Governance News

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

13 October 2021

Contents

Boards and Directors

Top Story | DINS are coming: What directors need to know now

Key Takeouts

- The deadlines by which directors will need to have applied for their unique director identification number or DIN have been confirmed.
- No action required yet: Eligible directors will not be able to apply until November 2021. Directors are encouraged to apply for a myGovID if they have not yet done so in preparation for submitting their application.

DIN regime is on the way

Schedule 2 of the Treasury Laws Amendment (Modernisation and Other Measures) Act 2020 introduces a new requirement for directors or alternate directors of companies or bodies corporate registered under either the Corporations Act 2001 (Cth) (Corporations Act) or the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) (CATSI Act) to hold a 'director identification number' or DIN.

The change is part of the government's Modernising Business Registers Program (summarised here).

What is a DIN?

A DIN is a unique 15 digit numerical identifier that will be assigned to each eligible director (upon a one-off application by the director) as proof of their identity.

Directors will then keep their DIN regardless of whether they change companies, change their name, cease to be a director or move interstate/overseas. This will make it easier to trace directors' relationships with companies over time.

The primary aim of the new requirement is to make it easier to track unlawful activity, including phoenix activity, though it's also expected that it will have other benefits. For example: it is expected to reduce time/cost for administrators and liquidators by making it simpler to track directors and their corporate history.

Who needs a DIN?

Directors (or alternate directors acting that capacity) will need to apply for a DIN if they are a director of either:

- a company, a registered Australian body or a registered foreign company under the Corporations Act; or
- an Aboriginal and Torres Strait Islander corporation registered under the CATSI Act

What action do directors need to take now?

The DIN application process will not be open until November 2021 at which point existing eligible directors, and those who wish to apply before their appointment, will be able to submit their application.

For now, the Australian Business Registry Services (public beta) website (ABRS website) suggests that directors set up their myGovID if they have not already done so in preparation for making an application.

DIN application deadlines

An instrument - Corporations (Director Identification Numbers—Transitional Application Period) Instrument 2021 – specifying the deadlines by which existing and future directors will need to have applied for a DIN was registered on 5 October 2021.

The deadline for submitting a DIN application differs according to the date at which directors were appointed. The explanatory statement accompanying the instrument specifies that these deadlines have been set to allow time for the new system to be properly tested and to allow sufficient time for eligible directors to submit their applications.

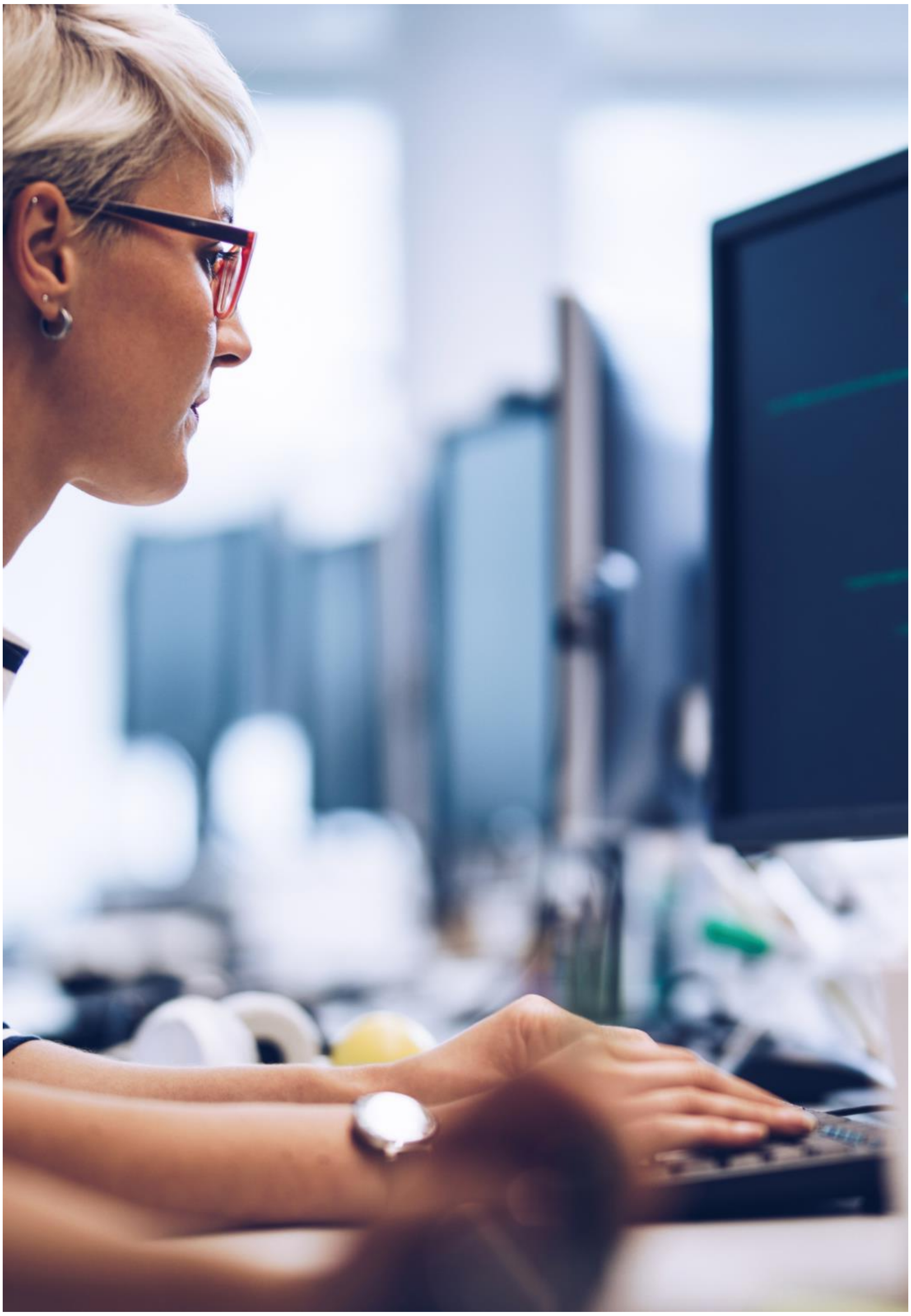
The ABRS website provides further detail on these deadlines. In summary:

Existing directors

- Eligible persons under the Corporations Act who are existing directors or who are appointed as a director on/before 31 October 2021 will have until **30 November 2022** to apply.

- Eligible persons under the CATSI Act who are existing directors or who are appointed on or before 31 October 2022 will have until **30 November 2023** to apply.

New directors



- Eligible persons under the Corporations Act who are:
  - appointed as a director between 1 November 2021 and 4 April 2022 will need to apply for a DIN within 28 days of their appointment as a director
  - appointed as a director from 5 April 2022 will need to apply for a DIN prior to their appointment.
- Eligible persons under the CATSI Act who are appointed as directors from 1 November 2022 will need to have applied for a DIN prior to their appointment.

The application process

Directors are required to apply for their DIN themselves because they will need to verify their identity. Directors will be able to apply online, over the phone or in 'paper form'. Details about the process are available on the ABRS website.

Penalties for non-compliance

Eligible directors who fail to meet their DIN obligations could be issued with an infringement notice or face civil or criminal penalties.

Extensions

Directors who are unable to apply by the relevant deadline will be able to apply for an extension. Information about how to make an extension application is not yet available but will be published on the ABRS website in November 2021.

Diversity

International study finds Australia is lagging other countries on closing the gender pay gap, ANU recommends three changes

- An international report has compared and ranked the gender pay gap reporting frameworks in six countries: Australia, France, South Africa, Spain, Sweden and the United Kingdom.
- The research, published by the Global Institute for Women's Leadership at King's College London and the Australian National University (ANU), identified 11 indicators of best practice reporting, including: accountability, coverage, enforcement and penalties, intersectional elements (the extent to which data is collected on additional aspects of diversity beyond gender) and action plans.
- The report ranks Australia equal last with the UK across the 11 indicators with a score of 4 out of 11. One area where Australia lags other jurisdictions is the lack of requirements for employers to take action to address gender pay gaps eg there is no requirement for Australian organisations to create/execute action plans and/or to report on outcomes.
- The top ranked nation with a score of 8.5 was Spain, followed by France on 8.
- Separately, the ANU has released a companion report which recommends three actions to address the gaps identified in Australia's current approach. These are:
  - Publication of organisation-level gender pay gap data
  - Mandating minimum corrective actions to address the gap (this could be achieved through setting minimum standards designed to achieve rolling average reductions in the gender pay gap)
  - Enacting sanctions for non-compliance eg make eligibility for government contracts and financial assistance such as Commonwealth grants contingent on compliance

  The report also recommends consultation on existing reporting requirements with a view to both streamlining requirements/reducing the reporting burden for organisations and enabling collection of intersectional data (as opposed to limiting data collection to gender-related data only)

[Sources: ANU media release 01/10/2021; Full text report: Bridging the Gap; Full text ANU report: Gender Pay Gap Reporting in Australia]

In Brief | Cranfield's latest annual Female FTSE Board Report tracking board gender diversity at FTSE100 and FTSE250 companies finds that while the Hampton-Alexander minimum female board representation target of 33% has been met in aggregate, 21% of FTSE 100 boards and 32% of FTSE 250 boards have yet to reach it. The report suggests that this calls into question whether it is appropriate to consider the introduction of mandatory targets

[Sources: Female FTSE Board Report 2021]

Shareholder Activism

SEC changes shareholder voting rules, CII says the changes will unfairly 'muzzle' smaller shareholders, files amicus brief in support of the lawsuit challenging the amendments

The Securities and Exchange Commission (SEC) adopted amendments to Exchange Act Rule 14a-8, the shareholder-proposal rule on 23 September 2021. Among other things the changes lift the existing ownership threshold required for shareholders to file and/or resubmit shareholder proposals.

