Governance News

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

25 January 2022

Contents

Boards and Directors

ATO issues reminder about deadlines to apply for Director IDs

- The Australian Taxation Office (ATO) has reminded tax agents that their director clients are now able to apply for a director identification number (Director ID) at Australian Business Registry Services (ABRS) and reiterated the cut off dates by which eligible directors will need to have applied.'
- In brief:
  - Directors who were already directors on/before 31 October 2021 will need to apply by 30 November 2022.
  - First time directors appointed between 1 November 2021 and 4 April 2022 need to apply within 28 days from their appointment
  - From 5 April 2022, new directors will need to apply, prior to their appointment.
- The ATO emphasises that a tax agent is unable to apply on a client's behalf.

The ABRS website provides further detail on deadlines, eligibility requirements and the application process.

[Source: ATO media release 19/01/2022]

Diversity

The glass ceiling is still in place? European Women on Boards report finds the pace of progress on gender diversity remains slow, the initiative plans to push for progress on legislating minimum quotas

Key Takeouts

- The report highlights that though the proportion of leadership roles held by women in Europe's largest companies is trending gradually upwards, progress remains very slow. At the present rate, the report predicts that gender equality is still 'decades' away
- To accelerate the rate of progress, European Women on Boards is pushing for minimum gender quotas to be legislated. Progressing the stalled European Directive on Gender Diversity also has the backing of European Commission President Ursula von der Leyen.

European Women on Boards (EWOB) has released its latest annual diversity index tracking the representation of women in leadership roles in the 668 largest listed companies across 19 European countries.

The headline conclusion is that though some progress is being made, the pace of change is extremely slow with gender equality is still predicted to be 'decades' away.

Key Takeaways

- The report found that across the companies analysed, the proportion of women in 'leadership' roles is trending (very) gradually upwards, though gender equality is still some way off. For example:
  - 30% of all leadership positions (board, executive level and board committees) are held by women (up slightly on 28% in 2020).
  - However, there are only 111 companies (or 17%) where the 'absolute share' of women in leadership is 40% or more (though this is up from just 13% in 2020).
  - Looking at women in executive roles (C-level executives and the second and possibly third layers of decision-making), women hold only 19% of positions (a very slight improvement on 18% in 2020).
  - Only 50 companies have a female CEO
  - 25% of companies sampled have at least one women in the CEO, CFO or COO position (up from 19% in 2020). Only seven companies had both a female CEO and a female CFO or COO.
- Looking at board representation, the number of female board members is also (slowly) increasing:

   - Women account for 35% of board positions at the 668 companies included in the index (up from 34% in 2020 and 33% in 2019).
   - Drilling down, 39% or 258 companies have boards with 40% or more women (up from 36% last year).
   - At the other end of the spectrum, 80 companies (12%) have boards where women account for 20% (or less) of board seats

- Few women hold the role of Chair:
   - The report found that only 9% of companies analysed had a female board Chair (unchanged from 2020).
   - The proportion of women Chairing committees is considerably higher - 32% of Committee Chair roles (for STOXX 600 companies only) are held by women (up slightly from 30% in 2020)

- Geographical differences: The report ranks Norway, France (both of which have binding quotas) and the UK as the countries closest to gender equality overall. At the other end of the spectrum, Poland ranked lowest.

EWOB to push for gender quotas to be legislated

To accelerate the pace of change, EWOB has identified the following four priority action points for 2022-23.

- **Push for progress on the directive on gender balance on boards** and ensure that targets include the board and the C suite.

  [Note: This appears to be a reference to the proposed 2012 EU Directive on Gender Balance on Boards.]

  This aim has the backing of EU President Ursula von der Leyen who in a recent speech confirmed her intention to progress the directive. President von der Leyen said:

  > 'I will push, as President of the Commission, to ensure that our proposal on Women on Boards becomes EU law. I have met with Member States and Members of Parliament. And I am confident that soon we will see progress. We cannot afford to lose another ten years'.

- **Create a leadership 'talent pool'**: EWOB plans to establish a talent pool of 1000 women senior executives capable of moving to the C-suite and the boardroom through rolling out development programs across Europe

- **Build a network of likeminded organisations** in 20 European countries,

- **Set up a taskforce to engage with each of the 668 listed companies** mentioned in the report, to get their views and plans in terms of gender diversity at the top, setting up corporate partnerships and sharing best practices.

  [Source: European Women on Boards Diversity Index 2021]

Half of FTSE 100 firms are now disclosing workforce diversity data

According to ShareAction, 50 FTSE 100 companies disclosed data on workforce practices to investors through the Workforce Disclosure Initiative (WDI) in 2021 (up from only 39 in 2018).

ShareAction attributes this to both:

- the jump in the number of investors backing the initiative (62 investors with $8.6tn in assets under management now support the initiative up from 52 investors the previous year); and

- willingness on the part of investors to 'flex their muscles in response to poor workforce practices' for example through voting down pay packages and/or declining to invest in companies with poor workforce practices.

Having said this, ShareAction observes that a number of listed firms, some of which have 'faced workforce-related controversies of late' have yet to engage with the initiative and/or are yet to disclose data on their workforce practices.

Rosie Mackenzie, Company Engagement Manager at the WDI commented:

> 'With half of the FTSE100 now disclosing workforce data to investors, these persistent non-responders are beginning to look like laggards with something to hide. We hope that these firms will recognise what their peers around the world already have - that transparency around workforce practices is beneficial not just for employees and investors, but also for the companies themselves.'

[Source: ShareAction media release 13/01/2022]

Shareholder Activism

Global report finds Australia was second only to the US in terms of the level of activist activity in 2021

Key Takeouts

- Insightia found that the level of activist activity globally in 2021 was down on previous years, and down on pre-pandemic levels
- Consistent with previous years, the level of activity in the US outpaced all other jurisdictions. The report also highlights that Australia had the second highest level of activist activity after the US.
- The most common category of activist demands overall were 'governance' related (consistent with previous years).
- Environmental demands in Australia reached record levels in 2021.

Insightia has released its latest statistical analysis of global trends in shareholder activism in 2021. The report features insights into trends in the US, Canada, Europe, Asia and Australia.

Some Key Takeaways from Insightia's report

Global trends

- Insightia found that activist activity was well-down on pre-pandemic levels, and down on last year:
  - The number of companies publicly subjected to activist demands fell from 968 in 2020 to 886 in 2021.
  - For context, this is well down on pre-pandemic levels of activist activity. In the 2017-2019 period, the number of companies subjected to activist demands stood at over 1000 each year.
- Looking at the level of activist activity by country, consistent with previous years, US-based companies faced the highest level of activist demands overall (456 companies targeted) followed by Australia (66), Japan (60), the UK (47) and Canada (45).
- Globally, the most targeted sectors were: industrials (134 companies) followed by consumer cyclical (120) and financial services (112)
- Consistent with previous years, the most common activist demands overall were governance related (391, up from 387 in 2020). The next most common category of activist demand was the appointment of personnel (286).
- Large cap companies (>$108) were the most likely to be targeted by activists. At the other end of the spectrum, nano cap and microcap companies were overall, the least likely to be targeted.

US trends

- The number of US-based companies subjected to activist demands fell from 503 in 2020 to 456 in 2021. For context, this was well-down on pre-pandemic levels of activity. In the 2017-2019 period over 550 US companies each year were subjected publicly to activist demands.
- Consistent with every year going back to 2015, the most common form of activist demands levelled at US-based companies in 2021 were governance related. Of the governance related demands levelled at US-based companies in 2021, the majority (146) called for a shift in company policy.
- Interestingly, 2021 saw 52 companies facing remuneration-related demands. For context, this is the highest number in any year since 2016 and marks a significant uptick on 2020 when only 40 companies faced remuneration-related demands.
- 2021 also saw an uptick in the number of companies facing 'environmental' demands from 34 companies in 2020 to 41 companies in 2021. Of the 44 environmental demands levelled at US-based companies in 2021, the majority (31) related to climate change and greenhouse gas (GHG) emissions.
- In the US, the most targeted sectors were: 1) technology and separately consumer cyclical, 2) industrials; and 3) healthcare. The least targeted sector was communication services.
- Board seats:

– Activists secured 130 board seats in 2021, down from 185 in 2020. For context, the number of board seats secured by activists has been trending down since 2018.
– Of the 130 secured by activists, 110 were secured through settlements (as opposed to contested votes at meetings).

