

A woman with curly hair, wearing a light-colored collared shirt, is looking down at a tablet computer she is holding. The background is a dimly lit office with blurred lights and equipment. A small red square is in the top left corner.

Governance News

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

27 October 2021

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Shareholder Activism

More shareholder environmental resolutions are proceeding to a vote at European companies

Shareholder resolutions

- **More shareholder 'environmental' are going to meetings, and the level of shareholder support is trending upwards**
 - According to analysis from [Insightia](#), the number of shareholder environmental proposals proceeding to a vote at European listed companies has spiked in recent years increasing from just 7 proposals in 2016/17, to 13 proposals in 2019/20 to 20 proposals in 2020/21.
 - The level of support these resolutions receive has also trended upward over the same period, with a sharp increase in support since last year. According to Insightia's analysis, shareholder environmental proposals received 17.6% shareholder support in 2020/21 up from just 8.5% in 2019/20.
- **The number of shareholder 'social' resolutions remains very low:**
 - In contrast, the number of shareholder 'social' proposals has remained within a range of 0-4 proposals over the 2016-21 period. The stand out year was 2018/19 when four proposals went to a vote and secured 39.7% support. In 2019/20 zero 'social' proposals went to a vote. In 2020/21 just two proposals proceeded to a vote and secured just 7.7% support.
 - This is interesting, as the report found that in the US in particular, focus on various social issues including diversity and inclusion issues, sharpened as a result of the events of 2020/21. Likewise, Insightia found that support for various forms of shareholder 'social' proposals also increased. For example, a new form of proposal emerged in 2020/21: shareholder proposals calling for companies to undertake racial audits. The report records that eight racial audit proposals proceeded to a vote (primarily at US banks) and secured, on average, 33.1% support. The number of diversity/employment related proposals remained fairly stable, but the level of investor support increased significantly as compared with last year jumping from 29.6% support in 2019/20 to 39.1% in 2020/21.

Concerns about lack of board diversity behind the decrease in support for directors?

- Overall, Insightia found that support for directors at EU listed companies remains high (96.8% overall). However, Insightia points out that this is somewhat lower than the overall level of support for director elections in previous years (which has remained stable at 97.2% over the 2017/18, 2018/19, and 2019/20 proxy seasons).
- Interestingly, Insightia attributes the decrease in support to the 'renewed emphasis' being placed on board diversity.
- Looking at the US, the Insightia found that based on analysis of investor voting rationales, 10 of the 17 'failed director elections' at US companies 'were due at least in part to a lack of board diversity'.
- The report predicts that focus on diversity and inclusion issues look set to continue to intensify going forward. The report suggests that in light of the fact that from 2022 Glass Lewis and State Street Global Advisors will consider taking voting action against S&P500 and FTSE 100 companies that do not meet minimum board diversity requirements, and in light of new Nasdaq comply or explain diversity requirements, companies are set to face increased pressure on the issue going forward.

[Source: [registration required] Insightia report: The Proxy Voting Annual Review]

Shareholder ESG resolutions receive 43.65% and 36.62% support at Origin

The Origin Energy AGM was held on 20 October 2021.

Shareholder resolutions

- None of the six shareholder resolutions filed at the company (the full text of which are included in the Notice of Meeting [here](#)) had board endorsement.
- Constitutional Amendment: Only one, the constitutional amendment proposing to amend the company's constitution to enable shareholders to bring advisory resolutions to express and opinion/make a request of the company, was formally put to the meeting because the remaining five were contingent on the passage of the

constitutional amendment. The special resolution to amend the constitution received 6.88% support (well short of the 75% or more required for the resolution to be carried).

- ACCR resolutions:
 - The Australasian Centre for Corporate Responsibility (ACCR) resolution calling on the company to align future capital expenditure with the goals of the Paris Agreement received 43.65% proxy support ahead of the meeting.
 - The ACCR resolution calling on the company to strengthen its processes for reviewing its industry association memberships to ensure alignment with the goals of the Paris Agreement (climate-lobbying resolution) received 36.62% proxy support ahead of the meeting.
 - The ACCR [described](#) the level of support for both resolutions as a 'significant rebuke' to the company and called on Origin to 'go back to the drawing board' to ensure its transition plan aligns with 1.5 degree warming scenario, and to reassess its membership of industry associations whose advocacy is at odds with the Paris Agreement.
- The remaining shareholder resolutions received lower levels of support:
 - Water/fracking resolution: The resolution calling on the company to: a) establish a baseline of water quality across its entire licence area; b) consult with Traditional Owners on cultural water flows; and c) publicly release the methodology, findings and recommendations of the research before undertaking any further fracking activity (received 8.38% support)
 - Cultural heritage protection resolution: The resolution calling on the company to: a) comply with any recommendations emerging from the review of existing State and Territory Heritage protection laws; b) pause operations across all licence areas pending the implementation of the recommendations of the Scientific Inquiry into Hydraulic Fracturing in the Northern Territory's Final Report (2018); and c) recognise the rights of all impacted Traditional Owner family groups to veto anything that will disrupt cultural heritage and sacred sites received 6.15% support.
 - Consent resolution: The resolution calling on the company to: a) acknowledge that Traditional Owners have a right to know who has consented to the company's operations on their country; b) to obtain consent from Traditional Owners in accordance with the standards set out under the principles of the United Nations Free, Prior and Informed Consent; and 3) to publicly disclose any and all materials used in consent negotiations and details of enquiries made by Traditional Owners about the consent agreements that pertain to their country received 10.97% support.



All board endorsed resolutions were carried.

- Director elections: The three directors standing for election and two directors standing for re-election received between 97.38% and 99.4% support.
- 96.25% of shareholders voted to approve the remuneration report. 83.97% of shareholders voted in support of equity grants to CEO and Managing Director (16.03% against)

[Sources: Origin Energy Notice of Meeting, Results of Meeting, ACCR media release 20/10/2021]

Meetings and Proxy Advisers

Two first strikes and one second strike at ASX 100 companies

The **Crown Resorts** AGM was held on 21 October 2021.

- **Director elections:** The two directors standing for election were both elected with over 99% support.
- **Remuneration report:**
 - The resolution to adopt the remuneration report was carried with 69.21% of votes in support, but received a second 'strike' (30.73% against). The conditional spill resolution was not carried receiving only 4.12% support.
 - In the [address](#) to the meeting ahead of the vote, Crown Resorts Chair Jane Halton acknowledged the concerns that had been raised by shareholders ahead of the meeting concerning termination payments made to former executives and 'aspects' of the new remuneration package agreed for CEO and Managing Director Steve McCann.
 - On the question of termination payments to former executives, Ms Halton said that the board had 'carefully reviewed each executive's termination arrangements, our legal obligations and the surrounding circumstances at the time these decisions were made, including obtaining advice' and considered that the payments 'were made in the best interests of shareholders having regard to the circumstances facing the Company'.
 - On the question of Mr McCann's remuneration package, Ms Halton said that the board had taken steps to ensure that the total package was 'benchmarked against the market, whilst ensuring it was sufficiently competitive to attract, motivate and retain a highly credentialed CEO at what was, and continues to be, a challenging and uncertain time for the business'.
 - Ms Halton said that company continues to 'review and adjust its remuneration strategy and framework to ensure remuneration outcomes are aligned with market practice, and community, regulatory and shareholder expectations' and that the details of this revised framework will be provided in the 2022 Annual Report.