Key changes

Currently shareholders need to have a minimum $2000 holding or 1% of a company's securities for at least one year. Under the changes shareholders will need to demonstrate continuous ownership of either:

- $2,000 of the company's securities for at least three years; or
- $15,000 of the company's securities for at least two years; or
- $25,000 of the company's securities for at least one year.

The changes prohibit the aggregation of holdings for the purposes of satisfying these amended ownership thresholds.

The changes also raise the minimum level of shareholder support required for a proposal to be eligible for resubmission at future shareholder meetings of the same. For example, a proposal that has been voted on three times within the last five years currently needs to secure at least 10% support in order to be eligible for resubmission at future meetings of the same company. Under the changes, the proposal would need to secure at least 25% support.

The final amendments will apply to any proposal submitted for an annual or special meeting to be held on or after 1 January 2022 though there is a transitional period that will allow shareholders meeting specified conditions to rely on the $2,000/one-year ownership threshold for proposals submitted for an annual or special meeting to be held prior to 1 January 2023.

Investor opposition to the changes

The Council of Institutional Investors (CII) has issued a statement that is highly critical of the changes which the CII considers will operate to 'deprive many shareholders of the right to submit proposals to be voted on at US public companies'. The CII is not alone in raising concerns. A number of groups (including CII) have previously written to the regulator arguing that the amendments should not go forward.

The CII has also filed an amicus brief in support of the complaint brought by the Interfaith Center on Corporate Responsibility, James McRitchie, and As You Sow in the District Court for the District of Columbia against the SEC, which alleges that changes to the shareholder proposal rules are 'unlawful under the Administrative Procedure Act and contrary to the Commission's role as "investor advocate"'.

[Sources: SEC media release 23/09/2021; CII media release 23/09/2021]

Fortescue sets net-zero by 2040 target for Scope 3 emissions, the ACCR has welcomed the commitment and called on other companies to follow suit

- Fortescue Metals Group Ltd has set a target to achieve net zero Scope 3 emissions by 2040. The target applies to emissions generated across the miner's entire global value chain including crude steel manufacturing which is the primary driver of the company's Scope 3 emissions.
- Fortescue plans to achieve this goal through the development/application of green-hydrogen technology as well as through the decarbonisation of its own fleet of eight ore carriers. The company will also engage with its shipping partners with a view to eliminating emissions from shipping.
- In addition to the long-term goal to achieve net zero Scope 3 emissions by 2040, Fortescue has set the following medium term targets:
  - Enable a reduction in emissions intensity levels from the shipping of Fortescue's ores by 50% by 2030 from FY21 levels

- Enable a reduction in emissions intensity levels from steel making by Fortescue's customers of 7.5% by 2030 from FY21 levels, increasing to 100% by 2040.

Announcing the new commitments Fortescue CEO Elizabeth Gaines commented:

> 'Fortescue has commenced its transition from a pure play iron ore producer to a green renewables and resources company, underpinned by the world's first major carbon emission heavy industry operation to set a target to achieve carbon neutrality by 2030. This Scope 3 target is consistent with this transition and complements our targets for Scope 1 and 2 emissions reduction.

Activist calls on others to follow suit

In a statement, Australasian Centre for Corporate Responsibility (ACCR) Director of Climate & Environment Dan Gocher welcomed Fortescue's commitment, observing that it compares favourably with less ambitious commitments made by other larger resources companies, an in particular Rio Tinto and BHP. Mr Gocher said,

> 'In the lead up to COP26 in Glasgow, Fortescue has demonstrated the type of corporate leadership that Australia has been lacking for decades. BHP and Rio Tinto should take note.'

[Sources: Fortescue Metals Group ASX announcement 05/10/2021; ACCR media release 05/10/2021]

Engine No 1 announces support for General Motors plan to transition to 100% electric vehicles by 2035

Activist Engine No. 1 (which rose to prominence following its high profile campaign targeting the Exxon board over climate and financial performance) has publicly announced its investment in and endorsement of General Motors Co's (GM's) plan to transition to 100% electric vehicles by 2035 following what Engine No 1 describes as 'constructive and collaborative two way conversations' with the company.

Chris James, founder of Engine No. 1 said:

> 'GM's goal to go 100% electric by 2035 signals one of the largest transformations in the history of the auto industry and creates an opportunity to re-center the battery supply chain in America…The company's early lead on battery technology, along with Mary Barra and the board's leadership, creates tremendous advantages. There's a narrative that only tech companies can move quickly to embrace change and win as the world changes. We don't think that's true. With the right leadership at the board and management level, incumbent companies can transform themselves and their own industry by aggressively investing in the near term in order to drive value creation over the long-term. GM has that leadership.'

The activist has also released a white paper outlining why transition to electric vehicles is necessary, the risks/opportunities this represents for established original equipment manufacturers (OEMs) and detailing at length how investment in the transition will deliver increased shareholder value.

[Source: Businesswire media release 07/10/2021]

Meetings and Proxy Advisers

ISS has released its climate policy and benchmark policy survey results

Key Takeouts

- Tougher expectations for high emitters: Most investors and non-investors agreed that high-emitters should be held to 'more stringent' climate-related expectations than other companies
- TCFD-aligned disclosure: There was strong support among investors and non-investors alike for companies to provide detailed, clear disclosure of climate-related risks (eg TCFD aligned disclosure)
- Net-zero: Most investors and non-investors would support ISS' climate policy assessing companies' alignment with a 'net zero by 2050 emissions pathway' as a means of gauging appropriate management of climate risk/opportunity
- 'Say on climate': There were mixed views on whether shareholder proposals requesting a 'say on climate' should be supported. While 42% of investors consider that these proposals should 'always' be supported, 31% of non-investor respondents consider that shareholder proposals of this kind should never be supported
- Use of ESG-related non-financial metrics in executive compensation plans: Only 4% of investors and 16% of non-investors consider use of these metrics is not appropriate

Institutional Shareholder Services (ISS) has released the results of its latest policy survey in two parts – the first covers specifically climate change related policy issues, the second covers other policy areas.

Responses to the survey will be used by ISS as part of its annual policy development process. ISS expects to complete the process of updating policies in December 2021. The final policies will apply to shareholder meetings occurring on/after 1 February 2022.

Climate policy survey: Snapshot of the key findings

There were 329 responses to the climate survey: 164 responses from investors or investor-affiliated organisations, 152 responses from companies and corporate-affiliated organisations (non-investors), with the remainder from academic and non-profit responders.

POLICY ISSUE	KEY TAKEAWAYS
Minimum climate-related expectations of companies	
Minimum expectations of companies and the boards of companies that are 'strong contributors' to climate change	▪ All survey respondents (investors, non-investor/corporate responders and academics/not for profits) were asked to identify from a list of suggested indicators the actions they consider to be the minimum appropriate to expect of companies that are 'strong contributors' to climate change. They were also asked to nominate factors they view as indicators that a board is 'failing in its management of climate change risk'. ▪ **General support for detailed disclosure:** 85% or more respondents across all survey respondents supported companies providing 'clear and appropriately detailed disclosure of its climate change emissions governance, strategy, risk mitigation efforts and metrics and targets' eg reporting in line with the TCFD recommendations. ▪ **Investors:** A majority (50% or more) of investors also supported all of the criteria listed by ISS. The following received the highest levels of support: – that the company has 'declared a long term ambition to be in line with the Paris Agreement goals for its operations and supply chain emissions (scopes 1,2 and 3 targets) that could reasonably seen to be in line with limiting global warming to well below 2 degrees C' (72% support)