Australia

- As flagged, Australia ranked second behind the US as the jurisdiction with the highest level of activist activity in 2021, with 66 Australia-based companies targeted. For context this was a decrease on the level of activity in 2020 when 71 companies were subjected publicly to activist demands.
- ESG-related demands:
  – According to Insightia's analysis, 100% of the 15 environmental demands levelled by activists at Australia-based companies in 2021 related to climate change and GHG emissions
  – According to Insightia there were zero 'social' demands in 2021.
  – Of the 20 governance related demands levelled at Australia-based companies during 2021, 16 called for a change in company policy, three were disclosure related, and one called for a change in board composition. Though the report does not indicate this as a possibility, it's seems possible that the high level of 'governance' demands may be a reflection of the fact that in the Australian context shareholder resolutions are almost always accompanied by/contingent on the passage of a constitutional amendment enabling shareholders to bring advisory resolutions.
- Board seats: In 2021, activists secured 31 board seats (up from 25 in 2020). 16 seats were secured through contested votes at meetings and the remainder were secured through settlements.
- The most commonly targeted sectors were: basic materials (26) and financial services (13)
- Interestingly, the smallest (nano cap and micro cap companies) rather than the largest companies were the most likely to be subjected to activist demands.

[Source: Full text report from Insightia: Shareholder Activism 2021]

ACCR names the companies it plans to target in 2022

The Australasian Centre for Corporate Responsibility (ACCR) has named the companies it plans to engage with and potentially target with shareholder resolutions in 2022.

The ACCR plans to (potentially) file resolutions at the following companies.

- H1 2022: Macquarie, Rio Tinto, Santos, Woodside.
- H2 2022: AGL, APA Group, Beach Energy, BHP, Cooper Energy, Fortescue Metals, Incitec Pivot, Origin, South32.

In addition to the above, the ACCR has flagged plans to engage with the following companies on a range of ESG issues, though it makes clear that these engagement may not lead to the filing of resolutions: Adelaide Brighton, Alumina, Ampol, ASX, Aurizon, Bluescope Steel, Boral, Coles, CSR, CIMIC, Dexus, IAG, Magellan Financial Group, Medibank Private, Mineral Resources, Newcrest Mining, Northern Star Resources, Orica, QBE Insurance, Scentre, Stockland, Suncorp, Tassal, Telstra, Washington H. Soul Patterson, Wesfarmers, Whitehaven Coal, Woolworths.

The ACCR filed 19 resolutions in 2021 including five which were withdrawn ahead of the meeting after agreement was reached with the companies.

[Source: ACCR Shareholder Impact Report 2021]

Market Forces is calling on shareholders in 18 global banks to push the lenders to withdraw their financing of a proposed new gas project

- Market Forces is calling on the shareholders in18 global banks (including three of Australia's big four banks) to push the lenders to withdraw financing for a proposed major gas project - Woodside's proposed Scarborough to Pluto LNG project in Western Australia.
- According to Market Forces' statement, it is estimated that the proposed project will enable emissions equivalent to running 15 coal power stations for 30 years over its lifetime – which Market Forces argues to be at odds with the goals of the Paris Agreement and with the banks' Paris commitments. In addition, the group contends that the project poses risks to marine life as well as endangering irreplaceable Murujuga Aboriginal rock art, which is under consideration for World Heritage listing.

[Source: Market Forces media release 18/01/2022]

US banks again targeted by US Interfaith Center on Corporate Responsibility over climate lending

- The US Interfaith Center on Corporate Responsibility (ICCR), together with a group of institutional investors, has filed nine shareholder proposals calling for greater accountability for climate lending at the same group of US banks that were targeted in 2021: Bank of America, Citigroup, Goldman Sachs, JPMorgan Chase, Morgan Stanley and Wells Fargo.
- According to the ICCR's statement:
  – Identical proposals were filed with each of the banks named above calling on them to align their lending decisions with the IEA net zero 1.5 degree scenario ie to ensure their financing does not contribute to new fossil fuel supplies.
  – Additional proposals were filed at Bank of America and Citigroup calling for an audited report on whether and how the fulfillment of the IEA Net-Zero Emissions by 2050 Scenario may impact underlying assumptions in financial filings.
  – An additional resolution was filed at JP Morgan Chase calling on the bank to provide a report setting absolute emissions reduction targets for its financed greenhouse gas emissions consistent with the IEA Net Zero Emissions by 2050 scenario.
- The ICCR notes that engagement efforts in 2021 were successful in pushing the banks to act on a range of climate-related proposals eg setting a policy restricting lending for coal and Arctic drilling and adopting commitments for net-zero financed emissions by 2050.
- However, the group considers that considerably more progress (including setting interim targets) is necessary if the net-zero by 2050 goal is to be achieved.

[Source: ICCR media release 16/12/2021]

Investors have called on vaccine manufacturers to integrate the achievement of WHO vaccine production/distribution goals into their executive remuneration strategies

A coalition of 65 institutional investors representing over €3000 billion in assets under management has written to COVID-19 vaccine manufacturers, calling on them to tie executive remuneration to the achievement of targets for affordable and accessible vaccination as set by the World Health Organisation (WHO).

More particularly, the group has called on pharmaceutical companies to (among other things):

- prioritise and fulfil COVAX and AVAT contracts
- disclose their production and manufacturing schedules for the planned and actual distribution of vaccines to low-income countries
- 'commit' to sharing licensing and production facilities as well as 'know-how' to 'ensure future vaccine supply is reliable affordable available and deployed to every country'.

The investors consider that the integration of WHO targets into remuneration strategy is an appropriate measure to ensure companies are accountable for taking action to address vaccine affordability and accessibility challenges.

You can find the full text of the letter which sets out the groups' concerns in more detail and includes a full list of investor supporters here.

Rogier Krens, Chief Investment Officer of Achmea Investment Management commented:

> 'We will only be able to get this pandemic under control by working together. Our view is that pharmaceutical companies have a duty to do their utmost on this but unfortunately we see that they are lagging behind. In addition, the business case is clear: new variants threaten the recovery of economies around the world'.

