Governance News

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

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Contents

Boards and Directors

Key takeaways from an expert panel discussion on the impact of COVID-19 on board decision making/risk management

In a panel discussion at the Governance Institute 2021 Conference, entitled, *Board matters and stakeholder relations* an expert panel - Vicki Robinson (Executive General Manager, Company Secretariat Wesfarmers) and Craig Katerberg (Chief Legal and Corporate Affairs Officer for Budweiser APAC) and Ann Bowering (Head of Issuer Services Australia and New Zealand Computershare) - reflected on the key challenges facing boards in the current environment including ESG and cybersecurity and the different approaches being taken to meet these challenges.

A high level, brief overview, of some of the key themes to emerge from the discussion is below.

Key changes in approach over the last 18 months

With lockdowns still in place 18 months on from the imposition of restrictions, boards have moved on from simply coping with what was hoped to be a fairly short term issue, to making concrete plans for how to best engage with each other, with management, with staff, shareholders and stakeholders in the current environment.

Ms Robinson gave as one example of this the focus that Wesfarmers has given to shareholder participation in the AGM context, and in particular, to ensuring that shareholders are able to participate regardless of AGM format. She said that since last year when the company held its first ever virtual AGM, the company has made investments in technology to enhance shareholders' experience. In consequence shareholders who attend the planned hybrid AGM this year, should have a better experience compared with last year.

At a board level, Ms Robinson observed that boards are now well-accustomed to video meetings but that some challenges (eg inducting new directors) are still being worked through.

Ms Robinson said that the Wesfarmers board is also looking at ways to improve the board's ability to engage with all levels of management in light of ongoing COVID-19 disruption/restrictions. This has led to a shift towards individual directors reaching out to individuals within the organisation on key issues (rather than having the individual attend a board meeting/make a presentation to the full board).

Ultimately, Ms Robinson opined that nothing can replace in-person interactions and when travel windows open the board is keen to take advantage of the opportunity to connect in person where possible.

The impact of remote work on board oversight of/monitoring of organisational culture

Asked to comment on whether the shift to remote work has been conducive to board oversight of/building of proactive culture, Ms Robinson said that the current environment has created real engagement on cultural issues that perhaps may not have been had pre-pandemic. For example, boards are more focused on the health and wellbeing of their people in the broader sense. A positive to have emerged from the pandemic has been the increased focus on mental health – there are many more discussions on this issue than there have been in the past.

The impact of remote work on board decision making

Asked to comment on the impact that the shift to remote work has had on the dynamics of board decision making, Ms Robinson said that a key shift has been that boards have a greater appetite for uncertainty than pre-pandemic. There is greater acceptance of uncertainty and the fact that plans/strategy may need to adapt/change. This has enabled a greater focus on planning for the future, rather than the core focus being on day to day operations.

Reflecting on Budweiser's experience, Mr Katerberg observed that there is no substitute for in-person interaction, and in person connection. There has been a move towards making more time for/space for unstructured discussion/conversation in the board meeting context – that is, rather than having a 25 minute presentation with zero time allocated to discussion, there has been a move toward much shorter presentations/summaries so that the majority of the time can be spent in discussion. Boards have become more comfortable with making time for dialogue/for an iterative process to reach the best decision. Adding to this, Ms Robinson observed that without benefit of being able observe body language, dialogue becomes even more important from a board perspective.

Why ESG is central to strategy

Asked to comment on why ESG is central to business strategy, Mr Katerberg said that ESG is/always has been central to Budweiser's long-term success/sustainability.

Even if it was not such an area of focus in the past/spoken about as often, ESG has always been central to Budweiser's business and remains key to the company's purpose - 'bringing people together for a better world' - today. He said that achieving this/staying true to this, has necessarily entailed focusing on sustainability and environmental issues. To illustrate, Mr Katerberg observed that at a basic level, if you don't have water, you don't have beer. Therefore the company has always had an interest in ensuring access to clean water/eliminating waste etc. Budweiser's purpose also underpins the company's environmental targets eg Budweiser is committed to brewing with 100% renewable electricity by 2025.

Mr Katerberg observed that the company is now expanding its ESG expectations to beyond its own immediate operations to its supply chains.

Is there an alternative to making sustainability reporting mandatory?

Asked to comment on how companies can be encouraged (without making reporting mandatory) to voluntarily become more progressive, accountable and transparent on ESG issues, Mr Katerberg suggested that companies may be motivated to do so because it delivers a quantifiable competitive advantage.

He observed that increasingly ESG/company purpose is playing an important part in the decisions being made by consumers, employees and prospective employees, investors and other stakeholders. For example, he said that 70%+ people take a company's purpose into account into account when deciding whether to take a role in a company. ESG considerations are also increasingly important in decisions around whether to buy a particular product. Therefore from a talent attraction/retention perspective and from a consumer perspective having strong ESG credentials arguably gives companies a competitive advantage over other companies.

Ms Robinson agreed, emphasising that organisational purpose/ESG makes financial sense. She suggested that on this basis, 'natural selection' and market forces may ultimately drive companies to adopt better practices. Having said this, she observed that TCFD reporting is still evolving and that though good practice is emerging, there is still much work to be done.

ESG is unquestionably 'real and mainstream'

Asked to comment, from a board perspective, on the indicators that ESG is an increasingly important issue Ms Robinson said that the board agenda and the amount of 'air time' being given to the issue is one indicator. The fact that ESG considerations (risks/opportunities) are integrated into every strategic decision is another.

Mr Katerberg agreed that the board agenda was a good indicator and added that the questions being asked by stakeholders eg staff and consumers is another. The majority of questions asked at townhalls now fall into the category of ESG and consumer monitoring also reflects increased interest.

Mr Katerberg also suggested that personal commitment from directors and top management on climate issues in particular have increased. There is acceptance that long term success necessarily needs to encompass considerations beyond purely financial considerations.

Top three emerging ESG trends

Asked for his thoughts on the top three global ESG and governance trends, Mr Katerberg said that they fit neatly into the ESG categories. He nominated:

- people-centric view – a focus on the importance of personal interaction and people as individuals (part of the Social aspect of ESG)
- the worsening climate crisis – there is growing acceptance that increasingly frequent and severe natural disasters are now par for the course, and that the situation is likely to get worse (part of the Environmental aspect of ESG)
- culture/ethics – a focus on what companies stand for and what it does in the world, and a focus on good governance norms (anti-corruption, ethics and compliance) (part of the G aspect of ESG)

Cybersecurity: Prominence on Australian board agendas

The panel agreed that awareness of cybersecurity as a key issue is high, with most boards recognising it as a key risk/focus area with huge potential downsides as well as upsides.

Mr Katerberg observed that boards are increasingly understand that there is nothing that can be done to reduce cyber risk to zero but there is a lot that can be done to nevertheless reduce the risk as far as possible. This includes training/raising awareness among staff/insiders around simple measures such as locking computers and/not sharing passwords etc to investing in teams to actively identify and explore vulnerabilities and work towards closing them.

Ms Bowering observed that cyber risk has become an unexpected driver of connectively across businesses, given the level of interconnectivity between businesses. Many businesses are open and transparent and willing to share knowledge with peer organisations because of the scale of the threat/in their own interests. This interconnectivity will be key, she suggested, to governments moving quickly to aid businesses in facing the risk.

Future risks?

Asked to comment on what the biggest takeaways will be from the coming year, Ms Robinson expressed the hope that companies will be able to look back on how adaptive, flexible, innovative and resilient they were able to be in dealing with the pandemic and that they will have taken on boards the key learnings from the experience that will enable them to continue to be so.

[Source: Notes from the Governance Institute National Conference 2021, Panel discussion: Board matters and stakeholder relations]

Remuneration

APRA releases final remuneration standard: CPS 511

As previously flagged by APRA, the final CPS 511 is very similar to the draft version on which APRA previously consulted. A brief overview of the final standard and the modifications made (and not made) to the final version in response to industry feedback is below.

Key Takeouts

- The final CPS 511 is substantially similar to the draft version previously consulted on. APRA states that 'APRA is finalising the November 2020 CPS 511 proposals without material revision'.
- APRA Deputy Chair John Lonsdale describes CPS 511 as a 'key milestone in APRA's drive to transform industry practices in governance, risk culture, remuneration and accountability'.
- Consistent with the proposed implementation timeline in the second round of consultation, industry will be required to comply with the new CPS 511 requirements from 1 January 2023, under a staged implementation approach.
- Pre-implementation review: APRA expects entities to self-assess their readiness to meet CPS 511 requirements and develop plans to implement any changes in 'a timely manner'. APRA intends to undertake a 'detailed review' of the progress being made towards and will commence engaging with entities to be included in the review in late 2021. Thematic findings of this review will be published to support all entities with implementation of the new requirements.

Overview

Following two rounds of consultation, the Australian Prudential Regulation Authority (APRA) has released its final remuneration prudential standard - CPS 511 Remuneration - together with a response to feedback received during consultation.

As previously indicated by the regulator, the final standard is very similar to the revised draft version (summarised here) with some relatively minor changes/clarifications.

The finalisation of CPS 511 addresses Hayne recommendations 5.1, 5.2 and 5.3.

A key GCRA milestone

Announcing the release of the final standard, Deputy Chair John Lonsdale described it as a 'key milestone in APRA's drive to transform industry practices in governance, risk culture, remuneration and accountability'.

Mr Lonsdale said,

> 'As the Royal Commission made clear, poorly designed or implemented remuneration practices can incentivise behaviour that is harmful to consumers, and detrimental to long-term financial soundness. CPS 511 will impose genuine financial consequences on senior banking, insurance and superannuation executives when their decisions lead to poor risk management or conduct that is contrary to community expectations. It ensures financial performance alone is no longer enough when companies reward employees; companies must also consider their impact on customers and risk management outcomes. Where executives fall short, they now stand at risk of losing their bonus'.

How does the final standard differ from the second consultation draft?

Though APRA states that submissions on the revised draft standard were generally supportive, the final standard includes three revisions to address certain industry concerns. These changes and the rationale behind them are briefly outlined below.

Threshold for determining Significant Financial Institutions (SFIs)

Under CPS 511, Significant Financial Institutions (SFIs) will be subject to stronger prudential requirements than smaller/less complex entities.

APRA's response paper observes that a number of submissions sought greater clarity around the process for determining SFIs. In particular, some submissions raised concerns that APRA's proposed approach to setting quantitative thresholds was inconsistent with existing requirements under the Banking Executive Accountability Regime (BEAR).

Though the regulator rejected calls for asset thresholds to allow for indexation and the use of rolling averages, APRA has adjusted its approach in the final CPS 511.

Under the final CPS511:

- For the purposes of determining ADI SFIs, APRA has increased the quantitative asset threshold to $20 billion (up from $15 billion). APRA has flagged that it will revisit the appropriateness of quantitative thresholds periodically, including when the standard is reviewed in 2027.
- APRA has also clarified that foreign ADI and insurer branches will not be SFIs, unless otherwise determined by APRA based on factors other than asset thresholds.
- For the purposes of determining superannuation SFIs, APRA has clarified that the $30 billion asset threshold applies to all RSEs of RSE licensees ie the $30 billion asset threshold will apply at the RSE licensee level and therefore to the aggregate asset value of all RSEs of an RSE licensee.

For clarify, under the final CPS 511 the final asset thresholds for each industry are:

- Authorised deposit-taking institutions > $20 billion
- General and life insurers > $10 billion
- Private health insurers > $3 billion
- RSE licensees > $30 billion

Remuneration arrangements of service providers

In its second round of consultation on draft CPS 511, APRA proposed that regulated entities be required to take steps to identify and address any inconsistencies arising from the remuneration arrangements of third party service providers and the objectives of their own remuneration framework.

APRA notes that a number of submissions sought greater clarity around this proposed new requirement, and in particular, what steps APRA expects entities to take to address inconsistencies, given that entities may have limited influence over how third parties remunerate their employees.

Some submissions also requested 'greater consideration of materiality', suggesting that APRA should take a more risk-based approach to this requirement.

In response to these concerns, the final CPS 511 clarifies that an APRA-regulated entities are expected to 'identify and mitigate material conflicts to the objectives of its remuneration framework that may result from third-party service provider compensation arrangements'.

