Governance News

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

22 September 2021

Contents

Diversity

Global report finds D&I remains a priority (even during the pandemic) but flags leadership accountability as an area for improvement

The latest annual United Nations Global Compact-CEO report provides insights into CEO and company attitudes/approach to diversity in the workplace, based on a global survey of 1122 CEOs.

A headline conclusion is that though business leaders generally agree on, and continue to prioritise diversity and inclusion initiatives, they have been slow to adopt accountability measures that would hold leaders accountable for meeting diversity goals.

Key Takeaways

- The report found that diversity remains a priority for the majority of CEOs globally (despite the pandemic). For example:
  - 94% of CEOs said that initiatives focused on building a representative workforce (racial, gender, LGBTIQ+ and disability) have not been negatively impacted by the pandemic.
  - 81% of CEOs indicated they have instituted practices and procedures to fully eliminate systemic racism across their operations 'and the wider ecosystem'
  - 82% of companies surveyed indicated that gender equality is embedded in their

corporate sustainability strategy
  - 55% of companies report having policies supporting working parents (eg parental leave, childcare and post-parental leave support)
  - 45% of CEOs globally agree that their company has expanded resources and protection for LGBTIQ+ communities across their workforce. The report found that North American companies are the leaders on this with 77% of CEOs indicating that their company has increased resourcing/protection for LGBTIQ+ communities across their workforce.
- The report also found that there are indications that companies are committed to building representative workforces. For example: 86% of companies surveyed have enacted non-discrimination policies and 81% have instituted an equal opportunity policy. A further 86% of CEOS state that they already have a representative workforce in the geographies where they operate.
- Interestingly the report found that smaller businesses are setting more ambitious targets and timelines than their larger peers:
  - 80% of companies with less than $25m USD in revenue (small companies) report that have set a 30+% target for women's representation at the C-Suite and Executive Management levels. 85% have set a 2021-25 timeline to achieve this goal.
  - In contrast, only 66% of companies with more than $1 billion USD in annual revenue have set a similar representation target and only 67% have matched the 2021-25 timeframe for achieving it.

  [Note: A recent Australian report – The Chief Executive Women (CEW) Senior Executive Census 2021 – tracking progress towards gender balance (ie 40% women, 40% men and 20% open) in the executive leadership teams of ASX 300 companies over the past five years found that larger rather than smaller companies are leading the way on gender diversity in the Australian context. You can find a short summary of the key takeaways from the report in Governance News 15 September 2021 at p4. The latest Governance Institue and Watermark Gender Diversity Index (summarised here) highlights a similar trend.]
- The report also analysed the impact of the pandemic on programs/initiatives that support equality in the community and the workplace. The report found that 27% of CEOs consider that the pandemic has negatively impacted their company's investment in community programs
- The pandemic has also widened the workforce skills gap: 26% of CEOs report that efforts to upskill workers (particularly initiatives to address the digital skills gap across their workforce) have been negatively impacted by the pandemic. CEOs in Africa were the most likely to report this was the case (36%), CEOs in Oceania were the next most likely (30%).

The report concludes that 'leadership accountability remains in a nascent stage globally'

- Though businesses appear to be committed to increasing diversity, the report found that they have generally been slow to implement measures to hold leaders accountable for meeting diversity goals. For example:
  - only 42% of companies have taken action to ensure leaders are accountable for diversity and inclusion targets and only 6% have tied executive remuneration to the achievement of diversity targets
  - only 38% of companies have publicly announced diversity and inclusion organizational targets
- In her opening letter to the report, Senior Global Advisor, Target Gender Equality Board Member, UN Global Compact, Dr Musimbi Kanyoro highlighted leadership accountability as an area for improvement.

  'While business leaders have expressed a genuine urgency to build a diverse and inclusive culture, they have been slow to adopt accountability measures and have failed to hold their leadership responsible for meeting and publicising diversity and inclusion targets. We are making progress every day but we know there is more work to be done. As CEOs and companies put their policies of inclusion into practice, we look forward to seeing their action plans and - most importantly - their results. We know that companies have the power - and must use it urgently to imagine, create and sustain a better world that values all people, providing them with respect, dignity and equality.

  [Source: Accenture UN Global Compact Report: Gender Equality, Diversity & Inclusion Spotlight 2021]

Shareholder Activism

BHP board recommends shareholders vote in favour of the ACCR's lobbying resolution

Board endorses ACCR lobbying resolution

- BHP's Notice of Meeting recommends that shareholders vote in support of the Australian Centre for Corporate Responsibility (ACCR) ordinary shareholder resolution on climate-related lobbying. The resolution calls on BHP to strengthen its review of industry association membership to ensure alignment with the goals of the Paris Agreement.
- The Notice of Meeting states that the company considers the resolution to be 'substantively aligned with the Group's existing approach' to industry association membership as outlined in its Climate Transition Action Plan (CTAP), noting that shareholders will have an opportunity to vote on the CTAP at the AGM.
- Importantly, BHP makes clear

that despite its recommendation, the Board 'does not support or agree with the supporting statement' from ACCR. BHP states,

> 'The supporting statement [from ACCR] makes a number of claims about the advocacy of industry associations that lack balance and context and appear to be inconsistent with the apparent intent of the resolution itself. The supporting statement also does not consider or provide a complete account of the benefits that BHP receives from its membership of industry associations and the strong contribution that industry associations can make to improving debate and practice in a range of areas'.

Board recommends against other shareholder resolutions

- The passage of the ACCR's lobbying resolution is contingent on the passage of a separate special resolution seeking to amend the company's constitution to enable shareholders to bring advisory resolutions. The BHP board has recommended shareholders vote against this resolution on the basis that it is not in their best interests.
- Similarly, the BHP board has recommended shareholders vote against the shareholder resolution calling on the company to provide details of how its capital expenditure (capex) and operations will be 'managed in a way that minimises stranded asset risk as the world moves to meet climate commitments that BHP supports'. The Notice of Meeting states that the board has recommended shareholders vote against the resolution on the basis that the company's CTAP provides sufficient detail around how the company factors in the goals of the Paris Agreement when setting its strategy and capital allocation. Accordingly, the board considers the resolution is not in the best interests of shareholders as a whole.

ACCR response

In a statement, the ACCR welcomed BHP's support for its shareholder climate-related lobbying resolution. ACCR Director of Climate and Environment Dan Gocher said that BHP's decision underlines the need for industry associations including APPEA, the Minerals Council of Australia, the NSW Minerals Council and the Queensland Resources Council to end their 'obsession with fossil fuel expansionism'.

Mr Gocher also called on Origin Energy and South32 to follow BHP and Rio Tinto's lead in supporting the shareholder resolutions on climate-related lobbying at their upcoming AGMs.

The ACCR was less welcoming of welcomed BHP's Climate Transition Action Plan (CTAP) which the group considers to be insufficiently ambitious. Mr Gocher commented:

> 'The only significant new commitment in BHP's Climate Transition Action Plan is its target for some of its Scope 3 emissions. BHP has set the target of net zero emissions by 2050 for the operational emissions of its suppliers and the shipping of its products, which appears to exclude the emissions from steelmaking - by far the largest share of its Scope 3 emissions. BHP has also failed to increase its operational emissions target to 2030 (30%), despite all of the scientific evidence suggesting we need to reduce emissions by 45-60% by 2030 in order to preserve a safe climate. BHP must use its unique position of leadership to push for more ambitious emissions reductions before 2030.'

BHP Group Ltd's Australian AGM will be held as a virtual meeting on 11 November 2021.

[Sources: BHP Notice of meeting; ACCR media release 14/09/2021]

AGL AGM: ASA to vote in support of ACCR shareholder climate resolution

The Australian Shareholders' Association (ASA) has confirmed its voting intentions for the AGL Energy Ltd AGM which will be held virtually on 22 September 2021.

The ASA states that it will vote open proxies as follows.