POLICY ISSUE	KEY TAKEAWAYS
	– that the company has demonstrated it is improving its disclosure/performance (even if it is not yet in line with peers of with Paris Agreement goals) (66%) – that the company has 'reported to show that its corporate and trade association lobbying activities are in alignment (or are not in contradiction) with limiting global warming in line with Paris Agreement goals' (65% support)) ▪ There were two exceptions to this: only 48% of investors supported companies setting/disclosing medium term Scope 1 and 2 emissions reduction targets (through 2035) and only 41% supported companies 'starting to show a declining trend in absolute GHG emissions'. ▪ **Corporate responders/non-investors** also were supportive of demonstrating improvement in disclosure (66% support) but far less supportive than investors of declaring long-term ambitions to be in line with the Paris Agreement goals (44% support).
Minimum expectations for (relatively) low GHG emitters	▪ Asked whether the minimum expectations applying to 'strong contributors' to climate change should be extended to companies that are 'not as strongly' contributing to climate change': 33% of investors and 62% of academic/not for profits agreed that the same expectations should apply. Only 28% of corporate non-investors supported this. ▪ The most popular response from investors (53%) and non-investors (44%) was that expectations for companies that are not as strongly contributing to climate change should be lower than for high-emitters.
High impact companies (ie companies that are 'disproportionately responsible for GHG emissions') should be subject to tougher expectations	▪ 83% of investors and 69% of non-investors agreed that high emitters eg the 167 companies identified by Climate Action 100+ as 'disproportionately responsible for GHG emissions', should be 'subject to a more stringent evaluation of additional indicators compared to companies that make a less substantial contribution to climate change' ▪ 24% of non-investors and 10% of investors disagreed with this view.
Say on climate	
Reasons not to support management-proposed advisory resolutions to approve a company's climate transition plan (Management 'Say on climate' proposals)	▪ Asked to nominate what 'could be a 'dealbreaker' for voting in support of a management proposed climate transition plan a majority of respondents across all three groups nominated 'lack of clear and appropriately detailed disclosure' (eg aligned with the TCFD recommendations). ▪ Top three 'dealbreakers' for investors after detailed were a lack of: a) long-term ambition to be aligned with Paris-type goals (76%), b) a strategy and capital expenditure program in line with GHG emissions reduction targets (63%); and c) reporting on lobbying aligned with Paris goals (60%).
Supporting (or not) 'Say on Climate' shareholder proposals	▪ There were mixed views on whether shareholder proposals requesting a regular 'say on climate' should be supported. ▪ The most popular answer from investors (with 42% support) was that these proposals should 'always' be supported, even if the board is managing climate risk effectively. In contrast only 10% of non-investor respondents agreed with this. ▪ 31% of non-investor respondents consider that shareholder proposals of this kind should never be supported. ▪ 36% of investors and 38% of non-investors considered that the decision whether to support a proposal of this kind should be case-specific and

POLICY ISSUE	KEY TAKEAWAYS
	would be warranted only where the company's plan fell short. This was the most popular answer from non-investors.
Vote Targeting: registering concern/support on a company's approach to climate risk	
Vote targeting: Expressing a view on the adequacy (or not) of a company's climate transition plan	▪ 62% of investors consider that voting on a 'the plan itself' to be the 'primary place to vote to express sentiment about the adequacy of climate risk mitigation but that escalation to votes against directors may be warranted in future years if there is multi-year dissatisfaction'. Only 46% of non-investor respondents and 31% of not for profits/academics agreed with this.
Net zero initiatives	
Net zero initiatives – views on whether ISS' climate policy should assess a company's alignment with net-zero goals	▪ 86% of investors and 52% of non-investors would support ISS' climate policy assessing companies' alignment with a 'net zero by 2050 emissions pathway' as a means of gauging appropriate management of climate risk/opportunity ▪ In terms of the importance that should attach to various criteria to assess net zero goals investors generally rated ISS' suggested criteria as more important than non-investors. ▪ Investors ranked the following as the top three criteria: 1) clear board oversight of climate change (74%); 2) clear/detailed disclosure (eg TCFD aligned) (67%) and 3) the inclusion of medium term emissions reduction targets (2026-2035) (66%) ▪ Non-investors ranked the following as the top three criteria: 1) clear board oversight of climate change (47%); 2) clear/detailed disclosure (eg TCFD aligned) (40%); and 3) an announced long term ambition to reach net zero by 2050 (30%)

[Sources: ISS media release 01/10/2021; ISS climate survey results]

Results of ISS Global Policy benchmark survey

- Institutional Shareholder Services (ISS) received 409 responses to the 2021 benchmark policy survey: 159 responses were from investors/investor affiliated organisations; 246 responses were from companies/corporate affiliated organisations and the remainder were from not for profit/academics.
- The survey sought stakeholder feedback on a range of issues many of which are specific to certain regions eg Shariah Supervisory Board Elections - Middle East & North Africa.
- Below is a high level overview of the findings that are of more general relevance relating to use of non-financial ESG performance metrics in executive compensation and the continued use of virtual-only shareholder meetings.

Executive compensation: Use of non-financial ESG performance metrics

ISS sought feedback on whether incorporation of non-financial ESG-related metrics into executive compensation programs is an 'appropriate way to incentivise executives'. Respondents were asked to select their preferred response from a set selection of responses.

- Only 4% of investors and 16% of non-investors consider use of these metrics is not appropriate .
- 52% of investors agreed that the inclusion of such metrics is appropriate provided that 'the metrics selected are specific and measurable, and their associated targets are communicated to the market transparently'. In contrast only 27% of non-investors supported this view.
- 46% of non-investors agreed that the inclusion of such metrics is appropriate 'when chosen well, even ESG-related metrics that are not financially measurable can be an effective way to incentivise positive outcomes that may be important for a company'. Only 34% of investors supported this response.

Asked which pay components they consider to be the most appropriate for inclusion of non-financial ESG-related performance metrics if a company chooses to use them 81% of investors and 71% of non-investors consider that both short-term and long-term incentives could be appropriate depending on the circumstances

Virtual-only meetings

- **Top three investor concerns about virtual only meetings:** Asked to select from a list of possible options the most 'detrimental and/or problematic' aspects of wholly virtual meetings investors nominated: 'management unreasonably "curating" which and how many questions to answer during the meeting, apparently to avoid addressing difficult questions' as the most concerning practice' (91%); followed by inability to submit questions live to the meeting (having no option but to submit questions in advance) (90%); and no opportunity for question and answer/questions submitted but not answered (90%).
- **Top three non-investor concerns about virtual-only meetings:** Asked the same question, non-investors ranked: the inability to ask live questions at the meeting/no option to submit questions in advance (80%) as the top concern followed by: no opportunity for question and answer/questions submitted but not answered (69%) and the inability for shareholders to vote or change their votes at the meeting (63%).

Asked to provide views on the most appropriate way for shareholders to voice concerns about such problematic practices in the context of virtual meetings the views of investors differed markedly from non-investors:

- The most popular response from investors was that an 'adverse' vote against the chair of the board may be warranted (38%). Only 10% of non-investors agreed with this view.
- 32% of investors considered that an 'adverse vote against 'all responsible directors may be warranted. Only 13% of non-investors agreed with this view.
- In contrast the most popular response from non-investors (65%) was that engagement with the company and/or communicating concerns would be sufficient. Voting against individual directors would not be appropriate Adverse votes targeting directors would not be appropriate. Only 17% of investors supported this view.

[Sources: ISS media release 01/10/2021; ISS global benchmark survey results]

Disclosure and Reporting

Top Story | The 'third wave' of climate litigation: greenwashing

MinterEllison has released an report discussing the risks associated with making 'green' claims and sharing insights from recent regulatory investigations and greenwashing litigation in Australia and globally. The report includes practical steps firms can take to minimise the risk of exposure to litigation, regulatory action, or reputational risks from consumer or civil society campaigns.

You can find a short introduction to the report here and download the full text here.

Enhanced 'Say on Pay' disclosure: SEC is consulting on proposed changes to proxy voting reporting requirements

On 29 September 2021, the US Securities and Exchange Commission (SEC) launched a 60 day consultation on proposed changes to (Form N-PX requirements), for mutual funds exchange traded funds and certain other funds (funds).

Broadly, under the proposed changes:

- Funds would need to:
  - use the same language as the issuer's form of proxy to identify proxy voting matters ie 'tie' the description of each voting matter to the issuer's form of proxy
  - categorise each matter by type to help investors identify votes of interest and compare voting records
  - organise the information in their reports in line with requirements prescribed by the SEC and use an XML structured data language to make the filings easier for investors to analyse
  - disclose how their securities lending activity impacted their voting

  These changes are intended to 'enhance' the useability and comparability of information in N-PX reports.
- Institutional investment managers would need to disclose how they voted on 'say on may' matters and generally be subject to the same Form N-PX reporting requirements as funds with respect to their say-on-pay votes. If adopted, this new requirement would complete implementation of Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).
- Mr Gensler said that the proposed changes would 'make it easier and more efficient for investors to get crucial information about proxy votes from funds'.

[Source: SEC media release 29/09/2021]

Institutional Investors and Stewardship

ASFA sharpens its focus on climate risk, seeks feedback on whether a 2050 net zero target is sufficiently ambitious

Key Takeouts

- The Association of Superannuation Funds of Australia (ASFA) has released a discussion paper underlining the extent to which Australia's superannuation fund assets are exposed to climate-related risks and the need for funds to have effective mitigation strategies in place
- ASFA appears to consider funds adopting a net-zero by 2050 target (in terms of investments) as a minimum requirement. Announcing the release of the report, ASFA CEO Martin Fahy said: 'In the absence of a commitment to net-zero greenhouse emissions by 2050, the superannuation industry stands to lose billions of dollars in investment returns on behalf of their members, which ultimately translates to less retirement savings'. The paper seeks feedback on whether a 2040 target would be more appropriate.
- The paper includes a number of questions for feedback on specific climate-related issues. The due date for submissions is 15 October 2021.

The Association of Superannuation Funds of Australia (ASFA) has released a discussion paper outlining the extent to which superannuation funds are exposed to climate risk and the potential impact on of this on portfolio performance (if the risk is not managed appropriately).

The headline message is that given the diversity of assets held by Australian superannuation funds, their overall exposure to climate-change risks is significant. Failure to mitigate these risks effectively could have a real impact on the future value of superannuation asset values and therefore ultimately on Australian retirement savings.