The response paper gives a number of examples of the possible actions entities could take, depending on the conflict.

The response paper makes clear that:

- APRA does 'not expect changes to a third-party service contract or termination of an arrangement where a regulated entity has put effective mitigants in place'.
- Where third-parties are subject to legislation covering compensation structures or remuneration arrangements, 'CPS 511 does not require third-parties to make changes to these arrangements'.

APRA also plans to include additional examples of better practice in the final accompanying guidance, CPG 511 which is due to be released in October 2021.

Downward adjustments to variable remuneration

In its second round of consultation, APRA proposed specific requirements for the application of risk and conduct adjustments to variable remuneration, including in-period adjustments, malus and clawback.

Submissions requested further clarity on the difference between 'significant' and 'material incidents'. Some respondents also suggested that APRA's focus should be on the overall adjustment to variable remuneration, rather than prescribing the specific tools that entities must use in particular circumstances.

In response to this feedback, final CPS 511 requires APRA-regulated entities to ensure that adjustments to variable remuneration are 'proportionate to the severity of the risk or conduct incident, but provides flexibility regarding the type of adjustment tool to be used'.

The draft guidance, CPG 511, provides better practice examples to assist entities in assessing severity.

Other issues raised in consultation

No change to minimum deferral periods in CPS 511

The response paper states that a number of submissions raised concerns around APRA's proposal to establish minimum deferral periods for variable remuneration that were longer than those implemented under the BEAR and/or under the proposed FAR.

Some insurers and RSE licensees also questioned whether they should be held to the same standards as banks.

However, the final CPS 511 maintains the proposed minimum deferral periods put forward in the consultation. The requirements will also continue to apply to SFIs across sectors.

APRA states that this 'risk-based approach reflects that failings in risk management at large and complex entities can have significant adverse consequences for the financial system. APRA has aligned its requirements for SFIs to international better practice'.

Alignment with the proposed FAR

Aside from the issue of minimum deferral periods outlined above, APRA intends that the requirements in CPS511 will align with the relevant requirements in the proposed FAR. In particular, APRA states that it is working closely with Treasury to ensure there are no inconsistencies in definitions and terminology across CPS 511 and the FAR.

APRA has also flagged that it may also make additional consequential amendments to CPS 511 or CPG 511 in due course, 'should this be considered necessary to achieve appropriate alignment with the FAR'.

No change in the approach to non-financial metrics

Despite industry feedback suggesting that measures such as Total Shareholder Return (TSR) or Return on Investment (ROE) already provide a balanced approach to incentives, and concerns that the use of non-financial measures in remuneration incentives remains immature and will therefor require a longer transition, APRA has not adjusted its proposed approach to the weight given to non-financial and financial metrics in the final CPS 511.

Accordingly, under the final CPS 511 SFIs be required to give 'material weight' to non-financial measures in the determination of each component of a person's variable remuneration and also be required to have risk adjustment mechanisms that could reduce variable remuneration, potentially to zero, for adverse risk and conduct outcomes. To support entities in implementing the change, CPG 511 will include examples of better practice.

APRA explains that the aim of this requirement is encourage both the prudent management of risk and ensure that financial performance measures are not the sole or the primary driver of remuneration outcomes. Moreover, APRA observes that existing mechanisms have proven to be inadequate. The response paper states,

> 'experience has shown that TSR and ROE are not adequate measures to capture all financial and non-financial risks. In particular, these measures typically do not effectively promote accountability for sound risk management. While these metrics might be appropriate as part of a suite of measures to determine variable remuneration, on their own they are inadequate to deliver the objectives of a prudent remuneration framework'

Implementation timeline

Consistent with the proposed implementation timeline in the second round of consultation, industry will be required to comply with the new CPS 511 requirements from 1 January 2023, under a staged implementation approach.

- ADI SFIs will need to comply with CPS511 requirements from 1 January 2023
- Insurance and RSE licensee SFIs will need to comply with CPS 511 requirements from 1 July 2023
- Non-SFIs (across all APRA-regulated industries) will need to comply with CPS511 requirements from 1 January 2024.

Timeframe: Variable remuneration requirements

CPS 511 requirements will not apply to a person's variable remuneration if the opportunity to earn the variable remuneration arose before the relevant commencement dates of the Prudential Standard. APRA states that:

> 'In practice, this would mean that an ADI SFI with a 30 June financial year-end must have incorporated CPS 511 requirements into variable remuneration arrangements from 1 July 2023. APRA generally expects that all variable remuneration arrangements would comply with CPS 511 requirements within the first 12 months of the implementation date'.

APRA suggests that 'it would be prudent for entities to begin transitioning to the new requirements as soon as possible, allowing time for learnings and refinement ahead of CPS 511 coming into force'.

Next steps

- **Pre-implementation review:** APRA states that implementation of CPS 511 will be a key area of focus over the next 18 months. APRA expects entities to self-assess their readiness to meet CPS 511 requirements and develop plans to implement any changes in 'a timely manner'. APRA intends to undertake a 'detailed review' of the progress being made towards implementing the new requirements, including benchmarking against peers for a 'subset of entities'. APRA will begin engaging with entities that will be included in this review in late 2021. Thematic findings of this review will be published to support all entities with implementation of the new requirements.
- **Repeal of existing remuneration requirements in CPS 510 and SPS 510:** APRA's Prudential Standards CPS 510 Governance (CPS 510) and SPS 510 Governance (SPS 510) include certain minimum requirements of APRA-regulated entities in managing their remuneration arrangements. APRA intends to repeal the remuneration components in both CPS 510 and SPS 510 to ensure there is no unnecessary duplication with the new CPS 511. Further detail will be provided to industry ahead of CPS 511 coming into force.
- **New disclosure requirements:** APRA plans to consult on new disclosure requirements for remuneration early in 2022. The new requirements will require entities to publicly disclose the steps they have implemented to strengthen their remuneration arrangements in line with CPS 511. This increased transparency is intended to enable stakeholders to hold entities to account for 'prudently managing remuneration'.
- **Post-implementation review in 2027:** To ensure that the remuneration reforms are achieving their intended objectives, APRA will review CPS 511 in 2027, four years after its implementation. This post-implementation review will also provide an opportunity to update guidance on better practice, to reflect improvements that are made by industry over the period ahead.

[Sources: APRA media release 27/08/2021; Final CPS 511; Response paper]

Analysis from Semler Brossy finds that the use of longer-term sustainability metrics is still relatively uncommon across S&P500 firms (despite increasing stakeholder focus)

Semler Brossy has released detailed analysis of the prevalence of the use of different forms of ESG metrics across S&P 500 firms in 11 industry sectors.

Some Key Takeaways

- The five industries with the highest prevalence of ESG metrics are: 1) energy sector (72%); 2) Utilities sector (64%); and 3) Materials sector (52%); 4) Financials sector (49%); and 5) Consumer staples (38%). Semler Brossy suggests that the higher prevalence of ESG metrics in 'heavy industries' reflects the 'confluence of the forces driving the adoption of ESG in incentive plans'.
- In contrast, the industries with the lowest prevalence of ESG metrics are: Consumer discretionary sector (20%); Real Estate (29%) and Information Technology (31%).
- Operational vs sustainability metrics:
  - Across the S&P500, 51% of companies use some form of 'operational' ESG metric. Semler Brossy describes these metrics as being 'engrained in the day-to-day success of the business' eg customer satisfaction, employee satisfaction, safety, talent development, cybersecurity etc.
  - Only 38% of S&P 500 companies are using 'sustainability' metrics, which are described as 'measures concerned with longer-term, broad social/economic stability' eg diversity and inclusion, carbon footprint, emissions reduction etc).
- Sustainability metrics:
  - Diversity and Inclusion (D&I): According to Semler Brossy's analysis, D&I metrics rank within the top three most prevalent ESG measures in nine of the 11 industries analysed making it the most prevalent of the sustainability metrics, across all sectors.
  - Environmental metrics: Semler Brossy found that use of environmental metrics is still relatively rare in compensation plans despite increasing stakeholder pressure. Currently environmental metrics are most prevalent in the Energy, Utilities and Materials sectors. The most common environmental metric used by each of these industries is an emissions metrics (measuring releases of chemicals and other pollutants) followed by carbon footprint.
- Operational Metrics
  - Safety is the most common metric across the Energy, Utilities, and Materials sectors and is prevalent in the Industrials sector. however, it is relatively rare outside of this group.
  - Customer satisfaction is most often found among Health Care, Financials, Information Technology, Industrials, and Utilities companies. It is less often used in direct consumer businesses in the Consumer Discretionary and Consumer Staples industries.
  - Talent metrics (eg employee satisfaction, talent development and employee turnover) are most common in the Financials, Real Estate, and Health Care sectors.

[Source: Harvard Law School Forum on Corporate Governance and Financial Regulation 27/08/2021]

Diversity

Canada: Analysis of TSX-listed companies finds progress toward increased gender diversity remains slow

Analysis of new listings on the Toronto Stock Exchange (TSX) for the period 1 January 2021 to 15 August 2021 by Women on boards and irlabs has identified that:

- Women hold only 25% of the 318 new board seats at newly listed companies
- Across the 61 new company boards, women hold on average 1.9 of 10 board seats
- Of the 61 companies, Greenlane Renewables Inc. (GRN) has the highest percentage of women directors at 43%, or 3 out of 7 board seats.
- Only three of the 61 newly listed companies have a female Chair.

Pressure from proxy firms to increase board gender diversity

The groups of observe that for the 2022 proxy season, Canadian public companies will face increased pressure from both Institutional Shareholder Services (ISS) and Glass Lewis to increase board gender diversity.

For example:

- From 1 February 2022, ISS expects S&P/TSX Composite companies to have at least 30% women board members, or a written gender diversity policy with a commitment to achieve at least 30% women board representation over a reasonable timeframe.
- From 1 January 2022, Glass Lewis expects all TSX listed issuers to have at least two women directors, or for boards with six of fewer directors to have at least one female director.

If these expectations are not met, companies could face possible voting action.

The groups have called on companies to consider these guidelines and make adjustments accordingly. The groups state:

> 'Exceptional corporate governance elevates shareholder value and both WGOB and irlabs have the expertise to support public companies in building their governance frameworks, including board renewal strategy and diversity policies'.
>
> [Source: irlabs media release 16/08/2021]

In Brief | Milestone: AICD has announced there are no zero ASX 200 all-male boards, but has reiterated support for the achievement of the 40:40:20 diversity target. ACSI has issued a statement welcoming the milestone and expressing support for a 40:40:20 target

[Sources: AICD media release 26/08/2021; ACSI media release 26/08/2021]

Meetings and Proxy Advisers

Top Story | Status update: Legislating permanent changes to meeting and execution requirements – another draft Bill

Despite (generally) broad support for modernising existing requirements in the Corporations Act 2001 (Cth) around execution and signing of documents and convening of meetings, legislating permanent change has proven to be a less than straightforward process. A brief overview of the temporary relief now in place and planned permanent reforms is below.

Temporary relief is now in place

Schedule 1 to the Treasury Laws Amendment (2021 Measures No.1) Act (TLA 1 Act) commenced on 14 August 2021. Broadly, the changes in Schedule 1 temporarily enable companies to use technology to meet regulatory requirements under the Corporations Act around convening meetings, distributing meeting related materials and signing/executing documents until 31 March 2022.

The temporary measures are similar in substance to the measures contained in the Corporations (Coronavirus Economic Response) Determination (No. 3) 2020 (Determination No. 3) which expired on 21 March 2021.

You can find more detail on the temporary relief currently in place here.

More time to hold AGMs

Following the passage of the TLA 1 Act, ASIC's no-action position on virtual meetings ceased to have effect. However, ASIC's no-action position giving companies with balance dates up to 7 July 2021 an additional two months to hold AGMs has not been withdrawn.

In light of ongoing COVID-19 restrictions and uncertainty, ASIC has formalised and added to this by making a legislative instrument - ASIC Corporations (Extension of Time to Hold AGMs) Instrument 2021/770 - giving all public companies with balance dates between 21 February 2021 and 7 July 2021 an additional two months to hold their AGM, and giving public companies limited by guarantee with balance dates between 24 January 2021 and 7 April 2021 an additional four months to hold their AGM.