- ACCR shareholder resolutions:
  - **Disclosure of Paris-aligned targets:** The ASA will however support the ACCR's ordinary resolution calling for AGL to disclose: a) short, medium and long-term targets for reductions in the proposed demerged companies' Scope 1, 2 and 3 emissions in line with the goals of the Paris Agreement; b) details of how the proposed demerged entities' capital expenditure will align with these targets; and c) details of how the proposed demerged companies' remuneration policies will incentivise progress against these targets. The resolution is conditional on the passage of the constitutional amendment.
    The ASA states that its decision to support it is 'meant to tap into the broad community support for mitigating climate change' and to confirm its support for the inclusion information relating to short, medium and long-term targets for reductions in the proposed demerged companies' Scope 1, 2 and 3 emissions aligned with

the Paris Agreement in the demerger documents. The ASA considers this information to be relevant/necessary to enable shareholders to make an informed decision about what to do with shares in the demerged entities AGL and Accel Energy.

  - **Constitutional amendment:** The ASA will vote in line with the AGL board's recommendation against the proposed amendment to the constitution that would enable shareholders to bring advisory resolutions. The ASA agrees with the AGL board that the resolution is unnecessary for 'fostering engagement with shareholders' and is 'not required and is not appropriate for inclusion the company's constitution'. The ASA also notes that AGL proposed to include a board-sponsored say on climate resolution to the AGMs to be held by each of the demerged entities in FY22.

- **Election of non-board endorsed candidate Mr Ashjayeen Sharif as a Director:** ASA has indicated that it will vote in line with the AGL board's recommendation, against the election of non-board endorsed candidate Mr Sharif. The ASA states that though it 'supports diversity in the boardroom, directors of large ASX-listed companies need to exhibit appropriate skills and experience to carry out the role'.

- **Remuneration:** ASA will vote against the remuneration report and the resolution to approve the grant of performance rights to the CEO primarily due to the change to the hurdles in the long-term incentive plan. In particular, the ASA considers that 'the removal of the return on equity hurdle for the long-term incentive and reduction in weight to the carbon transmission hurdle after receiving a first strike on its remuneration report in 2020 as not supporting the direction the company needs to make in its current situation'.

According to a media release from the ACCR, the shareholder resolution secured 55.13% suppor

[Sources: ASA voting intentions: AGL Energy; ASA media release 17/09/2021]

Stepping up investor focus on the hitherto neglected chemical sector: $3.2tn group of investors to push for the sector to decarbonise

- ShareAction has convened a $3.2tn group of investors to increase pressure on the chemicals sector to rapidly implement plans to decarbonise. The group includes EOS at Federated Hermes, Barrow Cadbury Trust, EdenTree Investment Management, Jesuits in Britain, NN Investment Partners, and Sarasin & Partners.

- According to analysis by ShareAction though the industry has high emissions - the chemicals sector is responsible for over 5.8% of global greenhouse gas emissions – it has so far taken 'little action' and come under little investor pressure (so far) to do so, relative to other high-emitting sectors. For example, ShareAction found that 'credible transition plans in the sector remain scarce'. For example, only two out of the 21 Stoxx Europe 600 Chemicals companies having a Science Based Targets initiative (SBTi)-approved 1.5C target.

- ShareAction considers that it is both 'technically and economically feasible' to decarbonise the production of chemicals by 2050 by both pushing companies to: a) electrify energy processes using only renewable energy; and b) replace fossil feedstock with green hydrogen or green methanol.

- Potential target companies for investor engagement are listed in ShareAction's report at p11. The report also includes a list of suggested engagement questions for investors at p8.

[Source: ShareAction media release 09/2021]

In Brief | Strong message: ACCR shareholder resolution calling for Paris Aligned targets at AGL has secured 55.13% support

[Source: ACCR media release 22/09/2021]

Meetings and Proxy Advisers

ISS analysis of the 2021 US proxy season confirms climate risk is a mainstream investor issue

Institutional Shareholder Services (ISS) has released analysis of the climate-related voting trends to have emerged over the US 2021 proxy season.

The headline conclusion ISS draws is that the trends highlighted below, in particular the escalation of shareholder engagement on climate related issues and the 'expansion of tactics' (eg the emergence of 'vote no campaigns') signal that 'the days of regarding climate disclosure and risk management as "non-financial" niche issues targeted by a relatively small number of activists and NGOs are over'.

Key Takeaways

More shareholder ESG resolutions were filed, and a record number received majority support

- ISS found that the volume of resolutions increased as did the level of support they received
  - According to ISS' analysis, the volume of shareholder climate-related resolutions not only increased this year (from 77 in 2020 to 84 in 2021), but the level of support for the resolutions that went to a vote also substantially increased.
  - The median level of support for shareholder climate-related resolutions in 2019 was 27.5%, increasing to 37.6% in 2020 and increasing to 48.5% in 2021. ISS interprets the continued uptick in the level of support over this period as an indication of the very high level of engagement from many shareholders on climate-related issues.
- High proportion of resolutions were withdrawn ahead of meetings: ISS found that relatively few climate-related shareholder proposals actually proceeded to a vote – only 23 of 84 resolutions – with 55 withdrawn by the proponents ahead of the meeting. ISS interprets this as a an indication of companies' willingness/preference to engage on ESG issues to negotiate an agreement where possible.
- Paris-aligned targets/disclosure: ISS found that the vast majority of climate-related shareholder proposals filed this season focused on the reporting on/achievement of Paris-aligned targets. A significantly lower number of proposals called for disclosure and reduction of greenhouse gas emissions; disclosure around climate topics not specific to emissions; and lobbying.

An expansion of tactics

Say on Climate resolutions

ISS points to the emergence of 'say on climate' resolutions (advisory resolutions enabling shareholders to vote on company's management of climate related risks) as an example of the increased level of shareholder engagement on climate issues.

The report opines that it is too early to conclude what impact they may have on: a) the volume of shareholder climate-related resolutions going forward; b) the level of support they may receive; or c) the extent to which 'say on pay' resolutions may relieve pressure on directors at companies 'as failing to adequately manage climate-related risks'.

Targeting individual directors over climate: The rise of 'vote no' campaigns

- 'Vote no campaign' is the term used in the report to describe the tactic of launching a campaign that calls on shareholders to vote against individual directors as a means of holding them accountable/registering concern over their inaction on climate change.
- According to ISS, Majority Action launched 19 climate-related 'vote-no campaigns' in the 2021 proxy season at companies in the electricity generation, oil and gas and banking sectors. ISS concludes that overall, the vote-no campaigns had little overall impact on vote outcomes in director elections with both directors who were targeted and those who were not targeted securing over 90% support.
- Having said this, the report observes that while the Vote no campaigns initiated by Majority Action did not result in significantly lower levels of support for targeted directors in 2021, ISS opines that the tactic may be repeated in

future. In support of this view, ISS points the fact that the tactic has been 'embraced by NGOs and activist investors' as well as by BlackRock and to the success of the Exxon proxy contest (in which activist Engine No 1 secured the election of three of its preferred board members over board-endorsed candidates).

[Source: ISS report: Proxy Voting in the Anthropocene: 2021 U.S. Proxy Season Climate – Related Voting Trends]

As You Sow report highlights the extent to which the group stepped up engagement on a range of ESG issues in 2021

As You Sow has released its latest annual shareholder impact review for 2021. A comparison against the 2020 report reveals that the group has significantly escalated and expanded its engagement across a broader range of issues.

Key Takeaways

More engagements across a broader range of issues than last year

- In 2021, As You Sow conducted 188 corporate engagements with 142 companies.
- The 188 engagements addressed the following issue areas: climate change (81); diversity, equity, and inclusion (46); ocean plastics, single use plastics, and recyclability (21); pesticides (7); racial justice (6); political spending (5); antibiotics misuse and overuse in factory farming (5); petrochemicals (5); governance (4); per-and poly-fluoroalkyl substances (PFAS) reduction or elimination (4); CEO pay and wage equity (3); and water use (1).
- This is a significant uptick on As You Sow's activity in 2020 when it conducted only 131 engagements with 111 companies across 10 program areas.