[Source: 2021 AGM results; Chair and CEO address]

The **Insurance Australia Group (IAG) AGM** was held on 22 October.

- **Director elections:** The two directors standing for election and one director standing for re-election were all elected with strong support (each received between 95.99% and 99.8% of votes in support).
- **Remuneration report:**
 - The resolution to adopt the remuneration report was not carried, receiving a first 'strike' of 57.25% of votes against (42.75% of votes in support).
 - The resolution to approve the grant of share rights to the Managing Director and CEO was carried with 94.56% of shareholders voting in support (5.44% against).
 - In her [address](#) to the meeting, IAG Chair Elizabeth Bryan acknowledged shareholder dissatisfaction with the company's performance and the decision to award some bonuses and outlined 'why the Board thought it was the right thing to reward our employees this year' and why the board considered doing so to be in the best interests of the company/shareholders.
 - Broadly, Ms Bryan said that the board needed to balance considerations of accountability for historical issues with considerations of fairness and motivation of staff going forward. In order to ensure there was appropriate accountability for historical issues, the board backed 'significant' downward adjustments to bonuses (totalling \$6.9 million). In addition, Ms Bryan noted that 'no member of the senior leadership team with direct accountability for the operational risk matters is still employed at IAG'. At the same time, the board felt it important to ensure that the management team now in place was suitably rewarded for its efforts over what has been a challenging year and sufficiently motivated going forward. 'We held those responsible to account. Underpinned by our profitable insurance business, we restored dividends and paid a reduced short term bonus to recognise the commitment of our employees over two difficult years...In short, we drew a line in the sand and moved to a focus on improving future performance, having dealt with historical failures'.
 - Ms Bryan said that the board has also initiated an independent review of IAG's remuneration framework, and this will include review of short and long term incentives and targets as well as ensuing alignment with CPS511 and the proposed Financial Accountability Regime (FAR).

[Sources: Results of AGM 2021; 2021 AGM Chair's Address]

The **Transurban AGM** was held on 21 October 2021.

- **Director elections:** The four directors standing for election and one director standing for re-election were all elected with strong support (97%+ of votes in support).
- **Remuneration report:**
 - The resolution to adopt the remuneration report was carried, but received a first 'strike' with 74.26% of votes in support (25.74% against).
 - The resolution to approve the grant of performance rights to the CEO was also carried with strong (97.45%) support.
 - In his [address](#) to the meeting ahead of the vote, Chair Lindsay Maxsted said that the remuneration framework was 'designed to attract, motivate, and retain the best talent with capabilities that enable our competitive value proposition'.
 - Ms Maxsted said that the remuneration framework had undergone a detailed review with input from an independent external remuneration adviser in FY21 as a result of which, the Long Term Incentive performance period had been extended from three to four years and the Short-Term Incentive framework had been 'enhanced' to better align outcomes with group performance and the outcomes for stakeholders. Mr Maxsted said that the board is 'confident these enhancements will further strengthen the alignment of executive and stakeholder interests'.
 - Following the meeting, [The AFR reported](#) that Mr Maxsted attributed the 'strike' primarily to the influence of proxy advisers that had issued an 'against' recommendation ahead of the meeting.

[Source: Transurban Results of Meeting 2021, Transurban Chair and CEO Address]

Disclosure and Reporting

London Stock Exchange introduces new climate reporting guidance to support issuers to implement the TCFD recommendations

- The London Stock Exchange (LSE) has published climate reporting guidance for public companies. The guidance is based on the United Nations Sustainable Stock Exchanges (SSE)'s Model Guidance on Climate Disclosure which aligns with the Taskforce for Climate Related Financial Disclosures (TCFD) recommendations.
- The guidance is intended to support issuers to integrate consideration of climate risks and opportunities into their operational decision making and carbon performance reporting.
- The LSE is also working with the UN SSE to produce comprehensive education resources to help London listed companies understand and implement TCFD.
- Separately, the LSE has introduced 'Climate Governance Scores' – an assessment of an issuer's management of climate risks and opportunities based on the Transition Pathway Initiative's (TPI) Management Quality Score (MQS) methodology - for over 400 Main Market listed companies.
- The purpose is to assist issuers to 'understand the key climate metrics that investors are focused on and identify areas of improvement and assess their performance against industry peers'.
- LSE CEO Julia Hogget commented:

'Investors are increasingly choosing to allocate capital to companies with clear frameworks for managing climate-related risks and opportunities. While many FTSE 100 companies have already taken a leadership position by committing to net zero by 2050 and before, the London Stock Exchange is home to companies at varying stages of the climate transition. Our new Climate Transition Offering launched today will help issuers understand how investor's view their performance on the transition and facilitate change by providing an action-orientated climate reporting framework aligned with global standards'.

[Source: London Stock Exchange media release 20/10/2021]

The FSOC has released a climate action roadmap acknowledging climate risk as a an 'emerging threat' to the US financial system and backing the introduction of 'enhanced' climate-risk disclosure requirements

- 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'.

FSOC Roadmap released.

- The FSOC has released a [report](#) identifying climate risk as 'an emerging threat to the financial stability of the United States' and outlining the work already being undertaken by federal regulators to address it.

- The report also includes a number of recommendations to guide future regulatory efforts.
- On the issue of public disclosure of climate-related financial risks, the report recommends (among other things) that:
 - FSOC members, 'consider enhancing public reporting requirements for climate-related risks in a manner that builds on the four core elements of the Task Force on Climate Related Financial Disclosure (TCFD), to the extent consistent with the US regulatory framework and the needs of US regulators and market participants'.
 - FSOC members 'evaluate standardising data formats for public climate disclosures to promote comparability, such as the use of structured data using the same or complementary protocols, where appropriate and practicable'
 - FSOC members consider whether public climate disclosures should be required to 'include disclosure of GHG emissions, as appropriate and practicable, to help determine exposure to material climate-related financial risks'.
 - The report also expresses support for the work of the International Financial Reporting Standards (IFRS) Foundation Trustees 'in laying the foundation for the formation of an international sustainability standards board (ISSB) to promote the development of sustainability reporting standards focused on enterprise value creation that could lead to consistent and comparable disclosures that can be used as building blocks across jurisdictions'.

Ceres welcomes landmark roadmap

- In a [statement](#) welcoming the release of the report, Ceres managing Director of Ceres Steven M Rothstein said that it is significant because it marks the first joint acknowledgement by US financial regulators of the risk that climate change poses to the US financial system. He said:



'For the first time in the report, these financial regulators have now unequivocally stated that climate change is an emerging threat to the financial stability of the United States. While individual US regulators have affirmed climate as a financial risk and begun taking action, this report marks their first collective pronouncement of the scale of risk posed to our economy by climate change...Banks, insurance and fossil fuel companies should be on notice'.

- Mr Rothsten added that it is now 'vital' that every agency publish timelines and plans to act on the recommendations in the report. He stated:

'With a very small window to prevent the next climate disaster, each agency must now provide specific timelines when they plan to put in place measures to protect the safety and soundness of our financial system, our institutions, our savings and our communities. There are agencies, including the Securities and Exchange Commission and the Department of Labor, that are acting quickly. Others need to match that level of leadership more rapidly.'