Legislating permanent change

The government consulted on draft legislation proposing to permanently modernise meeting and execution requirements under the Corporations Act 2001 (Cth) (summarised here) between 25 June to 16 July 2021.

On 30 August 2021, the government released a revised draft Bill – Treasury Laws Amendment (Measures for Consultation) Bill 2021: Use of technology for meetings and related amendments - for a another short round of consultation. Consultation closes on 10 September 2021.

Importantly, the proposed permanent changes are not identical to the temporary measures now in place.

Meeting requirements/meeting-related communications

Broadly, if legislated in its current form the draft Bill would permanently:

- Give companies and registered schemes the option to hold hybrid meetings. However, unlike the temporary measures now in place, companies would have the option to hold wholly virtual meetings only if expressly permitted to do so under their constitution. Under the temporary measures introduced by the TLA 1 Act, companies and registered schemes can currently hold wholly virtual meetings of members, regardless of whether they are permitted to do so under their constitutions, until 31 March 2022.

  Regardless of the meeting format, if the draft Bill is passed, companies will be required to give 'members as a whole' a 'reasonable opportunity to participate'. Section 249S of the draft Bill sets out what this may entail. Among other things, there is requirement to allow 'the members who are entitled to attend the meeting, and do attend the meeting using that virtual meeting technology, as a whole, to exercise **orally and in writing** [emphasis added] any rights of those members to ask questions and make comments'.

- Give members of companies and registered schemes the option to elect to receive meeting related documents electronically or in hard copy.

- Allow a member or group of members of a company or registered scheme with at least 5% of the voting power to request to have an independent person appointed to observe and/or prepare a report on a poll conducted at a members meeting
- Require votes on resolutions which are set out in the notice of a meeting of members of a listed company or listed registered scheme to be decided by poll (a listed company's constitution will not be is capable of providing otherwise - the requirement would not be a replaceable rule)

The draft Bill would also clarify that technology may be used to sign all materials related to a meeting and allow documents such as meeting minutes to be kept, retained, and provided electronically.

Execution of documents

In respect of execution of company documents the changes would permanently:

- enable companies and their officers (including company agents) to create and sign deeds, as well as other documents, electronically; and
- allow the use of technology to execute documents with a common seal electronically, including by allowing witnesses to validly witness the fixing of a company seal electronically.

The draft Bill also proposes to enable proprietary companies with a sole director and no company secretary to use the statutory document execution mechanisms.

Preparing for further 'modernisation' of requirements

The draft Bill proposes to relocate provisions relating to electronic communications and electronic signatures from Chapter 2G of the Corporations Act 2001 (Cth) to Chapter 1.

The draft explanatory memorandum states that this will enable them to be 'extended in the future to include additional types of documents that do not relate to meetings'.

Proposed timing

It's proposed that the permanent measures in the draft Bill will take effect from 1 April 2022 (ie after the temporary measures in the TLA 1 Act expire on 31 March 2022).

This means that even if the draft Bill is passed, companies and registered schemes that have sent meeting notices before the commencement of the draft Bill, but after the commencement of the TLA 1 Act, will be able to hold wholly virtual meetings (even if their constitution does not permit them to do so) until the temporary relief in the TLA 1 Act sunsets.

[Source: Treasury Consultation: Using technology to hold meetings and sign and send documents – August 2021 30 August 2021 - 10 September 2021; ASIC Corporations (Extension of Time to Hold AGMs) Instrument 2021/770; ASIC media release 08/09/2021]

Joint updated AGM guidance: The Governance Institute, AICD, Law Council and AIRA have released updated guidance following the passage of the TLA 1 Act

The Governance Institute, the Australian Institute of Company Directors, the Law Council of Australia, and the Australasian Investor Relations Association have released joint updated guidance following the commencement of the changes introduced by Schedule 1 of the Treasury Laws Amendment (2021 Measures No.1) Act (TLA 1 Act).

The guide summarises the current state of the law and includes guidance for organisations around planning hybrid and wholly virtual AGMs as well as practical guidance around the new methods for electronic signatures, electronic execution and shareholder communication under current conditions.

Announcing the release of the guide, Governance Institute CEO Megan Motto it is 'will help organisations unlock the benefits of digital engagement, replicate the cut and thrust of a physical meeting, and assist shareholders and members to feel confident their organisations are being accountable without needing to fly halfway around the country or risk their health to attend in person'.

[Source: Governance Institute of Australia media release 07/09/2021; Joint guidance: Guidance: Further update on online AGMs, electronic document execution and digital shareholder communications September 2021]

Shareholder Activism

ACCR files shareholder cultural heritage resolution at Fortescue

The Australasian Centre for Corporate Responsibility (ACCR), with the support of the National Native Title Council (NNTC) and the Western Australian Aboriginal Heritage Alliance, has filed two shareholder resolutions at Fortescue Metals Group ahead of the 9 November 2021 AGM.

The first resolution is a special resolution seeking to amend the company's constitution to enable shareholders to bring advisory resolutions. The second ordinary resolution (which contains the substance of the demands around cultural heritage protections) is contingent on the passage of the constitutional amendment.

The full text of the resolutions are here. The ACCR's supporting statement is here.

The Fortescue board is yet to make a voting recommendation. This will be included in the Notice of Meeting.

Details: Cultural Heritage Resolution

The ordinary resolution has three parts. It calls on the company to:

- publicly support part of Recommendation 2 of the Juukan Inquiry Interim Report. That is for the company to support the replacement of the existing Aboriginal Heritage Act 1972 with stronger heritage protections as a matter of priority;
- publicly support the WA Aboriginal peoples' calls on the WA government to 'pause' the enactment of a Bill currently before the parliament – the Aboriginal Cultural Heritage Bill 2020 – to enable engagement with Traditional owners and their representative organisations on the redesign of a new WA cultural heritage protection law and regulations;
- review its membership of trade organisations to which it is a member to ensure consistency between the terms of the resolution.

Rationale

The ACCR argues that the resolution is necessary because Fortescue could potentially be open to facing the same reputational and financial damage as was sustained by Rio Tinto following the destruction of the Juukan Gorge caves. The ACCR states,

> 'Our Company operates in the same mining province as Rio Tinto; has a contestable record of dealings with native title holders affected by its tenures and operations; and has taken advantage of the same permissive regulatory environment against the wishes of affected First Nations communities. In doing so it has assumed a similar or greater risk to Rio Tinto's'.

The ACCR considers that in light of this risk, it is in shareholders' interest and the interest of the company to support the resolution.

Further, the ACCR argues that supporting the resolution is consistent with Fortescue's publicly stated position on cultural heritage protections.

ACCR Legal Counsel James Fitzgerald has called on the Fortescue board to endorse the resolution. He stated:

> 'Investors simply can't stand by and watch another Juukan Gorge disaster unfold. The moral dimension is obvious. However stronger, fit-for-purpose cultural heritage protection law is also essential to mitigate the social, reputational and business risk to mining companies operating in Western Australia. In 2021 the new heritage protection laws should enjoy the informed consent of affected Aboriginal people. We are advised that the current WA Bill does not. As investors, we believe it's necessary that this shareholder resolution receive strong support —or preferably be proactively adopted by FMG's Board —because there is far too much at stake to allow virtual industry self-regulation to continue. In the wake of Juukan Gorge, investors know that business as usual is unacceptable'.
>
> [Sources: ACCR media release 01/09/2021; 01/09/2021; Fortescue Metals Group ASX announcement 01/09/2021]

Institutional Investors and Stewardship

ACCR report: Analysis of the voting behaviour of Australia's 50 largest super funds on ESG shareholder resolutions

The Australasian Centre for Corporate Responsibility (ACCR) has released a report analysing the voting behaviour of Australia's 50 largest superannuation funds on 959 shareholder ESG resolutions filed at 307 companies in Australia, Canada, the United Kingdom, the United States (US) and Norway during the period 2017 to 2020.

For context, the vast majority (78% or 749) of resolutions were filed at US listed companies. In contrast, the sample of Australian resolutions is relatively small (91 resolutions).

Some Key Takeaways

The overall level of support for shareholder ESG resolutions is trending upwards

- Overall, across all countries sampled, the average level of support for shareholder ESG proposals has increased over time from 19.9% average support in 2017 to 22.2% support in 2020
- The average level of support on Australian shareholder ESG proposals has also increased jumping from an average of 10.4% support in 2019 to 14.7% support in 2020. Looking more closely, the ACCR found that the level of support varies considerably according to the subject/theme of the resolution with support for environmental and social proposals considerably higher than for governance proposals (including constitutional amendments).
- Looking at the voting behaviour of funds over the three year period, the ACCR found that only eight of the 50 funds analysed supported more than 50% of shareholder ESG resolutions. They are: Local Government Super (76%), HESTA (65%), Cbus (63%), Macquarie (62%), NGS Super (58%), Mercer (54%), AustralianSuper (51%) and Qantas Super (50%).
- Interestingly, the ACCR found that Australian super funds are supporting more shareholder proposals in Canada, the United Kingdom, and the United States than in Australia. The report identifies a number of possible reasons for this including: the regulatory settings in Australia which mean that ordinary shareholder resolutions need to be accompanied by a constitutional amendment enabling shareholders to bring ordinary resolutions; the smaller sample of Australian proposals; funds' apparent willingness to vote against board recommendations at companies that are physically removed/less accessible than is the case at Australian companies (and conversely funds' unwillingness to vote against the boards of Australian companies); and the greater range of engagement tools available to funds when engaging with Australian companies.

Support for different categories of resolution

- Support for lobbying related shareholder resolutions: The ACCR found that 16 funds supported more than 50% of lobbying related proposals between 2017 and 2020. Looking purely at 2020, lobbying resolutions were the most supported resolutions (31% support).
- Support for climate-related shareholder resolutions: The ACCR found that only seven funds consistently supported more than 50% of climate-related proposals between 2017 and 2020. Looking at 2020, climate-related proposals were the second most supported category of ESG shareholder resolution (27% support).

Membership of investor groups and signatories to the stewardship Code were generally more supportive

- According to the report, members of the Australian Council of Superannuation Investors (ACSI), the Investor Group on Climate Change (IGCC), the UN Principles for Responsible investment (PRI) and/or the Responsible Investment Association of Australasia (RIAA) were more supportive of proposals between 2017 and 2020 than funds which are non-members of ACSI, IGCC, PRI and/or RIAA.
- Signatories to the Australian Asset Owners Stewardship Code (AAOSC) were also more supportive of proposals in 2020 than funds which are not signatories of the Code.

The ACCR has called on funds to take a more active role

Commenting on these results Dan Gocher, ACCR Director of Climate & Environment called on Australian funds to take a more active role in supporting shareholder ESG resolutions. Mr Gocher said,

> 'Despite a growing number of super funds claiming to incorporate ESG into their investment processes, the majority of super funds are still failing to support ESG proposals. We applaud the eight funds that supported a majority of ESG proposals between 2017 and 2020, but the vast majority of funds continue to pay lip service to ESG when it comes to proxy voting…Voting in favour of shareholder resolutions, or filing such resolutions, is an accepted tool of active company stewardship, and an important mechanism for investors to raise concerns to company management. This tool is under-utilised by super funds, who are often expressing their frustration with companies through divestment.'

Disclosure around voting activities is a key area for improvement

The report comments that unlike in the US, Australian super funds are not required to disclose their voting behaviours and that in consequence, 'the voting records of Australian super funds are highly individualised'. Moreover, the ACCR found that not all funds publish information about their voting activity. According to the report:

- Less than half of funds (22 of 50 funds) published complete voting records in 2020: 59% were industry funds, 18% were public sector funds, 14% were retail funds and 9% were corporate funds.
- Of this group, nine funds have consistently published complete voting records since 2017
- Eight funds did not disclosure a proxy record (an improvement on 2019 when 11 funds failed to do so)

Mr Gocher identified disclosure as a key area for improvement and called on funds to commit to greater transparency. Mr Gocher said,

> 'Six of the biggest super funds in the country…either don't vote, don't disclose their voting records or support far fewer ESG proposals than their peers. Together these six funds manage more than $748 billion, or approximately 38% of APRA-regulated funds. Their members deserve better transparency and stronger support for ESG issues'.