In light of this, the paper underlines the importance of funds implementing effective mitigation strategies. Strategies explored in the discussion paper include funds: a) adopting a portfolio-wide net zero by 2050 target; b) engaging with businesses on climate change risks to support their transition; and c) adopting the Principles of Responsible Investment three step approach.

ASFA seeks feedback on a number of specific questions, primarily related to these three areas, to help inform its position. The deadline for submissions is 15 October 2021.

Regulatory expectations

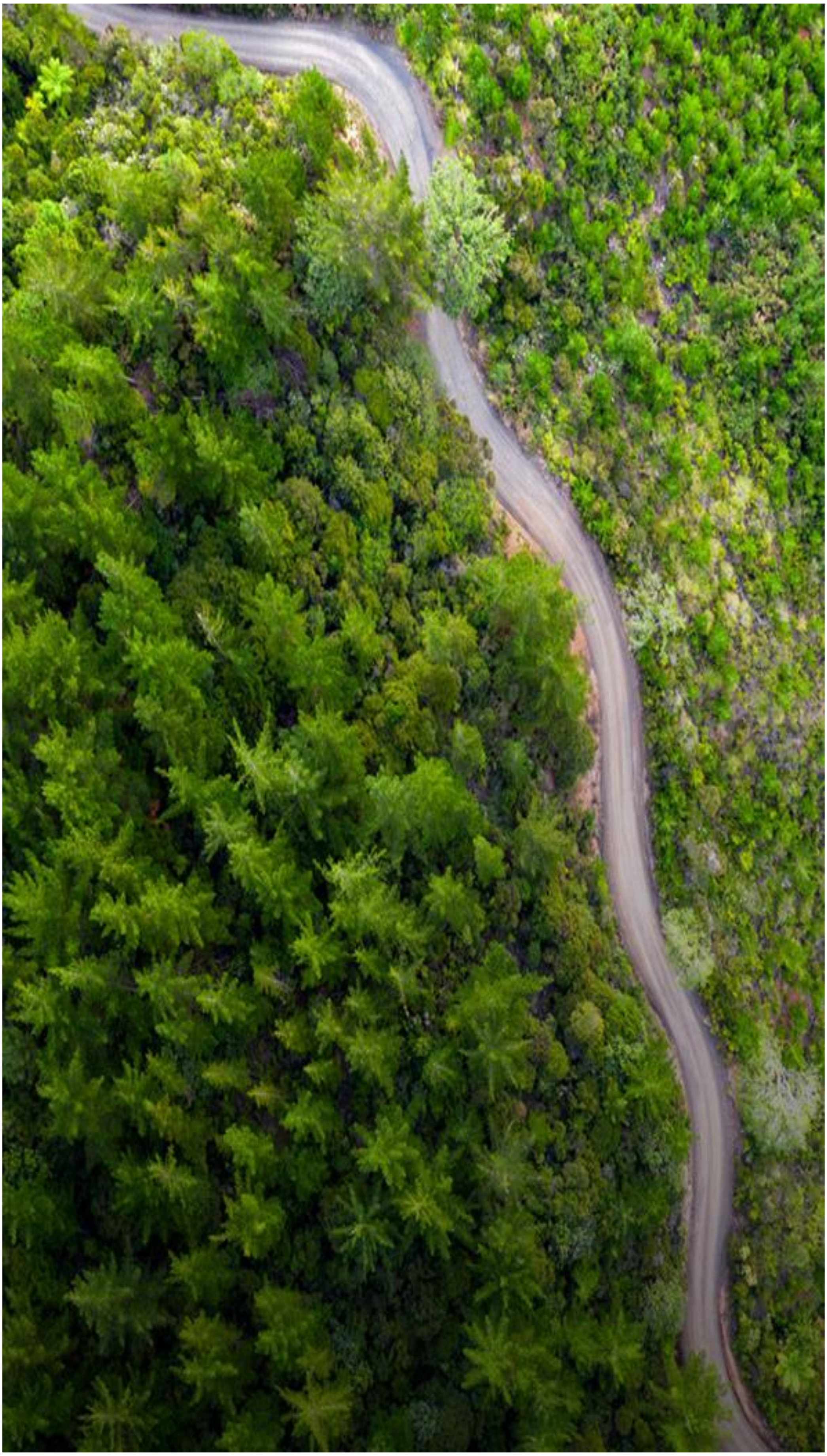
- The discussion paper outlines the approach that Australian financial regulators have adopted with respect to their expectations for how businesses manage and disclose climate-related financial risks.
- ASFA has called for feedback on whether Australian regulators have 'been clear enough in their expectations of organisations when dealing with climate change risk'.

Adopting a net-zero by 2050 goal

- ASFA observes that the adoption of a net-zero by 2050 goal is gaining ground in Australia and globally. ASFA characterises the net zero commitment in the superannuation context as a commitment by funds to gradually transition to investing in low-carbon business models by 2050, thereby helping to secure an orderly transition to a low-carbon economy. That is, ASFA contends that switching to a low-carbon investment portfolio over the next 30 years will help guard against financial stability risks that may otherwise arise from a less-orderly/more disruptive transition.
- Importantly, ASFA makes clear that the way in which individual funds meet their net-zero commitments will necessarily be unique to each fund and that adopting a net zero target does not necessarily commit funds to divesting assets in certain industry sectors and/or rule out future investment in certain industries or sectors. Rather, engagement with business is put forward as the preferred approach, with divestment a last resort (to be used where companies are unwilling to engage)
- ASFA also suggests that the transition to investing in low carbon business models could also involve increasing investments in certain areas eg renewable energy and/or the purchase of green bonds.

Specific questions for feedback: ASFA seeks views in particular on:

- Whether there is support for funds to be 'accountable for net zero emissions by 2050 (in terms of their investments)? Whether this is a sufficiently ambitious goal. ASFA seeks feedback on whether 2040 would be more appropriate.
- How the best financial interests duty interacts with net zero commitments
- Whether there is support for the disclosure of progress towards net zero goals through funds' portfolio holdings disclosure obligations? If so, whether a materiality threshold is needed
- The role that products such as green bonds will play in meeting net zero commitments
- What other products need to be created to achieve net zero emissions commitments



Engagement with business

ASFA considers that the combination of increased engagement by funds with business, together with voting action, can enhance funds' climate risk investment approach. The discussion paper contends that engagement not only provides funds with an opportunity to identify concerns but to 'foster best practice' through sharing insights.

ASFA seeks views on:

- What methods (other than engagement) funds could use to reduce their exposure to climate change risk
- The optimal point at which funds should begin to engage with business to achieve the best outcomes

Principles of Responsible Investment (PRI)

The PRI recommends a three-step approach for asset owners when responding to climate change risk. ASFA seeks feedback on:

- The extent to which funds have commenced implementing the PRI's recommended three step approach: (1) incorporating ESG into investment analysis/decision making processes; (2) incorporating ESG into ownership practices and policies; and (3) disclosing progress toward implementing the PRI approach
- Whether this approach supports or is a barrier to regulators' expectations of funds in relation to climate risk

[Sources: ASFA media release 01/10/2021; ASFA discussion paper: Climate change risk, ASFA discussion paper]

Vanguard's latest stewardship report for H1 2021

Vanguard has released its latest stewardship report covering its engagement/voting activity over the six months to 30 June 2021.

Global engagement themes

Diversity, equity and inclusion (DE&I)

- The report identifies risks to shareholder value associated with diversity, equity and inclusion (DE&I) as a key engagement priority, particularly in the board context. This is reflected both in:
  - the uptick in engagements on board diversity over the H1 2021 period: Vanguard conducted 290 engagements on board diversity during the period (up from 67 in H1 2020).
  - the uptick in engagements related to diversity more broadly: Vanguard conducted 305 diversity-related engagements with companies in H1 2021 (up from 71 in H1 2020)
- Vanguard demonstrated its willingness to register concern over companies' lack of progress toward increased board diversity in the broad sense (gender, race, ethnicity, age and national origin) through voting against individual directors. During the period, Vanguard did not support 173 director nominees due to a lack of sufficient strategy or progress on board diversity.
- Vanguard also demonstrated increased willingness to support shareholder DEI-related proposals, voting in favour of 50% of shareholder proposals of this kind during H1 2021 (up from 17% in H1 2020). The report comments that the uptick in support reflects Vanguard's view that workforce diversity disclosure (disclosure of EEO1 data) is 'reasonable and valuable for investors'. Vanguard states that its focus on DEI-related issues was 'particularly acute' for US companies which were targeted with a range of DEI-related shareholder proposals over the period.

Executive compensation

- Vanguard supported fewer 'say on pay' proposals than previously – the level of support dropped from 91% in H1 2020 to 87% in 2021. A key reason for this highlighted in the report is concern over certain COVID-19 pandemic-related pay adjustments. In particular, concern over companies retroactively adjusting pay hurdles to favour executives. The report states that 'at risk compensation should remain at risk. We believe that the experiences of executives should be aligned with those of shareholders in both good and challenging times'.

Shareholder climate-related proposals

- 'Say on climate' proposals: Vanguard supported 19 of 23 'say on climate' proposals during the period. The report makes clear that each decision was assessed on a case by case basis. The report states that Vanguard does not consider support for a 'say on climate' proposals to 'be a full endorsement of management's strategy or our non-support to show a lack of confidence in leadership. Rather, we view our vote as a signal of the direction of our thinking'.
- Shareholder climate-related proposals: Vanguard voted in support of 20% of shareholder environmental or social proposals (up from 6% in H1 2020). Vanguard supported 100% of management environmental or social proposals.