Uptick in the number of resolutions filed and the level of support they received

- In 2021 86 shareholder resolutions were filed vs 73 in 2020.
- Of these 86 resolutions:
  - 21 went to a vote. The average level of support was 43.3% with five resolutions receiving 50% or more support. For context, in 2020 a similar number of resolutions went to a vote (22) but the average level of support was significantly lower at 30% and only four resolutions received majority support.
  - 48 resolutions where withdrawn after the companies agreed to make concessions in response to As You Sow's demands. In contrast, in 2020 40 resolutions were withdrawn after filing and a further 36 were not filed after As you Sow negotiated an agreement with the company.
  - 10 resolutions were omitted by companies after the Securities and Exchange Commission (SEC) granted approval for them to do so (vs 6 in 2020).
  - 7 resolutions had not yet gone to a vote (as at 9 September 2021)

[Source: As You Sow 2021 Shareholder Impact Review]

Disclosure and Reporting

Singapore: Consultation on new board diversity and TCFD-aligned reporting requirements

Proposed TCFD-aligned reporting and director sustainability training requirements

- Singapore Exchange Regulation (SGX RegCo) is seeking views on the proposed phased introduction of mandatory TCFD-aligned disclosure requirements for certain listed issuers in preparation for/a first step towards reporting under the 'anticipated' global sustainability standards to be developed by the International Financial Reporting Standards Foundation.
- SGX RegCo proposes a phased approach to implementation:
  - all issuers would be required adopt climate reporting on a 'comply or explain' basis for their financial year (FY) commencing in 2022;
  - from the FY commencing in 2023 onwards, climate reporting would be mandatory for some sectors of issuers while 'comply or explain' will remain the approach for the others; and
  - from the FY commencing in 2024 onwards, more sectors of issuers will adopt mandatory climate reporting with the rest doing so on a 'comply or explain' basis.
- Assurance: SGX RegCo proposes to require issuers to subject their sustainability report (SRs) to assurance by their internal auditors. Assurance through external auditors or through an independent assurance services provider would be optional.
- Board sustainability training requirement: SGX RegCo also proposes to introduce a requirement for all directors to attend one-off training on sustainability.

Proposed non-mandatory baseline ESG metrics and an investor data portal

- Separately, SGX RegCo has also released a list of 27 proposed base-line ESG metrics for consultation. It's intended that once finalised, the metrics could be used by issuers (on an optional basis and together with their sustainability reporting) to help ensure the information they provide is as consistent and comparable as possible.
- Further to this, SGX RegCo is also consulting on a proposed data portal which would enable investors to access ESG data in a 'structured format as reported by issuers in accordance with aligned metrics and disclosure requirements'.

An important step towards facilitating the climate transition

Commenting on the proposed new climate disclosure requirements Assistant Managing Director (Capital Markets), Monetary Authority of Singapore Mr Lim Tuang Lee said,

> 'SGX's proposed roadmap towards mandatory TCFD aligned climate-related disclosures by SGX-listed issuers is a timely one. Globally consistent, comparable and reliable climate-related disclosures will enable market participants to price and manage climate risks more effectively. This will help enhance trust in sustainable investments and expand SGX-listed issuers' access to the growing pool of global capital directed at sustainability investing. Overall, this is an important step in facilitating Asia's transition to a low carbon economy'.

CEO of SGX RegCo Mr Tan Boon Gin said that the changes respond to investor demand.

> 'Lenders, insurers and investors increasingly want climate-related information for decision-making. The proposals today are aimed at helping our issuers meet these demands and to build their resilience to climate risks. Some business sectors are more carbon intensive and hence climate risks affect them more significantly compared to others. These should therefore be among the first to make climate disclosures. We are also proposing to codify board diversity disclosures in response to investor requirement'.

Proposed new board diversity requirements

- SGX RegCo also proposes to introduce new requirements for issuers to:
  - have in place a board diversity policy including targets, accompanying plans and timeline for achieving the stipulated diversity on its board;

- disclosure how the combined skills, experience and diversity of directors on the board serves the needs and plans of the issuers.

- SGX RegCo proposes that issuers be required to adopt these enhancements for their sustainability reports and annual reports for financial years beginning on or after 1 January 2022.

  [Sources: SGX media release 26/08/2021; Consultation paper on Climate and Diversity; Consultation paper on starting with a core set of ESG metrics]

GRI sector specific sustainability standard for mining planned for Q3 2023 release

- GRI plans to progressively release sector specific sustainability reporting standards covering 40 sectors. Sectors with the highest sustainability impacts are being prioritised.

- The first completed Sector Standard – for oil and gas – is planned to be released in October 2021.
- Plans for standards covering coal, agriculture, aquaculture and fishing are described as being 'at an advanced stage'
- The next GRI sector standard to be developed will be for the mining sector. To assist in the development of this standard, GRI's Global Sustainability Standards Board (GSSB) is seeking individuals with reporting/sustainability expertise in mining or quarrying to join a new Mining Sector Standard Working Group.
- Following the appointment of working group members, the draft Sector Standard for Mining will be developed and consulted on in 2022-23 with a view to releasing the finalised standard in Q3 2023.

  [Source: GRI media release 16/09/2021]

Seven suggested principles to guard against unintentional greenwashing

Writing in Forbes, Dr Robert G Eccles (with input from former Group Sustainability Officer at DWS Group Desiree Fixler) puts forward seven suggested principles to help guard against unintentional greenwashing in ESG investing.

Dr Eccles comments,

> 'While we don't regard our seven principles as the definitive word by any means, we do hope they will be helpful to asset managers, their clients, and regulators of the investment industry, such as BaFin'.

Brief overview of the seven principles and the thinking behind them

The full text of the principles together with more detailed explanation around each is included in the Forbes article here. The table below provides a short summary.

PRINCIPLE	COMMENTARY
Have clear criteria for ESG products	▪ Given the lack of standards around what an ESG product is, the authors consider it imperative that asset managers are 'very clear about how they are defining and ESG product' including steps to ensure that any metrics used are 'based on a reliable data source that can be independently verified'. They comment that 'what is essential is that these criteria are clear and well-defined and transparently communicated, not hidden deep in a fund offering prospectus'.
Exercise care in the selection of ESG data vendors	▪ The authors consider that especially with 'newer' ESG data vendors it is 'important [for asset managers] to do careful due diligence' on the vendors' methodology and to take steps to understand how it has been validated. The authors suggest that 'ideally, you should get feedback from some of their existing customers'.
Develop a rigorous process for aggregating these data	▪ Given the 'substantial variation' in how ESG data vendors rate a company, both in terms of the overall rating and its components, the authors consider that asset managers need a 'sophisticated approach to aggregate a rating' that goes beyond simply averaging two or three overall ESG ratings (an approach that may disguise underlying risk). They suggest that asset managers should instead develop their own methodology for the ratings used to inform investment decisions.
Have 'an integrated process for constructing ESG products'	▪ The authors suggest that portfolio managers (as those responsible for making asset management decisions) should be involved in the construction of ESG products, be able to answer questions about how the fund was constructed (eg the sources of ESG data) and be held accountable for both the financial and ESG performance of the fund.
Ensure ESG labelled offerings 'walk the talk'	▪ The authors emphasise the need to ensure that offerings live up to any ESG claims. ▪ They consider that asset managers need to be transparent about product fees on ESG offerings and more particularly that they should be transparency about how the fee structure of ESG offerings compares with similar products not labelled ESG
Identify, manage and disclosure conflicts appropriately	▪ The authors consider it important that conflicts – eg using the products/services of a data vendor in which the asset managers has made an investment - are identified, managed and disclosed appropriately.
Ensure proper governance at all levels of the organisation	▪ The authors consider that asset managers should have a 'legitimate process' in place for addressing any concerns raised about ESG products. It's suggested that: 'Turning a blind eye and trying to make the whistle blower roadkill will come back to bite you. Failure here by an asset manager selling ESG products is especially egregious. Even worse, it will fuel the understandable and growing cynicism about ESG investing. Those doing bad who purport to be doing good are worse than people doing bad who just admit they are bad'.

[Source: Forbes 19/06/2021]

Institutional Investors and Stewardship

Common ownership theory is no basis to justify reform? BlackRock and Vanguard's separate submissions to the common ownership inquiry question the need to change current settings

The House of Representatives Standing Committee on Economics Inquiry into the implications of common ownership and capital concentration in Australia commenced on 29 July 2021. The terms of reference are here.