[Sources: FSOC report: Report on Climate-Related Financial Risk 2021; Ceres media release 21/10/2021]

Financial Services

Top Story | Australia set to regulate cryptocurrency and digital assets

On 20 October 2021, the Senate Select Committee on Australia as a Technology and Financial Centre (the Committee) released its final report.

The MinterEllison team have released an overview and discussion of the 12 recommendations including insights into potential industry implications. You can access the full text [here](#).

Top Story | Status update: Tracking progress against each of the Hayne Commission's 76 recommendations

The Financial Services Royal Commission's final report was publicly released on 4 February 2019. In the two (plus) years since its release a number of actions have been implemented in response – though in many cases, the changes have not yet been fully implemented or have been deferred due to COVID-19.

We have prepared a table briefly outlining the actions taken to date and/or the planned actions to be implemented in response to each of the Commission's 76 recommendations.

We will be updating the table regularly.

The table was last updated on 27 October 2021 to reflect developments relating to implementation of recommendations 5.1 -5.3 (APRA's supervision of remuneration), recommendation 2.10 (new disciplinary system for financial advisers) and recommendation 5.7 (APRA supervision of culture and governance).

Hayne insurance sales case study: ASIC commences proceedings against former Freedom Insurance director and consultant over insurance sales incentive programs

Context: Conflicted remuneration/insurance sale and retention practices case study

- The Hayne Commission considered Freedom Insurance Group Ltd's (Freedom) sales and retention practices as a case study during the sixth round of hearings. Broadly, Commissioner Hayne highlighted Freedom's remuneration and incentive structures, quality assurance and disciplinary processes and lack of appropriate staff training as contributing to a 'culture in which sales agents were encouraged to sell aggressively, without regard for the needs of consumers (including vulnerable consumers), and with few, if any, constraints on their conduct'. You can find discussion of the case study in the [Hayne Commission's Final Report, Volume 2 at p302-317](#)
- Prior to the release of the Hayne Commission's final report, the Australian Securities and Investments Commission (ASIC) had commenced an investigation into Freedom.
- Freedom was placed into external administration on 13 February 2020.

ASIC has commenced civil penalty proceedings:

- On 25 October 2021, the Australian Securities and Investments Commission (ASIC) [announced](#) that it had commenced civil penalty proceedings in the Federal Court against two individuals over alleged conduct relating to the marketing and selling by Freedom of certain insurance products, including final expenses cover (a type of life cover), accidental death cover and accidental injury cover. The two individuals are:
 - the former the Managing Director of Freedom Insurance, director of Insurance Network Services Australia Pty Ltd (in liquidation) (INSA) and a Responsible Manager on Freedom Insurance's Australian financial services licence (AFSL); and
 - a former Quality Control manager engaged by INSA as a consultant to deliver services to INSA and Freedom Insurance.
- Details of ASIC's allegations are available in the [Concise Statement](#) and [Originating Process](#). Broadly, ASIC alleges that between November 2018 and October 2018:
 - the former Freedom Managing director was 'knowingly concerned in, or party to' (alleged) breaches of conflicted remuneration provisions by Freedom Insurance and INSA involving the payment of non-monetary incentives to sales agents in the form of two separate trips to Bali and a Vespa scooter

- the former quality manager was also knowingly concerned in or party to Freedom Insurance's (alleged) breaches
 - both individuals were concerned in/party to (alleged) breaches by Freedom Insurance of its licensee obligations arising from its breaches of the conflicted remuneration provisions
 - the former Freedom Managing Director (allegedly) breached his directors' duties by 'exposing Freedom Insurance and INSA to a foreseeable risk of harm in relation to such conflicted remuneration'.
- ASIC is seeking declarations, civil penalties, injunctions and disqualification orders against the former Freedom Managing Director and declarations and injunctions against the former quality adviser.

[Source: ASIC media release 25/10/2021]

Hayne implementation: CHOICE survey finds strong public support for implementation of a stronger CSLR and Financial Accountability Regime

Context

Financial Accountability Regime

- The government released [draft legislation](#) proposing to implement the Financial Accountability Regime (FAR) in response to several Hayne Recommendations (Hayne recommendations 3.9, 4.12, 6.6, 6.7, 6.8 and 1.17) for consultation on 16 July 2021. Consultation closed 13 August 2021.
- The FAR will replace and expand on the existing Banking Executive Accountability Regime or BEAR. Broadly, the FAR proposes to extend strengthened, but BEAR-like accountability requirements, to other APRA-regulated entities and to the directors/senior executives of those entities. You can find an overview and discussion of draft Bill [here](#).
- On 2 September the government released a [second draft Bill \(summarised in Governance News 8/09/2021 at p30\)](#) for consultation intended to support the implementation/establishment of the proposed FAR. Consultation on the draft Bill closed on 17 September 2021.
- If legislated in its current form, the FAR will apply to:
 - authorised deposit-taking institutions and their authorised non-operating holding companies from the later of 1 July 2022 or six months after commencement of the legislation.
 - The FAR would commence for insurers, their licensed NOHCs and registrable superannuation entity (RSE) licensees from the later of 1 July 2023 or 18 months after the commencement of the FAR (following a declaration from the Minister noting that the Minister can make a declaration at any time after the Act receives Assent).

Compensation Scheme of Last Resort

- 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 have [since called](#) on the Federal government to expand the proposed CSLR to provide compensation for all financial products and services that fall under AFCA jurisdiction.

Survey finds Australians support the passage of stronger reforms

- CHOICE has issued a [statement](#) calling on the government to prioritise the passage of legislation to implement key the establishment of the CSLR and the FAR.
- According to CHOICE there is strong support for the introduction of a broad-based CSLR:
 - 81% of respondents from a nationally representative survey agreed that victims of finance investment scams should receive compensation if they have lost money
 - 73% of survey respondents support a compensation scheme for victims of financial misconduct.
- Similarly, CHOICE argues that there is strong community support (90% of survey respondents) for a FAR that includes individual financial penalties for executives who breach their FAR obligations (a measure which was included in the original consultation, but is not included in the draft Bill).

[Source: CHOICE media release 21/10/2021]

Hayne Implementation: The Better Advice Bill has passed both Houses

- The [Financial Sector Reform \(Hayne Royal Commission response – Better Advice\) Bill](#) (Better Advice Bill) passed both Houses on 21 October 2021. You can find a summary of the measures included in the Bill in [Governance News 30/06/2021 at p15](#).
- Among other things, the Bill will give effect to the government's response to recommendation 2.10 by: expanding the role of the Financial Services and Credit Panel (FSCP) within the Australian Securities and Investments Commission (ASIC) to operate as the single disciplinary body for financial advisers; b) introducing additional penalties/sanctions for financial advisers who have breached their obligations under the Corporations Act 2001 (Cth); and c) introducing a new two stage registration system for financial advisers. The Bill also implements the Government's response to recommendation 7.1 of the Tax Practitioners Board Review by introducing a single registration and disciplinary system for financial advisers who provide tax (financial) advice services.
- Separately, the government concluded consultation on [draft regulations and a draft legislative instrument](#) to support implementation of the Bill on 15 October 2021 ([summarised in Governance News 13/10/2021 at p22](#)).

Commencement

- The new disciplinary and registration systems for financial advisers will apply from 1 January 2022.
- Registration requirements:
 - Stage 1 registration will commence from 1 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 will require individuals to apply to the registrar to register themselves annually) will commence either on a day set by proclamation, or if no such proclamation is made within a specified period, four years after Assent.
- Regulations: It is intended that the supporting regulations and legislative instrument (once finalised) will come into force on 1 January 2022.