Looking ahead to the Australia and New Zealand proxy seasons

- Executive remuneration
  - Talent retention: Vanguard observes that with Australian borders still closed due to COVID-19 restrictions, ASX listed companies are having to source executive talent from solely within the domestic market. This has sharpened board focus on talent retention and the risks associated with losing key executives to competitors offering them more attractive pay. This is reflected in the increased prevalence of retention awards of various kinds in proposed remuneration plans.
  - The report makes clear that Vanguard will assess each proposal on a case by case basis and may vote against remuneration plans where the plan does not align with 'performance and the shareholder experience'.

- Climate risk
  - Vanguard expects climate risk will continue to be a key topic in the Australian market, especially for companies in the mining and energy sectors
  - Say on climate: Vanguard welcomes moves by a number of companies to step up engagement with activists/investors on their approach to climate-related risks, including calls to give shareholders a 'say on climate' vote. The report welcomes moves by some companies to voluntarily adopt say on climate votes ahead of meetings which has led to some shareholder proposals being withdrawn ahead of meetings. Vanguard states that it will 'carefully evaluate these [climate] reports in 2022 and beyond'.

- Board composition: The report states that Vanguard takes a 'favourable view' of the 30% minimum diversity recommendations set out in the ASX Corporate Governance Principles and Recommendations which Vanguard considers 'supports Vanguard's stewardship activities as we continue to engage with companies on their board and workforce diversity strategies'.

[Source: Vanguard semi-annual stewardship report 2021]

Gaining traction: Investor support for a global campaign calling on high emitters to set science based emissions reduction targets increases 60% on last year

- A global coalition of 220 financial institutions across 26 countries holding $29.3 trillion in assets has called on the world's 1616 most carbon intensive companies to adopt science based emissions reduction targets in line with 1.5°C warming scenarios ahead of the COP26 conference. The full list of supporting investors is here.
- The companies being targeted have a market capitalisation of over $41 trillion and account for 11.9 gigatons of emissions (Scope 1 and Scope 2) which is equivalent to more than the annual total of the United States and European Union combined.
- The 2021 campaign has seen a significant increase in interest from investors and lenders with 60% more institutions signing the letter to CEOs compared with last year.
- The campaign is being coordinated by the non-profit CDP and is now in its second year. Following last year's campaign, 8.1% of companies targeted (154 companies) joined the Science Based Targets Initiative (SBTi). Over 20% of companies by global market capitalisation are already part of the SBTi.

[Sources: CDP media release 29/09/2021; CDP Science Based Targets Campaign Final Progress Report: 2020 Campaign]

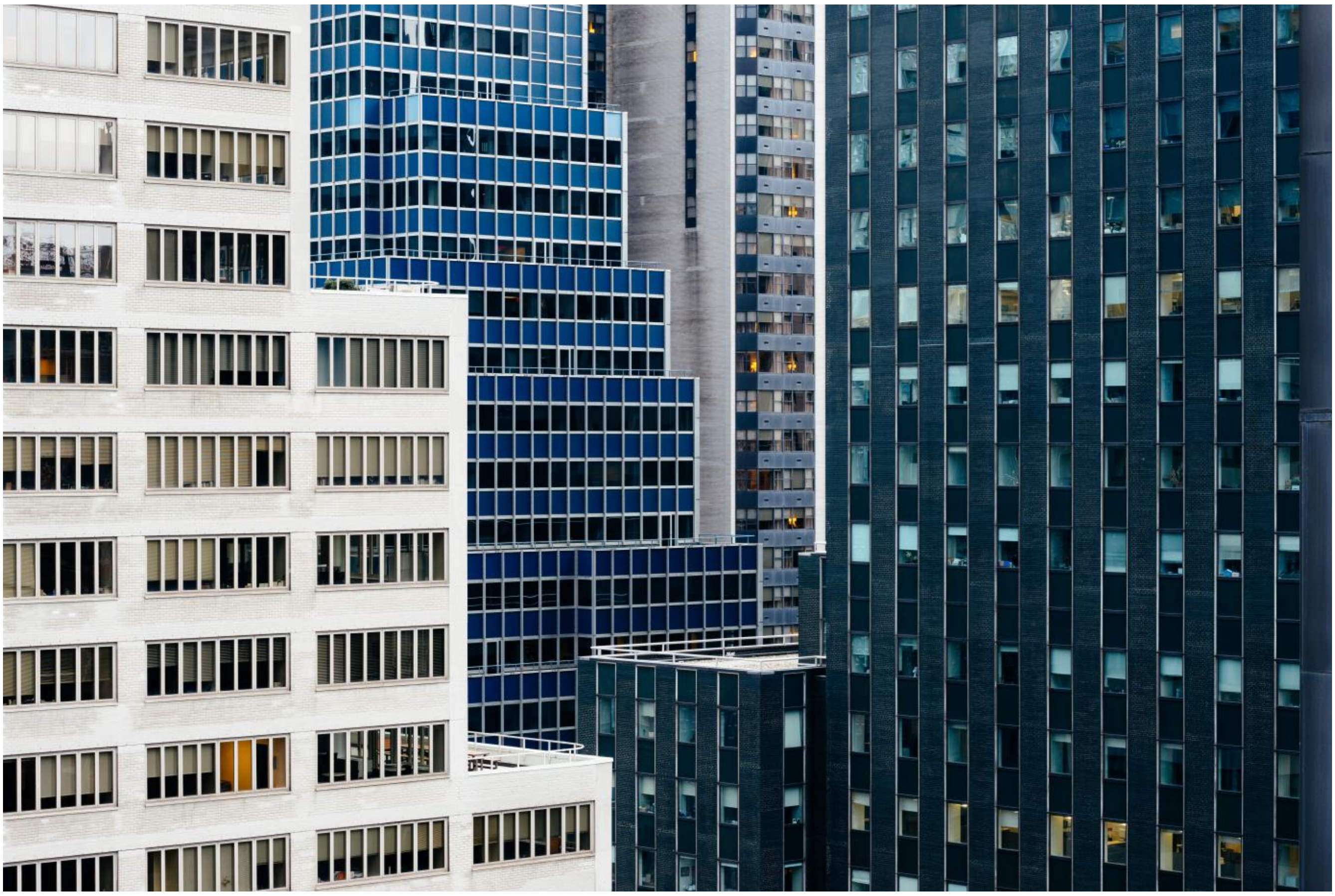
Financial Services

Top Story | COVID-19 Business Interruption Insurance: Second Test Case

On 8 October 2021, the Federal Court of Australia handed down its first instance decision in the second Australian business interruption insurance test case, Swiss Re International Se v LCA Marrickville Pty Limited [2021] FCA 1206 (Second Test Case).

The decision is the latest judicial guidance in Australia around whether certain business interruption insurance policies provide cover to businesses for losses arising from Novel Coronavirus SARS-CoV-2 (COVID-19).

You can find an expert summary and discussion of the decision as well as the likely implications/next steps on our website here.



Past its use-by date? FSC has put forward a proposed roadmap for the reform of the financial advice regulatory framework to significantly cut the cost of advice

- The Financial Services Council (FSC) has released a White Paper on Financial Advice, setting out a proposed framework and timeline to simplify and streamline the existing financial advice regulatory framework to reduce the current compliance and costs burden on individual advisers.
- A key theme running through the white paper is the desirability of moving away from a complex, prescriptive regulatory regime to a simpler, principles-based approach.
- The proposed reforms map out a proposed pathway to the eventual self-regulation of the advice industry by 2030. A summary of the proposed timeline for implementation of the reforms is here
- Announcing the release of the white paper FSC CEO Sally Loane said that the existing regulatory framework is no longer fit for purpose:

> 'The financial advice industry has reached an important milestone, it has become a profession. It is time the Government modernised the current complex and costly regulatory framework to recognise and respect the

professional judgement of advisers. Current regulations prescribe compliance obligations at every step of the advice process. They are an unprecedented driver of cost for financial advisers and consumers, and are past their use-by date'

Snapshot: Three Key Recommendations

The FSC highlights three recommendations as key to reducing the costs burden on advisers. These are:

- abolishing the existing safe harbour steps for complying with the best interests duty;
- replacing Statements of Advice with simpler Letters of Advice; and
- replacing the various categories of financial advice with two categories: personal advice and general advice

The FSC contends, that based on KPMG modelling, implementation of these recommendations could potentially reduce the cost of providing advice by 37%.

These three recommendations and the rationale behind them are outlined briefly in the table below.