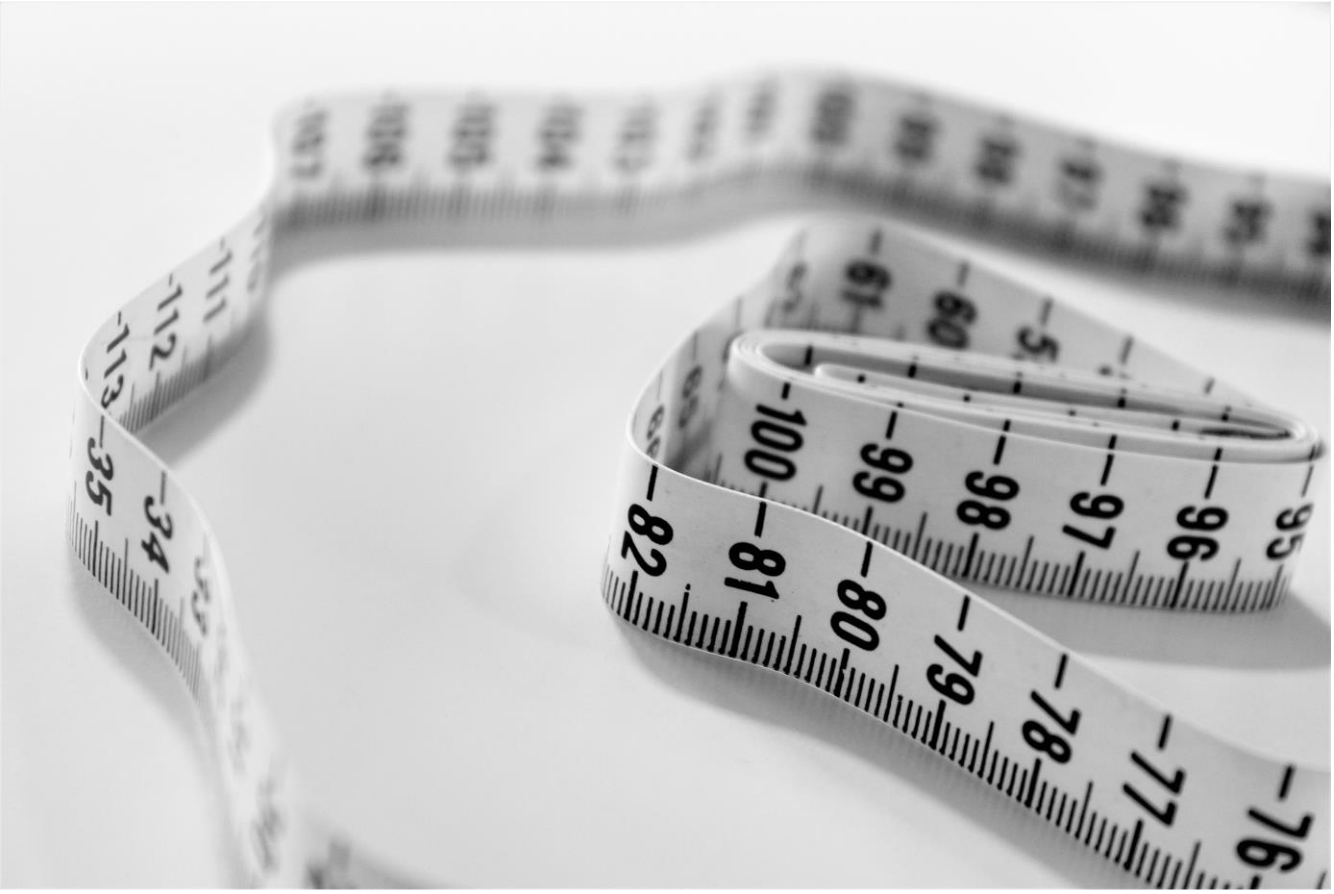
The call follows the release of a statement in April 2020 by the same investor group calling on companies to cooperate to minimise the spread of the virus.

[Source: Achmea Investment Management media release 06/01/2022]

The obesity crisis is a sustainability issue? Unilever targeted with a 'health' resolution

- ShareAction has filed a 'health' resolution at food manufacturer Unilever ahead of the company's 2022 AGM. ShareAction states that the resolution has the backing of a global coalition of institutional investors with combined assets under management of $215 billion as well as over 100 Unilever shareholders.
- Broadly, the resolution calls on Unilever to report from 2023 onwards on: a) the proportion of total food and drink sales made up of 'healthier products' (using government defined as opposed to the company's own metrics; b) publish targets to significantly increase those sales by 2030; and c) report annually on progress.
- ShareAction argues that the resolution necessary as it considers Unilever's current disclosure on the issue and the metrics used by the company for reporting purposes to be inadequate. For example, ShareAction writes that though Unilever reported in 2020 that 61% of its food/drink sales were from products it considered to have 'high nutritional standards', an independent review found that this proportion was 17%.
- More particularly, ShareAction considers that the company's current approach to the issue does not: a) enable investors (or the community) to understand the impact of Unilever's sales policies on the health of customers; b) enable investors to benchmark Unilever's approach relative to its peers; or c) enable investors to understand how the company is adapting to what the group considers to be a shifting regulatory landscape.
- ShareAction also considers that the resolution is consistent with Unilever's otherwise strong ESG approach/commitments.
- ShareAction has called on the board to back the resolution.

[Source: ShareAction media release 20/01/2021; Full text resolution]



Meetings and Proxy Advisers

New proxy reforms to take effect from February

A consultation paper, Greater Transparency of Proxy Advice (summarised) setting out potential options for reform was released for public consultation from 30 April 2021 to 4 June 2021.

Following this, Treasury Laws Amendment (Greater Transparency of Proxy Advice) Regulations 2021 (Regulations), were registered on 17 December 2021. The explanatory statement accompanying the Regulations states that feedback from the consultation process informed the development of the Regulations.

Key changes

Broadly, the Regulations extend Australian Financial Services (AFS) licensing requirements to a broader range of proxy adviser activities and introduce new requirements for:

- proxy advisers to provide entities that are the subject of proxy advice, with a copy of the advice, on the same day it is provided to the client. This change applies in relation to proxy advice provided by a financial services licensee on or after 7 February 2022 and under a contract entered into or renewed on or after the commencement of the Regulations.
- proxy advisers to be independent of their clients. This new independence obligation applies in relation to proxy advice provided by a financial services licensee on or after 1 July 2022 and under a contract entered into or renewed on or after the commencement of the Regulations.

The Regulations also amend the Superannuation Industry (Supervision) Regulations 1994 (SIS Regulations) to introduce a new requirement for Registrable Superannuation Entity (RSE) licensees to make publicly available on their website a detailed summary of how they have exercised their voting rights. This new requirement applies on and after 1 July 2022 in relation to a half of a financial year if the half begins on or after 1 January 2022.

According to the explanatory statement, the purpose of the reforms is to 'strengthen the transparency and oversight of proxy advice'.

In a statement the government also emphasised the importance of strengthening accountability, given the 'highly concentrated proxy advice market' and the 'significant influence' wielded by advice firms, including influence over superannuation funds.

Mixed response to the changes

Proxy firms have questioned the need for increased regulation

The Australian Council of Superannuation Investors (ACSI) has questioned the transparency of the consultation process and the rationale for increased regulation of proxy advisers. In particular, ACSI has questioned the need for/rationale behind new independence requirements.

ACSI CEO Louise Davidson said:

> 'The Treasurer's changes would see superannuation funds that manage money on behalf of millions of members denied independent advice on the performance of the companies they invest in…The Business Council of Australia and the Australian Institute of Company Directors specifically stated that they do not consider the current ownership arrangements of proxy advisers to be of concern, as outlined in submissions to the consultation. Pushing through regulations with no consultation just before Christmas undermines the principle of transparency that the Treasurer claims to uphold. No case has been made for the regulations. This appears to be a deliberate attempt to sidestep the parliamentary process to avoid proper scrutiny and is an insult to the Senate and millions of superannuation fund members.'

Head of Australia & New Zealand Research at Institutional Shareholder Services Vas Kolesnikoff has also expressed concerns about the reforms and the consultation process. Mr Kolesnikoff said that ISS is 'disappointed and surprised by Treasury's decision to put forward these new rules without advance notice and, critically, with compliance expected in under 60 days, including over the holiday season'.

Mr Kolesnikoff added that ISS disagrees with the need for any additional regulation and is 'concerned with the potential that these efforts will hamper, not help, the ability of investors to receive high quality, independent proxy research'. Despite these concerns, Mr Kolesnikoff made clear that ISS has no intention of withdrawing from the Australian market.

The Business Council of Australia has backed the changes

Writing in the AFR, Business Council of Australia President Tim Reed expressed support for the changes arguing that they merely formalise best practice and bring Australia more into line with requirements in the US and Britain. Mr Reed states:

> 'Any moves to enhance accountability, transparency and independence can only strengthen the system and bolster community confidence. The government's modest and measured proposal for changes to the way proxy advisers work and disclose information makes this system stronger, to the benefit of everyone.

A possible disallowance motion?

The AFR reports that Senator Rex Patrick has indicated that he plans to move a disallowance motion on 10 February 2022.

If this motion were agreed to, the Regulations would be 'disallowed' which would mean that they would cease to have effect. If a notice of motion to disallow is not resolved or withdrawn within 15 sitting days after having been given, the Regulations would be deemed to have been disallowed and would cease to have effect.