In its submission to the inquiry, BlackRock argues against the need to change existing regulatory settings. Among other things the submission contends that:

- **Fund managers have limited voting power.** BlackRock argues that as 'stewards of investments' fund managers advocate for the interests of clients who invest through their products and services, but importantly, do not hold 'decisive voting power'. Rather, BlackRock is a minority shareholder. BlackRock also observes that some institutional investors reserve the voting rights of assets otherwise managed for them, further limiting the total number of votes a fund manager like BlackRock is able to exercise.
- **The funds management industry in Australia is already 'highly regulated** and adheres to a robust legislative regime with access to regulatory tools that can be deployed to address anti-competitive conduct'
- **What is the rationale for reform?** BlackRock argues that the 'common ownership hypothesis' - the theory linking institutional investors' minatory holdings of more than one company with decreased competition – remains contentious and is the subject of 'significant challenge within academia' and more broadly. For example, BlackRock quotes the ACCC as stating that: 'Overall, there appears to be no consensus in the research on the effects of common ownership on competition.'

  BlackRock's own view is that the theory is based on 'fundamental misconceptions about the role of fund managers as shareholders on behalf of diverse clients with diverse portfolios objectives and expectations'.

  Accordingly, BlackRock considers that basing any future reform 'based on an idea still subject to rigorous debate, is in our view, premature and inconsistent with the approach taken overseas'. BlackRock adds that it would also 'abruptly impose direct costs and restrictions on Australians and their savings for an unproven consumer or market outcome'.

Similarly, Vanguard argues in a separate submission against the need for reform for broadly similar reasons as put forward by BlackRock including that common ownership theory 'reflects an unproven hypothesis' and that regulatory intervention to 'curtail common ownership' would likely have 'severe consequences for investors'.

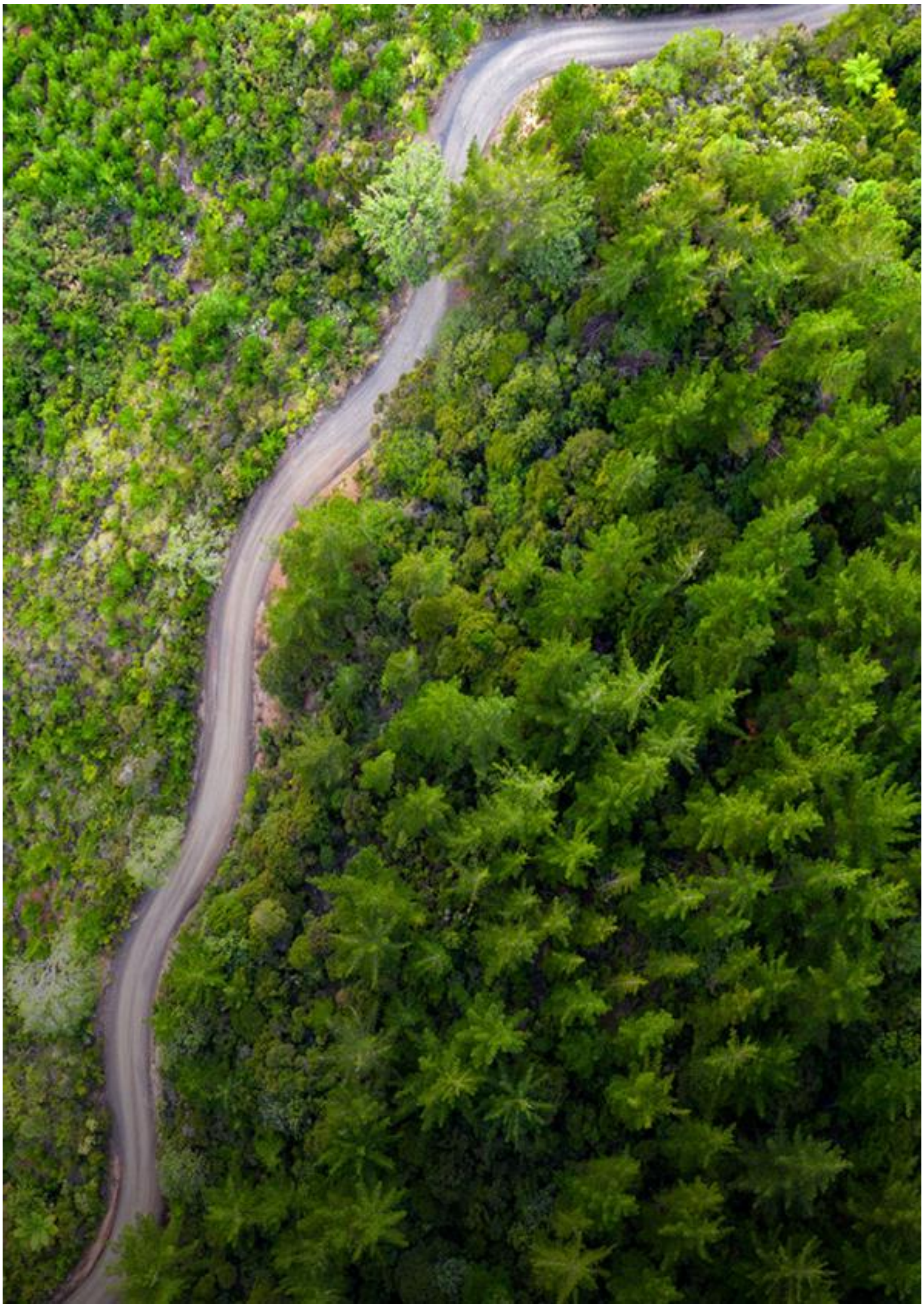
Public hearing will be held 22 September

The Reserve Bank of Australia, The Australian Institute of Superannuation Trustees, institutional investor Vanguard Investments Australia, the Australian Council of Superannuation Investors; CBUS Super representatives and the Australasian Investor Relations Association will appear before the Committee on 22 September 2021.

Announcing the hearing, Committee Chair, Mr Tim Wilson that it would provide an opportunity to 'directly question proxy advisers' on key issues. Mr Wilson said that

> 'Our recent hearings with regulators and Australian and international scholars who are experts on this topic confirmed that there are serious questions about the impact that common ownership can have on competition, and consumers more broadly'.
>
> [Sources: BlackRock submission to the House of Representatives Standing Committee on Economics Inquiry into the implications of common ownership and capital concentration in Australia; Vanguard submission]

LPPI commits to net zero by 2050



UK pension service provider Local Pensions Partnership Investments (LPPI) has committed to net zero emissions by 2050. The commitment includes:

- Setting an interim target 2030 target for the decarbonisation of some assets as a step towards bringing all assets in scope by 2050
- Implementing a stewardship and engagement program to encourage investee companies to set and disclose robust net zero targets

LPPI will use the Institutional Investors Group on Climate Change Net Zero Investment Framework and has also announced its intention to become a signatory to the Net Zero Asset Manager Initiative later this year.

Announcing the commitment LPPI CEO Chris Rule said:

> 'Net zero by 2050 is an ambitious goal – not least as we all seek better data. We believe it is most likely to be achieved if we collaborate, including with our clients, peers and suppliers. The IIGCC framework is well suited to this collective endeavour, as we manage risks, identify opportunities, and support positive and permanent change.'

[Source: LPPI media release 21/09/2021]

Markets and Exchanges

HKEX is seeking feedback on the possible introduction of a SPAC listing regime

The Stock Exchange of Hong Kong (HKEX) is consulting on proposals to amend the Listing Rules to potentially create a listing regime for special purpose acquisition companies (SPACs) in Hong Kong.

In putting the proposals forward, HKEX makes clear that it has not yet formed a view on whether a SPAC regime should be implemented in Hong Kong and emphasises that the proposals are still at a 'formative stage' and intended to facilitate public discussion, including around the appropriate suggested safeguards and conditions (should a SPAC regime be implemented).

The due date for submissions is 31 October 2021.

Rationale

The introduction of a SPAC listing regime in Hong Kong is intended to attract Greater China and South East Asia companies to list in Hong Kong rather than elsewhere (eg the US) via De-SPAC Transactions and to remain competitive internationally given the introduction of SPAC listing regimes in other jurisdictions.

HKEX comments that the proposed approach would result in a SPAC listing regime that is 'more stringent than that of the US. However, as has been demonstrated through our implementation of the 2018 listing reforms that enabled the listings of Biotech Companies, issuers with WVR structures and secondary "homecomings", this approach can result in very successful commercial and regulatory outcomes'.

Proposed approach

Table 1 at p3 of the consultation paper summarises the proposed approach to the introduction of a SPAC regime. Some of the key points are below.