Recommended actions for funds

The report includes a number of recommendations aimed at increasing transparency around funds' voting decisions and encouraging funds to take a more active role.

ISSUE	RECOMMENDATIONS
Funds should consider taking a more active role	▪ The ACCR recommends that 'funds should consider filing or co-filing proposals when other forms of engagement are unsuccessful in delivering change'.
Representing the interests of members/making voting decisions	The ACCR recommends that: ▪ 'Funds should consider the interests of their members when voting for shareholder proposals, particularly when voting at companies that employ their own members'. ▪ 'Funds should interrogate the integrity and quality of the research and arguments presented in shareholder resolutions, along with the credibility of the filers and co-filers'
Lack of readily accessible, timely and comprehensive information of funds' proxy voting record	To address this issue the report recommends that funds: ▪ 'should disclose their entire proxy voting record, for every proposal, at every company meeting, across all jurisdictions'. ▪ 'Funds should publish a summary of their voting record'. ▪ 'Funds that delegate voting to asset managers should disclose the proxy voting record of those managers'. ▪ 'Voting should be disclosed within a week of the company meeting' and ideally ahead of the meeting. . ▪ 'Voting disclosures should be easily accessible on fund websites'.
Lack of transparency around active ownership strategies	▪ The report recommends that funds that describe themselves as 'active owners' should publish information about their active ownership strategies. it's suggested that this could involve describing their expectations of companies or sectors during private engagement, publishing analysis of their own proxy voting record and publishing vote bulletins/short explanations of their voting decisions on votes of public interest.

ISSUE	RECOMMENDATIONS
Lack of transparency around funds' voting policies/voting decisions	The ACCR recommends that: ▪ 'Funds should publish their responsible investment and proxy voting policies and ensure their voting is consistent with those policies' ▪ 'As part of their voting records, funds should publish a brief rationale about their reasons for abstaining from a vote or voting against management'.
Lack of consistency in voting behaviour across jurisdictions	The ACCR recommends that ▪ 'Funds should vote consistently across jurisdictions'.

[Sources: ACCR media release 02/09/2021; 07/09/2021; Full text report: Super Votes How Australia's Largest Superannuation Funds Voted on ESG Resolutions in 2020]

FRC has released a list of the successful signatories to the UK Stewardship Code

- The UK Financial Reporting Council (FRC) has announced that 125 of 189 applicants have been successful in becoming signatories to the UK Stewardship Code (the Code) which applies to asset owners, asset managers and service providers. A full list of the successful signatories is here.
- The FRC observes that in order to remain signatories organisations 'will need to continue to improve their reporting as market practice and expectations evolve'.
- Of the applications received: 147 were from asset managers, 28 were from asset owners, including pension funds and insurers, and 14 were from service providers, including data and information providers and investment consultants.
- The FRC states that the decision the approve successful applicants followed a 'rigorous review process'. The FRC comments that it was 'pleased to see investors better integrating stewardship, and environmental, social and governance (ESG) factors into their investment decision-making, reporting on asset classes other than listed equity and identifying the outcomes of their efforts. There was also some strong reporting on underpinning governance activities'.
- Unsuccessful applicants typically either did not address all the Principles or were too reliant on policy statements as evidence of their approach. Other areas of weakness included both reporting on the approaches to review and assurance, and monitoring service providers. The FRC encourages unsuccessful applicants to consider the individual feedback provided together with the upcoming annual review of reporting (which will be published in November).
- Unsuccessful applicants are eligible to reapply. The next opportunities to do so are: 31 October 2021 and 30 April 2022.

[Source: FRC media release 06/08/2021]

Regulators

Discussion of the role of regulators and regulation in shaping culture and accountability: Insights from ASIC Commissioner Cathie Armour and an expert panel

In a panel discussion at the Governance Institute 2021 Conference, entitled *Regulation, Accountability and Culture*, an expert panel - Pauline Vamos (Chair of the Governance Institute), Cathie Armour (ASIC Commissioner), Ilana Atlas (Non-executive Director ANZ Banking Group, Origin Energy and Scentre Group) and Kathleen Conlon (Chair, Lynas Rare Earths Ltd, Non-executive Director, REA Group, BlueScope and Aristocrat Leisure)– discussed the impact regulation and regulators on accountability, board behaviours and culture.

Some key takeaways from the discussion are below.

Sound corporate governance is key to ensuring firms deliver long-term value

Ms Armour said that ASIC's interest in ensuring strong corporate governance/strong culture is explained by the regulator's focus on outcomes and actions that ensure firms are able to discharge the goals of long term value creation and risk management. Good corporate governance, she said is the foundation of delivering good outcomes in the broad sense.

Certain upcoming regulation could be viewed as seeking to regulate culture/behaviour

Ms Armour observed that in the wake of the Hayne Commission, focus on strengthening accountability and culture significantly sharpened and that this focus has persisted. Ms Armour suggested that the raft of legislative reforms due to take effect in 2021 (eg the introduction of design and distribution obligations, breach reporting and internal dispute resolution reforms) could be interpreted as an attempt to regulate firm culture in a way that perhaps would not have happened in the past.

In addition to the introduction of new regulatory requirements, Ms Armour also suggested that there are other levers on firm culture, notably investor and community pressure, also at play. Ms Armour cited the destruction of rock shelters at Juukan Gorge as an example of the serious financial and reputational consequences of failing to meet these expectations.

Ms Armour said that corporate leaders are increasingly accepting of the need to take into account a broad range of stakeholder needs/views in decision making. In her view, there is broad acceptance that long term success from an investor perspective goes beyond this years' financial results .

Prescriptive rules vs principles based regulation – an important debate

Ms Armour observed that the Australian Law Reform commission's review of the structure of the Corporations Act 2001 (Cth), and in particular Chapter 7, raises questions about the way in which regulation should ultimately be designed. Whether regulation should be principles based (eg as is the case with Directors' Duties) or more prescriptive.

She observed that in her personal view, prescriptive laws have been implemented on certain contentious issues where industry may have valued a discussion around this. Ms Armour suggested that ultimately, where culture and corporate governance is focused on long-term value creation then the 'rules' become less relevant.

Is legislative/regulatory complexity counterproductive?

Asked to comment on whether the complexity of the regulatory framework is counterproductive to business 'doing the right thing' Ms Atlas appeared to disagree, observing that regulation is only one input into organisational culture among a range of other factors/inputs.

Ms Atlas said that it is open to organisations to view regulation as a 'tick box exercise' or as a way of increasing focus on a particular issue eg consumers. Ms Atlas cited upcoming design and distribution obligations as an example of this.

Ms Conlon appeared to take a similar view stating that in her view, regulation sets a minimum standard and that in most cases (outside financial services) companies are exceeding these expectations in line with more demanding investor and broader social expectations. Companies are motivated to do this, she said because doing so gives them a competitive advantage. She gave as an example of this, the focus on securing strong customer outcomes, ESG outcomes and staff outcomes. Regulation, she observed, 'becomes just a minimum standard'.

Should BEAR bonus deferral requirements be extended to broader corporate Australia?

Another issue considered by the panel was whether requirements under the Banking Executive Accountability Regime (BEAR) concerning mandatory deferral of executive variable remuneration for a set period should be extended to 'broader corporate Australia'.

It was suggested that creating a framework based on a lack of trust – a lack of belief that executives will behave ethically – is arguably unnecessary given that the regime was designed to deal with a small proportion of people deliberately engaging in misconduct in a certain context. Incentivising people to 'do the right thing' was viewed as a better alternative.

Monitoring culture: cultural indicators

Asked to comment on how ASIC assesses board oversight of organisational culture, Ms Armour said that assessing organisational culture/board oversight of culture is 'not ASIC's job'. Ms Armour clarified that ASIC is focused instead on outcomes and in particular, on customer outcomes. Though this entails 'looking at' culture she said, this is only to the extent that a framework is in place to achieve sound customer outcomes.

In this context, Ms Armour said that 'cultural indicators' that ASIC pays attention may include (among others): whether policies/procedures are up to date eg whistleblower policies, how quickly complaints are dealt with, and how quickly customers are remediated. Ms Vamos suggested that the rate of staff turnover could also be a possible indicator.

Uncovering potential cultural issues

The panel spoke about the challenges of creating an environment where the board can be confident that they will hear bad news – that this information will be reported. The volume of metrics available to boards was identified as a key challenge from the perspective of drawing out meaningful insights into potential issues and the potential for boards to be overwhelmed by data.

Asked to comment on how boards can ensure important stories reach the board table, it was agreed that there is no 'magic bullet'. The challenge was agreed to be harder, the larger and more complex the organisation.

Having said this, it was suggested that speaking with employees throughout the business, visiting different areas of the business (though was agreed to be challenging in the current environment given COVID-19 restrictions), reviewing information from other data sources such as Glassdoor could potentially be helpful. In addition, it was suggested that boards should think about the information they are requesting/the metrics they are asking for to ensure that the cultural elements that they care about/that are most relevant to their organisation are being measured.

A blurring of the line between boards and management?

The panel touched briefly on the question of whether increased board oversight of organisational and the associated increased proximity/contact between board members and employees across all levels of organisations has led to a blurring of board and managerial roles.

Ms Conlon observed that having information as a board member requires 'having conversations' at multiple levels of the organisation as well as from external stakeholders (eg consumer groups, feedback from regulators). On this basis, she considers it necessary for a CEO to embrace this approach.

Ms Armour said that ASIC has observed instances of 'good news communication' – where boards receive only good news and very little, if any bad news – through its supervisory work. Ms Armour reiterated the importance of transparency around board communication in this context, suggesting that board members should be alive to the risk that they may not be hearing the whole story. Ms Armour suggested that boards should consider asking 'why aren't I hearing anything bad?'.

Regulatory 'lag'

A final issue discussed by the panel was the issue of regulation failing to keep pace with/adapt to changing circumstances and expectations. /changing expectations.

Ms Conlon and Ms Atlas suggested that it not necessarily a bad thing that regulation is slow to adapt/change as it shouldn't impact firms taking the lead themselves on key issues. Ms Conlon suggested that regulatory lag may allow time for best practice to emerge (without the need for prescriptive rules) on certain issues.

Having said this, Ms Conlon said that regulatory lag on some issues eg climate change is a problem because the cost is so high.

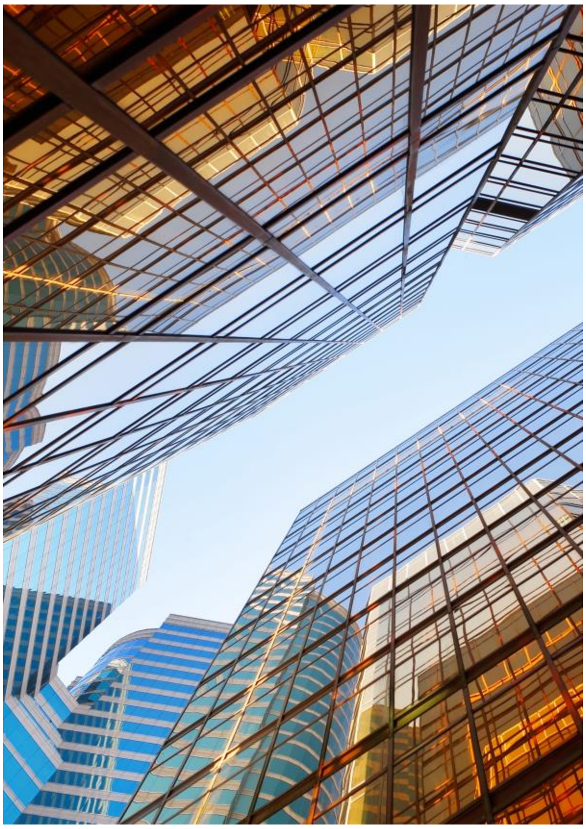
Ms Armour observed that if firms have strong culture and governance and are focused on long0-term value creation then the rules become less relevant.

[Source: Notes from the Governance Institute National Conference 2021, Panel discussion: Regulation, Accountability and Culture]

New statement of expectations for ASIC

Following the appointment of Mr Joseph Longo as Chair of the Australian Securities and Investments Commission (ASIC), the government has released a new Statement of Expectations outlining its expectations of how the regulator will achieve its objectives, carry out is functions and exercise its powers.