> [Sources: Treasury Laws Amendment (Greater Transparency of Proxy Advice) Regulations 2021; Joint media release: Treasurer Josh Frydenberg and Minister for Superannuation, Financial Services and the Digital Economy Jane Hume media release 17/12/2021]

SSGA proxy agenda for 2022: Climate and diversity the two main areas of focus

Key Takeouts

- Increasing board diversity and climate disclosure are flagged as key priorities in State Street Global Advisors' annual CEO letter
- Companies are cautioned that they may face voting action if minimum climate disclosure obligations are not met
- Starting this year, the boards of all portfolio companies are expected to include at least one female member

In his annual CEO Letter, Cyrus Taraporevala President and CEO of State Street Global Advisors (SSGA), outlined SSGA's proxy voting agenda for 2022.

Clear, detailed disclosure around how companies plan to manage their transition to a low-carbon economy and separately diversity practices are highlighted in the letter as key areas of focus.

Key Points

Climate risk

A focus on understanding how companies are planning to transition to a low carbon future

- Mr Taraporevala states that driving progress towards the transition to a low carbon economy is a key focus for SSGA. In particular, SSGA is looking for companies to provide detailed information around how they plan to achieve their climate targets/goals and how they plan to transition to a low carbon economy. Mr Taraporevala comments that 'while ambitious climate goals are important, it is supporting company efforts to make meaningful and pragmatic progress toward those goals that will be the focus of our climate work in the years ahead'.
- The letter makes clear that while the path to net-zero may be 'relatively straightforward for some companies, for the majority, it is likely to be 'very hard and non-linear' requiring 'experimentation, innovation and ongoing adjustments'. That is, it is unlikely to be a case of transitioning from 'brown' to 'green'.
- Further to this, Mr Taraporevala suggests that in the short term, it may make sense for companies to continue to invest in 'light brown' fossil fuels as a transitional step toward achieving goals/targets as opposed to simply divesting their highest emitting assets in order to appear more 'green'. Mr Taraporevala writes:

> 'As a long-term investor in companies making these commitments, what we are seeking from these transition plans is not purity, but pragmatic clarity around how and why a particular transition plan helps a company make meaningful progress towards the destination. Indeed, it is essential that boards understand their companies' pathway to net-zero, and how they will leverage their unique strengths and opportunities, which in turn will help investors like us support companies on this journey'.

SSGA's climate disclosure expectations

- The letter flags that starting this year, directors of companies in major indices in Australia, the US, Canada, the UK and Europe may face voting action if minimum disclosure expectations are not met. Specifically, SSGA expects companies to report in line with the TCFD framework including disclosing: 1) board oversight of climate risks/opportunities; 2) Scope 1 and 2 emissions; and 3) emissions reduction targets.
- SSGA also plans to launch an engagement campaign targeted at the most significant emitters, which will push for disclosure of climate transition plans covering 10 areas including: decarbonisation strategy, capital allocation, climate governance, and climate policy. From 2023, SSGA will 'hold companies and directors accountable for failing to meet these expectations'.

Internal efforts

- SSGA joined the Net Zero Asset Managers Initiative in April 2021 which commits SSGA to ensuring its portfolios reach net zero emissions by 2050 (or sooner) and set interim 2030 targets.
- SSGA plans to announce its interim targets, Investor Climate Action Plan and TCFD report by April 2022.
- The letter also calls on asset owners to 'develop a universal disclosure requirement for all companies of a certain size in their portfolios - irrespective of whether they are publicly-traded or privately-held, to avoid the pernicious effects of "brown-spinning"'.

Diversity: Advancing the Transition Toward More Diverse Boards and Workforces

Board Gender Diversity

- Starting this year, SSGA expects the boards of all SSGA holdings globally (as opposed to only some companies in select markets), to include at least one woman.
- From the 2023 proxy season, SSGA expects boards of companies in major indices in Australia, the US, Canada, the UK and Europe to include a minimum of 30% women directors.
- In each instance, the letter cautions that failure to meet these expectations could result in a vote against the Chair of the board's Nominating Committee or the 'board leader'.

Board Racial/Ethnic Diversity

Beginning in the 2022 proxy season, SSGA will take voting action against responsible directors of S&P 500 and FTSE 100 companies where minimum board diversity expectations are not met. These minimum expectations are that:

- boards must include a person of colour
- companies must disclose the racial and ethnic diversity of their boards. For S&P 500 companies, SSGA expects that they will disclosure their EEO-1 reports.

More broadly, the letter flags that human capital management will be a topic of engagement.

[Source: SSGA CEO's Letter on Our 2022 Proxy Voting Agenda 12/01/2022]

Institutional Investors and Stewardship

Top Story: Larry Fink's annual letter 2022: Stakeholder capitalism is not woke, just good business says BlackRock CEO

In his latest annual 'dear CEO' letter, BlackRock CEO Larry Fink has defended stakeholder capitalism and BlackRock's push to hold firms accountable for progress on a range of ESG issues as good business practice and not inconsistent with, or at the cost of, long term financial returns. Rather, the letter seeks to explain why effective stakeholder capitalism is a driver of value-creation over the long term.

In his 2022 letter to CEOs, BlackRock CEO Larry Fink highlights the themes he considers 'vital to driving durable long-term returns'.

A headline message is the role of effective stakeholder capitalism (underpinned effective stakeholder engagement, clear corporate purpose and innovation) in driving positive financial as well as social outcomes over the longer term.

In terms of specific areas of investor concern, Mr Fink highlights planning for the transition to a low-carbon economy and human capital management as important issues about which companies should be prepared to engage. The letter also makes clear that investors are looking for detailed disclosure around how companies are managing these issues.

A high level overview of the key points in the letter is below.

Stakeholder Capitalism is good business

As flagged, a key theme running through the letter is the idea that companies that are driven not only by profits but by purpose – companies that deliver not only for shareholders but for key stakeholders as well – are more successful over the longer term. As such, Mr Fink argues that stakeholder capitalism is essentially good business. He writes:

> 'Stakeholder capitalism is not about politics. It is not a social or ideological agenda. It is not "woke". It is capitalism, driven by mutually beneficial relationships between you and the employees, customers, suppliers, and communities your company relies on to prosper. This is the power of capitalism….It is through effective stakeholder capitalism that capital is efficiently allocated, companies achieve durable profitability, and value is created and sustained over the long-term. Make no mistake, the fair pursuit of profit is still what animates markets; and long-term profitability is the measure by which markets will ultimately determine your company's success'.

The COVID-19 pandemic has underlined the importance of corporate purpose

Mr Fink writes that the uncertainty caused by the pandemic, together with the erosion of trust in traditional institutions, has served to underscore the importance of corporate purpose. Mr Fink writes,

> 'Putting your company's purpose at the foundation of your relationships with your stakeholders is critical to long-term success…They will be more likely to support you in difficult moments if they have a clear understanding of your strategy and what is behind it'.

Mr Fink also considers purpose to be central to enabling companies to innovate and to adapt to the changing environment.

> 'If you stay true to your company's purpose and focus on the long term, while adapting to this new world around us, you will deliver durable returns for shareholders and help realize the power of capitalism for all'.

Effective engagement with key stakeholders is key

Effective stakeholder engagement is also positioned in the letter, together with purpose, as key aspect of effective stakeholder capitalism. Mr Fink writes,

> 'Time and again, what they [businesses that are successful over the long-term] all share is that they have a clear sense of purpose; consistent values; and, crucially, they recognise the importance of engaging with and delivering for their key stakeholders. This is the foundation of stakeholder capitalism…
>
> In today's globally interconnected world, a company must create value for and be valued by its full range of stakeholders in order to deliver long-term value for its shareholders'.

Two key areas of investor concern

The letter highlights two areas of suggested focus for companies: human capital management and the energy transition.

