assets under management across the globe, are now signatories.
- In the lead up to the COP26 conference, 43 new asset managers representing over $22.8 trillion of assets under management have recently become signatories with more expected to sign on. These include: BlackRock, Vanguard, Lazard Asset Management, LGT Capital Partners, Standard Life Aberdeen and Aviva Investors (among many others).

[Source: Net Zero Asset Management media release 29/03/2021]

Tackling racial inequality: Should institutional investors be pushing for disclosure of meaningful 'equality metrics'?

Following the 2020 Black Lives Matter protests, a number of US organisations made statements in support of racial equality, yet few have taken steps/disclosed the actions they are taking to address the issue within their own organisation or supply chains.

A recent paper, Equality Metrics (and separately a shorter article by the same authors in Harvard Law School Forum) suggests that institutional investors have a key role to play in pushing organisations to take action. Broadly, the authors argue that disclosure of meaningful data - 'equality metrics' – though not a complete answer, is likely to be an effective catalyst for change (as it has been in the context of driving action on climate risk).

'Equality metrics'

For clarity, the term 'equality metrics' is used by the authors to refer to 'systematised corporate disclosure of the current demographic diversity of the workforce and supply chain, as well as measurable, specific plans to improve racial equity'.

What's being suggested?

The authors suggest that institutional investors should call on firms to:

- provide demographic data for various segments of the workforce on 'at least an annual basis' to provide a snapshot of the current state of equality/inequality across the organisation and across supply chains
- set and disclose their goals/objectives for improving workforce demographic diversity
- implement strategies/policies/procedures to achieve their stated goals and disclose these strategies
- provide regular updates on progress towards meeting their stated targets
- disclose progress toward meeting their targets at their progress toward meeting their goals (including their own assessment of whether they are meeting their objectives)

On this last point, the authors suggest that investors should 'encourage firms to engage in root-cause analyses to determine why they are or are not meeting certain goals and to share their own assessments of that information'.

The authors also suggest that investors should encourage firms to apply the learnings they gain through the assessment process to improve their own approach and share the success of initiatives with other market participants to contribute to broader improvement efforts.

The authors argue that the use of equality metrics would have a number of benefits including (among others), providing a baseline against which to assess progress on the issue.

Ultimately, the authors argue that

> 'As significant equity owners in the largest American corporations, institutional investors are well-positioned to incentivise corporations to adopt, assess, reformulate and disclose equality metrics…The work needed to achieve racial equity within corporations is not easy nor will it be quick, but without measurable goals, corporations cannot truly know whether or to what extent their well-meaning efforts are bearing fruit. For institutional investors and corporations that do not wish to squander the current social movement, adopting equality metrics is a necessary first step on the path to achieving meaningful, long-lasting changes for racial equity within corporate America'.
>
> [Sources: Harvard Law School Forum on Corporate Governance and Financial Regulation 19/03/2021; Martinez, Veronica Root and Fletcher, Gina-Gail S., Equality Metrics (January 21, 2021). Yale Law Journal, Forthcoming, Duke Law School Public Law & Legal Theory Series No. 2021-06, Available at SSRN: https://ssrn.com/abstract=3772895 or http://dx.doi.org/10.2139/ssrn.3772895]

Financial Services

APRA Chair tells Committee that work on pre-COVID cyber and super projects has resumed, Hayne implementation is progressing

In his opening statement to the Senate Economics Legislation Committee Australian Prudential Regulation Authority (APRA) Chair Wayne Byres provided an update on some of the supervision and policy activities on which APRA has been focusing since the end of last year, following the temporary COVID-19 pause. Mr Byres also provided a brief update on APRA's response to the Hayne Commission.

Hayne Commission implementation

- APRA is 'on track to complete' the ten recommendations directed to APRA this calendar year, including finalising the new remuneration standard.
- APRA has completed or is 'close to' taking action on 11 of the 12 enforcement referrals (relating to 10 entities) made by the Hayne Commission. APRA expects to finalise its approach on the final remaining matter 'by the end of the year'.

Cybersecurity

Touching briefly on APRA's cybersecurity strategy, Mr Byres observed that due to the nature of the risk – APRA only directly supervises a relatively small proportion of Australia's economic infrastructure - cooperation with other arms of government is necessarily key to the achievement of APRA's objectives.