THREE KEY RECOMMENDATIONS	FSC RATIONALE	PROPOSED TIMELINE
Abolishing the existing 'Safe Harbour' steps for complying with the Best Interests Duty ▪ The White Paper recommends that: 'The Best Interests Duty in Section 961B (1) of the Corporations Act 2001 should be retained, and the safe harbour steps in Section 961B (2) of the Act abolished in 2023. The Code of Ethics should be amended to reflect this reform but not in effect reimpose the safe harbour requirements as principles. The Code of Ethics should remain principles based and evolve as the sector evolves'.	▪ The FSC contends that compliance with the existing safe harbour steps for meeting the Best Interests Duty is a key driver of costs for advisers and a key barrier to providing low risk financial advice on simple issues (because compliance makes this commercially unviable) ▪ The FSC further argues that 'in practice the safe harbour steps have resulted in a system where meeting the Best Interests requirement has become a "tick-box exercise"' ▪ Cost saving: KPMG modelling commissioned by the FSC estimates that the removal of the safe harbour steps will reduce the cost of financial advice by between 9-11%. Implementing additional reforms would increase the estimated cost saving. ▪ The FSC argues that the abolition of the safe harbour steps should therefore be prioritised as a first step towards implementing a 'principles-based' advice model.	2023 (following the government's planned Quality of Financial Advice Review)
Replacing existing Statements of Advice with simpler 'Letters of Advice' ▪ The White Paper recommends that 'the provision of a Letter of Advice should apply to all forms of personal advice, be able to be provided physically or digitally, and comprise three requirements: ▪ Specify the subject matter and scope of the financial advice sought; ▪ The circumstances of the consumer relevant to that financial advice sought; ▪ The recommendation relevant to the subject of the advice that is given in accordance with the Best Interests Duty and a reasonable rationale for that advice.	▪ The FSC contends that onerous disclosure requirements coupled with the risk of penalties for breaches of those requirements have meant that in practice Statements of Advice are often lengthy and difficult for consumers to understand. ▪ The FSC argues that the proposed simplification of requirements would address this by enabling advisers to use their professional judgement to determine the appropriate level of detail (beyond certain minimum requirements) to include. ▪ The FSC argues that this approach will 'help develop a culture of disclosing what is commensurate to the risk of the financial advice being sought, rather than a catch-all approach'. ▪ Cost saving: KPMG modelling commissioned by the FSC estimates that replacing the Statement of Advice with the Letter of Advice as recommended would reduce the time taken to produce advice by 17% from 23.9 hours to 19.9 hours. This change would reduce the cost of providing advice by $917.24, from $5334.64 to $4,417.40.	2023

THREE KEY RECOMMENDATIONS	FSC RATIONALE	PROPOSED TIMELINE
Satisfaction of these requirements should ultimately rest on the professional judgement of the advice provider and regulators should set reasonable and clear requirements around the data and record keeping with respect to Standard 8 of the Code of Ethics and Section 947B of the Corporations Act. The Statement of Advice and its requirements in Section 947B of the Corporations Act should be amended to reflect the requirements of the Letter of Advice. The requirement to provide a Record of Advice should be abolished'	Implementing additional reforms would increase the estimated cost saving.	
Replacing existing categories of advice with two categories: General Information and Personal Advice ▪ Recommendation 11 recommends that 'personal advice should be defined in legislation as advice that considers the personal circumstances of an individual consumer. The current education and professional standards should continue to apply to providers of personal financial advice. Personal financial advice should only be provided by a trained qualified financial adviser' ▪ Recommendation 12 recommends that '"Intra-fund" advice, "strategic" advice, "specialised" advice would all simply be personal advice. Specialised advice would be a 'restricted form of personal advice'. ▪ Recommendation 13 states that '"General Information" is factual information that is not specific to an individual consumer's circumstances and which does not make or imply recommendations. General Information should be legislated and consolidate the remaining elements of "General Advice', as well as the existing concepts of 'Education' and 'Factual Information'. ASIC should support the interpretation of General Information with regulatory guidance'.	▪ The FSC argues that the existing 'complex web' of various categories of advice should be simplified with any information given by adviser that considers an individual consumers' circumstances falling into the 'personal advice category' and therefore triggering the proposed 'reformed Best Interests Duty obligations and the Letter of Advice disclosure obligations'. ▪ The FSC argues that this reform would provide clarity around what is and what is not personal advice (in light of the recent High Court decision). Having said this, the White paper draws a distinction between consideration by an adviser of an 'individual consumers' circumstances' and 'personal circumstances' contending that personal circumstances 'could have a much broader application'. ▪ Cost saving: KPMG modelling commissioned by the FSC estimates that 're-labelling or simplifying the model of financial advice even with distinctions of simple and complex will still likely result in a 9% reduction in the cost of advice or reduce the cost of the advice process from $5,334.64 to $4,865.39.'	'After 2026'

- Other recommendations put forward by the FSC include (among others):
  - Raising the threshold under which consumers are identified as 'retail clients' to those with assets of less than $5 million (up from $2.5 million) and indexing the threshold to CPI (currently not indexed)
  - Removing the link between financial products and advice
  - Transitioning to self-regulation by 2030 in which prior learning and pathways, and individual registration are supported by the Australian Financial Services Licensing Regime.

  [Sources: FSC media release 12/10/2021; FSC White Paper on Financial Advice]

Supporting Hayne implementation: FSC to introduce an enforceable standard prohibiting the use of occupational exclusions and restrictive definitions within default group life insurance policies in superannuation amongst FSC members

Context

- Hayne Recommendation 3.5 recommended that a person should have only one default superannuation account and that 'machinery should be developed for "stapling" a person to a single default account'.
- Schedule 1 of Treasury Laws Amendment (Your Future, Your Super) Act 2021 (YFYS Act) implements the government's response to this recommendation. New single default account amendments will apply in relation to employees who commence employment on or after 1 November 2021. You can find out more about what the new stapling requirements mean for employers here.
- The introduction of stapling could potentially lead to members being stapled into funds where they are ineligible to claim under their default policy because of their occupation. To address this concern, the Financial Services Council (FSC) released a policy paper (summarised in Governance News 18/08/2021 at p20) for consultation on 12 August 2021 proposing to implement a prohibition on the use of occupational based exclusions in default life insurance policies in MySuper offerings. That is, a prohibition on 'the use of any terms in MySuper group life policies that would cause a claim to be declined in default group life insurance in superannuation on the basis of a change in the occupational classification of the member'.

FSC to introduce an enforceable standard to prohibit the use of occupational exclusions and restrictive definitions

- On 11 October 2021, the FSC announced that it will be introducing an enforceable FSC Standard to prohibit the use of occupational exclusions and restrictive definitions within default group life insurance policies in superannuation amongst FSC members.
- The enforceable FSC Standard will:
  - apply to all default cover for Life Insurance, Total and Permanent Disability and Income Protection insurance in MySuper and Choice products
  - and ban the use of exclusions and restrictive disability definitions because a member is employed in a high risk occupation.
- The standard will not prevent trustees from electing not to offer cover to a new member based on their occupation when the member joins the fund. Where this occurs the new member would not be charged insurance premiums.
- The Standard will also not apply to individually underwritten life insurance in superannuation.
- Planned implementation timeline: Subject to the finalisation of the standard and to further consultation with regulators, the FSC plans that trustees will need to remove their occupational exclusions and restrictive disability definitions for members in high risk occupations by 1 January 2023.

  [Source: FSC media release 11/10/2021]

Hayne implementation: Consumer advocates, legal centres and professional associations call for the proposed CSLR to be broadened

Context

- Hayne Recommendation 7.1 recommended the establishment of a Compensation Scheme of Last Resort (CSLR).

- The government released a package of draft legislation proposing to establish a compensation scheme of last resort together with a proposal paper setting out its proposed approach to various aspects of the operation of the scheme (eg scope, eligibility) for consultation on 13 July 2021. Consultation closed 13 August 2021.
- Were the draft legislation package enacted in its current form, it would commence on the later of 1 January 2022; and the day after the Financial Services Compensation Scheme of Last Resort Levy Bill 2021 receives the Royal Assent. The package would not commence if the Financial Services Compensation Scheme of Last Resort Levy Bill 2021 is not passed.
- The government intends that the regulations (which have not yet been consulted on) and the legislation to enact the scheme will be legislated by Q4 2021-Q1 2022. It is as yet unclear when the scheme would start processing applications for compensation.
- Submissions from consumer groups and industry associations have raised concerns about the proposed design of the scheme:
  - Industry associations: Though supportive in principle of a CSLR, 12 industry associations/representative bodies have raised concerns about the proposed design/approach calling among other things for the scope of the scheme to be narrowed and for the approach to funding to be rethought.
  - Separately consumer groups have also raised concerns about the design and scope of the regime (though for different reasons). Among other things, the groups have called for the scope of the scheme to be broadened.
  - You can find a summary of the concerns raised in these submissions in Governance News 18/08/2021 at p14

Consumer advocates, legal centres and professional associations have called for the proposed CSLR to be expanded

- 15 consumer groups and professional associations have called on the Federal government to expand the proposed compensation scheme of last resort (CSLR) to provide compensation for all financial products and services that fall under the jurisdiction of the Australian Financial Complaints Authority (AFCA).
- The groups consider the proposed scheme to be inadequate because it would exclude 'vast segments of the financial industry' eg managed investment schemes and the funeral expenses industry. This would mean that many victims of financial misconduct would be left without redress.
- The 15 consumer groups/professional associations are as follows: Association of Financial Advisers; Boutique Financial Planning Principals Association; Chartered Accountants Australia and New Zealand; CHOICE; Consumer Action Law Centre; Consumer Credit Legal Service (WA) Inc; Council of the Ageing (COTA); CPA Australia; Financial Rights Legal Centre; Financial Counselling Australia; Financial Planning Association of Australia; Institute of Public Accountants; Super Consumers Australia; SMSF Association; and Uniting Communities.
- Parliament is due to resume sitting on 18 October 2021.