Key Takeaways



Consistent with Treasurer Josh Frydenberg's previous announcement, the statement make clear that the government expects the regulator to 'identify and pursue opportunities to contribute to the government's economic goals, including supporting Australia's economic recovery from the COVID pandemic'.

More particularly, ASIC is explicitly expected to:

- 'promote the sound functioning of capital markets and the corporate sector for the benefit of businesses and households;
- minimise the costs and burdens of regulatory requirements for regulated entities and consumers; and
- administer the law in a way that promotes competition and innovation in the interests of all consumers, including through promoting a digital economy'.

In addition, ASIC is expected to:

- 'ensure that its actions are not inconsistent with the policies of the Government, in accordance with section 21 of the Public Governance, Performance, and Accountability Act 2013;
- work closely with the Government and Treasury, including through the provision of information to Ministers in accordance with section 11(3) of the Australian Securities and Investment Commission Act 2001;
- consult with the Government and Treasury in exercising its policy-related functions, such as the use of its exemption and modification powers, other rule-making powers, and guidance;
- provide appropriate guidance when needed so that regulated entities have clarity and certainty about how ASIC will exercise its powers;
- ensure that guidance is not unduly prescriptive, and does not limit businesses' discretion and flexibility to operate in the manner they see fit while still complying with the law;
- ensure that guidance or other communications do not have the effect of setting standards beyond what the law requires;
- make decisions informed by open and transparent engagement with regulated entities, consumers, and investors, as well as data;
- identify and reduce misconduct risk through well-targeted and proportionate supervision, surveillance and enforcement activities; and
- coordinate regulatory activities with other regulatory agencies to avoid duplication, including through sharing information where possible'.

[Sources: Treasurer Josh Frydenberg media release 26/08/2021; Statement of Expectations]

A shift in approach: ASIC's Corporate Plan 2021-25

Key Takeouts

- ASIC's latest corporate plan commits the regulator, in line with the government's Statement of Expectations, to supporting Australia's economic growth and recovery from the COVID-19 pandemic, to supporting the implementation of the government's policy/regulatory agenda and to taking a targeted approach to enforcement focusing its actions on the areas of greatest harm eg addressing harms caused by cyber scams, and the harms caused by failure to adequately manage cyber risk (among other areas)
- From an enforcement perspective, there is no mention in the plan of the 'why not litigate?' approach. Rather the plan underlines ASIC's commitment to using more efficient methods of regulation and fully utilising the full range of available regulatory powers available to swiftly respond to/discourage/deter misconduct.

The Australian Securities and Investments Commission (ASIC) has released its latest Corporate Plan, together with a Statement of Intent responding to the government's new Statement of Expectations. The Statement of Intent confirms the regulator's commitment to exercise its powers/functions in line with the government's expectations and in line with its statutory objectives. The corporate plan outlines how the regulator's priorities over the 2021-25 period align with these expectations.

Approach to enforcement

The plan makes no reference to the 'why not litigate?' approach to enforcement adopted by the regulator in the wake of the Hayne Commission. Rather, the plan makes clear that ASIC intends to use the full scope of available enforcement options, prioritising the areas of 'greatest harm'.

The areas of greatest harm identified in the report include:

- 'serious misconduct that harms confidence in markets, business and the economy or exacerbates consumer hardship
- poor product design and governance, mis-selling, and failure to comply with conflict of interest requirements and disclosure obligations
- perpetrators of egregious digital and other financial sector scams
- failure to adequately manage cyber risks that harm consumers
- failure to implement new standards set by law reform initiatives'.

In his foreword to the plan, ASIC Chair Joe Longo comments:

> 'ASIC will continue to be a strong and targeted law enforcement agency. We will remain an active litigator against misconduct. We will use our full suite of tools and powers to address wrongdoing. Our enforcement actions will prioritise areas of greatest harm and the protection of vulnerable consumers and investors'.

According to media reports (The AFR, The Australian), Mr Longo has said that the shift in language/apparent shift in approach does not mean that that the regulator intends to take a 'softer' line/will not take court action where warranted – merely that it will do so in a targeted way and will make use of all other available regulatory options. This was also a key theme of Mr Longo's opening statement to the Parliamentary Joint Committee on 27 August 2021, in which he emphasised that ASIC will take a more 'efficient' approach to enforcement. He stated:

> 'We will ensure ASIC continues to take opportunities to support businesses through more efficient methods of regulation. At the same time, I will ensure ASIC remains vigilant in protecting consumers and investors from harm. By using the full suite of regulatory tools at our disposal, we will disrupt misconduct and drive effective and proportionate regulatory outcomes. I and my fellow commissioners and other ASIC members look forward to taking your questions'.

ASIC's Strategic Priorities

The plan sets out four external priorities aimed at addressing the 'most significant threats and harms in our regulatory environment'. These are as follows:

1. 'Promoting economic recovery – including through better and more efficient regulation, facilitating innovation, and targeting regulatory and enforcement action to areas of greatest harm

2. Reducing risk of harm to consumers exposed to poor product governance and design, and increased investment scam activity in a low-yield environment
3. Supporting enhanced cyber resilience and cyber security among ASIC's regulated population, in line with the whole-of-government commitment to mitigating cyber security risks
4. Driving industry readiness and compliance with standards set by law reform initiatives (including the Financial Accountability Regime, reforms in superannuation and insurance, breach reporting, and the design and distribution obligations'.

The plan also includes four internal priorities aimed at lifting ASIC's internal capabilities. These are: 1) enhancing engagement/communication with stakeholders and other regulatory agencies; 2) strengthening internal operations, processes and governance frameworks; 3) strengthening ASIC's data and cyber resilience capabilities; and 4) 'continuing to nurture a workplace environment that promotes a culture of speaking up, challenge and accountability'.

Further details: Planned actions under each of the four external priorities

The table below provides a brief overview of some of the actions under each of the four external priorities identified in ASIC's Corporate Plan.

FOUR EXTERNAL PRIORITIES	KEY PLANNED ACTIONS
Priority 1: 'Promoting economic recovery – including through better and more efficient regulation, facilitating innovation, and targeting regulatory and enforcement action to areas of greatest harm'	▪ Supporting the government's deregulation agenda: ASIC states that it will 'create a dedicated unit within ASIC to identify and implement changes to how we administer the law, with a focus on minimising regulatory costs for businesses' and streamline the way in which stakeholders interact with ASIC to support 'more efficient and effective delivery of our regulatory remit'. ▪ A number of planned actions focus on monitoring disclosure/addressing harm caused by poor disclosure and/or improving disclosure practices. These actions include (among others): – Improving climate risk and governance disclosure through targeted surveillance and communications – Working towards the development a regtech solution to enable identification and assessment of poor market disclosure by listed companies – Expanding monitoring of social media platforms and moderators to facilitate early detection of unlicensed advice and research. ▪ Financial advice: ASIC also flagged plans to take action to address (as far as possible within ASIC's remit) the issue of unmet advice needs and in particular, to address the barriers to delivery of quality, affordable personal advice ▪ Insurance in superannuation: – ASIC plans to conduct 'surveillance' of superannuation trustees on issues raised in Report 633 Holes in the safety net: A review of TPD insurance claims, and Report 675 Default insurance in superannuation: Member value for money. – support/monitor implementation of regulatory reforms including claims handling ▪ Insurance outcomes for consumers affected by natural disasters: ASIC plans to – Analyse data collected from insurers to measure consumer harms, and develop a risk-based approach for responding to consumer harms resulting from natural disasters – ASIC will consider regulatory intervention where necessary

FOUR EXTERNAL PRIORITIES	KEY PLANNED ACTIONS
	▪ ASIC plans to consult on and update relief instruments and guidance on Retirement income calculators and projections ▪ Credit and banking: ASIC identifies a number of actions in this area including: – responding to 'predatory lending practices' – 'review existing guidance, prepare to use new powers, and engage with industry to set expectations following the passage of law reforms' – monitoring lenders' responses to borrowers experiencing financial difficulty (including as a result of COVID-19) and take enforcement action 'where warranted' ▪ Poor debt collection practices are also identified as an area of focus. ASIC plans to collect data around what controls are in place when debt is sold and to engage with industry to identify issues of concern ahead of providing further guidance, and 'where appropriate' undertaking surveillance and/or enforcement action. ASIC will also continue to monitor developments, trends and issues of concern through engagement, data collection and analysis of data collected by APRA
Priority 2: 'Reducing risk of harm to consumers exposed to poor product governance and design, and increased investment scam activity in a low-yield environment'	▪ Continue to finalise investigations relating to referrals and case studies arising from the Hayne Commission ▪ Greenwashing: ASIC plans to conduct 'targeted surveillance' to identify misleading statements relating to ESG claims, 'particularly across social media'. ▪ Review of corporate finance transactions: ASIC states that it intends to 'review public corporate finance activity' including IPOs and takeovers through what it describes as a 'targeted and risk based framework to identify and address issues amid record high volumes of activities'. ▪ General insurance pricing misconduct is also flagged as an area of focus. ASIC states that it plans to review 'whether premiums and advertised discounts are correctly calculated and charged', the adequacy of controls in place to identify/respond to pricing issues, and take regulatory action to deter pricing misconduct 'if warranted' ▪ Marketing and disclosure – risk and return for managed investment funds: ASIC plans to monitor marketing 'using search terms that are likely to appeal to retail investors', review PDSs 'focusing on new PDSs and responsible entities with a history of poor disclosure, to identify likely misleading returns, inappropriate benchmark use or poor risk disclosure' and take enforcement action 'where warranted'. ▪ Review the governance practices of a sample of large managed investment schemes 'with a view to mitigate the risks of adverse member outcomes'
Priority 3: 'Supporting enhanced cyber resilience and cyber security among ASIC's regulated population, in line with the whole-of-government commitment to mitigating cyber security risks'	▪ Cybercrime and cyber governance are flagged in the plan as areas of focus. ASIC plans to take 'proactive and disruptive enforcement action against perpetrators of egregious cybercrime and other conduct facilitated by digitalisation' and to take action against 'egregious instances of failure to adequately manage cyber risks'

FOUR EXTERNAL PRIORITIES	KEY PLANNED ACTIONS
	▪ Cyber resilience: A number of actions in the plan focus on building/strengthening cyber resilience. Actions include: releasing industry guidance, assessing 'selected regulated entities' cyber resilience and management of cyber risks (eg through self-assessments), communicating expectations to boards and sending letters to 'specific entities with key findings' as well as developing and finalising an 'effective supervisory approach' with APRA for dual-regulated entities. ▪ Overseeing ASX's implementation of new infrastructure to replace the existing Clearing House Electronic Subregister System (CHESS) system ▪ Monitoring LIBOR transition
Priority 4: 'Driving industry readiness and compliance with standards set by law reform initiatives (including the Financial Accountability Regime, reforms in superannuation and insurance, breach reporting, and the design and distribution obligations'.	▪ The plan identifies supporting implementation of the proposed Financial Accountability Regime (FAR); and supporting/monitoring implementation of other regulatory reforms (eg design and distribution obligations (DDO); breach reporting obligations; anti-hawking reforms; and internal dispute resolution reforms, Your Future, Your Super reforms) as a key area of focus. ▪ The plan also flags that ASIC will establish the Financial Services and Credit Panel (FSCP) as the single disciplinary body for financial advisers ▪ ASIC plans to conduct a review of a sample of whistleblower programs, which will include reviewing the level of board/executive oversight of programs ▪ Enforceable industry Codes of Conduct: ASIC will publish an update to Regulatory Guide 184 Approval of financial services sector Codes of Conduct

[Sources: ASIC Corporate Plan 2021-25; ASIC media release 26/08/2021]

The government has welcomed ASIC's response to its deregulation agenda

Responding to the release of the Australian Securities and Investments Commission's (ASIC) latest corporate plan [outlined above] the government has welcomed both the regulator's commitment to establish a dedicated red tape reduction unit – a dedicated unit focused on minimising regulatory costs for businesses and consumers – and the regulator's broader commitments to support implementation of the government's deregulation agenda.