[Source: Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Bill 2021]

APRA calls on RSE licensees to sharpen their focus on improving governance and strategic planning

The Australian Prudential Regulation Authority (APRA) has released an [information paper](#) outlining the key findings of three thematic reviews undertaken over the last 12 months that considered RSE licensees' approaches to: strategic and business planning; fund expenditure; and unlisted asset valuation practices.

Key Takeaways

Good governance and strategic planning is key

The information paper highlights the overall importance of 'strong governance and robust strategic planning' in improving member outcomes and avoiding potential misconduct, as a 'common and recurring theme' that emerged across the three reviews. APRA states that

'Where robust pre-existing frameworks, clear lines of accountability and holistic planning existed, practices were of a better standard across the board. It is vital that funds are well-governed and intensely focused on the best financial interests of members'.

Specific findings

The information paper highlights a number of specific areas where APRA would like to see improvements in current practices (outlined below). APRA's expectation is that RSE licensees assess their own practices against the findings in the report to 'identify any sub-standard practices and improve relevant processes and procedures'.

SPS 515 implementation benchmarking review

The review examined how 24 selected trustees were meeting the requirements of SPS 515 Strategic Planning and Member Outcomes, which came into effect from 1 January 2020 with a particular focus on business plans and business performance reviews (BPRs).

The table below provides a snapshot of the key improvement areas identified in the report and APRA's expectations.

ISSUE IDENTIFIED	APRA'S EXPECTATIONS
<ul style="list-style-type: none">The link between BPR findings and updates to business plans was not always clear (eg how BPR findings were used to develop future activities was not always explained)	<ul style="list-style-type: none">APRA expects an RSE licensee to 'clearly document and reflect BPR recommendations in their next business plan' and that the strategic objectives/initiatives defined in business plans address the 'challenges and weaknesses identified in the BPR'. For example, APRA suggests that any 'concerns arising from declining membership and challenges to attract new members could be addressed by specific steps to identify and pursue merger opportunities'.
<ul style="list-style-type: none">Explanation as to how strategic objectives support desired member outcomes was also identified as an area for improvement.In particular, the report flags that the metrics used to monitor the performance of strategic objectives in business plans were not always clearly aligned with 'the expected outcome for members'	<ul style="list-style-type: none">APRA expects an RSE licensee to clearly describe how each strategic objective supports desired member outcomes – ie the specific positive outcome the objective will have on member outcomes. To illustrate the report suggests that the link between an objective to 'increase scale' with member outcomes could be expressed in the following terms: 'Increasing the scale of the fund by X per cent would lead to a reduction of members' fees by Y per cent'.APRA comments that 'This discipline is likely to assist RSE licensees to demonstrate the sharper focus demanded by the duty to act in the best financial interests of beneficiaries'
APRA found that some BPRs, failed to identify and assess all of the relevant factors affecting business performance and member outcomes.	<ul style="list-style-type: none">APRA expects more 'robust' analysis of the drivers of business performance.More particularly, when assessing the drivers of performance, APRA expects RSE licensees consider: external factors (eg investment market) and internal factors (eg complexity of the product offering) and to explain how these factors 'drove the RSE licensee's outcomes'. APRA comments that 'understanding the root cause of the RSE licensee's performance supports well-informed future activities'.

ISSUE IDENTIFIED	APRA'S EXPECTATIONS
<p>APRA found that, for more complex business models with multiple funds under trusteeship or a large number of products, RSE licensee analysis of the business performance across their entire business operations was limited, tending to focus on each individual RSE as opposed to taking a broader perspective.</p>	<ul style="list-style-type: none"> ■ For RSE licensees of multiple RSEs, APRA expects to see consideration of the entire business operations, not just individual RSEs. APRA considers that this will enable RSEs to both: <ul style="list-style-type: none"> – 'pursue initiatives across multiple RSEs in their business operations that are facing similar opportunities for improvement, such as an administration outsourcing tender' and – 'seek efficiency through simpler and cheaper operating models, for example, by reducing the number of products and funds, and streamlining outsourced arrangements'
<p>APRA found that the majority of RSE licensees did not undertake stress testing of financial projections to test their resilience.</p> <p>APRA also found that some business plans lacked sufficient detail and 'in many cases, key assumptions were generally unsubstantiated and not aligned to historical trends, leading to questions about their credibility'.</p>	<ul style="list-style-type: none"> ■ The report makes clear that APRA expects RSE licensees to 'undertake stress testing under adverse internal and external scenarios to explore the range of projected outcomes to better understand the financial soundness of the business plan'. ■ APRA also expects RSE licensees to 'implement a clear and well-documented approach for deciding assumptions'
<p>APRA found that cohort analysis was in many cases, limited 'to the letter of APRA's guidance' in Prudential Practice Guide SPG 516 Business Performance Review'.</p>	<ul style="list-style-type: none"> ■ Going forward, APRA expects RSE licensees to focus, on an approach to cohort analysis that is tailored to their own membership. ■ APRA expects RSE licensees to: <ul style="list-style-type: none"> – Implement membership cohorts that demonstrate a 'deep understanding' of their membership base. APRA suggests that this could include (in addition to age, product and investment options): gender, employment sector, employment classification, super guarantee contribution/no super guarantee contribution, introduced by advisor/no advisor, and/or 'other attributes' identified by data analytic teams/tools. – Consider the impact of fees, investments, insurance and services on the fund's membership cohorts.

RSE licensee expenditure thematic review

The review considered expenditure on advertising, sponsorships and promotions by 12 trustees with a particular focus on whether: a) expenditure was in the best interests of members; and b) whether trustees 'had applied appropriate governance and oversight to their decisions'.

Overall, APRA's standout finding was that:

'licensees need to make a significant shift from broad reliance on qualitative judgements as a basis for decision making and instead apply robust processes in both the ex-ante (taking the decision) and ex-post (analysing the outcomes of the decision) phases'.

The table below provides a snapshot of the key improvement areas identified in the report and APRA's expectations.