1. Human Capital Management

A new employee-employer relationship

Mr Fink writes that 'no relationship has been changed more by the pandemic than the one between employers and employees' as workers the world over seek more flexibility and more meaningful work (as well as higher pay in some markets). In addition, he considers that the pandemic has 'shone a light' on a host of other issues such as racial equity, childcare, and mental health.

From BlackRock's perspective, this is not a negative development, in fact Mr Fink considers that 'workers demanding more from their employers is an essential feature of effective capitalism' as it 'drives prosperity and creates a more competitive landscape for talent, pushing companies to create better, more innovative environments for their employees – actions that will help them achieve greater profits for their shareholders'.

However, Mr Fink cautions that companies that are not 'grounded in their purpose', and that fail to adapt to changed employee expectations/the new environment expose themselves to risk.

> 'Companies not adjusting to this new reality and responding to their workers do so at their own peril. Turnover drives up expenses, drives down productivity, and erodes culture and corporate memory. CEOs need to be asking themselves whether they are creating an environment that helps them compete for talent.'

For this reason, the letter suggests that companies should expect to engage on these issues including being able explain the steps they are taking to attract and retain employees. Mr Fink writes:

> 'At BlackRock, we want to understand how this trend is impacting your industry and your company. What are you doing to deepen the bond with your employees? How are you ensuring that employees of all backgrounds feel safe enough to maximize their creativity, innovation, and productivity? How are you ensuring your board has the right oversight of these critical issues? Where and how we work will never be the same as it was. How is your company's culture adapting to this new world?'

2. The transition to a low-carbon future

Investors expect companies to explain how they plan to navigate the transition

Mr Fink writes that in the two years since he flagged climate risk as investment risk, the predicted 'tectonic' shift of capital towards sustainable investments as the world transitions to a low-carbon future has started, and is now accelerating. From an investor standpoint he writes, how companies plan to navigate the transition, and more particularly whether/how established businesses will be able to adapt is a key issue.

In particular, the letter states that investors want to know:

> 'what are you doing to disrupt your business? How are you preparing for and participating in the net zero transition? As your industry gets transformed by the energy transition, will you go the way of the dodo, or will you be a phoenix?'

In terms of disclosure, he writes that investors are focused on sustainability, 'not because we're environmentalists, but because we are capitalists and fiduciaries to our clients'. This means understanding the plans companies have in place to transition to a sustainable future, including the targets they are setting for emissions reduction and the quality of their plans to meet these goals.

The transition doesn't mean an instant switch from brown to green and it won't be instant

Commenting briefly on the path to net zero, Mr Fink writes that the transition 'is already uneven with different parts of the global economy moving at different speeds'. Moreover, the letter emphasises that the energy transition cannot happen 'overnight' and will mean passing through 'shades of brown to shades of green' as alternative energy sources are developed and become more affordable.

Mr Fink considers for example that ensuring continuity of affordable energy supplies during the transitional phase will mean the continued use of fossil fuels such as natural gas in some regions for heating as well as for the production of hydrogen. This, he considers makes pragmatic sense, but is also important in terms of ensuring a just transition. He writes:

'As we pursue these ambitious goals - which will take time - governments and companies must ensure that people continue to have access to reliable and affordable energy sources. This is the only way we will create a green economy that is fair and just and avoid societal discord. And any plan that focuses solely on limiting supply and fails to address demand for hydrocarbons will drive up energy prices for those who can least afford it, resulting in greater polarisation around climate change and eroding progress'.

Why BlackRock is not divesting from oil and gas

Mr Fink explains that BlackRock does not 'pursue divestment from oil and gas companies as a policy' because the firm's view is that divestment of carbon intensive assets 'will not get the world to net zero'.

Rather, BlackRock supports the transformation of carbon intensive businesses as a critical part of global decarbonisation.

'We believe the companies leading the transition present a vital investment opportunity for our clients and driving capital towards these phoenixes will be essential to achieving a net zero world'.

Having said this, Mr Fink argues that government has an important role to play in this context.

'Capitalism has the power to shape society and act as a powerful catalyst for change. But businesses can’t do this alone, and they cannot be the climate police. That will not be a good outcome for society. We need governments to provide clear pathways and a consistent taxonomy for sustainability policy, regulation, and disclosure across markets. They must also support communities affected by the transition, help catalyse capital for the emerging markets, and invest in the innovation and technology that will be essential to decarbonising the global economy'.

There is a considerable upside to the transition (and considerable risk for companies that fail to adapt)

The letter makes clear that the energy transition affords significant opportunities for 'green' startups as well as for established companies that are willing/able to adapt to a low carbon economy. Conversely, Mr Fink considers that companies that fail to adapt face considerable risk. As such, the letter positions innovation in this space as an imperative rather than a choice for existing businesses. Mr Fink writes:

'I believe the decarbonising of the global economy is going to create the greatest investment opportunity of our lifetime. It will also leave behind the companies that don’t adapt, regardless of what industry they are in…The next 1,000 unicorns won’t be search engines or social media companies, they’ll be sustainable, scalable innovators – startups that help the world decarbonize and make the energy transition affordable for all consumers…

With the unprecedented amount of capital looking for new ideas, incumbents need to be clear about their pathway succeeding in a net zero economy. And it’s not just startups that can and will disrupt industries. Bold incumbents can and must do it too. Indeed, many incumbents have an advantage in capital, market knowledge, and technical expertise on the global scale required for the disruption ahead'.

However, the letter underscores that access to capital 'is not a right. It is a privilege. And the duty to attract that capital in a responsible and sustainable way lies with you'.

Giving shareholders more opportunity to participate

Mr Fink writes that BlackRock has observed a growing interest among shareholders in the corporate governance of public companies and in having a stronger voice in company decision making. In light of this growing interest in active involvement, he writes that BlackRock is pursuing an initiative to enable more of its clients to have the option to have a say in how proxy votes are cast at companies their money is invested in.

At this point, this is limited to certain institutional clients, but in future BlackRock is 'committed to a future' where all investors, including individual investors, will have the option to participate in the proxy process.

Research into the link between stakeholder engagement and firm value

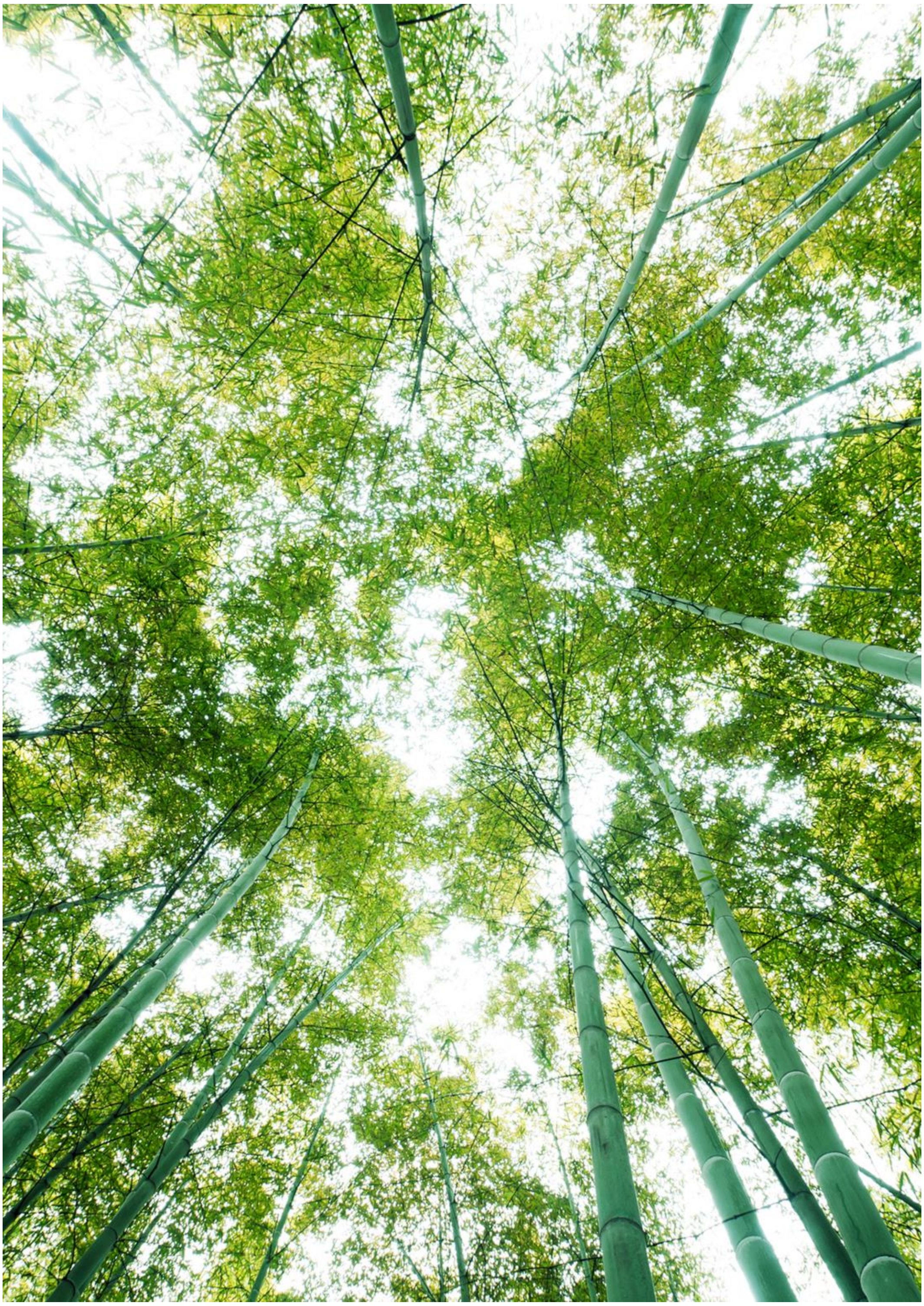
The letter flags that BlackRock has launched a new research centre - the Center for Stakeholder Capitalism - with a view to better understanding the relationship between companies and their stakeholders and the connection between stakeholder engagement and shareholder value.