In particular the government welcomed the following actions as evidence of the work ASIC is undertaking to 'embed a stewardship culture':

- 'provide clear guidance and communication on how it will exercise its powers, thus helping businesses comply with the law with minimum compliance costs
- actively and transparently engage with stakeholders and take their feedback into account when making regulatory decisions
- enhance cooperation with other regulators, to share information, avoid duplication and promote common approaches to regulation
- improve its IT capability, to more efficiently collect and share data between agencies, streamlining interactions with our regulated population, to achieve compliance
- continue to embed consistent risk management tools and practices across all of its functions and teams, to improve compliance

- the ongoing transition of registry functions and implementation of the Modernising Business Registers program - part of the Government's first Deregulation package
- promote regulatory technology (regtech), to deliver better regulatory compliance and consumer outcomes, as well as financial technology (fintech)
- administer an enhanced regulatory sandbox to allow the testing of certain innovative business models without first having to obtain an AFS or credit licence'.

The statement also welcome's ASIC's commitment to align its performance reporting with the government's Regulator Performance Guide.

> [Source: Joint media release Minister for Superannuation, Financial Services and the Digital Economy Jane Hume and Assistant Minister to the Prime Minister and Cabinet Ben Morton 30/08/2021]

APRA's corporate plan 2021-25: 'Protected today, prepared for tomorrow' is the strategic theme

The Australian Prudential Regulation Authority (APRA) has published an updated Corporate Plan – Corporate Plan 2021-25 – outlining the regulator's strategic priorities over the next four years.

The priorities identified in the plan are based around the 'strategic theme': 'protected today, prepared for tomorrow'. APRA states that this is intended to 'drive organisational focus' on: ensuring financial institutions are resilient and prudently managed; ensuring the stability of the financial system; and 'contribut[ing] to the community's ability to achieve good financial outcomes in line with APRA's purpose.

Broader range of strategic priorities identified

Announcing the release of the plan, APRA Chair Wayne Byres said:

> 'After narrowing our focus last year to help support the industry through the early stages of the pandemic, our latest Corporate Plan once again widens APRA's regulatory gaze and activities. With no sign of an imminent end to the COVID crisis, helping regulated entities and their customers through the pandemic and ensuring the financial system's stability remain immediate priorities, but they are not the only challenges on the horizon. As the financial sector rapidly evolves, our updated Corporate Plan aims to ensure APRA and its regulated entities remain equipped to deal with existing, emerging and future trends and risks – whether it be the growing spectre of cyber-threats, continued access to affordable insurance, or the emergence of new technologies and market disrupters. While our strategic priorities may change over time, our core purpose remains constant: to ensure the financial system remains stable, efficient and competitive, and the financial interests of Australians are protected.'

'Protected today': overview of key priorities/actions under the plan

Preserving the financial and operational resilience of APRA regulated entities

APRA states that it will continue to 'direct the majority of time and resources' to preserving the financial/operational resilience of APRA regulated institutions.

APRA states that its activities will be targeted to certain key areas in each of the sectors it regulates.

SECTOR	PRIORITIES
Banking	▪ Complete implementation of the Basel 3/unquestionably strong capital reforms ▪ Maintain 'scrutiny of credit risk and liquidity risk' at an individual bank and systemic level with particular focus on the impacts of the COVID-19 pandemic ▪ Ensure banks are operationally resilient and 'support the ongoing development of credible recovery plans by banks' ▪ 'Monitor banking industry cohorts by adopting targeted supervisory strategies where appropriate to foster competition and viability'.
Insurance	▪ Ensure 'insurers take steps to strengthen governance and risk management practices, including in response to the lessons learned from COVID-19'

SECTOR	PRIORITIES
	▪ Work with the government and other stakeholders to address accessibility/affordability challenges ▪ 'Promote the sustainability of insurance products for the long-term benefit of consumers, including continued heightened attention on business lines such as individual disability income insurance and insurance in superannuation'. ▪ 'Strengthen APRA's resolution and crisis management capability and ensure credible recovery plans are in place across the Australian insurance sector, prioritising insurers facing higher risks and those of greater systemic importance'.
Superannuation	▪ 'Ensure the superannuation industry eradicates unacceptable product performance' ▪ 'Drive the implementation' of the Your Future, Your Super reforms and 'act on superannuation entities not meeting the new obligations'. ▪ Continuing to 'enhance APRA's data collections to ensure appropriate data is available to monitor performance of all superannuation products'. ▪ Strengthen prudential standards (to ensure that industry acts to rectify 'substandard practices') focused on: a) fitness and governance of super trustees and conflicts of interest; b) risk management and investment governance; c) operational risk management including outsourcing and business continuity; and d) strategic planning and member outcomes.

Cyber resilience

Strengthening cyber resilience across the financial system remains a key focus for the regulator as part of a multi-year work program. Specific priorities include:

- working closely with Council of Financial Regulators (CFR) agencies to 'harmonise regulation and enhance supervision of cyber across the financial system using a variety of mechanisms to identify weaknesses including data collection and analysis'
- ensuring baseline expectations for cyber controls, hygiene and cyber-attack protocols are in place together with appropriate recovery plans
- 'fostering the maturation of supplier cyber assessment and assurance by rectifying weak links within the broader financial ecosystem and supply chain'
- enabling boards and executives to oversee and direct correction of cyber exposures

Transforming governance, culture, remuneration and accountability (GCRA) across regulated entities

The plan also emphasises APRA's ongoing commitment to strengthening governance, culture, remuneration practices and lift accountability standards across APRA-regulated entities.

In particular, APRA states that it will prioritise the following:

- Finalising and implementing Prudential Standard CPS 511 Remuneration and strengthening Prudential Standards CPS 220 Risk management; CPS 510 Governance and CPS 520 Fit and proper;

  [Note: CPS 511 was finalised by the regulator on 27 August 2021. You can find the final CPS 511 here. You can find a short overview of the final standard in a separate post in this issue of Governance News at p7.]
- Sharing more frequent GCRA insights with external stakeholders.
- Putting into operation APRA's new risk culture survey to 'benchmark and assess trends in risk culture across regulated industries'
- Working with the government and with the Australian Securities and Investments Commission (ASIC) to extend the Financial Accountability Regime to APRA-regulated entities (once the regime is finalised)
- Following up/evaluating regulated entity actions in response to issues identified in risk governance self-assessments and prudential engagements

Modernising the Prudential Architecture

The plan includes a new strategic priority focused on 'modernising the prudential architecture for a digital world'.

More particularly, over the 2021-25 period, APRA plans to:

- adapt the existing prudential architecture to take into account new and emerging risks
- update/modernise the prudential framework to make 'prudential standards and guidance more accessible for industry, reduce burden and encourage innovation in regtech and suptech'.
- build capabilities to support digitisation and better regulation.

Enabling data driven decision making

The plan makes clear that APRA considers technology and data to be 'key to enabling effective operations and decision-making for the entities that APRA supervises'.

To support data driven decisions by APRA and by industry, APRA plans to continue to invest in/embed data as a 'core enabler for achieving its purpose and strategy'. In particular, APRA plans to:

- deliver APRA's new data collection infrastructure: APRA Connect and 'accelerate migration' of data from APRA's legacy system to APRA Connect (in the longer term APRA intends to decommission the existing legacy D2A system)
- implement new data collections to collect more granular data which will meet APRA's future data needs as well as better manage the reporting burden on regulated industries
- continue to work with other government agencies on opportunities to collect data once and share.
- continue to pilot and apply applications of data science analytics techniques

In the longer term, APRA plans to modernise its data publications by 'investing in tools to support more extensive external data sharing both publicly and between government agencies'.

Prepared for tomorrow: key actions/priorities identified

Tracking and understanding shifts in the financial landscape and the impact of new business models/technology

The Corporate Plan observes that the global financial landscape is rapidly evolving with new business models and new technology emerging that are 'testing traditional regulatory boundaries and approaches worldwide'. Accordingly Australian's prudential architecture will need to adapt to the changed/changing environment.

Over the 2021–2025 period APRA plans to consider the implications of the evolving financial landscape through:

- 'Scanning the horizon to better understand, and articulate its position, on the impact of new financial activities and emerging business models, and the wider implications for system safety and stability that the prudential architecture will need to address'.
- 'Engage closely with peer regulatory agencies domestically and internationally, particularly on regulatory perimeter and cross-border issues to ensure there are appropriate frameworks in place for Australia'.
- 'Identify opportunities offered by new technology to improve the way APRA and regulated industries operate, including the usage of suptech deployed by APRA and regtech deployed by regulated entities'.

Helping to identifying 'solutions to important challenges'

- APRA will focus on helping to identify 'solutions to important challenges' facing Australia's financial system including: a) superannuation retirement income products; b) insurance accessibility and affordability; and c) the financial risks associated with climate change;
- Financial climate-related risks: ASIC's planned actions are aimed at facilitating 'well informed decision making by APRA regulated entities'. These include: a) finalising prudential guidance; b) conducting climate vulnerability assessments; c) data gathering and further engaging with Council of Financial Regulator agencies and others to improve APRA's understanding of the financial risks associated with climate change. Adopting the latest regulatory tools

Adopting the latest regulatory tools

The plan states that 'APRA will continue to seek to adopt the latest regulatory tools, techniques and practices, including in areas such as specialist regulatory services, enforcement actions, transparency and resolution, to influence and enable the achievement of prudential outcomes'.

Maintaining a high calibre workforce

To support and enable the achievement of APRA's strategic priorities APRA is focused on maintaining a high calibre workforce.

To this end, APRA is focused on delivering a modern and flexible working environment; enhancing internal capabilities and forming additional strategic partnerships and engaging external strategic advisers/experts,

[Source: APRA media release 26/08/2021; APRA Corporate Plan 2021-25]

APRA's latest biennial stakeholder survey finds 25% of regulated entities consider the burden of APRA's regulation to be too high

APRA has released its 2021 Stakeholder Survey of regulated entities, and 'knowledgeable observers' eg auditors, actuaries and industry associations.

APRA states that overall the results were positive. For example, the survey found that:

- 95% of regulated entities believe that APRA effectively communicated its changing expectations during COVID-19
- 87% agreed that APRA's policy responses were appropriate during the pandemic
- 95% of respondents agree that APRA's public communications are clear and effective
- 93% of respondents agree that APRA is effective in identifying risks across their industry
- 87% agree that APRA's increased focus on risk culture had a positive impact on their entity

However, the survey also identified some areas of concern. For example

- a quarter of regulated entities feel the burden of APRA's regulation is too high for the benefit gained by their entity
- almost one-third of respondents believe that APRA collects too much statistical data.

Commenting on the results, APRA Chair Wayne Byres said that

> 'It's pleasing to see that, overwhelmingly, entities are supportive of the work that we are doing and the actions we have taken during COVID-19. The stakeholder survey also helps to identify areas where we can improve. Our updated Corporate Plan includes our commitment to modernising the prudential framework so that it's less burdensome and more adaptable to the rapidly evolving financial sector'.

[Source: APRA media release 07/09/2021]

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.

The table was last updated on 8 September 2021 and can be accessed here.

Consultation on a draft Bill to support implementation of the proposed FAR

Context

Following the release of a proposal paper in January 2020 (summarised here) the government recently concluded its consultation on draft legislation proposing to establish the long-awaited FAR which will expand on and replace the existing Banking Executive Accountability Regime (BEAR). You can find a summary of the draft Bill here.

Consultation on a second draft Bill

On 2 September 2021, Treasury released a second draft Bill for consultation - [exposure draft\ The Financial Accountability Regime (Consequential Amendments and Transitional Provisions) Bill 2021 (draft Bill) – that proposes to support the implementation/establishment of the proposed Financial Accountability Regime (FAR).

Broadly, the draft Bill:

- sets out how/when the different sectors would transition into the FAR
- sets out requirements for the repeal of the existing Banking Executive Accountability Regime (BEAR) following the application of the Financial Accountability Regime (FAR) to the banking sector (authorised deposit-taking institutions and their authorised non-operating holding companies)
- defers the application of the proposed FAR deferred remuneration obligations so that the obligations apply to the banking sector (authorised deposit-taking institutions and their authorised non-operating holding companies) **six months after** the rest of the FAR obligations apply to the sector. During this six month period, existing BEAR deferral obligations would continue to apply
- makes consequential amendments to various Commonwealth laws at the commencement of the Financial Accountability Regime 'to ensure the regime functions appropriately'.