ISSUE IDENTIFIED	APRA'S EXPECTATIONS
<p>APRA found that some RSE licensees could not articulate a 'clear and objective purpose' for marketing expenditure at an aggregate level as part of their annual strategic and business planning processes</p>	<ul style="list-style-type: none"> ▪ APRA expects that where marketing is considered to be a necessary expenditure, as part of the annual business planning process, the RSE licensee's Board would approve marketing budgets, business case and metrics for the overall marketing program. ▪ APRA expects that the Board would base its decision to approve the expenditure on a 'comprehensive assessment of the outcomes of prior years' marketing expenditure'. ▪ RSE licensees are expected to be able to articulate a 'clear and objective purpose for marketing expenditure at an aggregate and campaign level consistent with the sole purpose test'. APRA expects that this will include explanation of how the benefits of the marketing expenditure will be measured in terms of driving improved member outcomes. ▪ APRA also expects there to be 'a clear decision as to whether the amount of proposed expenditure is appropriate for the circumstances of the RSE in absolute and relative terms, for example, informed by the absolute dollar spend and the average cost and benefit per member'.
<p>APRA found some RSE licensees could not: a) demonstrate that 'robust processes were in place for determining quantifiable expected outcomes from individual campaigns including how the best interests of beneficiaries are promoted, prior to their commencement'; or b) 'demonstrate robust assessment of outcomes achieved when renewal of campaigns is being considered'.</p>	<ul style="list-style-type: none"> ▪ APRA expects: <ul style="list-style-type: none"> – Planned campaigns and activities to be supported by robust business cases. APRA expects that business case will set out the purpose/expected outcomes for the campaigns and explain how the campaign is consistent with/supportive of the strategic initiatives in the business plan as well as the expected impact of the campaigns on members eg a reduction in fees as a result of an increase in the number of members – Robust processes to be in place to monitor the impact of marketing campaigns and activities. APRA states that 'where actual performance against the stipulated metrics does not meet planned performance, a prudent RSE licensee would assess the discrepancy to inform decisions on those current and planned marketing activities that are best able to deliver improved financial outcomes to members, and whether existing marketing activities should cease'. – Decisions on renewal and/or continuation of marketing campaigns to be 'subject to the same rigour as initial decisions'.
<p>APRA found 'a lack of clear metrics to assess the benefits to members of specific marketing expenditure'. For example, there were instances where RSE licensees could not clearly demonstrate how additional benefits associated with sponsorships, provided to directors, executives and staff resulted in improved outcomes for members</p>	<ul style="list-style-type: none"> ▪ APRA expects RSE licensees to have in place business cases 'that clearly define': a) the metrics that will be used to measure the impact of marketing activity/campaigns; b) explain how the chosen metrics will measure improved financial outcomes for members; and c) 'a comprehensive risk assessment that addresses any potential adverse impacts of the marketing campaign or activity'
<p>APRA considers that 'as a general principle, a direct personal benefit to an RSE licensee director, executive or staff member obtained</p>	<ul style="list-style-type: none"> ▪ APRA expects that any additional benefits provided as part of an arrangement would be used 'only for purposes that are clearly consistent with improved outcomes for members and not for the

ISSUE IDENTIFIED	APRA'S EXPECTATIONS
<p>pursuant to entering into a marketing or sponsorship arrangement, with associated cost to the fund, would present an actual or perceived conflict'.</p> <p>APRA 'found instances' where executives, directors and staff members were provided with additional benefits, connected to sponsorship arrangements to 'reward RSE licensee employees.'</p> <p>New best financial interests obligation: APRA observes that since 1 July 2021, all expenditure decisions must be made in the best financial interests of members and be 'supported by strong analysis and evidence'. APRA comments that the review found 'some instances of expenditure [that] did not have sufficient evidence to demonstrate that the expenditure would be in the best financial interests of members'.</p>	<p>benefit of directors, executives, staff or associates of the RSE licensee'.</p> <ul style="list-style-type: none"> ▪ APRA also expects 'express assessments of how actual or perceived conflicts will be avoided or managed including by declining to take up the additional benefits at all'. ▪ APRA also expects all RSE licensees to review their approach to expenditures to reconsider which expenditures remain appropriate in light of the new best financial interests obligation. APRA states: 'More generally, all RSE licensees should review their practices to ensure they are compliant with the strengthened obligations under the YFYS reforms, and seek appropriate advice if necessary'. ▪ The information paper flags that APRA has written to some RSE licensees 'challenging them to demonstrate how they have considered the impact of the best financial interests duty on expenditure decisions, and their conclusions in relation to expenditure of the kinds identified in this report'. APRA will review the responses and determine whether any action may be 'necessitated by the requirements of the best interests duty'.

Unlisted asset valuation thematic review

The unlisted asset valuation thematic review examined unlisted asset valuation practices among 31 trustees selected according to their level of exposure to unlisted assets and known competency in valuation governance.

Broadly, the review found that:

- Most trustees demonstrated a proactive approach to revaluing unlisted assets in response to heightened market volatility
- Revaluation frameworks (policies and procedures for the imposition, monitoring and review/adjustment of revaluations) need improvement. APRA expects RSE licensees to have 'robust board-approved valuation policies and procedures'.
- Board engagement was often limited. APRA expects RSE licensee boards to: a) 'actively engage' particularly during heightened market volatility; b) be capable of challenging management and external parties, c) provide appropriate oversight and approval of out of cycle valuations via the relevant committees; and e) clearly define delegations and responsibilities.
- APRA found some RSE licensees were overly reliant on external parties for the valuation of unlisted assets. Consistent with SPS 530, APRA requires RSE licensees to: a) 'undertake robust initial and ongoing due diligence'; b) 'proactively engage with fund managers and asset consultants'; c) 'set expectations with fund managers on valuation frequency in periods of heightened market volatility'; and d) 'set expectations on valuation frequency, methodology and hierarchy of information, against which fund managers can be assessed'.
- APRA found that only six of the RSE licensees revised had dedicated valuation committees prior to the heightened market volatility of early 2020. Prudential Practice Guide SPG 531 Valuation makes clear that valuation decisions and committees should occur independently of investment decision-makers.

[Sources: APRA media release 26/10/2021; APRA information paper: Findings from APRA's superannuation thematic reviews]

APRA publishes new FAQs on the outcomes assessment

- The Australian Prudential Regulation Authority (APRA) has published new frequently asked questions (New FAQs 1-5) on the outcomes assessment under section 52(9) of the Superannuation Industry (Supervision) Act 1993 (Cth) (SIS Act).
- APRA has also updated guidance (FAQ 11) on how RSE licensees may undertake the outcomes assessment for lifecycle products.

- APRA states that the new information will assist RSE Licensees to 'explain how the outcomes assessment must consider the performance test, and provide expectations on the publication of the assessment'.

[Sources: APRA media release 25/10/2021; APRA Frequently Asked Questions]

BI Test Case Appeal listed to be heard from 8 November 2021

- On 8 October 2021, the Federal Court 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 a concise overview and discussion of the decision [here](#).
- The Insurance Council of Australia has issued a [statement](#) confirming that appeals have been brought by both policyholders and insurers on a number of issues arising from the decision.
- According to the statement policyholders have filed appeals to the Full Court of the Federal Court on five of the test case matters and insurers have filed cross-appeals and notices of contention in relation to those five matters.
- Five other matters in the test case involving insurers Chubb, Allianz and Guild are not being appealed.
- The appeal is listed to be heard from 8 November 2021.

[Source: ICA media release 21/10/2021]



Risk Management

Cybersecurity, Privacy and Technology

Top Story | Trusted Digital Identity Bill exposure draft released for public consultation

The government has released an exposure draft of the Trusted Digital Identity Bill for public consultation. MinterEllison has published an article exploring what the proposed changes would mean and the potential benefits for individuals, and the public and private sectors.

You can access the full text [here](#).

Security Legislation Amendment (Critical Infrastructure) Bill 2021 amended to focus on implementation of 'urgent' reforms

The [Security Legislation Amendment \(Critical Infrastructure\) Bill 2021](#) passed the House of Representatives with government amendments on 20 October and is now before the Senate.

If legislated the Bill will:

- introduce a new cyber-incident reporting regime for critical infrastructure assets
- include provision for the government to step in (as a last resort) to assist in dealing with cyber incidents.

Key Amendments

The amendments made in the House of Representatives are intended to respond to a number of recommendations made by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in its [Report](#) on the Security Legislation Amendment (Critical Infrastructure) Bill 2020 and Statutory Review of the Security of Critical Infrastructure Act 2018 of 29 September 2021 (the PJCIS report).