Mr Fink states that this new centre is expected to provide a forum for research, dialogue, and debate and bring together leading CEOs, investors, policy experts, and academics to share their experience and deliver their insights.

[Source: BlackRock CEO Letter 2022]

ACSI has released updated Governance Guidelines to reflect 'evolving' investor expectations on a range of ESG issues

The Australian Council of Superannuation Investors (ACSI) has released revised Governance Guidelines to reflect 'evolving expectations on ESG issues' in the two years since the guidelines were last revised.



Announcing the release of the revised guidelines, ACSI CEO Louise Davidson emphasised ACSI's focus on ensuring companies have a clear understanding of investor expectations around the management of financially material ESG risks and opportunities. Ms Davidson said:

> 'One principle underpins everything we do. We are focused on financially material ESG risks and opportunities over the long term to protect and enhance the retirement savings that are entrusted to our members. Over the past two years, we have seen the financial impact that can occur when companies mismanage ESG issues. Our guidelines seek to promote better ESG performance of listed companies and ensure companies have a clear understanding of the issues important to investors.'

Some Key Updates

Climate change

- Broadly, ACSI's expectation is that companies facing material climate-related risks demonstrate how they are planning to transition to a low-carbon future. This includes, adopting the risk assessment and reporting framework in the Financial Stability Board's Taskforce on Climate-related Financial Disclosure (TCFD). Importantly, ACSI expects companies to demonstrate how they are integrating these risks and opportunities into their governance, strategy and risk management processes.
- When assessing company's approach to managing climate-related risk and opportunity ACSI states that it will assess the extent to which companies are already meeting/demonstrating progress towards meeting the following expectations:
  - whether a company has adopted the TCFD risk assessment and reporting framework (including disclosure of Scope 1, 2 and 3 emissions)
  - whether a company's strategy is aligned with the Paris Agreement and net zero emissions by 2050. ACSI's expectation is that these considerations are integrated into capital allocation decisions, financial reporting and 'where appropriate' tied to remuneration practices. ACSI also expects companies to provide annual disclosure of progress against its long term strategy
  - whether a company conducts stress-tests against a range of 'plausible but divergent climate futures' including a 1.5 degree scenario
  - whether a company has set Paris-aligned short, medium and long-term emissions-reduction targets
  - whether a company undertakes analysis of physical risks to portfolio assets
  - whether a company's own policy/advocacy activity as well as the policy/advocacy activity of any industry associations to which it belongs is consistent with the goals of the Paris Agreement
  - whether a company incorporates consideration of the impacts on employees, communities and other stakeholders into transition strategy and planning.
- Say on climate: The guidelines have been updated to make clear that ACSI is generally supportive of 'say on climate' resolutions. ACSI states that it,

  > 'supports the provision of a "Say on Climate" whereby companies that are materially exposed to climate risk provide investors with an advisory vote on the company's management of climate-related risks and opportunities. A 'Say on Climate' vote facilitates greater transparency, accountability and focus on material risks and opportunities. Providing a vote annually allows investors to express their opinions on a company's ongoing progress against its strategy'.

  The guidelines also states that where a company has adopted a 'Say on Climate', 'this will be the primary focus for ACSI's engagement and analysis'.
- Voting recommendations: ACSI makes clear that when making voting recommendations, it will take a case by case approach and avoid a 'one size fits all or "tick the box" evaluation'. Having said this, where companies 'consistently fall short' of ACSI's expectations on the issue, directors may face 'against' recommendations. ACSI states that:

  > 'Our recommendations will focus on the individual directors most accountable for oversight of climate-change related risks, for example company Chairs, and the Chairs of the Risk and Sustainability committees or similar'.

Diversity

- The guidelines make clear that ACSI considers diversity (in the broad sense) and 'promoting a workforce that reflects the diverse demographic and society in which a company operates' as an important issues for investors.
- The guidelines make clear that:
  - ACSI expects companies to provide disclosure on board diversity and how this is being encouraged
  - companies are expected to be progressing gender diversity at executive level
  - companies are expected to establish a safe and inclusive working environment (a new section has been included on racism and other forms of discrimination)

Director elections

The guidelines make clear that when making a recommendation on director elections or reelections will include consideration of (among other issues): a) the company's progress on the board diversity; b) the company's management of material climate-related risk; and c) any relevant, publicly-known conduct of the director

ACSI's position on meeting format

The revised guidelines make clear that ACSI supports a hybrid AGM model. ACSI's expectation is that the use of technology should not compromise shareholders' ability to actively participate in AGMs.

Other changes

- Sexual harassment: The guidelines have been updated to reflect ACSI's expectation that companies proactively prevent and respond effectively to sexual harassment. The guidelines state:

  > 'Boards have a responsibility to ensure that they are receiving the information needed to appropriately respond to, and prevent, sexual harassment. Stakeholders increasingly expect companies to manage this material risk. In order to do so, companies must proactively prevent sexual harassment. It is not sufficient to respond to sexual harassment on a reactive basis'.

- First Nations peoples: The guidelines have been updated to highlight the potential financial risks of poor engagement and cultural heritage practice from a company and investor perspective and provides guidance on ACSI's expectations with respect to engagement/building constructive and long term relationships.
- Modern slavery: ACSI has updated the guidelines to provide more detailed guidance on its expectations around meaningful action/disclosure on the issue.

The revised guidelines came into force on 1 January 2022.