The due date for submissions is 17 September 2021.

[Source: Treasury consultation: Financial Accountability Regime (Consequential Amendments and Transitional Provisions) Bill 2021 02 September 2021 - 17 September 2021; [exposure draft] Financial Accountability Regime (Consequential Amendments and Transitional Provisions) Bill 2021 No. , 2021; draft explanatory materials]

Hayne implementation: ASIC has released new breach reporting guidance (RG 78) ahead of the commencement of reforms set to commence from 1 October

Context

- Schedule 11 of the Financial Sector Reform (Hayne Royal Commission Response) Act 2020 (the Act) implements the government's response to Hayne recommendations 1.6, 2.8, 2.9 and 7.2.
- The changes introduced by the Act strengthen and clarify existing breach reporting obligations that apply to Australian Financial Services licensees and extend their application to Australian credit licensees (credit licensees) as well as introduce new requirements for licensees to notify, investigate and remediate breaches of the law in certain circumstances. The new obligations take effect from 1 October 2021

Final guidance and information sheet released

- **RG 78:** Following consultation, ASIC released final guidance: RG 78 Breach reporting by AFS licensees and credit licensees on 7 September 2021. In response to industry feedback during the consultation, the final guidance includes 15 more worked examples to support compliance with the new obligations.
- **Information sheet:** ASIC has also published an information sheet - INFO 259 Complying with the notify, investigate and remediate obligations - setting out actions that must be taken by licensees to notify affected customers of a breach of the law, investigate the breach and remediate impacted customers. This implements a new obligation that applies to licensees of financial advisers and mortgage brokers in certain situations.
- **Exclusions:** ASIC notes that it has made a legislative instrument - ASIC Corporations and Credit (Breach Reporting—Reportable Situations) Instrument 2021/716 – which operates to exclude enforceable IDR standards from the categories of situations deemed to be 'significant' breaches and therefore automatically reportable under the reforms.
- **Superseded RG78:** ASIC notes that for AFS licensees, the existing breach reporting framework under s912D of the Corporations Act 2001 (Cth) (the Act) continues to apply with respect to the reporting of certain breaches as set out in s1671A of the Act. Accordingly, the superseded version of RG 78 issued in March 2020 continues to be available for the use of AFS licensees in these circumstances.
- **A reasonable approach:** The regulator reiterated that it intends to take a 'reasonable approach' to enforcing compliance in the initial stages of the new obligations, provided that industry uses its best efforts to comply.

Commenting on the release of the guidance ASIC Deputy Chair Karen Chester said,

> 'The new reporting obligations address long held concerns on the quality and timeliness of breach reporting. ASIC analysis in 2018 revealed it took more than 4 years (on average) for large financial institutions to identify incidents that proved to be significant breaches. Today's remediation tally reveals how much consumer harm these delays caused, and ultimately at great cost to those firms… The Government's new reporting obligations put strong guard rails in place that will benefit firms and consumers alike'.

Publication of data on breach reporting

The reforms also introduce a new requirement for ASIC to publish data about breach reports annually on its website. ASIC intends to consult separately on this obligation which does not commence until Q4 2022.

> [Source: ASIC media release 07/09/2021; Final RG 78 Breach reporting by AFS licensees and credit licensees; Superseded SRG 78 Breach reporting by AFS licensees; REP 698 Response to submissions on CP 340 Breach reporting and related obligations; INFO 259 Complying with the notify, investigate and remediate obligations]

Updated IDR Guidance: ASIC has released final RG 271 Dispute Resolution

Updated IDR guidance: RG 271

- The Australian Securities and Investment Commission (ASIC) has released final updated guidance RG 271 Internal Dispute Resolution. RG 271 establishes new requirements for how financial firms will need to deal with consumer complaints from 5 October 2021.
- Changes to the guidance include various technical amendments and clarification of the guide's interaction with other legislative requirements relevant to complaints handling. ASIC has made available a summary of the changes made to the guidance here.
- ASIC highlights that the changes to the guidance that will be 'of most relevance' for trustees include additional guidance on ASIC's interpretation of when complaints will involve a decision of a trustee (or failure by a trustee to make a decision) concerning a complaint.

Survey of trustees identifies areas where 'additional effort' is needed

A recent survey of registrable superannuation entities (trustees) about their preparedness for the new enforceable internal dispute resolution (IDR) obligations identified that though many trustees were taking 'significant steps to uplift their handling of consumer complaints', certain areas continue to require 'additional effort'. These areas are:

- 'attention to governance arrangements;
- application of the expanded definition of 'complaint';

- implementation of the new maximum timeframes for IDR responses;
- identification, ownership and reporting of systemic issues; and
- data capture and integration'.

ASIC has made available a summary of the survey findings here.

ASIC encourages all trustees to assess their preparedness for RG 271 in light of these findings and in light of the fact that from 5 October 2021, key parts of the new IDR requirements will be enforceable.

ASIC's approach to implementation

Commenting on ASIC's approach to implementation of the IDR requirements in the initial stages, ASIC Commissioner Danielle Press reiterated that it will take a 'reasonable approach' provided that trustees use their best efforts to comply.

[Sources: ASIC media release 02/09/2021; RG 271 Internal dispute resolution]

Consultation on possible options to change (or not) the settings around the use of occupational exclusions in the context of default life and TPD insurance in MySuper products

Treasury has released a consultation paper seeking feedback on whether existing settings governing the use of occupational exclusions in the context of default life and total permanent disability (TPD) insurance in MySuper products are necessary/appropriate.

The consultation paper puts forward four potential options to change (or not) existing settings. These options (outlined briefly in the table below) are aimed at addressing the following three concerns: a) inadequate disclosure of occupational exclusions; b) members losing default insurance after they move into a higher risk occupation; and c) members not being able to get automatic acceptance of default cover.

Four potential options

OPTION	RATIONALE
Option 1: No change.	▪ In light of the trend towards removing occupational exclusions, government intervention may be unnecessary ▪ The review seeks feedback on the scope of the problem - ie the extent to which the current regulatory framework has the potential to result in some members having inappropriate life and TPD insurance through their MySuper product
Option 2: Strengthen disclosure of occupational exclusions.	▪ The consultation paper seeks feedback on whether further steps could be taken to strengthen disclosure to members. ▪ To improve the comparability of information about occupational exclusions, it's suggested that this could include introducing a new requirement to disclose occupational exclusions within a brief, standard template that better supports comparisons across products. ▪ It's suggested that this option could potentially be implemented in combination with option 3 below.
Option 3: Members retain their insurance coverage when they change occupations.	▪ To address the issue of members losing default insurance cover after changing occupations, it's suggested that members would not lose their default insurance cover ie where a member holds insurance for their current occupation, they could not subsequently be subject to occupational exclusions if they changed occupations. ▪ The consultation paper also seeks feedback on alternative mechanisms to ensure members have appropriate cover when they change occupations. ▪ The consultation paper suggests that consideration could be given to the relative costs/benefits of option 3 vs option 4 (described below).
Option 4: Ban	▪ To address the issues of members not being able to get automatic acceptance of default cover and separately to address the issue of the loss of default cover after changing jobs it's suggested that a ban could be introduced on the use of occupational exclusions in default life and TPD

OPTION	RATIONALE
occupational exclusions.	insurance offerings within MySuper products. It's also suggested that consideration be given to other occupation related clauses in group insurance policies that could 'deny a member's insurance claim' due to the nature of their employment.

[Sources: Minister for Superannuation, Financial Services and the Digital Economy Jane Hume media release 02/09/2021; Treasury Consultation: Review of occupational exclusions in default insurance offered through MySuper products 02 September 2021 - 14 October 2021]

Improved reporting: 14% increase in reported Banking Code breaches over H2 2021

Key Takeouts

- The number of reported breaches jumped significantly in H2 2021 according to the latest report from the Banking Code Compliance Committee (BCCC)
- According to the BCCC, the Code obligations most commonly breached by banks continue to be: privacy and confidentiality, responsible lending, debt recovery, assisting with financial difficulty, commitments to train staff to understand how to comply with the Code and be fair, reasonable and ethical in dealings with customers.
- The incidents reported during H2 2020 affected more than 2.8 million customers, with a total financial impact of over $76 million
- Though the BCCC welcomed the continued improvement in the detection of Code breaches, it called on banks to increase their focus on prevention and expressed the hope that the number of reported breaches will decrease in the next round of reporting (especially as the current version of the Code has now been in operation since July 2019)

The Banking Code Compliance Committee (BCCC) has released its latest report on compliance with the Banking Code of practice. The report covers banks' self-reported breach data for the period July to December 2020 (H2 2020).

Key Takeaways

14% increase in reported breaches

- The 19 banks that subscribe to the Code reported 22,473 breaches of the Code during the period (a 13.7% uptick from the 19,766 breaches reported in H1 2020).
- Looking more closely:
  - Ten banks reported increases, one major bank reported the same number of breaches as the last period and eight banks reported decreases.
  - The four major banks account for nearly 90% of all breaches reported in the period, and 'Major Bank 1' reported more than 45% of all breaches.
- Though the BCCC welcomed improvements in breach reporting, it expressed concern at the volume of reported breaches and called on banks to step up their focus on prevention. The BCCC observed that the current version of the Code has been in operation since July 2019 and that 'it is important for both customers and the standing of banks in the community that the number of breaches starts to decrease'.
- According to the report, one major bank has indicated that its monitoring and reporting systems have matured over time, and that it may have reached a tipping point where, as it concentrates on improving Code compliance, the number of breaches will start to decrease after years of regular increases. The BCCC expresses hope that there will be further examples of this when banks next report their breach data in September 2021.

Further detail

- Customer impact: The incidents reported during H2 2020 affected more than 2.8 million customers, with a total financial impact of over $76 million
- Highest numbers of reported breaches:
  - Breaches of the obligation in Part 3 of the Code (Opening an account and using our banking services) jumped 40%

- Breaches of the obligations in Part 10 of the Code (Resolving your complaint) increased 30%
  - Breaches of the obligations in Part 8 of the Code (Managing your account) increased 27%
  - Breaches of the obligations in Part 9 of the Code (When things go wrong) increased 21%

- Reported causes of the breaches: Consistent with H1 2020, banks reported that the majority of incidents for H2 2020 (69%) were caused by human error alone, and a further 3% caused by human error plus another factor

- Identification of breaches:
  - 30% of breaches were identified via Line 1 quality assurance activities (eg call monitoring and system monitoring); 29% were identified as a result of customer complaints, queries or feedback
  - The other most prominent method of breach identification was self-identification by staff members not specifically involved in line 1 activities (24%).
  - A further 10% of incidents were identified by line 2 or internal reviews and 3% via external parties or events.

- Corrective action taken: The most common actions taken by banks to prevent recurrence of breaches were one or more of the following:
  - provide staff training, coaching or feedback (60% of incidents)
  - review and/or improve processes (14%)
  - review staff performance or taken disciplinary action (8%)
  - implemented a system fix (6%)
  - enhance monitoring or controls (3%)
  - Banks reported that they did not take actions to prevent recurrence or that no action was required for approximately 3% of incidents
  - In 7% of incidents, banks' actions to prevent recurrence were still under review
  - In 6% of cases, banks did not provide details of what actions would be taken

  [Sources: BCCC media release 27/08/2021; Full text report]

84% pass rate: APRA releases results of its inaugural MySuper Product Performance Test

The Australian Prudential Regulation Authority (APRA) has released the results of its inaugural MySuper Product Performance Test.

Of the 76 MySuper products assessed, 13 products failed to meet the objective benchmark. A full list of these products is available on the APRA website here.

Trustees of failed products are required to write to members by 27 September 2021 advising them of their Performance Test outcome and providing details of the ATO's YourSuper comparison tool.

APRA Executive Board Member Margaret Cole commented that APRA has stepped up supervision of trustees with products that failed the performance test. Ms Cole said:

> 'Trustees of the 13 products that failed the test now face an important choice: they can urgently make the improvements needed to ensure they pass next year's test or start planning to transfer their members to a fund that can deliver better outcomes for them. APRA has intensified its supervision of trustees with products that failed the test and has requested they provide a report identifying the causes of their underperformance and how they plan to address them. Trustees have to monitor their products closely and report important information to APRA – including relating to the movement of members and outflow of funds.'