STAGE	PROPOSAL
Pre De-SPAC Transaction Proposals	▪ The subscription for and trading of a SPAC's securities would be restricted to professional investors only. ▪ The funds expected to be raised by a SPAC from its initial offering would need to be 'at least $1 billion'. ▪ SPAC Promoters: – SPAC promoters would need to meet minimum suitability/eligibility requirements – Each SPAC would be required to have at least one SPAC Promoter which is an SFC licensed firm holding at least 10% of the Promoter Shares. – Promoter Shares would be capped at a maximum of 30% of the total number of all shares in issue as at the initial offering date.
De-SPAC Transaction Proposals	▪ A De-SPAC Transaction would need to be approved by SPAC shareholders at a general meeting (which would exclude the SPAC Promoter and other shareholders with a material interest) ▪ SPAC shareholders would need to be given the option to redeem their shares prior to either a De-SPAC Transaction, a change in SPAC Promoter and any extension to the deadline for finding a suitable De-SPAC Target. ▪ A Successor Company would be required to meet all new listing requirements including minimum capitalisation and financial eligibility tests ▪ Independent Third Party Investment would be mandatory and must constitute at least 15=25% the expected market capitalisation of the Successor Company, validating the valuation of the Successor Company
Liquidation and De-listing	▪ If a SPAC were unable to announce a De-SPAC Transaction within 24 months, or complete one within 36 months, the SPAC would be required to 'liquidate and return 100 per cent of

STAGE	PROPOSAL
	the funds it raised (plus accrued interest) to its shareholders'. The SPAC would then be delisted by HKEX.

[Source: HKEX media release 17/09/2021; Consultation paper: Special Purpose Acquisition Companies September 2021]

SGX implements a SPAC listing framework

- On 31 March 2021, Singapore Exchange Securities Trading Ltd (SGX) released a consultation paper seeking feedback on proposals to introduce a primary listing framework for Special Purpose Acquisition Companies (SPACS) on the Mainboard of SGX. Consultation closed on 28 April.
- SGX has now confirmed that in light of the generally strong support for the proposed approach, it has 'decided to implement the proposals set out in the Consultation broadly as proposed with some amendments to reflect comments made by respondents on matters of detail and to clarify the intent of some of the Mainboard Rules'. The revised rules enabling SPACs to list on the SGX Mainboard came into effect on 3 September 2021.

Mandatory requirements:

- An SGX listing under the SPAC framework must have the following features:
  - 'Minimum market capitalisation of S$150 million
  - De-SPAC must take place within 24 months of IPO with an extension of up to 12 months subject to fulfilment of prescribed conditions
  - Moratorium on Sponsors' shares from IPO to de-SPAC, a 6-month moratorium after de-SPAC and for applicable resulting issuers, a further 6-month moratorium thereafter on 50% of shareholdings.
  - Sponsors must subscribe to at least 2.5% to 3.5% of the IPO shares/units/warrants depending on the market capitalisation of the SPAC
  - De-SPAC can proceed if more than 50% of independent directors approve the transaction and more than 50% of shareholders vote in support of the transaction
  - Warrants issued to shareholders will be detachable and maximum percentage dilution to shareholders arising from the conversion of warrants issued at IPO is capped at 50%
  - All independent shareholders are entitled to redemption rights
  - Sponsor's promote limit of up to 20% of issued shares at IPO'.

[Sources: Consultation Paper on Proposed Listing Framework for Special Purpose Acquisition Companies; SGX media release 02/09/2021; Responses to Comments on Consultation Paper Proposed Listing Framework for Special Purpose Acquisition Companies 02/09/2021]

Regulators

A 'two way street': ASIC Chair Joe Longo says the advice industry needs to play a role in addressing current challenges

In his speech to the AFA Hybrid Conference 2021, Australian Securities and Investments Commission (ASIC) Chair Joe Longo spoke about the challenges facing the advice industry, the actions the regulator is taking to address them and 'suggestions' around the steps industry could take to 'play its part'.

A theme running through the address was the need for the industry and the regulator to work together to tackle the challenges facing the advice sector and secure the future of the industry given the critical role that it plays in the economy.

Key Takeaways

- Mr Longo said that the issues facing the advice sector is a key priority for ASIC, given the critical role that the sector plays in the economy.
- COVID-19 challenges: Mr Longo nominated the disruption caused by the COVID-19 pandemic as a key challenge facing the industry and outlined some of the steps ASIC has taken in response to date. These include:
  - limiting the regulatory activity that required a response from industry as much as possible and consulting with industry on areas where ASIC could provide support
  - providing temporary relief/guidance to improve access to affordable/timely financial advice for consumers impacted by the pandemic
  - issuing guidance in relation to the raft of Hayne reforms that commence this year eg updating breach reporting guidance in RG 78.
  - confirming that ASIC will take a 'reasonable approach' in the early stages of reforms set to commence in October, provided that industry use their best efforts to comply
  - creating a dedicated ASIC unit to identify and implement changes to how the regulator administers the law with a focus on minimising regulatory costs to business.

- Access to quality financial advice was also nominated as a key challenge and priority for ASIC.
  - The rise of finfluencers: Mr Longo observed that the pandemic has 'created the perfect conditions for finfluencers to flourish. The result is the conflation of general and personal advice, which is now in a state of flux'. Mr Longo said that ASIC is 'watching this evolution closely' and in particular is 'making it clear to social media content creators and the public that there is a clear legal difference between advice and opinion. And we are working to enable industry to counterbalance opinion with professional, good-quality advice that is also affordable'.
  - Impediments to accessing advice: Mr Longo summarised the feedback received from industry on the impediments to providing quality/affordable and limited advice to consumers and said that the next step for ASIC is to deliver initiatives to 'assist industry overcome some of these impediments', 'resources and regulatory role permitting'.
  - Work currently underway includes: 'looking at creating' a Financial Adviser Hub on the ASIC website to make finding relevant content easier; adding additional guidance in the form of an example Statement of Advice and an Information Sheet on Records of Advice; passing on to Treasury feedback on areas of potential law reform to help inform the Quality of Advice Review.
  - Mr Longo emphasised that ASIC will continue to engage closely with industry on the issue.
- ASIC's role and priorities:
  - Mr Longo made clear that ASIC role 'has been to administer and enforce the Parliament's laws'. He observed that 'As the Chair, it is my job to ensure ASIC administers the law to good effect, and in accordance with Government policy'.
  - Mr Longo asked that this be kept in mind in the context of issues relating to Chapter 7 of the Corporations Act 2001 (Cth) which is currently under review by the Australian Law Reform Commission (ALRC).
- 'This has to be a two-way street': Mr Longo emphasised that industry needs to play a role in addressing current challenges. He made three suggestions as to the steps industry could take: 1) continue to focus on client interests; 'continue to cultivate and advice your industry's value proposition'; and 3) 'comply with the spirit of the new laws'.
- Optimistic about the future of the advice sector: Mr Longo said that he remains 'optimistic about the future of the industry' provided both the sector and ASIC play their part. He observed that 'as we look toward the future, the lines of communication must remain open in both directions…I believe that if we continue to engage effectively, and remain focused on our shared goal, we can help Australian consumers achieve greater economic prosperity'.

  [Source: ASIC Chair Joe Longo speech, 'The Regulator's Perspective', AFA Hybrid Conference 2021, hosted by the Association of Financial Advisers 21/09/2021]

In Brief | ACCC Chair Rod Sims has been appointed as the new Vice Chair Digital Co-ordination and Asia-Pacific Liaison of the International Competition Network. Mr Sims will focus on co-ordinating ICN projects and discussions about competition in the digital economy. Mr Sims will also act as a liaison between the ICN Steering Group and ICN members in the Asia-Pacific region

[Source: ACCC media release 17/09/2021]

Financial Services

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 22 September 2021 to reflect developments relating to implementation of recommendation 4.3 (Deferred sales model for the sale of add on insurance products) and recommendation 4.14 (Additional scrutiny for related party engagements). You can find the full text here.