[Sources: ACSI media release 15/12/2021; ACSI Governance Guidelines 2021]

In Brief | Best practice examples: Investor Agenda has released 10 case studies highlighting leading practice for setting and implementing Investor Climate Action Plans (ICAPs). So far, 271 asset managers and asset owners have committed to issuing ICAPs through the Net Zero Asset Managers Initiative and the Paris Aligned Investment Initiative. It's hoped that the best practice examples will support these investors (and others) to implement 'bold' action plans

[Source: IGCC media release 12/01/2022]

Regulators

Five regtech businesses have received funding to conduct a feasibility study to test potential technology solutions to assist ASIC in monitoring compliance by listed companies with corporate disclosure requirements

- The Business Research and Innovation Initiative (BRII) is a government program that provides regulatory technology (regtech) businesses with funding to carry out feasibility studies to test new technology to solve various government challenges.
- The latest round of the BRII is focused on assessing the potential of regtech to streamline/improve existing compliance/reporting processes across government agencies/departments.
- Among other specific 'challenges', this round of the BRII provides funding for five regtech companies- Listcorp Pty Ltd, Digitalx Limited, Eastern Analytica Pty Ltd trading as DHI-AI, Bedrock AI Aus Pty Ltd and Pyxta Pty Ltd - to test new approaches to identifying and assessing poor market disclosure by listed companies (disclosure challenge) .
- The focus of the disclosure challenge, which was set by the Australian Securities and Investments Commission (ASIC), is on developing technology solutions to assist the regulator in monitoring compliance with various corporate disclosure requirements by listed companies. These requirements include: a) continuous disclosure (price sensitive disclosure) and other disclosure obligations to the market; b) financial reporting obligations; c) the prohibition against misleading or deceptive disclosure (such as misleading categorisation of market announcements); and d) the prohibition against practices that manipulate the pricing of securities.
- Each regtech has received up to $100,000 to conduct the feasibility study in response to the corporate disclosure challenge over the next three months. In the next stage of the BRII Regtech Round, two of these regtechs may receive further grants of up to $1 million each to develop and test a proof of concept over a further 15 months.
- ASIC Commissioner Cathie Armour commented that the project has the potential to 'transform ASIC's ability to harness technology to reduce regulatory burden, while enhancing market integrity'.

[Sources: ASIC media release 21/01/2021; Joint media release: Minister for Industry, Energy and Emissions Reduction Angus Taylor, Minister Assisting the Prime Minister and Cabinet Ben Morton and Assistant Minister for Industry Development Jonno Duniam 21/01/2022]

Financial Services

Top Story | Foreign licensing exemption regime released

Over the Christmas break, the Government completed a short consultation on its plans for the new regime for Foreign Financial Service Providers (FFSPs) in the form of the Exposure Draft legislation. Submissions closed on 12 January 2022.

You can access the full text of MinterEllison's submission as well as a brief overview of the proposed changes here.

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

The Financial Services Royal Commission's final report was publicly released on 4 February 2019. In the nearly three 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.

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

The table was last updated on 25 January 2022 to reflect developments relating the following recommendations.

- Recommendation 2.1 (annual renewal and payment)
- Recommendation 2.3 (Quality of Advice Review)
- Recommendation 2.5 (Life Risk Insurance Commissions)
- Recommendation 2.6 (General Insurance and Consumer Credit Insurance Commissions)

You can access the ful text here.

Hayne implementation: Quality of advice review draft terms of reference released

- On 16 December 2021, the government commenced consultation on proposed draft terms of reference for the planned 'Quality of Advice' Review which is due to be completed in 2022.
- The review proposes to implement the government's response to three Hayne recommendations: Recommendations 2.3, 2.5 and 2.6. In addition, it's proposed that the review will also consider recent reforms which introduced annual renewal for ongoing fee arrangements (Recommendation 2.1).
- The due date for submissions on the draft terms of reference is 4 February 2022.

Purpose of the Review

The government identifies ensuring access to affordable, high quality financial advice as the key aim of the review. Streamlining regulatory requirements/lessening the existing costs/compliance burden on advisers is presented as an important aspect of achieving this aim. Announcing the review, Minister for Superannuation, Financial Services and the Digital Economy Jane Hume said:

> 'the Quality of Advice Review aims to identify opportunities to streamline and simplify regulatory compliance obligations to reduce cost and remove duplication, recognising that costs of compliance by businesses are ultimately borne by consumers.

This is reflected in the proposed terms of reference.

Proposed scope of the review

The Review is proposed include examination of the legislative framework for financial advice including:

- Whether concepts such as 'financial product advice', 'general advice' and 'personal advice' could be 'simplified' or 'more clearly demarcated' as well as how these terms are understood/used by consumers. It's also suggested that role and scope of advice that is termed - 'scaled', 'intrafund' or 'limited in scope'- would be considered.
- Whether the safe harbour provision for the best interests duty should be repealed

- Existing financial advice disclosure requirements including statements of advice
- 'Recent reforms to introduce annual renewal for ongoing fee arrangements' (Hayne Recommendation 2.1)
- 'Life insurance remuneration reforms, and he impact of the reforms on the level of insurance coverage'
- The remaining exemptions to the ban on conflicted remuneration in life and general insurance (Royal Commission Recommendations 2.5 and 2.6)
- 'The application of the advice framework to certain activities and professions including consideration of Recommendation 7.2 of the Review of the Tax Practitioners Board'. For context, Recommendation 7.2 recommended that 'a specific review of what advice accountants can and cannot give in respect of superannuation and which accountants that might apply to' should be undertaken in the interests of reducing the regulatory burden on tax (financial) advisers.
- 'The processes through which investors are designated as sophisticated investors and wholesale clients, and whether the consent arrangements are working effectively'.

It's also suggested that the review consider 'actions' undertaken by the Australian Securities and Investments Commission (ASIC) eg regulatory guidance and class orders as well as the role of professional associations.

It's further proposed that the Review should 'have regard to' (among other things): the potential for increased use of technology to enable 'mass market adoption of low cost advice', opportunities to reduce compliance costs for industry, structural changes in the sector and 'other regulatory developments' eg the Consumer Data Right, Retirement Income Covenant and Design and Distribution Obligations.

Proposed timing

It's proposed that the review will be led by an independent reviewer, supported by a secretariat within Treasury. In terms of timing, it's proposed that the final report will be provided to the government by 16 December 2022.

> [Sources: Minister for Financial Services, Superannuation and the Digital Economy Jane Hume media release 16/12/2021; Treasury Consultation: Quality of Advice Review 16 December 2021 to 4 February 2022; Draft Terms of Reference]

Consultation on proposals to 'streamline' education requirements for financial advisers

Treasury has released a policy paper seeking feedback on proposed changes to existing minimum education requirements for financial advisers. According to the policy paper, the proposed changes are intended to both 'streamline' education requirements and give recognition to 'on the job experience' .

Announcing the consultation, Minister for Superannuation, Financial Services and the Digital Economy Jane Hume said that the proposed streamlining of education requirements would support the provision of more affordable financial advice.

Key proposals include:

- A new 'experience pathway' for meeting minimum education requirements: It's proposed that financial advisers with ten or more years of full time experience as a financial adviser as at 1 January 2026 (in the preceding 12 years) would only need to complete one tertiary level unit of study on the Code of Ethics in order to continue to provide financial advice. For clarity, in order to meet this requirement, the adviser would need to have been authorised to provide personal advice to retail clients in relation to relevant financial products for ten or more years as at 1 January 2026. Advisers using the 'experience pathway' would also need to have a 'clean record' – ie 'no sanctions from the Financial Services and Credit Panel' excluding warnings prior to 1 January 2026.
- Qualification pathway: Existing financial advisers or new entrants who do not meet the proposed experience pathway requirements would need to complete a qualification – a bachelor's degree (AQF7 level), Graduate Diploma (AQF8 level) or a Masters qualification (AQF 9 level) - with at least eight units in a 'related' field of study (see Attachment A to the policy paper for details). It's proposed that the eight units could be completed as a single qualification or across multiple qualifications. The timeframe for meeting this requirement would remain 1 January 2026.

It's proposed that the government would not accredit individual degrees/subjects to ensure they meet the necessary requirements. Rather advisers would self-assess whether a unit of study/qualification meets the requirements.

Timing and next steps

- Minister for Superannuation, Financial Services and the Digital Economy Jane Hume assumed responsibility for setting the education and training standards for advisers from 1 January 2022. However, until and unless the existing FASEA standards are amended/replaced, the existing standards continue to apply.
- The due date for submissions to the consultation is 1 February 2022.