These recommendations include splitting the Bill to legislate 'urgent' reforms as a matter of priority and legislate less urgent reforms separately. Accordingly, the Bill has been cut down to focus on implementing more the 'most urgent amendments to deal with post-cyber incident responses and reporting' while other changes (eg Part 2A of the original Bill relating to the proposed new critical infrastructure management programs) have been omitted.

According to the [supplementary explanatory memorandum](#) the government intends that these less urgent measures 'will be proposed in a separate Bill that the Government intends to bring back to the Parliament for consideration at a later date'.

Key amendments to proposed new reporting requirements include the following:

- the inclusion of a new section 30BEA defining when a cyber security incident is having a 'significant impact' and must therefore be reported
- extending the timeframe for entities to provide their written report of a cyber incident to the relevant Commonwealth body to 84 hours after an oral report is made (instead of 48 hours)
- enabling the relevant Commonwealth body to exempt an entity from the requirement to provide a written report
- requiring any draft rules relating to the mandatory reporting obligations be provided 'directly to any entities which would reasonably be impacted by the draft rules' and also include 'an obligation that the Minister must formally respond to any submissions made by responsible entities'.

Emergency 'step in' power retained

The proposed measures in the Bill enabling the government to 'step in' to help address a cyber incidents have been retained in the Bill. In a [statement](#), Minister for Home Affairs Karen Andrews said that the powers will only be used as a last resort:

'These emergency measures will only apply in circumstances where a cyber-attack is so serious it impacts the social or economic stability of Australia or its people, the defence of Australia or national security, and industry is unable to respond to the incident'.

The Minister added that:

'Attacks on our critical infrastructure require a joint response, involving government, business, and individuals, which is why we are asking critical infrastructure owners and operators to help us help them by reporting cyber incidents to the Australian Cyber Security Centre. Implementing these reforms now will allow the government to continue to work with critical infrastructure entities to develop supporting rules to ensure that the second phase of reforms is implemented in a manner that secures appropriate outcomes without imposing unnecessary or disproportionate regulatory burden.'

Broader reform agenda

The reforms are part of the government's broader cybersecurity agenda, including the proposed reforms under the government's [Ransomware Action Plan](#).

[Sources: Security Legislation Amendment (Critical Infrastructure) Bill 2021; Government Amendments; Supplementary Explanatory Memorandum; Minister for Home Affairs Karen Andrews media release 20/10/2021]

Consultation launched on an online privacy Bill

The government is consulting on draft legislation – [\[exposure draft\] Privacy Legislation Amendment \(Enhancing Online Privacy and Other Measures\) Bill 2021](#) (Draft OP Bill) – which proposes to enable the development and introduction of a new binding online privacy code (OP Code) for social media services, data brokers and other large online platforms operating in Australia.

It's proposed that the new OP Code (once developed) will require in-scope organisations to: a) follow stricter rules around how they handle the personal information of children and other vulnerable groups; b) take reasonable steps to stop using or disclosing an individual's personal information upon request; and c) strengthen requirements for organisations to be transparent about data sharing.

It's proposed that the OP Code will be co-developed by the Australian Information Commissioner and industry.

The draft OP Bill also proposes to increase the powers of the Office of the Australian Information Commissioner to enforce compliance as well as introduce tougher penalties.

Announcing the proposed reforms the government [said](#) the legislation would ensure children's privacy in particular would be treated more carefully and transparently by online platforms such as social media companies.

'Under the code, social media platforms will be required to take all reasonable steps to verify their users' age, and give primary consideration to the best interests of the child when handling children's personal information. The code will also require platforms to obtain parental consent for users under the age of 16'.

The deadline for submissions on the draft Bill is 6 December 2021.

Review of the Privacy Act

As part of the broader review of the Privacy Act 1988 (Cth) (Privacy Act) which is part of the government's response to the Australian Competition and Consumer Commission's Digital Platforms Inquiry, the Attorney-General's Department has released a [Discussion Paper](#) that 'builds' on the proposed reforms in the draft OP Bill, outlines feedback received in response to an earlier [Issues Paper](#) and seeks feedback on a broad range of potential reform proposals. A full list of proposals is included at page 10.

Submissions on the Discussion Paper will be considered in the development of the final report for the Privacy Act Review and will also be considered in the context of finalising the draft OP Bill.

The deadline for submissions on the Discussion Paper is 10 January 2021.

[Sources: Consultation on the Online Privacy Bill 25 October-6 December; [\[exposure draft\] Privacy Legislation Amendment \(Enhancing Online Privacy and Other Measures\) Bill 2021](#); Online Privacy Bill Explanatory Paper; Regulatory Impact Statement; Privacy Act Review Discussion Paper: 25 October – 10 January; Discussion Paper; Joint media release Senator Michaelia Cash, David Coleman MP 25/10/2021]

Climate Risk

Australia commits to net-zero emissions by 2050 target, IGCC welcomes the commitment

Prime Minister Scott Morrison and Minister for Industry, Energy and Emissions Reduction Angus Taylor have jointly [announced](#) that Australia has adopted a target for achieving net-zero emissions by 2050. The government has also released a [plan](#) for achieving this objective.

The plan is based on the following five principles:

- 'Technology not taxes – no new costs for households or businesses'
- 'Expand choices, not mandates – we will work to expand consumer choice, both domestically and with our trading partners'
- 'Drive down the cost of a range of new energy technologies – bringing a portfolio of technologies to parity is the objective of Australia's Technology Investment Roadmap'
- Keep energy prices down with affordable and reliable power – the 'Plan will consolidate our advantage in affordable and reliable energy, protecting the competitiveness of our industries and the jobs they support'
- 'Be accountable for progress – transparency is essential to converting ambition into achievement. Australia will continue to set ambitious yet achievable whole-of-economy goals, then beat them, consistent with our approach to our Kyoto-era and Paris Agreement targets.'

Announcing the plan the government made clear that it does not:

- include more ambitious 2030 targets
- 'mandate' the closure of domestic or international resources or agricultural industries. Mr Morrison stated: 'we want our heavy industries, like mining, to stay open, remain competitive and adapt, so they remain viable for as long as global demand allows'.
- impose 'mandates on what people can do and buy'

You can find a one page, high level summary of some of the planned priorities under the plan at p9 of [here](#).

Mixed initial response to the announcement

- The **Business Council of Australia** (BCA) has welcomed the announcement stating it provides business with the certainty required to invest in the transition to a low emissions economy. BCA CEO Jennifer Westacott said: 'We now have a bipartisan commitment to net zero emissions by 2050 that clears the way for businesses to continue leading the transition. The government has outlined a set of clear principles to guide Australia's path to net zero by 2050 and make sure that Australians are winners in this change'.

- Investor and climate groups have raised concerns that the proposed approach does not go far enough.
 - The **Investor Group on Climate Change** (IGCC) has welcomed the 2050 target on the basis that it sends an 'important long-term signal to investors' which the group considers critical to attracting and sustaining investment. IGCC CEO Rebecca Mikula-Wright commented that:

'The global transition to net zero emissions is underway. Investors are ready to invest billions, not millions, in Australia's transition to net zero. There is a huge opportunity for the Australian economy, jobs and regional communities if we get the national climate policy settings right.'