With this in mind, Mr Byres listed a number of actions the regulator has on foot. These include:

- a program of independent reviews of compliance with Information Security standard (CPS 234)
- a data collection exercise on technology and cyber risks

APRA is also planning to undertake a pilot exercise involving 'penetration testing of selected regulated entities', in conjunction with CFR agencies.

Internally, Mr Byres said that APRA is 'working to ensure we have a robust cross-agency cyber incident response protocol in place for when major cyber incidents happen'

Superannuation

- Focus on delivery of improved member outcomes is yielding results:
  - Mr Byres said that the regulator has been 'making good progress' toward improving superannuation outcomes through it focus on enhanced data, greater transparency, a stronger prudential framework and more 'intense supervision'.
  - Mr Byres said that so far, APRA's work has delivered 'significant improvements across the industry' eg improved governance, lower fees, poor performing fund exits and fund consolidation.
  - On this last point, Mr Byres observed that the momentum on fund mergers is continuing with the number of regulated funds decreasing from 270 in 2013 to 164 now, with six mergers completed since 30 June 2020. Mr Byres said that this 'consolidation has helped drive better governance, stronger performance and lower costs, although we still see plenty of scope for further consolidation and efficiency within the industry'.
- Addressing fund underperformance remains a key area of focus. Mr Byres said that 'there is also still more to do in relation to fund underperformance' and outlined a number of actions APRA is taking to address the issue. This work includes:
  - issuing 'formal notices' to eight superannuation trustees in relation to the 'continuing underperformance of 10 MySuper products' following the publication of the last MySuper heatmap. Mr Byres said that APRA is 'seeking explanations as to the actions being taken' to address concerns. APRA will then review the responses to 'determine the most appropriate steps in each case'.
  - seeking to expand its superannuation data collection to give APRA access to 'more granular' data, including data on costs and expenditure, to enable the regulator to 'scrutinise these aspects of trustee performance much more deeply'

– expand the Heatmaps 'beyond MySuperproducts' in H2 21.

Mr Byres concluded by stating that Australia's financial system 'remains fundamentally sound' and that APRA remains focused on 'maintaining financial and operational resilience' during the COVID-19 recovery.

[Sources: APRA Chair Wayne Byres Opening statement for Senate Economics Legislation Committee 25/03/2021]

Banking: APRA Chair outlines the regulator's top priorities for the sector over the next 12 months

In his speech to the AFR Banking Summit, Australian Prudential Regulation Authority (APRA) Chair Wayne Byres outlined APRA's planned priorities in banking over the next twelve months. Broadly, he said that APRA will focus on sustaining and enhancing the resilience of the banking sector through: capital, credit, cash, continuity (or operational resilience) and contingency ('the five Cs').

Capital – completion of the consultation on proposed changes to the capital framework is a key priority

- Mr Byres said that the banking system entered into the pandemic in an 'historically strong capital position' and that 'the core financial resilience of the banking system is as strong as it has been in recent memory'.
- Proposed reforms of the capital framework:
  - Capital reform and in particular, proposed changes to the capital framework (outlined in a discussion paper released in December 2020), remain 'high' on APRA's list of priorities for 2021.
  - Mr Byres reiterated that the proposed changes 'do not ask the banking system to build more capital' but rather are aimed at building a more resilient system – a 'banking system that is better equipped to respond to adversity' by enabling greater flexibility and building in greater risk sensitivity and enhanced transparency. Mr Byres added that the proposed changes should also support increased competition. 'Once the proposed changes are implemented, we will have a stronger capital framework that will help to future-proof the system from the next crisis, from wherever it may come' he said.
  - In terms of timing, Mr Byres said that APRA aims to complete the consultation in 2021 and provide industry with a 12 month 'implementation runway to be ready by 1 January 2023'.

Credit

- Mr Byres said that the increase in impaired assets (as a result of the COVID-19 pandemic) 'has been nothing like the experience of the 2008/09 global financial crisis' and that the 'signs are good' that any further increase in impaired assets will be 'quite manageable' as opposed to a 'major surge', despite the removal of government support.
- Mr Byres also emphasised the importance of banks not becoming to 'too conservative in their lending'.

The Housing Market

Mr Byres commented that there has been a good deal of speculation that APRA may take action in response to rising house prices, and the actions it will take.