Hayne implementation: Regulations finalised for the deferred sales model exemptions for add-on insurance

- Hayne Recommendation 4.3 recommended the introduction of a deferred sales model for the sale of any add on insurance products (except policies of comprehensive motor insurance). Commissioner Hayne said that this should be 'implemented as soon as is reasonably practicable'.
- Schedule 3 of Financial Sector Reform (Hayne Royal Commission Response) Act 2020, which is due to commence on 5 October 2021, implements an industry wide deferred sales model for the sale of add-on insurance products. The legislation provides for regulations to exempt a class of add-on insurance products where it would not be appropriate that they be captured by the deferred sales model.
- Following consultation, the Australian Securities and Investments Commission Amendment (Deferred Sales Model) Regulations 2021 were registered on 17 September 2021. The Regulations exempt the following classes of insurance from the deferred sales model for a period of five years from 5 October 2021:
  - add-on comprehensive motor vehicle or vessel insurance products;
  - add-on compulsory third party motor vehicle insurance products;
  - add-on home and contents insurance products;
  - add-on home building insurance products;
  - add-on landlord insurance products;
  - add-on limited motor vehicle insurance products;
  - add-on transport and delivery insurance products
  - add-on travel insurance products;
  - business-related add-on insurance products; and
  - superannuation-related add-on insurance products
- The Regulations also amend the Australian Securities and Investments Commission Regulations 2001 to prescribe, for the purposes of subsection 12DO(3) of the Act, when a consumer is taken to have entered a commitment to acquire certain classes of products or services. The explanatory statement explains that this is intended to 'provide clarity for industry and consumers as to when the deferred sales period for add-on insurance products commences, and to ensure deferred sales model achieves the intended policy outcome'.

Announcing the finalisation of the regulations, Assistant Treasurer Michael Sukkar commented:

> 'The deferred sales model regime is focused on protecting everyday consumers and businesses from being pressure sold add-on products. Relief from the deferred sales model will also be provided for business related add-on insurance products where the premium exceeds $1,000. This will ensure that the Deferred Sales Model protects businesses most at risk of being pressure sold add-on insurance products but maintains an appropriate balance whereby larger businesses can continue purchasing add-on insurance where it meets their business needs'.

Mr Sukkar also confirmed the government's commitment to implementation of the Hayne recommendations stating: 'The Morrison Government remains committed to completing implementation of the Financial Services Royal Commission and in doing so ensuring Australians continue to have trust and confidence in a strong and effective financial system'.

[Sources: Australian Securities and Investments Commission Amendment (Deferred Sales Model) Regulations 2021; Assistant Treasurer Michael Sukkar media release 17/09/2021]

Hayne implementation: APRA clarifies its 'intended position' on proposed new independent certifications of insurance arrangements

Context

- Hayne recommendation 4.14 recommended that the Australian Prudential Regulation Authority (APRA) amend SPS 250 to 'require RSE licensees that engage a related party to provide group life insurance, or who enter into a contract, arrangement or understanding with a life insurer by which the insurer is given a priority or privilege in connection with the provision of life insurance, to obtain and provide to APRA within a fixed time, independent certification that the arrangements and policies entered into are in the best interests of members and otherwise satisfy legal and regulatory requirements'.
- In response to this recommendation, APRA consulted on proposed changes to SPS 250 (released in January 2021) including a requirement for independent certification of related party arrangements and priority and privilege arrangements.
- APRA confirmed in a 21 September 2021 letter to industry that it is currently finalising the amendments to Prudential Standard SPS 250 Insurance in Superannuation (SPS 250) and Prudential Practice Guide SPG 250 Insurance in Superannuation (SPG 250). APRA intends to issue the final standard and guidance 'in the coming months'. APRA plans that revised SPS 250 will be effective from 1 July 2022.

APRA will not proceed with the proposal to mandate independent certification of priority and privilege insurance arrangements

APRA's letter to industry also clarifies its 'intended position' on proposed new independent certifications of insurance arrangements.

- APRA states that though submissions expressed broad support for the proposed revisions in draft SPS250, concerns were raised about the impact of the introduction of a new independent certification requirement for 'priority and privilege arrangements'. Broadly submissions raised concerns that the introduction of such a requirement could have unintended consequences including that it could potentially capture a majority or possibly all insurance arrangements.
- In response to this feedback, the letter confirms that APRA plans to proceed with the requirement for independent certification for related party arrangements but will not proceed with the proposal to mandate independent certification of priority and privilege insurance arrangements.
- Instead, APRA states that it plans to amend the prudential framework to 'reflect the intent' of the Hayne recommendation by:
  - Requiring RSE licensees to 'consider whether any "priority and privilege" provisions in insurance arrangements are affecting the insurance outcomes for members (as reflected in the Business Performance Review (BPR) and annual outcomes assessment in Prudential Standard SPS 515 Strategic Planning and Member Outcomes (SPS 515)'.
  - Requiring that RSE licensees' insurance management frameworks (IMF) to 'include consideration of any contractual terms and business practices that may indicate conflicts and/or "priority and privilege". Further, the comprehensive review of the IMF (undertaken every 3 years by an operationally independent person) will be required to assess whether there are any such provisions or practices with respect to insurance arrangements, and to assess the appropriateness of these provisions and practices, and whether they are in the best financial interests of beneficiaries'.
  - Including a new provision in SPS 250 for APRA to require an RSE licensee to obtain an independent certification. APRA states that 'this is intended to be a reserve power that it is likely to be used in limited situations'.

[Source: APRA letter to industry 21/09/2021]

Hayne implementation: FSC calls for amendments to the government's proposed CSLR

Context

- Hayne recommendation 7.1 recommended the establishment of a Compensation Scheme of Last Resort (CSLR) as recommended in the Supplementary Final Report to Ramsay Review.
- In July 2021, the government released a package of draft legislation for consultation proposing to implement the government's approach to implementing this recommendation through the establishment of an industry-funded, forward-looking CSLR for consumer and small business complaints. The government also released a proposal paper setting out its proposed approach to various aspects of the operation of the scheme (eg scope, eligibility). You can find a summary of the government's proposed approach in Governance News 21 July 2021 at p11. Consultation closed on 13 August.
- The government intends that the regulations and the legislation to enact the scheme will be legislated by Q4 2021-Q1 2022.

'Why put a safety net under a leaky bucket'? The Financial Services Council argues that there needs to be a stronger focus on prevention

The Financial Services Council (FSC) has raised concerns about the proposed approach to implementing the CSLR including that it 'does little to reduce the risk of unpaid Australian Financial Complaints Authority (AFCA) determinations and simply shifts the cost, via levies, to financial services companies that have done nothing wrong'.

FSC CEO Sally Loane commented:

> 'For the CSLR to genuinely be a scheme of last resort for consumers ASIC must strengthen its oversight of existing requirements for advice licensees to have appropriate capital, professional indemnity insurance and compensation arrangements in place. Weak enforcement has been a significant contributor to the current scale of unpaid determinations and the future cost of the scheme, and a more proactive approach to enforcing the law is essential…Why put a safety net under a leaky bucket? Mandating that sound financial services businesses to fund consumer compensation for those businesses which have failed is moral hazard writ large'.

In addition, the FSC submits that the government significantly underestimates the future costs of the scheme. According to economic modelling commissioned by the FSC, the future costs of advice failures for the CSLR is likely to be $59.2 million, rather than the $8 million forecast by the government.

To address these concerns, the FSC recommends that:

- ASIC introduce minimum capital requirements for Advice Licensees.
- ASIC exercise 'proactive oversight of Professional Indemnity Insurance (PI) held by Advice Licensees'. For example, ASIC could 'undertake risk-based reviews of a representative sample of advice licensees to encourage good practice and reduce the risk of consumer unpaid determinations arising from those businesses that are undercapitalised and have inadequate insurance'.
- The introduction of provisions in the CSLR to prevent phoenixing (the FSC considers phoenixing to be a major driver behind the 'ballooning' UK compensation scheme)
- Retaining the $150,000 cap on claims proposed by the government.

The FSC also recommends that Treasury administer the CSLR to 'remove conflicts of interest and reduce operational costs'.

[Sources: FSC media release 17/09/2021; Summary of findings from the EY report]

Consumer groups 'applaud' proposed changes to the UCT regime

Context

Between 23 August 20 September 2021, Treasury consulted on draft legislation proposing to make several amendments to the unfair contract terms (UCT) regime including (among other things):

- introducing civil penalties for proposing, applying or relying on an unfair contract term

- extending the application of unfair contract terms (UCT) protections to a much broader range of businesses, covering standard form contracts where at least one party either employs fewer than 100 persons (as opposed to the current threshold of 20 employees) or has an annual turnover of less than $10 million.