However, the IGCC also raised concerns about impact that Australia's current approach to the 2030 target - 26-28% below 2005 levels - will have on the economy. According to the IGCC, its own modelling shows that the government's current approach will see total investment fall by \$43 billion by 2025, and \$265 billion by 2050, (compared with the orderly transition scenario). As such, the IGCC cautions that Australia's current 2030 emissions target 'remains an acute financial risk to the Australian economy'. In contrast, the IGCC contends that more ambitious 2030 policies have potential to 'unlock' \$131 billion investment in clean industries and new jobs by the end of the decade. The IGCC has called on the government to set emissions reductions of 'at least 45% below 2030 to join the global investment boom that will emerge over the next decade as countries implement policies to achieve their emissions 2030 commitments'.

- Similarly, the **Responsible Investor Association Australia** has welcomed the 2050 announcement, but has also raised concerns that it is not enough to position Australia competitively into the future. The RIAA

argues that 'to be competitive globally, we should be lifting the bar and adopting scientifically relevant emissions reduction targets for 2030 that set the pace for decarbonising Australia's economy in step with the global investment market place'

- The **Climate Council** has raised concerns that without concrete actions in the next decade, the 2050 target 'means little' and 'is not enough'. The Climate Council recommends that Australia reduce its emissions by 75% (below 2005 levels) by 2030 and achieve net zero by 2035.

The Climate Council has called for donations to help fund a domestic and international campaign to let the public know, that the 'target doesn't stack up' and push politicians to do more. Chief Councillor of the Climate Council Tim Flannery states:

'Ahead of COP, many of our strategic allies and major trading partners have already strengthened their 2030 targets, and committed to roughly halving their emissions this decade - when it matters most...But Australia is still at the back of the pack. We have unrivalled renewable energy potential, and should be taking advantage of the regional jobs, cheaper power, and clean energy that a decarbonised economy can bring. Our leaders need to aim higher and go faster than ever before towards our bright, zero-emissions future'.

[Source: Joint media release Prime Minister Scott Morrison and Minister for Industry, Energy and Emissions Reduction Angus Taylor 26/10/2021; Full text plan; Government's Summary of the plan; Climate Council subscriber email 26/10/2021 and media release 26/10/2021; Business Council of Australia media release 26/10/2021; Investor Group on Climate Change media release 26/10/2021; Responsible Investment Association Australasia media release 26/10/2021]

President Xi Jinping says 'climate change is nature's alarm bell to humanity', calls for increased international cooperation on the issue

In his [address](#) to the Conference Marking the 50th Anniversary of the Restoration of the Lawful Seat of the People's Republic of China in the United Nations, Chinese President Xi Jinping called (among other things), for more international cooperation on key global challenges, including climate risk and for individual nations to step up their efforts.

President Xi Jinping's comments were fairly high level referencing the need to support 'green' initiatives included no reference to specific targets or timeframes. He stated:

'We should step up cooperation, and work together to address the various challenges and global issues facing humanity. The international community is confronted by regional disputes as well as global issues such as terrorism, climate change, cybersecurity and biosecurity. Only with more inclusive global governance, more effective multilateral mechanisms and more active regional cooperation, can these issues be addressed effectively. Climate change is Nature's alarm bell to humanity. Countries need to take concrete actions to protect Mother Nature. We need to encourage green recovery, green production and green consumption, promote a civilised and healthy way of life, foster harmony between man and Nature, and let a sound ecology and environment be the inexhaustible source of sustainable development'.

[Source: Speech by H.E. Xi Jinping President of the People's Republic of China at the Conference Marking the 50th Anniversary of the Restoration of the Lawful Seat of the People's Republic of China in the United Nations 25/10/2021]

Bill introduced proposing to ban the mining, burning export and/or importation of thermal coal in Australia by 2030

Greens leader Adam Bandt introduced a Private Members Bill – [the Coal Prohibition \(Quit Coal\) Bill 2021](#) – into the House of Representatives on 25 October 2021. If legislated the Bill would:

- Ban new coal mines or coal-fired power stations or the expansion of existing mines or stations from the date of Royal Assent;
- Phase out the export of thermal coal by 2030
- Ban the mining or burning of coal after 1 January 2030
- Prohibit the importation of thermal coal into Australia (with some exceptions for research or 'heritage purposes)
- Implement a penalty regime to ensure compliance with the proposed measures in the Bill including up to seven years imprisonment for certain breaches.

[Source: Coal Prohibition (Quit Coal) Bill 2021]

Separately Independent MP Zali Steggal's [Climate Change \(National Framework for Adaptation and Mitigation\) Bill 2021](#) and the [Climate Change \(National Framework for Adaptation and Mitigation\) \(Consequential and Transitional Provisions\) Bill 2021](#) (summarised in Governance News [11/11/2020 at p30](#)) were re-introduced into the House of Representatives on 18 October 2021. The Bills have been revised 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

[Sources: [Climate Change \(National Framework for Adaptation and Mitigation\) Bill 2021](#); [Climate Change \(National Framework for Adaptation and Mitigation\) \(Consequential and Transitional Provisions\) Bill 2021](#)]

'Goodbye to investments in fossil fuel producers': Dutch pension fund ABP has announced short term fossil fuel divestment plans

- Dutch Pension fund ABP has [announced](#) that it plans to sell off 'the majority' of its €15bn investments in fossil fuel (oil, gas and coal) producers in the first quarter of 2023 on climate grounds.
- The decision was taken by the ABP board following the release of recent reports from the International Energy Agency (IEA) and the UN Climate Panel (IPCC). The decision was also influenced by a number of groups pushing for the fund to withdraw its investment in the fossil fuel industry.
- Engagement was ineffective: ABP states that it made the decision to divest rather than continue to engage with fossil fuel producers because it considers there was 'insufficient opportunity to influence them [as a shareholder and to let them make the switch to sustainable energy]'.
[Source: [ABP media release 26/10/2021](#); [ABP Frequently asked questions](#)]
- Longer term fossil-fuel plan: In 2022, ABP intends to develop a longer-term plan for its fossil, illiquid investments that that ultimately – 'we also want to get rid of that'.
- New focus of engagement: ABP now plans to 'focus' its engagement efforts on heavy users of fossil energy (eg electricity companies, the automotive industry and aviation). ABP states that as shareholder it 'wants to encourage these types of companies to make the switch from fossil to sustainable energy more quickly and to operate more socially responsible'.
- Going forward, the fund plans to increase its €4bn+ investments in renewable energy

How to drive meaningful progress on climate: Key takeaways from a Governance Institute Public Sector Forum discussion

The Governance Institute Public Sector Forum was held on 22 October 2021. The Forum included a discussion with Craig Reucassel focusing on what mechanisms could be effective in driving concrete and meaningful action on climate. Some key takeaways from the discussion are below.

- The discussion touched on Australia's current approach to managing climate change at an individual, business and government/policy level and the limitations of voluntary measures that are often not backed up with appropriate incentives or disincentives aimed at achieving a specific outcome. A key theme of the discussion was the need generally in Australia for more precision in setting specific goals, coupled with the inclusion of appropriate accountability mechanisms (ie disincentives or incentives).
- The discussion also touched on the increasing adoption of climate-risk disclosure by companies and the shift globally towards the imposition of mandatory disclosure requirements. Mr Reucassel observed that though disclosure aligned with the TCFD reporting framework has merit, and that it is good to see some companies not only setting targets but providing detailed disclosure around how these will be achieved, there is variation in the quality of reporting. There are also questions around how many people are actually engaging with the reporting enough to be able to identify gaps/weaknesses. As such, he said that disclosure alone should be viewed as essentially a 'first step' and a way of sharpening focus on climate risk rather than an outcome in itself. Disclosure

alone, he opined, is unlikely to be effective in achieving concrete, meaningful action to address broader climate change risk, unless it is backed up with appropriate accountability mechanisms.