Responding briefly to this, Mr Byres commented that:

- APRA has 'no mandate to target the level of housing prices, or act to improve housing affordability. For us, housing prices are a risk factor, not a goal'.
- Any actions APRA may take would be driven by 'considerations of financial stability and risk taking' based on a number of 'key metrics'. As yet, though the regulator is monitoring risk taking closely together with the Council of Financial Regulators, Mr Byres said that 'there does not seem cause for immediate alarm'. For example, Mr Byres observed that 'at an aggregate level, lending statistics do not show major signs of a return to higher risk lending. The shares of investor lending and interest only lending – areas where we previously intervened – are below where they were 18 months ago, and well down on the previous cycle'.
- Mr Byres said that APRA is 'alert to signs that very low interest rates and rising housing prices create a dynamic in which households seek to take on even higher debt levels, and that banks searching for credit growth seek to accommodate that demand through greater risk taking' eg through 'looser lending standards, .relaxing portfolio limits, or simply not adjusting to market developments'. Mr Byres said that there is as yet no evidence that this is occurring, though APRA is 'digging into this more deeply'.

- APRA is monitoring various indicators - 'the share of high LVR lending, high DTI lending and broker-originated lending' – which are increasing.
- Mr Byres said that APRA is monitoring trends closely and also expects banks to be doing likewise and be ready to answer questions from the regulator.
- Mr Byres said that should risks materialise APRA has a range of tools that it could deploy. Which tool the regulator will opt to use will depend on the particular circumstances.

Cash

- Mr Byres commented that the banking system has been 'awash with liquidity', in the main due to the government's economic support measures. With support measures winding down, APRA also expects to see 'something of an unwind'.
- Mr Byres said that APRA is monitoring the impact of this and that as yet, there is no cause for 'immediate concern'.

Continuity (or operational resilience)

- Mr Byres commented that the pandemic has highlighted a number of 'lessons' around how the operational resilience of Australia's financial services sector could be strengthened.
- APRA is conducting a review of its prudential requirements for operational resilience. This includes:
  - the (possible) introduction of a new operational risk management
  - possible revisions to the existing Prudential Standards for Outsourcing (CPS 231) and Business Continuity Management (CPS 232)
  - the release of additional guidance for entities to encourage better practice.
- APRA will also be 'looking at' existing pandemic planning guidance in CPG 233.

Cybersecurity: a focus on third party providers

- APRA's focus on operational resilience also includes a sharper focus on cyber resilience. Mr Byres observed 'as we have said on a number of occasions, no APRA-regulated bank, insurer or superannuation fund has suffered a material cyber breach yet, but it's only a matter of time until an incident occurs'. Mr Byres flagged that APRA's cyber supervision strategy adopts a necessarily broad approach to resilience (given the nature of the cyber threat) and includes a focus on third party providers as well as regulated entities
- Mr Byres observed that during COVID-19 it was 'often the failure of third-party providers to meet agreed service levels, rather than failures in banks' own operations, that created operational and processing problems. COVID-19 also highlighted difficulties in substituting or switching to alternate service providers in a timely manner to maintain continuity of operations'. In light of this, and in light of the increasingly complex 'web' of third party relationships supporting the financial system, a key goal for APRA is to obtain better assurance as to the resilience of not just banks, but the broader ecosystem in which they operate.

Contingency planning and resolution planning

- In last year's budget, the government approved a temporary increase in APRA's resources to implement stronger recovery and resolution prudential framework. Mr Byres said that the new framework will formalise APRA's requirements on recovery planning and set out obligations on institutions to cooperate with APRA in the development and implementation of resolution plans.
- APRA plans to progress the developments of the prudential standard over the course of 2021 with a view to releasing a draft standard for consultation in late 2021 or early 2022.

Competition in the banking sector

- Mr Byres commented that predictions of the 'demise of the neobank model' following Xinja's recent exit and 86 400's decision to merge with NAB, are 'greatly exaggerated'.
- Mr Byres said that APRA is now considering 'upwards of a dozen applications from aspiring ADIs' many of which incorporate innovative technologies and business models. He added that 'not all will be licensed, but there is no lack of interest'.
- Mr Byres said that APRA has recently revised its licensing framework with a view to 'improv[ing] the prospects of new entrants'. On this point, Mr Byres commented that 'Adding explicit requirements such as the need to have an income-generating product are hardly onerous expectations. But hopefully they will help sharpen up

prospective entrants' plans, and give greater comfort to everyone involved that a new entrant can add to the competitive dynamics of the industry'.