You can find a summary of proposed key changes, including insights into the implications for business, on our website here.

Consumer group strongly supports the proposed changes

Consumer group CHOICE has issued a statement 'applauding' the proposed changes to the UCT regime, and in particular, the proposed introduction of fines to incentivise compliance.

CHOICE states that it has found unfair contract terms across all types of industries over the past ten years, and has urged Parliament to pass the legislation before the end of the year.

CHOICE campaigner, Dean Price commented:

> 'Right now, businesses are not allowed to use unfair terms but there's no penalty for breaking the law. At worst, a business will be told to change their contract. This practically means that unfair contract terms are still common in Australia…Penalising businesses will stop unfair behaviour, like businesses deleting your account without reason, charging higher fees without notice or sneaking in hidden extra costs. The proposal from Minister Sukkar will finally make businesses think twice before proposing an unfair term in a contract. CHOICE is urging the government to proceed with its plan to make businesses pay when they force Australians into unfair contract terms.'
>
> [Source: CHOICE media release 21/09/2021]

Further ASIC guidance on complying with upcoming DDO obligations

- ASIC has released additional information (INFO 264) for advice licensees and financial advisers who are authorised representatives to help them prepare for the commencement of the design and distribution obligations (DDOs) due to commence on 5 October 2021.
- INFO 264 summarises what ASIC describes as 'the most relevant guidance in Regulatory Guide 274 Product design and distribution obligations (RG 274)' to further assist the advice sector.
- ASIC 'strongly recommends that advice licensees and financial advisers who are authorised representatives familiarise themselves with RG 274 for more detailed guidance on many of the issues covered in INFO 264'
- ASIC also 'encourages' advice licensees and financial advisers who are authorised representatives to engage with the issuers of financial products ahead of the commencement of the DDO regime.
- ASIC also again reiterated its intention to 'take a reasonable approach in the early stages of the reforms provided industry participants are using their best efforts to comply'.

> [Sources: ASIC media release 16/09/2021; ASIC INFO 264: FAQs: Design and distribution obligations for advice licensees and financial advisers]

ISA calls for the government to pay super on paid parental leave

An Industry Super Australia (ISA) commissioned report has concluded that paying superannuation on parental leave would be an effective step towards narrowing the retirement savings gap that exists between men and women nearing retirement. According to the report, women nearing retirement have about a third less superannuation than their male peers. The report calls for governments at federal and State/Territory levels to set an example by paying super on paid parental leave. That is for:

- the federal government pay super on Commonwealth Paid Parental Leave.
- State and Territory Governments to pay all staff super on paid parental leave.

The report also calls for private companies to pay super on their parental leave schemes.

Launching the report, former Workplace Gender Equality Agency director Libby Lyons said that the government has an opportunity to make a tangible difference in reducing the gender retirement gap.

> 'The government has the opportunity, to heed the clear and compelling business case to lead by example and pay superannuation on its parental leave scheme, something smart employers are already doing. We must stop penalising Australian women and men for having children'

ISA Director Georgia Brumby echoed this stating,

> 'Unless the Federal Government acts, millions of women will continue to pay a price for taking time out of the paid workforce to raise a family, missing out on super and ending up with thousands less at retirement.'
>
> [Sources: ISA media release 20/09/2021; Full text report: Paying Super on Parental Leave]

APRA has released new FAQs to assist regulated entities to interpret Prudential Standard APS 120 Securitisation (APS 120)

- The Australian Prudential Regulation Authority (APRA) has released new frequently asked questions (FAQs) to provide guidance for authorised deposit-taking institutions (ADIs) on the interpretation of Prudential Standard APS 120 Securitisation (APS 120).
- The FAQs are relevant to originating ADIs as well as ADIs who hold securitisation exposures and should be read together with Prudential Practice Guide APG 120 Securitisation.
- The FAQs cover the following topics: a) repurchasing of underlying exposures from a securitisation; b) Transfer of assets between securitisations; and c) credit enhancement.

  [Sources: APRA media release 16/09/2021; FAQs: Securitisation - frequently asked questions]

The ICA has announced a range of measures to improve the accessibility and affordability of commercial insurance products for the SME sector

In response to 13 recommendations in the final report of the Independent Strategic Review into the role of the private commercial insurance market, the Insurance Council of Australia (ICA) has announced a range of measures intended to improve the affordability and availability of commercial insurance products for the small and medium-sized business sector.

Key measures include the following.

- The creation of a Business Advisory Council (Council)
  - The Council will be tasked with working towards to work towards 'practical solutions to insurance availability and affordability issues' including in the context of professional indemnity, public liability, and business interruption cover. It will also participate in an 'ICA-led examination of the feasibility of business interruption cover providing protection against future pandemics'.
  - The Council will be chaired by outgoing CEO of the National Insurance Brokers Association (NIBA) Dallas Booth, and will include representatives of the ICA, the Council of Small Business Organisations Australia, the Australian Chamber of Commerce and Industry, the Australian Small Business and Family Enterprise Ombudsman, and the Office of the NSW Small Business Commissioner.
  - Both NIBA and the Underwriting Agencies Council 'will participate as required'. NIBA and the Underwriting Agencies Council will also work with the ICA (through a separate process) to work to 'facilitate greater access by brokers to underwriters to enable more understanding of and dialogue on underwriting decisions'.
  - The Council will report directly to the ICA board.
  - The Council will hold its first meeting 'in coming weeks'.
- 'The establishment of an ICA Board committee to consider proposals by the Advisory Council to intervene where no single provider of cover exists'
- 'An examination of the simplification of commercial policy definitions and documentation'
- 'Consideration of consistent industry-wide protocols for situations where significant increases occur on already high-cost premiums'
- 'Continued support of work to improve the transparency of broker fees'
- 'Improved engagement with government to ensure policy development and implementation takes account of overt and latent insurance issues, and to reform insurance taxes and levies'
- 'Advocacy to expand public availability and improve useability of the National Claims and Policies Database held by APRA'

  [Source: Insurance Council of Australia media release 20/09/2021]

APRA registers Superannuation Data Transformation reporting standards

The Australian Prudential Regulation Authority (APRA) has registered 10 Financial Sector (Collection of Data) determinations under the first phase of its multi-year Superannuation Data Transformation (SDT) aimed at enhancing the data reported to APRA by superannuation trustees.

The reporting standards include minor amendments to the versions of the reporting standards APRA released as part of the response to consultation in March 2021. These amendments incorporate clarifications issued publicly as Frequently Asked Questions.

[Source: APRA media release 20/09/2021]

In Brief | In her address to the Association of Financial Advisers conference Senator Jane Hume said advisers should 'all hold your Financial Adviser Standards, registration, and Authorisation up like a badge of honour' and identified 'unauthorised advisers' (not finfluencers) as one of the 'biggest risks' to the advice sector because of their potential to undermine consumer trust

[Source: Senator Jane Hume, Address to the Association of Financial Advisers conference 21/09/2021]

In Brief | The government has appointed Julie-Anne Schafer as a part-time board member of the Australian Reinsurance Pool Corporation (ARPC) for a three-year period. Ms Schafer joins Mr Ian Carson (ARPC Chair), Ms Elaine Collins, Ms Maria Fernandez, Ms Robin Low and Mr Jan Van Der Schalk

[Source: Assistant Treasurer Michael Sukkar media release 16/09/2021]

Risk Management

Top Story | Data's opportunities and risks for private health insurers

MinterEllison has released an article discussing the challenges of optimising the use of 'big data' in the private health insurance context and how the risks can be minimised.

The full text can be accessed here.

Unnecessary? The case against introducing a mandatory cybersecurity governance standard

Context

- On 13 July 2021 the Department of Home Affairs published a discussion paper - Strengthening Australia's cyber security regulations and incentives - seeking views on a range of regulatory reform options that would require Australian businesses to invest in cybersecurity.
- Among other things, the consultation paper sought views on the possible introduction of new cybersecurity governance standards on a voluntary or mandatory basis (noting that mandatory standards could be costly and onerous, particularly in a post-pandemic economic environment). Consultation closed on 27 August 2021. You can find a short summary of key proposals here.