- Mr Reucassel also queried the benefit (in terms of addressing broader climate risk) of companies focusing their efforts on addressing the specific climate-related risks that impact/intersect with their own business. For example he suggested that companies opting to divest carbon heavy projects ultimately does not address the broader climate issue (though it enables the company to minimise the risk to its own business). Mr Reucassel queried how companies could be motivated to take responsibility for the high emitting aspects of their existing businesses in the interests of reducing the overall risk to the community/to the planet rather than having the option to divest (as pass the problem on to business/investor).
- There was some discussion of the mechanisms that have been effective and ineffective in driving meaningful action. Ultimately Mr Reucassel suggested that specific rules, mandatory (rather than voluntary initiatives) and the inclusion of targeted incentives and or disincentives should be considered.

[Source: Notes from the Governance Institute of Australia Public Sector Forum Discussion, 'Fight for Planet A: Our climate challenge' discussion with Tania Sargeant and Craig Reucassel 22/10/2021]

In Brief | Ahead of COP26, Saudi Arabia has reportedly joined China and Russia in announcing a target to reach net zero emissions by 2060

[Sources: BBC news 24/10/2021; Reuters 23/10/2021; The Guardian 24/10/2021; CNBC 23/10/2021; Washington Post 23/10/2021]

Other Developments

Changes to the NSW Modern Slavery Act under consideration

The [Modern Slavery Act 2018 \(NSW\)](#) (NSW Act) was passed by NSW Parliament in June 2018 but is yet to commence, due among other things to a lack of harmonisation with reporting requirements under the under the Modern Slavery Act 2018 (Cth).

On 14 October 2021, the NSW Government introduced the [Modern Slavery Amendment Bill 2021](#) (Bill) into Parliament proposing to introduce various amendments to the NSW Act to 'ensure the intended operation of certain provisions in the Act are effective, improve the operation of the Act, enhance protections for the Anti-slavery Commissioner, reduce regulatory burden on businesses in New South Wales, reduce legal risks posed by the Act and ensure that victims of modern slavery can receive recognition payments'.

If legislated in its current form, a key change introduced by the Bill will be the repeal the current \$50 million per annum reporting threshold in the NSW Act. If legislation, this would mean that commercial organisations that do not meet the Commonwealth reporting threshold of \$100 million will not need to prepare a Modern Slavery Statement (though they can voluntarily elect to do so under the Commonwealth scheme).

In his [second reading speech](#) Don Harwin, Special Minister of State, and Minister for the Public Service and Employee Relations, Aboriginal Affairs, and the Arts, explained the rationale behind the proposed removal of the \$50 million reporting threshold as follows.

'It is appropriate that the Commonwealth's scheme cover the field on regulating the supply chains of commercial organisations. The Commonwealth has legislative power in relation to corporations, trade and commerce and external affairs. There is little public benefit in implementing a New South Wales scheme that largely duplicates and overlaps the Commonwealth's scheme—only more red tape for business. The New South Wales Modern Slavery Act passed Parliament on 21 June 2018, before the Commonwealth bill was introduced in the following week, on 28 June 2018. Now that the Commonwealth has acted in this space, section 24 of the Act should be repealed'.

Mr Harmon added that the NSW government has the Commonwealth to revisit the reporting threshold, with the New South Wales Government's express preference of harmonising the threshold at \$50 million'. However, this appears unlikely to be considered ahead of the statutory review of the Act scheduled to commence in 2022.

Proposed commencement date: It's proposed that the NSW Act (as amended by the Bill) will commence on 1 January 2022.

[Source: Modern Slavery Amendment Bill 2021; Second Reading Speech]

Workplace diversity and inclusion: New report finds Indigenous women with caring responsibilities are most at risk

In November 2020, the UTS Jumbunna Institute for Indigenous Education and Research, the Diversity Council Australia (DCA) and the Workplace Gender Equality Agency (WGEA) released a joint report looking at the experiences of Indigenous workers in Australian workplaces. The report was based on survey of over 1033 Aboriginal and/or Torres Strait Islander workers.

Broadly, the report found that Indigenous employees experience significant workplace racism and exclusion. For example:

- 38% of respondents indicated they had experienced being treated unfairly because of their Indigenous background 'sometimes, often or all the time'
- 44% of respondents reported hearing racial slurs 'sometimes, often or all the time'
- 58% reported receiving comments about they 'should' look as an Indigenous person (appearance racism)

The report also found that existing support mechanisms are ineffective. For example:

- Only 1 in 3 respondents reported that they had the workplace support required when they experienced racism
- Very few (1 in 5) respondents reported that their organisation's racism complaint procedure and antidiscrimination compliance training referenced Indigenous discrimination and harassment.

You can find a report synopsis [here](#).

Gendered insights

- A [follow up report](#) (and [factsheet](#) summarising key insights) has now been released analysing the original report data from a gendered perspective and providing insights into the intersection between Indigenous identity and gender in the workplace context.
- A key takeaway is that Indigenous women who are also carers are at particular risk in the workplace because they experience 'triple jeopardy'. That is, women workers who are also carers are even more likely to feel: a) unsafe in the workplace; b) less supported when they encounter racism/unfair treatment; and c) to carry additional expectations around making their workplace culturally sensitive/engaged. Their position in the workplace hierarchy was another factor in their workplace experience – the report found that managers generally felt that they carry the heaviest 'cultural load' while those in lower positions, feel the least supported.
- [Page 23 of the report](#) sets out suggested actions to help organisations to 'centre Indigenous Australians' voices' to create an inclusive workplace. These actions include:
 - Organisations being prepared to acknowledge how existing workplace policies/culture may be particularly harmful to Indigenous women and seeking to address this
 - Ensuring that support mechanisms are available and accessible to Indigenous women (especially those in less senior roles)
 - Addressing the 'identity strain' and 'cultural load' on Indigenous people in the workplace context. Acknowledge and remunerate the extra work entailed and understand why the largest 'cultural load' tends to fall on women
 - Consult with Indigenous workers on how to minimise cultural load

[Sources: Diversity Council of Australia media release 26/10/2021; WGEA media release 26/10/2021; Full text report: Gari Lara (Speak the Truth) Gendered Insights; Factsheet]

In Brief | Improving workplace gender equality: The government has announced a review of the Workplace Gender Equality Act 2012 (Cth). The review will include (among other things) consideration of existing WGEA reporting requirements as well as existing compliance mechanisms. The due date for submissions on the review terms of reference and the issues raised in the consultation paper is 24 November 2021

[Sources: Department of Prime Minister and Cabinet: Consultation on review of the Workplace Gender Equality Act 2012, Consultation Paper, Terms of Reference, Senator Marise Payne media release 20/10/2021]

In Brief | The Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021 was introduced on 27 October 2021. Broadly, if legislated, the Bill will establish a new kind of managed investment scheme (class action litigation funding scheme) as well as additional requirements for the constitutions of managed investment schemes that are class action litigation funding schemes. The purpose is 'to ensure that returns to litigation funders out of the claim proceeds of a scheme are fair and reasonable'

[Source: Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021]

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