[Source: APRA Chair Wayne Byres - Speech to the 2021 AFR Banking Summit, Banking on an unpredictable future 30/03/2021]

Hayne implementation: ASIC has released advice fee and lack of independence legislative instruments

- The Financial Sector Reform (Hayne Royal Commission Response No.2) Act 2021 (the Act) received assent on 2 March. The legislation implements the government's response to Hayne recommendations 2.1 (annual renewal and payment); 2.2 (disclosure of lack of independence); recommendation 3.2 (no deducting advice fees from MySuper accounts); and recommendation 3.3 (limits on deducting fees from choice accounts).
- Following this, and following consultation on its proposed approach - Consultation Paper 329 Implementing the Royal Commission Recommendations: Advice fee consents and independence disclosure - ASIC has released three advice fee advice instruments and a report (REP 687 Response to submissions on CP 329 on advice fee consents and independence disclosure) highlighting the key issues raised in the consultation.

Three new instruments:

- Under the changes introduced by the Act, fee recipients will need to obtain their client's (ie the account holder or account holders') written consent before deducting/arranging to deduct or accepting payment of fees under an ongoing fee arrangement. The requirements for this consent are set out in ASIC Corporations (Consent to Deductions—Ongoing Fee Arrangements) Instrument 2021/124. To support compliance, ASIC has released an example ongoing fee consent form that meets these requirements.
- The changes also mean that superannuation trustees 'must obtain a fund member's written consent before directly or indirectly passing the cost of providing financial product advice in relation to the member on to their superannuation account(s) under an arrangement (a non-ongoing fee arrangement) that is not an ongoing fee arrangement'. The written consent must meet the requirements in the ASIC Superannuation (Consent to Pass on Costs of Providing Advice) Instrument 2021/126. To support compliance, ASIC has released an example of a non-ongoing fee consent form that meets these requirements. ASIC flags that additional information to assist superannuation trustees to comply with the new requirements 'will be released in the next few months'.
- The changes also introduce a requirement for providing entities (AFS licensees, or their authorised representatives), to disclose their lack of independence where they are providing personal advice to retail clients and they would be in breach of s923A of the Corporations Act if they used the words 'independent', 'impartial' or unbiased' (or similar words/phrases). ASIC Corporations (Disclosure of Lack of Independence) Instrument 2021/125 sets out the requirements of providing 'lack of independence' disclosure to retail clients.

ASIC considers that the three instruments 'strike an appropriate balance between minimising regulatory burden for the financial advice and superannuation industries and ensuring that consumers receive the information that is relevant to them'.

ASIC has provided additional guidance on the new requirements in frequently asked questions here.

[Sources: ASIC media release 25/03/2021]

PJC inquiry launched into mobile payment and digital wallet financial services

On 25 March 2021, the Parliamentary Joint Committee on Corporations and Financial Services began an inquiry into Mobile payment and digital wallet financial services.

Broadly, the inquiry will consider:

- the commercial relationship between mobile payment and digital wallet providers and other stakeholders, including whether there is any 'imbalance in bargaining power' between mobile payment digital wallet services providers and financial services providers, merchants/vendors and consumers
- the implications for competition and consumer protection
- 'the adequacy, performance and international comparison of Australian legislation, regulations, self-regulation, industry codes, standards and dispute resolution arrangements'

The full terms of reference are here.

The deadline for submissions is 21 May 2021.

[Source: Parliamentary Joint Committee on Corporations and Financial Services Inquiry: Mobile payment and digital wallet financial services]

Upskilling bankers in climate related financial risk: Major bank announces plans to establish a team of climate experts

NAB has announced plans to establish a team of climate experts to support customers in their net zero transition. Over the next two years, a group of NAB's corporate and institutional bankers will complete a new course, developed for NAB with Melbourne Business School and the Climate Reality Project, to deepen their understanding of climate related financial risk and transition planning.

Announcing the initiative, NAB Group Executive – Corporate & Institutional Banking, David Gall commented

> 'This is a long-term investment in the capabilities of our bankers. Part of our role as a bank is making sure Australia's biggest companies can access the financial expertise and innovative thinking they need to adapt their businesses over coming years, We know climate change and the transition is keeping customers awake at night. That's why it's important that we invest in building a team of bankers who are the most qualified at climate change transition planning.'