  [Source: CHOICE media release 06/10/2021]

Hayne implementation: Consultation on regulations and a legislative instrument to support implementation of the Better Advice Bill

Context

- The Financial Sector Reform (Hayne Royal Commission response – Better Advice) Bill (Better Advice Bill) is has passed the House and is currently before the Senate.
- Broadly, the Better Advice Bill proposes to implement:
  - the government's response to Hayne Recommendation 2.10 (the establishment of a single disciplinary body for financial advisers and new registration system for financial advisers)
  - Recommendation 7.1 of the Independent Review of the Tax Practitioners Board (TPB) to introduce a single disciplinary and registration system for financial advisers that provide tax (financial) advice services
  - the government's decision to wind up the Financial Adviser Standards and Ethics Authority (FASEA) and transfer its functions to the government, with the Australian Securities and Investments Commission (ASIC) responsible for administering the financial adviser exam.

Consultation on draft regulations and a draft legislative instrument to support implementation of the Better Advice Bill

- Treasury has released draft regulations - [Exposure Draft] Corporations (Fees) Amendment (Relevant Providers) Regulations 2021 and [Exposure Draft] Financial Sector Reform Amendment (Hayne Royal Commission Response - Better Advice) Regulations 2021 – for consultation that sets out much of the detail around how the measures in the Better Advice Bill are proposed to operate.
- Broadly, the draft regulations propose to:
  – prescribe the criteria for when ASIC must convene a Financial Services and Credit Panel (FSCP)
  – provide for the 'allowances and expenses' to be paid to witnesses summoned to appear at a hearing of an FSCP
  – confirm that breaches of the Code of Ethics and continuing professional development (CPD) requirements are not taken to be significant (and therefore may not be reportable) under the relevant breach reporting regime
  – prescribe sanctions that must be included on the Register of Relevant Providers
  – extend the deadline for certain existing providers to pass the financial adviser exam
  – providing for the Minister to be able to delegate the functions and powers to approve foreign qualifications to officers in the Department of Treasury
  – set requirements (including eligibility criteria and fees) to provide for persons, companies and partnerships to register as tax agents that provide tax (financial) services under the Tax Agent Services Act 2009 (Cth) (TAS Act)
  – make amendments to the TAS Regulations to remove the requirement for persons who provide tax (financial) advice services to be registered under the TAS Act and no longer recognise tax (financial) adviser associations
  – set fees for the financial adviser exam and applications for registration of financial advisers.
- The draft Instrument - Corporations (Relevant Providers - Education and Training Standards) Determination 2021 – proposes to put in place the principles to guide the administration of the financial adviser exam by the Australian Securities and Investments Commission (ASIC) and the setting of education and training standards for the provision of tax (financial) advice services by relevant providers.

Proposed Timeline

- Consultation on the exposure draft regulations and a draft legislative instrument will close on 15 October 2021.
- It's proposed that the draft instrument and draft regulations will take effect from 1 January 2022.
- If the Better Advice Bill is passed in its current form, the new disciplinary and registration systems for financial advisers will apply from 1 January 2022.
- New registration requirements:
  – Stage 1 registration would commence from1 January 2022 and require financial services licensees to make a one-off application to ASIC to register their financial advisers.
  – Stage 2 registration for individual advisers (which would require individuals to apply to the registrar to register themselves annually) would commence either on a day set by proclamation, or if no such proclamation is made within a specified period, four years after Assent

  [Source: Treasury Consultation: Better Advice Bill - Exposure Draft Regulations 29 September 2021-15 October 2021]

Countering the rising risks of residential mortgage lending: APRA increases banks' loan serviceability expectations

- The Australian Prudential Regulation Authority (APRA) has increased the minimum interest rate buffer it expects banks to use when assessing the serviceability of home loan applications from 2.5 percentage points above the loan product rate to 3 percentage points above the product loan rate.
- The increase in the interest rate buffer will apply to all new borrowers and is expected to reduce the maximum borrowing capacity for the 'typical borrower' by approximately 5%.
- APRA comments that 'given some borrowers are already constrained by the floor rates that lenders use, and that many borrowers do not borrow at their maximum capacity, the overall impact on aggregate housing credit growth flowing from this is expected to be fairly modest'.

- APRA said that the decision to raise the interest rate buffer 'reflects growing financial stability risks from ADIs' residential mortgage lending' and is aimed at ensuring the ongoing stability of the financial system. APRA makes clear that the decision is 'not seeking to target the level of housing prices' but rather is aimed at ensuring that 'mortgage lending is conducted on a prudent basis and that borrowers are well-equipped to service their debts under a range of scenarios'.
- APRA states that the decision has the full support of the other members of the Council of Financial Regulators and the Australian Competition and Consumer Commission (ACCC).
- APRA flagged that together with the other members of the CFR it intends to 'continue to closely monitor risks in residential mortgage lending, and can take further steps if necessary'.

[Source: APRA media release 06/10/2021]

AFCA's latest complaints data shows a fall in the number of complaints against major banks, flags the volume of funeral plan complaints as an area of concern

According to the Australian Financial Complaints Authority (AFCA) during the period 1 July 2020 – 30 June 2021:

- **The number of complaints about the four major banks fell by 7%.** Chief Ombudsman and CEO David Locke welcomed this result and expressed the hope that 'all firms and customers continue to do what they've been doing – firms actively engaging with customers they think may be struggling, and customers talking to firms before a small problem becomes a bigger one'.
- **90% of complaints were resolved within six months**. Again Mr Locke welcomed this result stating that it 'demonstrates that AFCA is achieving its purpose in being faster and cheaper for consumers and firms compared to an alternative such as a court or tribunal'.
- **70% of complaints were resolved during the early stages of AFCA's process** (because the parties were able to reach agreement/an outcome in favour of the complainant was reached) without the need to progress the case to the ombudsman for a formal decision. Where complaints did progress to a formal decision, it was likely to be decided in favour of the financial firm. Mr Locke said that it was 'pleasing' that firms are willing to work with AFCA and their customers to resolve complaints early.

Areas of concern

- **Funeral plans continue to be of concern:** Funeral plans were among the top five life insurance products most complained about during the period. Of the 260 funeral plan complaints received over the period, more than half were from people who self-identified as Aboriginal or Torres Strait Islander people. AFCA has awarded $700,000 in refunds and compensation in funeral plan cases.
- **Paid representatives: 5% of complainants were assisted by a paid representative.** On more than 200 occasions during the period, AFCA used its powers to refuse to continue considering a complaint because of a representative's conduct (where this occurs, AFCA works directly with the complainant). Mr Locke observed that AFCA is 'working to ensure a small number of paid representatives who are not acting in good faith are prevented from exploiting AFCA's process, either by delaying matters or by lodging complaints lacking merit.'

[Source: AFCA media release 07/10/2021]

Insolvency and Reconstruction

ASIC gives companies in external administration more time to comply with AGM and financial reporting obligations

Following consultation (Consultation Paper 337 Externally administered companies: Extending financial reporting and AGM relief (CP 337)) the Australian Securities and Investments Commission (ASIC) has issued conditional relief - ASIC Corporations (Amendment) Instrument 2021/506 – removing the need for companies under external administration to seek individual relief from certain financial reporting and AGM obligations under the Corporations Act 2001 (Cth) (the Act).

Announcing the changes ASIC Commissioner Sean Hughes said:

> 'Our new legislative relief will provide companies in financial distress more time to comply with financial reporting and AGM obligations while ensuring members are able to continue to access information about the externally administered company.'

Details

Broadly, the relief means that:

- companies will have a minimum of six months after the appointment of the voluntary administrator, managing controller or provisional liquidator (and up to a maximum of 24 months) to comply with financial reporting obligations under part 2M.3 of the Act and any continuing obligations under Part 2M.3 of the act (deferral relief).
- If a voluntary administration is followed by a deed of company arrangement (DOCA), 'the deferral relief will continue up to 24 months after the voluntary administration commenced, so long as the deed administrator exercises all or most of the management functions and powers of the company under the DOCA'.

- companies will also have until two months after the deferral relief (above) expires to meet the requirement to hold an AGM under section 250N of the Act and any continuing obligations under section 250N of the Act (AGM deferral relief).

The deferral relief and the AGM deferral relief are not available to companies in liquidation.

ASIC has updated its guidance in Regulatory Guide 174 Relief for externally administered companies and registered schemes being wound up (RG 174) to reflect the change. RG 174 includes guidance on the circumstances in which an externally administered company may rely upon ASIC's relief.

ASIC has also released Report 703 Response to submissions on CP 337 Externally administered companies: Extending financial reporting and AGM relief (REP 703) which highlights key issued raised in submissions and ASIC's response.

ASIC has said that it will continue to consider individual relief applications in relation to financial reporting and AGM obligations for situations outside of the legislative relief.