The case against the imposition of new mandatory cybersecurity governance standards

Though acknowledging the increasing frequency, scale and sophistication of cybersecurity incidents and the associated risks, Melbourne University academics Associate Professor Rosemary Teele-Langford and Dr Andrew Godwin question whether the imposition of new cybersecurity governance standards on individual directors or on organisations is appropriate and/or will achieve the desired result.

The authors give a number of reasons in support of this view. These include that the imposition of new voluntary or mandatory cybersecurity governance standards is undesirable because:

- such a standard (whether it applied to directors or to companies) would add to the existing and substantial regulatory/compliance burden on directors, which in turn would add to the challenges of compliance
- 'the more detailed and prescriptive a duty becomes, the more likely it will fall victim to qualifications, exceptions and safe harbours. The result is compliance in form but not in substance'.
- it is questionable whether directors' duties can/should 'do all the heavy lifting in regulating businesses'

The authors argue that the need for increased accountability/oversight of cyber risk needs to be balanced against 'the adverse effects on director sentiment, willingness to serve on boards (or even continue business in Australia), as well as the costs of compliance and professional indemnity insurance'.

The authors observe that the increased costs that the introduction of new standards would impose on business and the increased regulatory burden are acknowledged in the discussion paper. They opine that 'the paper's recognition that a mandatory standard may be too costly and onerous is appropriate'.

Directors already have a duty

The authors also consider that the imposition of additional standards is unnecessary because directors may already be liable in circumstances where they fail to exercise sufficient care and diligence in relation to cybersecurity matters, especially where the company is in breach of the law (ie 'stepping stone liability'). For example, where directors fail to take reasonable steps to protect against a breach of data security and/or privacy laws, the authors suggest that 'an argument could well be made that the directors hadn't complied with the requirements of the duty of care in allowing, or failing to prevent, the breach'.

As such they contend that managing cyber risk is already a 'core governance concern in relation to which directors should exercise care and diligence'.

[Source: Monash University media release, Associate Professor Rosemary Teele Langford and Dr Andrew Godwin, University of Melbourne Directors' Duties and Cyber Security – It's complicated 03/09/2021]

ABA supports the extension of the AML/CTF regime to other sectors

Context

- On 23 June 2021, the Senate referred the adequacy and efficacy of Australia's anti-money laundering and counter-terrorism financing (AML/CTF) regime to the Senate Legal and Constitutional Affairs References Committee for inquiry and report by 2 December 2021. The terms of reference for the Committee are here.
- The Committee released a discussion paper seeking feedback on views on the need for further reform. Submissions were due 27 August 2021.

Australian Banking Association supports the extension of the existing AML/CTF Regime

- The ABA's submission to the inquiry expresses support for the expansion of the AML/CTF Regime to other high risk sectors (ie to Designated Non-Financial Business and Professions (DNFBPs) eg real estate agents, lawyers, notaries etc) to 'address gaps' as identified in the FATF Mutual Evaluation Report.
- The ABA also supports implementing the remaining recommendations from the statutory review of the AML/CTF regime including the simplification and streamlining of the international funds transfer instruction (IFTI) reporting regime.
- The submission observes that should these reforms progress, the current AUSTRAC industry contribution model will need to be amended to ensure it is 'representative of the AUSTRAC regulated population, the level of AML/CTF risks posed by those different industry sectors and the level of effort required by AUSTRAC to ensure reporting entities in those industry sectors adequately mitigate risks of illegal activity in their sector'.

[Source: ABA submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the adequacy and efficacy of Australia's anti-money laundering and counter-terrorism financing (AML/CTF) regime 27/08/2021]

In Brief | The ABA has launched a digital and radio campaign to raise public awareness of scam tactics and help people avoid losing money to financial scammers. The campaign was prompted by new ABA data which found that 37% of Australians have lost money themselves or know someone who has lost money to scams. The campaign is part of a wider ABA project focused on finding ways to better share information with law enforcement and on working with regulators and AFCA to ensure laws keep pace with evolving scams

[Source: ABA media release 22/09/2021]

Other News

Consultation launched seeking views on potential options to streamline the way that that statutory declarations and deeds are executed

As part of its commitment to modernise and harmonise document execution requirements across all Australian jurisdictions, the government is seeking feedback on how existing execution processes for statutory declarations and deeds could be improved through the use of technology, as well as on several high level proposals aimed at achieving this.

The consultation paper explains that statutory declarations and deeds have been prioritised as they are commonly used in commercial activities but that the government seeks feedback 'other reform opportunities connected with the modernisation of document execution'.

The due date for submissions is Friday 8 October 2021.

Call for feedback on how statutory declarations and deeds are used currently and where the pain points are

The paper includes 11 questions, many of which are focused not so much on the potential reform options, but on eliciting information about how statutory declarations and deeds are being used currently and identifying where the key barriers/challenges for businesses and individuals are as well as the desirability of reform in this area. For example, the consultation paper seeks feedback on:

- whether electronic execution of statutory declarations and deeds should be permitted and what the benefits as well as the risks might be
- when and why statutory declarations or deeds are used (as opposed to using a standard declaration or a contract) and the costs involved in the process
- the 'barriers, challenges or difficulties' individuals/businesses have experienced with physical document execution. In particular, the paper calls for examples relating paper requirements, witnessing requirements, jurisdictional inconsistencies or other barriers. The paper also calls for views on 'what can we learn from international approaches'.

Potential options for reform

The consultation paper puts forward 'potential and non-mutually exclusive options' for reform in four areas as a 'starting point for consideration'.

Enabling digital alternatives to paper-based document execution on an optional basis

Allowing for statutory declarations and deeds to be executed entirely electronically without a physical document on a permanent basis across all Australian jurisdictions is one option put forward.

It's suggested that this could potentially mean that businesses and individuals would have the option to use digital alternatives to physical processes throughout the document execution process, including in the printing, signing and witnessing steps.

It's suggested that this could provide flexibility for a 'range of hybrid models, such as split execution where one party to a deed may prefer an electronic option while the other party has only a hard copy option available to them'.

Providing common definitions and minimum standards

The paper suggests that there may be a need, in the interests of minimising confusion and simplifying processes, to introduce common minimum standards, guidelines and definitions to ensure the appropriate use of electronic signatures, with the appropriate level of security, in different transactions.

More particularly paper suggests that setting minimum standards for what an electronic signature method should entail may be helpful. It's suggested that any minimum standards could take into account various factors such as: a) 'the function of signature requirements in the relevant statutory environment'; b) 'reliability and consent in using a particular method'; c) 'the type of transaction'; d) 'the capability and sophistication of the relevant communication systems'; and e) 'the value and importance of the information in the electronic communication'.

The paper also suggests that common data standards and metadata standards may need to be identified and defined.

Land title registration is highlighted as one area where providing clarity around the minimal acceptable form of electronic signatures and witnessing could be developed.

Allowing digital identity verification in place of witnessing

The paper suggests enabling a form of digital identity verification for electronic signatures as one option to streamline existing witnessing requirements. This would mean that users could use electronic signatures with enhanced levels of security and identity verification (digital signatures) or digital identity to fulfill witnessing requirements.

The paper suggests that the change would 'allow people the flexibility to use safe, secure and appropriate digital identity and signature services where they consider it appropriate and suitable to their needs'.

The government seeks views in particular on:

- Whether witnessing is a necessary requirement for statutory declarations and deeds (or whether advances in digital identify verification make witnessing requirements redundant)
- Whether there are documents that should still require the presence of either a physical witness or a witness over Audio Visual Link (AVL)
- Whether providing common requirements and definitions, enabling digital verification or improving national usability would increase reliability. And, further to this, what minimum reliability requirements should apply to the electronic execution of statutory declarations and deeds, and whether the existing provisions in the Electronic Transactions Act 1999 (Cth) are sufficient.
- What processes and/or technologies are appropriate for executing statutory declarations and deeds electronically.

Addressing inconsistencies and improving useability

To address the inconsistency across jurisdictions with respect to execution of statutory declarations and deeds the paper suggests two possible options for reform:

- 'eliminating unnecessary inconsistencies' around document execution, format and witness requirements; and/or
- providing for the mutual recognition of statutory declarations formed in different jurisdictions.

[Source: Joint media release Attorney General Michaelia Cash and Assistant Minister to the Prime Minister and Cabinet Ben Morton 14/09/2021; Consultation paper: Modernising Document Execution Consultation on a common pathway for digital execution of statutory declarations and deeds]

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