The announcement follows NAB's commitment to align its business operations and lending portfolio to achieve net zero carbon emissions by 2050, including 'working with 100 of its largest greenhouse gas emitting customers to support them in developing or improving their low carbon transition plans by 2023'.

[Source: NAB media release 30/03/2021]

Equal credit access: The US Federal Trade Commission has reminded credit providers of their obligations not to discriminate based on race, ethnicity, religion, sex, sexual orientation or gender identity

The US Federal Trade Commission (FTC) has issued a statement reminding credit providers of their legal obligations to ensure they provide equal access to credit based on non-discriminatory criteria and cautioning that the FTC's expectation is full compliance.

Citing a recent action against Bronx Honda (which allegedly discriminated against African American and Hispanic car buyers) the FTC underlines that it is willing to take enforcement action were required.

The statement goes on to call attention to the FTC's new rule clarifying that the prohibition under the Equal Credit Opportunity Act (ECOA) against sex discrimination also bans credit discrimination based on sexual orientation or gender identity. The FTC states,

> 'When it comes to ECOA, it's clear that discrimination against members of the LGBTQ+ community violates the law. If you handle ECOA compliance at your company, read the CFPB's interpretive rule to make sure your policies are in accordance with those principles'.

The statement concludes by emphasising the FTC's role in protecting all consumers from discrimination and quotes Acting Chairwoman Rebecca Kelly Slaughter as describing the FTC as 'a vanguard agency for enforcing civil rights' through effective enforcement of laws ensuring equal access to credit.

[Source: FTC media release 26/03/2021]

BI test case: The High Court will hear oral arguments on the application for special leave to appeal the NSW BI test case decision, the development has been welcomed by the ICA

The High Court will hear oral arguments on the application for special leave to appeal the NSW Court of Appeal's decision in the first business interruption (BI) test case.

In a statement welcoming this development, the Insurance Council of Australia confirmed that the industry 'remains of the view that pandemics were not contemplated for coverage under most business interruption policies and that the Quarantine Act exclusion excludes COVID-19 related claims'.

Andrew Hall, CEO, Insurance Council of Australia Andrew Hall said,

> 'Today's decision is a welcome next step in this important process and the insurance industry looks forward to presenting what we believe is a compelling case based on a solid legal framework. Given this issue relates to a policy exclusion for which insurers have not been collecting premiums, seeking reinsurance or collecting reserves, there is a strong public interest benefit in the High Court hearing oral arguments. Once final rulings have been obtained from the courts, insurers are committed to applying the relevant principles in an efficient, transparent, and consistent way when assessing claims'.

A second test case in the Federal Court is expected to provide further clarity to industry around certain policy wordings not covered in the first test case. According to the statement, the second case is likely to be heard by the full Federal Court in the first half of September which will mean that 'insurers and policyholders will have certainty on most substantial issues in 2021.

[Source: ICA media release 25/03/2021]

In Brief | ASIC's product intervention order imposing conditions on the issue and distribution of contracts for difference (CFDs) to retail clients took effect on 29 March 2021. The order will remain in force for 18 months, after which it may be extended or made permanent

[Source: ASIC media release 29/03/2021]

In Brief | Philip Kewin has stepped down as CEO of the Association of Financial Advisers. The AFA's General Manager Policy and Professionalism Phil Anderson, has been appointed Acting CEO while the board conducts a search for Mr Kewin's replacement

[Source: AFA media release 25/03/2021]

In Brief | Catastrophe declaration extended: The Insurance Council of Australia has extended the previously declared 'insurance catastrophe' applying to large parts of NSW to include South East Queensland, in order to prioritise support for policyholders impacted by recent floods

[Source: ICA media release 24/03/2021]

Accounting and Audit

Global audit quality survey released: IFIAR has called for continued focus on quality improvement

The international forum of independent audit regulators (IFIAR) has released its ninth annual audit inspection findings survey: 2020 Inspection Findings Survey. Members from 50 jurisdictions participated in the survey.

The headline finding is the slight uptick in the proportion of audit engagements inspected that resulted in at least one 'finding' ie 'a significant deficiency in satisfying the requirements of auditing standards'.

In 2019, 33% of audit engagements inspected had at least one 'finding'. In 2020 this has increased to 34%. Though down from 47% (in 2014) IFIAR comments that the increase is significant because it is the 'only time the finding rate has increased over the past seven surveys'.

IFIAR has called for continued focus on audit quality improvement in light of this.