[Sources: ASIC media release 06/10/2021; ASIC Corporations (Amendment) Instrument 2021/506]

Combatting illegal phoenix activity: ASIC has released information sheet 261: ASIC orders about credit-defeating dispositions

- The Australian Securities and Investments Commission (ASIC) has published Information Sheet 261 ASIC orders about creditor-defeating dispositions (INFO 261) setting out how registered liquidators can request that ASIC make an order to undo the effect of a voidable creditor-defeating disposition
- The information sheet covers:
  - ASIC's power to make orders about creditor-defeating dispositions
  - The process for making a request for ASIC to make such an order
  - The factors that ASIC will consider when assessing the request
  - How liquidators can apply for Assetless Administration Fund assistance in relation to creditor-defeating dispositions
  - The information that ASIC must disclose when deciding whether to make an order

[Source: ASIC Information Sheet 261 (INFO 261) 11/11/2021]

Risk Management

A roadmap to net zero? Independent MP Zali Steggal to reintroduce revised climate change Bills

Independent Federal MP Zali Steggal has flagged her intention to reintroduce revised versions of the Climate Change Bills -Climate Change (National Framework for Adaptation and Mitigation) Bill 2020 and Climate Change (National Framework for Adaptation and Mitigation) (Consequential and Transitional Provisions) Bill 2020 (summarised in Governance News 11/11/2020 at p30) – to parliament when it resumes sitting on 18 October 2021.

The Bills have been updated to include:

- a mid-term target in the objects and guiding principles. The specific wording is: 'a 60% reduction of emissions on 2005 levels by 2030'
- positive duties on the Minister to ensure adaptation plan goals, Net Zero by 2050 and emissions budgets are met
- provision for a 10 yearly review of the operation of the Bill (once legislated)
- provisions for the proposed Climate Change Commission to establish sub-committees to assist with specialised plans for areas such as adaptation and fair employment transition

Announcing her intention to reintroduce the revised legislation, Ms Steggal said that the Bills would deliver a credible pathway forward on climate which the government could present to COP26 and which would position Australia to take advantage of the opportunities flowing from the global transition to a net zero economy.

Ms Steggal said that if the government fails to support the measures she intends to take the Climate Change Bills to the next federal election. Ms Steggal also made clear that her support for any future minority government would be contingent on support for the passage of the Bills.

[Source: Zali Steggal media release 07/10/2021]

A science based framework for companies to set net-zero targets: SBTi to launch a global standard to ensure net zero targets are sufficiently rigorous

- Following a consultation process, the Science Based Targets Initiative (SBTi) plans to launch the first science-based framework for companies to set rigorous net-zero targets - the Net-Zero Standard - on 28 October 2021.
- The new standard aims to address various criticisms/concerns of net-zero targets including that they: a) often lack rigour; b) enable companies to delay taking action until 2050; c) often exclude Scope 3 emissions; and d) place insufficient focus on emissions reduction, focusing instead primarily on use of offsets to neutralise emissions.
- To address these (and other concerns) the new SBTi standard will require companies to:
  - reduce their emissions in line with a global temperature increase of 1.5°C before 2050
  - set short term targets and take rapid action to reduce emissions in the next 5-10 years, in line with a global temperature increase of 1.5°C before 2050
  - set long-term 'deep decarbonisation' targets of 90-95% across Scope 1, 2 and 3 – ie covering all of a company's value chain emissions, including those produced by their own processes (Scope 1), energy and power they buy-in (Scope 2) and those generated by suppliers/customers (Scope 3) - before 2050
  - cap dependence on carbon offsets to neutralise emissions that cannot be eliminated at 5-10%
  - submit their net zero targets to external, independent verification and provide annual progress reports against their targets.

The latest version of the draft standard is here.

[Source: Science Based Targets Initiative website: Science Based Targets Initiative blog post 07/10/2021; latest version of the draft standard]

An excuse to 'greenwash'? Advocacy groups have called for membership requirements for the UN-convened Glasgow Financial Alliance for Net Zero to be strengthened

- 90 advocacy groups have written directly to UN special Envoy on Climate Action and Finance Mark Carney, ahead of the COP26 conference, urging him to strengthen the guidelines for membership of the Glasgow Financial Alliance for Net Zero (GFANZ).
- The letter, which was published in the Financial Times and the Toronto Star, contends that banks and other financial institutions are currently able to use 'net zero by 2050' commitments 'largely as greenwash' in that the commitment enables them and their leaders to delay taking action to cut emissions in the immediate term. Richard Brooks, Climate Finance Director with Stand.earth. commented:

  'The membership requirements for these net zero initiatives are set too low and as a result these alliances are doing the opposite of what they're supposed to…Rather than forcing banks and other financial institutions to step up their climate action, they're giving them the cover to continue their dirty financing of fossil fuel companies. We are running out of time and can't waste it on more greenwashing talk.'

- The letter argues that despite signing onto the GFANZ, many signatories have issued new financing to companies expanding fossil fuel infrastructure and the majority of signatories have not: a) submitted detailed plans to reduce their fossil fuel investments; b) set measurable interim emissions reduction targets; and/or c) ruled out reliance on 'discredited offsetting schemes and other unproved carbon dioxide removal technologies'.
- The groups have called for Mr Carney to take steps to set a 'true gold standard' by calling on signatories to:
  - set fossil fuel financing reduction targets and implementation plans covering all of their financial services with a goal of reducing financed emissions by 50% by 2030
  - integrate the findings of the IEA Net Zero scenario into their climate strategies
  - phase out all financing of thermal coal, oil and gas companies (starting with coal)
- The letter also calls for signatories to be required to commit to protect/restore biodiversity through their financing activities and to 'ensure the free, prior, and informed consent of Indigenous communities'

  [Source: Stand.earth media release 07/10/2021; Open letter]

Concrete industry announces net zero by 2050 ambition

- Cement, Concrete and Aggregates Australia (CCAA) is the peak body for the heavy construction materials industry in Australia. Members include: Boral Ltd and Adelaide Brighton Ltd.
- CCAA has released a statement announcing its ambition to deliver net zero carbon cement and concrete by 2050.
- Announcing the release of the statement, CCAA commented:

  'Concrete is the world's most widely used building and construction material and is vital to securing a resilient built environment that is sustainable for life…The release of this landmark statement reinforces that the industry recognises the challenges of climate change and outlines the industry's commitment to work towards decarbonisation throughout the value chain, with a strong emphasis on technological, regulatory, structural, and behavioural change. Achieving these significant decarbonisation objectives will require changes to policy settings, material technology and design practices which can only be achieved through collaboration across the construction supply chain'.

  [Source: CCAA Climate Ambition Statement]

Climate risk: Calls for US Treasury Secretary Janet Yellen to issue a climate-risk mitigation 'roadmap', calls for financial regulators to issue supervisory guidance

- On 20 May 2021, US President Joe Biden issued an Executive Order on Climate-Related Financial Risk, which among other things, called on the Secretary of the Treasury as Chair of the Financial Stability Oversight Council (FSOC) to issue a report within 180 days of the date of the order (by 16 November 2021) outlining any efforts by FSOC member agencies to integrate climate-related financial risk considerations into their policies/programs and recommending 'processes to identify climate-related financial risk to the financial stability of the United States' and 'any other recommendations on how identified climate-related financial risk can be mitigated, including through new or revised regulatory standards'.

- On 28 September, a coalition of over 30 sustainability-focused not for profits, coordinated by Americans for Financial Reform, wrote to US Treasury Secretary Janet Yellen calling on her to use this as an opportunity to issue a report that 'can serve as a comprehensive roadmap that recognises the urgency and severity of the climate crisis, includes specific policies beyond assessment and disclosure, and encourages each of the independent agencies to use all available tools to mitigate climate risk and its drivers'.
- Specifically, the group has called for the report to both:
  - Identify specific policies that could be used by regulators to mitigate systemic climate risk within their respective remits; and
  - 'Address fossil fuel finance head on as the primary driver of systemic climate risk'.

Separate call for regulators to issue supervisory guidance

Separately, the Americans for Financial Reform together with Public Citizen, Natural Resources Defense Council, and Center for American Progress have written directly to federal bank regulators (the Federal Reserve, the National Credit Union Administration, the Federal Deposit Insurance Corporation, and Currency Department of the Treasury) calling on them to both:

- immediately issue supervisory guidance for banks covering both the physical and transition risks of climate change and setting expectations around how these risks should be managed; and
- integrate consideration of climate-risk management, consistent with the expectations set out in the guidance, into their regulator examinations of individual firms.

The group has also set out what it considers to be the 'key' elements that supervisory guidance should cover.

[Sources: Americans for Financial Reform Letter 28/09/2021; Americans for Financial Reform Letter 29/09/2021]

Other News

In Brief | Treasurer welcomes global tax agreement: 136 of the 140 members of the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting, representing more than 90% of global GDP, have signed a global tax agreement that will see certain Multinational Enterprises (MNEs) subject to a minimum 15% tax rate from 2023. The aim is to see the world's largest and most profitable MNEs 'pay a fair share of tax wherever they operate and generate profits'

[Sources: Treasurer Josh Frydenberg media release 09/10/2021; OECD media release 08/10/2021; OECD/G20 Base Erosion and Profit Shifting Project Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy;]

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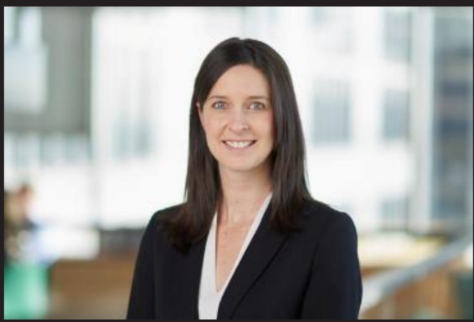

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