APRA engaging with trustees of 'at risk' products

APRA has said that it is engaging with trustees with products 'at risk' of failing the performance test next year to ensure they are taking action to improve performance and to understand their contingency plans which APRA notes are required to include 'pre-positioning to be able to give effect to an orderly transfer of members to another fund, if required'.

APRA observes that from next year, the performance test will be expanded to include trustee-directed products.

[Source: APRA media release 31/08/2021]

ASIC levy freeze: Treasurer announces temporary freeze on ASIC industry levy for advisers and review of the funding model, SAFAA has welcomed the news

Temporary freeze

- The government has announced that the Australian Securities and Investments Commission (ASIC) per-adviser industry levy charged to financial advisers will be temporarily reduced to 2018-2019 levels for the next two years (ie the freeze will apply to 2020-21 and 2021-22).
- The flat per licensee charge will remain at $1500.
- Announcing the temporary freeze Treasurer Josh Frydenberg and Minister for Superannuation Financial Services and the Digital Economy Jane Hume said that the temporary reduction will provide advisers with 'the certainty they need over the next two years to deal with the impacts of COVID-19 and further regulatory reforms making their way through the Parliament, including the introduction of a Single Disciplinary Body and a Compensation Scheme of Last Resort'.

Review of the ASIC Industry Funding Model

The Treasurer also said that a review of the ASIC Industry Funding Model will be completed while the temporary relief is in place. The review will commence in 2022 and will be undertaken in consultation with the Department of Finance and ASIC.

SAFAA has welcomed the announcement

In a statement, the Stockbrokers and Financial Advisers Association (SAFAA) welcomed the announcement as an acknowledgement that the current funding model/level of increases are unsustainable. SAFAA likewise welcomed the review of the design of the funding model, commenting that SAFAA and other associations have long advocated for such a review.

[Sources: Joint media release: Treasurer Josh Frydenberg and Minister for Superannuation, Financial Services and the Digital Economy Jane Hume 30/08/2021; SAFAA media release 30/08/2021]

In Brief | Establishing the CCIV regime: Following previous consultation, the government is consulting on a package of draft legislation to implement the tax and regulatory components of the CCIV (corporate collective investment vehicle) regime which is aimed at increasing the competitiveness of Australia's managed funds industry. The due date for submissions is 24 September 2021

[Sources: Treasury Consultation: Corporate Collective Investment Vehicles - Regulatory and Tax Frameworks; Joint media release: Treasurer Josh Frydenberg and Assistant Minister to the Prime Minister and Cabinet Michael Sukkar 27/08/2021]

In Brief | In a joint submission, CPA Australia and Chartered Accountants Australia & New Zealand have questioned the need for the proposed retirement income covenant. The groups argue that the proposed covenant is 'unnecessary', will be of 'little or no practical benefit' and would add to the costs of running superannuation funds

[Sources: Joint media release Chartered Accountants ANZ & CPA Australia 20/08/2021; Full text: Joint submission]

In Brief | APRA has published a new frequently asked question outlining its view on Pandemic Leave Disaster Payments, COVID-19 Disaster Payments and the 'work test' for the purpose of voluntary superannuation contributions

[Source: APRA Frequently Asked Questions - Superannuation trustees' response to COVID-19]

Risk Management

Climate Risk

Top Story | Climate risk governance guide: An introductory resource for directors on climate risk governance

MinterEllison has partnered with the Australian Institute of Company Directors to release a climate risk governance guide to assist directors in establishing good governance structures and meeting the challenges and opportunities that climate change risks present.

You can access the full text of the guide here.

Climate Risk: APRA has released an information paper outlining the design/scope of its climate vulnerability assessment (CVA)

The Australian Prudential Regulation Authority (APRA) has released an information paper setting out the objectives and the scope of the Climate Vulnerability Assessment (CVA) currently underway with Australia's five largest banks: ANZ, CBA, Macquarie Bank, NAB and Westpac.

The information paper also provides insights into the way in which the CVA compares with similar exercises being undertaken by other international regulators.

Key Takeaways

What is the CVA?

The CVA is a Council of Financial Regulators (CFR) initiative led by APRA which is designed to assess the nature and potential impact of climate-related financial risks (ie both physical and transition risks) on banks' lending exposure under two different scenarios:

- Scenario 1: The first scenario assumes that current climate policies will remain in place until 2030, followed by a rapid reduction in global greenhouse gas (GHG) emissions after 2030, consistent with limiting global warming to less than 2 degrees.

- Scenario 2: The second scenario assumes that existing policies remain in place unchanged and that global GHG emissions continue to rise beyond 2050, peaking in 2080.

The two scenarios are aligned to the internationally accepted scenarios developed by the Network for Greening the Financial System (NGFS).

Rationale

The CVA is part of the work APRA is undertaking to ensure that regulated entities are taking appropriate steps to understand and manage the financial risks associated with a changing climate.

APRA Chair Wayne Byres said

> 'APRA began the CVA program in the banking sector due to its centrality to the Australian financial system, as well as the potential impacts associated with climate risk across the portfolios, from household mortgages to business exposures. The results should help the boards and management of participating institutions to understand and proactively address any identified risks, as well as capitalise on new opportunities. They will also help regulators with a better picture of the nature of the risks, and how financial institutions plan to respond.'

Objectives of the exercise

The CVA has three key objectives:

- to assess/measure the potential financial risks to banks posed by both physical and transition climate risks
- identify what adjustments could be made to existing business models/what actions could be taken to mitigate the risks under different scenarios
- support improvement in climate risk management capabilities in the banking sector (and more widely).

The information paper makes clear that the CVA is not the same as a traditional capital stress test in that is 'does not include capital adequacy components and its results do not lead to direct prudential requirements'.

However, the methodology used in the CVA draws from traditional stress tests. The information paper describes the CVA as an 'opportunity to incorporate climate-related factors into APRA's existing stress testing program'.

Focus on lending

The focus of the exercise is on understanding the potential impacts of the transition and physical climate risks on Australian lending. Banks are being asked to assess: residential mortgages, corporate and business lending and exposures.

PORTFOLIO EXPOSURE	APPROACH
Mortgage exposures	Mortgage exposures will be assessed in the CVA using the following approaches: ▪ transition risk: impact on Australian-based residential mortgage exposures from changes in economic activity ▪ physical risk: impact on Australian-based residential mortgage exposures from physical risks. Participating lenders have the option to provide further information relating to new Zealand/international residential mortgage exposures (but this is not a requirement). Insurance coverage has also been included within the mortgage exposure analysis.
Business exposure	Business exposures will be assessed in the CVA using the following approaches: ▪ transition risk: impact on Australian-based business exposures from changes in economic activity ▪ physical risk: physical risk will be separated into two classifications: – agriculture-focused lending from physical risk to primary agriculture activities for three commodities: beef cattle, dairy and grain – non-agriculture focused lending. ▪ Banks will apply different physical risk assessment approaches for these two classifications of business lending, reflecting the differing risk profiles and impacts.

PORTFOLIO EXPOSURE	APPROACH
	▪ Banks have the option (but are not required) to also include their New Zealand exposures, and/or broader international-based exposures.

Assessments of counterparties to which the banks have a material exposure will be used to supplement the portfolio-level analysis of climate risk.

The counterparty assessment is expected to cover a wide range of information, including (but not limited to): a) climate metrics (eg counterparty's scope 1 and 2 emissions, and/or emissions intensity of its business activities); b) mitigating and management actions that would likely be considered by the counterparty under the scenario; and c) 'consideration of the interplay between different climate risks and how this may impact the overall level of losses (either qualitatively or quantitatively)'.

International climate risk activities

A number of international regulators are undertaking climate risk assessments and stress tests similar to the CVA in their own jurisdictions (among other climate-risk related activities). Table 5 at p23 of the information paper provides a comparison of the different approaches to climate stress tests in different jurisdictions.

The information paper highlights that though the use of NGFS scenarios will increase the comparability of results, there is nevertheless variation across jurisdictions in the approach being taken. Ultimately, achieving comparability of results across jurisdictions would require/will require consistency in approach.

Next steps

- The banks commenced their CVAs in June, and are due to submit their first CVA analysis towards the end of this year. APRA intends to publish the 'aggregated results' of the banks CVA analyses in 2022.
- APRA also intends to conduct a comparison of the findings from the CVA with the findings of similar stress test assessments in other jurisdictions.
- The insights and learnings from the inaugural CVA, as well as international peer experiences/insights, would be used to support any extension of the CVA. APRA flags that it will consider extending the CVA to include the insurance and superannuation sectors.

[Sources: APRA media release 03/09/2021; APRA information paper: Climate Vulnerability Assessment]

Greenwashing test case: ACCR has brought a case challenging the truth of a company's net zero emissions target

The Australasian Centre for Corporate Responsibility (ACCR), has launched proceedings in the Federal Court against Santos alleging that certain 'green' claims made in the company's 2020 Annual Report constitute misleading or deceptive conduct under both the Corporations Act 2001 (Cth) and the Australian Consumer Law.

The case is significant because it is the first case globally to test the veracity of a company's net zero claim.

Allegations

Broadly, The ACCR alleges that the reasonableness of Santos' description of itself as a clean energy provider and the reasonableness of its assertion that it has a clear and credible plan to reach net zero emissions by 2040 are questionable (and potentially misleading and deceptive in contravention of s 1041H of the Corporations Act 2001 (Cth) and s 18 of the Australian Consumer Law (ACL) (Schedule 2 of the Competition and Consumer Act 2010 (Cth))) because the company:

- failed to disclose plans to increase its greenhouse gas emissions by developing new or existing oil and gas projects
- failed to disclose that its net zero by 2040 plans depend upon a range of undisclosed qualifications and assumptions, including assumptions about carbon capture and storage (CCS) processes and 'blue hydrogen'.

Further, the ACCR alleges that in making representations that gas is a 'clean' fuel or energy source, Santos engaged in conduct that was liable to mislead the public as to the nature, characteristics, suitability and quality of Santos' primary product - being 'natural' gas – contrary to s 33 of the ACL.

Relief being sought:

The ACCR is seeking that the Court grant an injunction requiring Santos to correct the record publicly on these statements, and prohibit Santos from engaging in similar misleading or deceptive conduct in the future.

[Sources: ACCR media release 26/08/2021 ; Environmental Defenders Office media release 26/08/2021]

Other Developments

A significant step forward: The Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021

MinterEllison has released an article expertly summarising the changes introduced by the Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021 and outlining suggested steps for organisations to implement i response.

You can access the full text here.

Modern Slavery Reporting – Year in Review

MinterEllison has released an article expertly summarising the key findings from the Australian Council of Superannuation Investors (ACSI's) recent report analysing the first full year of reporting under the Modern Slavery Act 2018 (Cth) by Australia's top companies. The article also provides insights into how companies can improve their reporting going forward.

You can find the full text here:

Emerging trends from the OAIC Notifiable Data Breaches Report

MinterEllison has released an article discussing the findings from the Office of the Australian Information Commissioner's latest Notifiable Data Breaches report which covers the period January to June 2021.

You can find the full text here.

ACCC proposes sweeping changes to Australia's merger control regime

MinterEllison has released an article discussing the ACCC's significant proposals for the reform of Australia's merger control regime and the implications of the proposed changes.

You can access the full text here.

Insolvency and Reconstruction

Consultation paper: Review of the insolvent trading safe harbour

Treasury has released a consultation paper seeking feedback on the effectiveness/appropriateness of the existing safe harbour provisions and what (if any) changes should be made.

The consultation paper sets out 13 questions for feedback including, among other things view on:

- the effectiveness of the COVID-19 insolvent trading moratorium and whether there are any improvements or qualifications stakeholders would like to see made to the safe harbour provisions and/or the underlying prohibition on insolvent trading
- whether the pre-conditions to access the safe harbour are appropriate
- whether clarification is required around the role of advisers, including who qualifies as advisers, and what is required of them

The due date for submission is 1 October 2021.

[Source: Treasury Consultation: Review of the insolvent trading safe harbour 3 September 2021 – 1 October 2021]

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