[Source: IFIAR media release 15/03/2021; Full text report: 2020 Inspection Findings Survey]

Boards and Directors

DIN implementation: Treasury has released draft instruments setting out proposed timeframes for DIN applications during the early stages of the regime

Legislation that will introduce a new director identification number (DIN) requirement, and centralise and streamline access to business registers received Royal Assent on 22 June 2020. You can find a short overview of the reforms here.

In order to allow time to test the DIN regime 'before the full population of directors are onboarded into the system', and in order to ensure that directors are not disadvantaged/in breach of the requirement to have a DIN within the required timeframe, draft legislative instruments have been released for consultation, that will remove the need for directors to apply for a DIN during the early stages of regime.

It's proposed that roll out of the new DIN requirements will be a staged process.

- Directors appointed under the Corporations Act 2001 (Cth) (both existing directors and those appointed during the testing stage) would need to apply for a DIN before 30 November 2022.
- The DIN will then be rolled out to directors of indigenous corporations which are governed by the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (the CATSI Act). CATSI Act directors will need to apply for a DIN before 30 November 2023.

The deadline for submissions to the consultation is 16 April 2021.

Separately, consultation on the DIN data standard and disclosure framework closes on 1 April 2021.

[Source: Treasury consultation: Modernising Business Registers – Transitional Application Periods]

Risk Management

Modern Slavery

Top Story | Modern Slavery deadline approaching

Deadlines for entities to submit their mandatory Modern Slavery Statement are as follows.

REPORTNG PERIOD	STATEMENT DUE DATE
1 July 2019 to 30 June 2020	31 March 2021
1 January 2020 to 31 December 2020	30 June 2021
1 April 2020 to 31 March 2021	30 September 2021
1 July 2020 to 30 June 2021	31 December 2021

You can access a very brief reminder of the requirements here. You can find more a more detailed overview here.

Modern Slavery reporting in the UK finance sector: Analysis of reporting by asset managers under the UK Modern Slavery Act 2015 has identified that more than 50% fail to meet minimum legal requirements

A review of reporting by asset managers under the UK Modern Slavery Act 2015 (the Act) has identified a number of areas where reporting is falling short of expectations. For example:

- **Some asset managers are not publishing statements at all:** Of the 91 asset managers identified as within scope of Modern Slavery Act reporting requirements, 12 asset managers have not published a modern slavery statement on their websites. The report flags this as a concern given it has been over five years since the Act was passed.
- **Not meeting minimum requirements:** Only 47% of modern slavery statements met requirements that the statement be: signed by a director (or equivalent); approved by the Board of Directors (or equivalent management body), and linked from the company's homepage.
- **Supply chains:** Of the 79 statements assessed:
  - 54% did not disclose due diligence processes (eg audits, site visits etc) to address modern slavery risks in their supply chains
  - 28% did not disclose have modern slavery policies in place to address the issue in their direct operations or supply chains.
  - 30% did not disclosure providing any training did not provide any training on modern slavery risks
- **Gaps in risk assessment:** 51% of asset managers conducted some type of risk assessment but of this group, only 30% then identified specific risks (eg such as industry specific or workforce specific risks)
- **Portfolio risk:** Only 27% of reports disclosed conducting some form of due diligence on human rights or modern slavery in their portfolio.

The report calls on asset managers to improve their reporting and makes several recommendations around how they can do so.

Broadly, the report calls on asset managers to ensure their reporting meet legal requirements and to go beyond these requirements to provide more detailed information about what steps are being taken to identify and ultimately to address modern slavery risk in their direct operations, portfolios and supply chains. :

The report also calls on asset managers to 'use their leverage to steer companies to adopt and adhere to human rights standards such as the United Nations Guiding Principles and to engage/share good practice with industry initiatives and collaborations eg the PRI.

Announcing the release of the report – CEO of the UN Principles for Responsible Investment Fiona Reynolds said,

> 'The report highlights that investors should recognise the leverage they have to strengthen their efforts to address modern slavery risks in their financial activities, including investment portfolios, and their supply

chains. At PRI, we have highlighted the importance of considering human rights issues in investment decision making. Many investors recognise that preventing and mitigating actual and potential negative outcomes for people leads to better financial risk management and aligns their activities with the demands of beneficiaries, clients and regulators. Our signatories have made it clear that PRI should focus on social issues, including modern slavery, and this reports further highlights the need for social issues to come to the fore in investment decisions in order to deliver on the achievement of the SDGs and the eradication of modern slavery'.

[Sources: Full report: Beyond Compliance in the finance sector: A review of statements produced by asset managers under the UK Modern Slavery Act; Business and Human Rights Centre media release 11/03/2021]

Climate Risk

Top Story | Positive outlook for investing in Australian renewables

MinterEllison has released a report exploring the current trends shaping the Australian renewable energy market, in addition to the main drivers behind deals, opportunity sectors and challenges facing investors.

The report can be accessed here.

Transition to net-zero: AGL may split its retail from its energy generation business

AGL has announced plans to structurally separate the retail from the energy generation side of the business to 'give each business the freedom, focus and clarity to execute their own respective strategies and growth agendas, while playing an equally important, but different, role in Australia's energy transition'.

Under the proposal:

- 'New AGL' would become 'Australia's largest multi-product energy retailer'. New AGL would be carbon neutral for scope 1 and 2 emissions with 'a clear pathway to full carbon neutrality'.
- 'PrimeCo' would become 'Australia's largest electricity generator' retaining AGL's 'leading low cost thermal generation position'. PrimeCo would continue to run coal power stations until either they are no longer required/not commercially viable, while also developing green energy projects.

AGL states that the plan is being put forward in response to changes in the market driven by customers, community and technology

> … 'an accelerating desire for action on climate change, shifts in government policy and rapidly falling technology costs have changed our market…the market would benefit from greater transparency in valuing each business. And customers would benefit from more targeted products and services'.

You can find further details of AGL's proposals in the investor day presentation here.

Engagement process

AGL has flagged that it now commence a 'process of engaging with shareholders, regulators, government and workforce stakeholders' on both the 'timing and nature of the proposed structural separation' with a view to confirming both by the end of FY21.

[Source: AGL media release 30/030/2021; ASX announcement 30/03/2021]

Largest gas distribution utility in North America announces target to achieve net zero emissions across its Scope 1, 2 and 3 emissions by 2045

The largest natural gas distribution utility in North America, SoCalGas, has set targets to achieve net-zero carbon emissions by 2045 across its Scope 1, 2, and 3 emissions.

Announcing the new targets SoCalGas CEO Scott Drury said the decision is in line with California's 2045 net zero commitment and with the reentry of the US into the Paris Agreement.

As You Sow has welcomed the announcement but stressed that it is important that the company provides details of how the targets will be achieved.

Shareholder resolution at Sempra Energy

The shareholder resolution (you can find details here) calling on Sempra Energy (of which SoCalGas is a subsidiary) has not been withdrawn. Commenting briefly on the resolution As you Sow's senior energy program manager Lila Holzman said that shareholders have 'remaining concerns' about the company's 'anti-climate lobbying activities'.

[Sources: SoCalGas media release 23/03/2021; As You Sow media release 24/03/2021]

Culture

'Wholly unacceptable' behaviour: Chair of Galvani Bioelectronics terminated for alleged sexual harassment/inappropriate behaviour

The Chair of Galvani Bioelectronics and former head of the Trump Administration's Operation Warp Speed, Moncef Slaoui has lost his position as Chair after an investigation determined that allegations that he had sexually harassed a female GlaxoSmithKline (GSK) employee, during the time that he was also employed by GSK several years ago, were found to be 'substantiated'.

The decision to terminate Dr Slaoui's position was announced by the GSK board (GSK is the majority shareholder of Galvani).

In a statement, GSK said that the board received a letter outlining allegations against Dr Slaoui in February and had immediately engaged an 'experienced law firm' to investigate. The decision to terminate Mr Slaoui as Galvani Chair was made after the investigation (which is ongoing) determined that 'Dr Slaoui's conduct substantiated the allegations'.

Announcing the decision GSK states,

> 'Dr Slaoui's behaviours are wholly unacceptable. They represent an abuse of his leadership position, violate company policies, and are contrary to the strong values that define GSK's culture. The company expects everyone at GSK to behave in accordance with its values, especially its leaders where its standards are the highest. Sexual harassment and any abuse of leadership position are strictly prohibited and will not be tolerated'.

Current Galvani board member and SVP Development at GlaxoSmithKline Christopher Corsico has been appointed Chair of Galvani.

A new director, Amy Altshul, SVP Legal, R&D and Global Commercial Franchises at GlaxoSmithKline has also been appointed to the Galvani Board.

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