The Stockbrokers and Financial Advisers Association (SAFAA) has welcomed the proposed changes commenting that they 'restore[s] common sense to education standards to the benefit of Australians needing sound financial and investment advice'.

[Sources: Treasury Consultation: Financial adviser education standards 16/12/2021-01/02/2022]

ASIC has issued a warning to super fund members about an uptick in scams pushing for individuals to switch to SMSFs in order to invest in cryptocurrency

- The Australian Securities and Investments Commission (ASIC) has issued a warning about an increase it has observed in marketing scams calling on members of retail and industry super funds to switch to self-managed super funds (SMSFs) in order to take advantage of investments in crypto-assets (or cryptocurrencies).
- ASIC emphasised that super fund members should seek advice from a licensed financial adviser before agreeing to transfer their super into an SMSF.
- ASIC also pointed to the ATO website which sets out information about SMSF's obligations with respect to investing, including investing in cryptocurrencies.

[Source: ASIC media release 17/01/2021]

19 North American and Canadian banks form climate risk group

- The Risk Management Association (RMA) has announced that 19 US and Canadian banks including Bank of America and Wells Fargo have joined the RMA Climate Risk Consortium.
- The aim of the Consortium is to develop standards for the integration of climate risk into bank operations. It's envisaged that the Consortium will assess current efforts by member banks and develop a consistent taxonomy, frameworks and standards for climate risk management.
- The Consortium also plans to engage with regulators and policy makers to 'help inform ongoing policy considerations specific to a changing climate'.

[Source: Risk Management Association media release 12/01/2021]

Australian consumer groups warn UK government against relying on industry 'self-regulation' of BNPL sector

- The UK government recently concluded its consultation on potential policy options to regulate 'interest free' buy now pay later products to address potential consumer detriment caused by those products.
- In a joint submission to the UK consultation Financial Counselling Australia (FCA) and the Consumer Action Law Centre (CALC) have cautioned against the UK following Australia's self-regulation model on the basis that it does not adequately protect consumers.
- Evidence of consumer harm: The submission argues that harm caused by BNPL products is becoming more widespread in Australia as highlighted in recent (2018 and 2020) ASIC reports. The submission also points to FCA research that found that many users of BNPL products are using BNPL to pay for essential items (eg groceries), struggling to pay for other living expenses and are at risk of being caught in a debt cycle.
- The Industry Code is not sufficient to protect consumers from harm: The submission flags various concerns about the effectiveness of the industry developed Code of Practice, including that it is not mandatory and fails to provide adequate consumer protections. For example (among other things) providers are able to offer credit to consumers without an affordability assessment.
- Recommended approach: The submission recommends against the UK relying on self-regulation of the BNPL industry through an industry code, recommending instead that certain minimum requirements be legislated. These include (among others) that BNPL providers be required to:

- conduct an affordability assessment (assess whether an individual can afford to repay an initial credit limit as well as any increases to the initial limit)
- make 'reasonable inquiries about the purpose for which their customers are seeking a line of credit through their product
- keep records of BNPL limits in their credit reporting system

The submission further recommends that limits on the cost of late fees that can be charged to customers be legislated and that existing penalties in consumer credit laws apply equally to the BNPL products 'where relevant'.

[Sources: Consumer Action Legal Centre submission January 2022]

ASIC is consulting on proposed changes to guidance for licensed exchanges on ETP naming conventions

- In response to industry feedback, the Australian Securities and Investments Commission (ASIC) reviewed the guidance in Information Sheet 230 Exchange Traded Products Admission guidelines (INFO 230) for licensed exchanges on Exchange Traded Product (ETP) naming conventions. The review concluded that there is 'potential for improvement and clarification' of existing guidance.
- ASIC has released a consultation paper – CP 356 ETP naming conventions: Updates to INFO 230 (CP356) – seeking feedback on proposed changes to the guidance. ASIC states that the proposed changes are intended to both simplify the naming conventions and 'promote flexibility for the next phase of ETP market development'.
- Importantly, the consultation was limited to ETP naming conventions only. ASIC comments that:

> 'Although there may be merit in naming conventions being applied to other similar listed and unlisted/unquoted product types (eg LICs, LITs, funds that are not quoted on an exchange), this is beyond what ASIC can achieve by updating INFO 230. Broader 'true to label' considerations, including when it may be appropriate to label a product a 'crypto' or an 'environmental, social and governance' (ESG) product, are also out of the scope of this consultation'.

Proposed changes

Broadly, ASIC proposes to retain naming conventions for ETPs, but introduce a two level labelling system. If adopted the changes would mean that:

- All ETPs would have a primary label (which would identify the category of ETP the product falls into)
- In addition, some more ETPs would also have a secondary label – 'Active' or 'Complex' - as an indicator of the 'presence of additional risks'.
  - It's proposed that the 'Active' label would apply to ETPs that either: a) 'buy and sell investments based on an active investment strategy'; or b) 'disclose their full portfolio holdings on a delayed basis under internal market making or material portfolio information disclosure models'.
  - It's proposed that the 'Complex' label would apply to ETPs that: a) 'have leveraged or inverse exposures'; b) 'employ short selling'; d) 'use derivatives (other than for exchange rate hedging purposes)'; and/or e) 'otherwise meet the definition of a hedge fund in Regulatory Guide 240 Hedge funds: Improving disclosure (RG 240)'.
  - It's proposed that secondary label would not apply (ie an ETP would only have a primary label) where the licensed exchange assesses that is not required.

ASIC also proposes to clarify of the role of licensed exchanges authorised to admit ETPs to quotation to 'ensure a more consistent, market-wide approach to ETP naming conventions at the time of admission and on an ongoing basis'.

More particularly, ASIC proposes that rules should be introduced for licensed exchanges around the naming of ETPs to ensure (among other things) that the name of any ETP admitted to quotation is not 'capable of misleading retail investors as to the nature, features or risks of the product' and is consistent with ASIC guidance on naming convention requirements. It's also proposed that these rules would enable licensed exchanges to require a product issuer to change the name of their product if the exchange forms the view that the product name does not meet these requirements.

Proposed implementation timeframe

- The due date for submissions is 3 March 2022.
- ASIC plans to release an updated INFO 230 in Q2 2022.

[Sources: ASIC media release 20/01/2022; Consultation Paper 356 ETP naming conventions: Updates to INFO 230 (CP 356); Attachment to CP 356: Draft updates to INFO 230]

In Brief | Implementation of Hayne Recommendation 2.10: From 1 January 2022, ASIC must convene a Financial Services and Credit Panel (FSCP) in circumstances prescribed by the Financial Sector Reform Amendment (Hayne Royal Commission Response—Better Advice) Regulations 2021. ASIC has indicated its intention to consult on guidance on the operation of the FSCP 'in early 2022'. The regulator has also indicated its intention to release guidance on how it will exercise its new power to issue warnings/reprimands in 'early 2022'.

[Source: ASIC media release 22/12/2021]

In Brief | Insurance Claims handling and settling reforms now in force: From 1 January 2022, persons providing insurance claims handling and settling services are required to hold an AFS licence. ASIC has said it will work with industry to 'address any challenges' that may arise in the course of implementing these significant reforms.

[Source: ASIC media release 14/01/2021]

Risk Management

Cybersecurity, technology and privacy

Top Story | First Security of Critical Information Bill is now live

On 2 December 2021 the Security Legislation Amendment (Critical Infrastructure) Bill 2021 (Cth) received royal assent and became law in Australia. The MinterEllison team has published an article setting out the key points.

You can find the full text here.

Climate Risk

Top Story | Carbon Markets: The international and domestic state of play

MinterEllison has released an overview of the current status of domestic and international carbon markets ain light of recent developments. You can access the full text here.

In Brief | A year after activist Engine No 1 succeeded in securing three seats on the board, ExxonMobil has announced its ambition to reach net zero GHG emissions for its operated assets by 2050. Importantly, this applies to Scope 1 and 2 emissions but does not extend to emissions from the use of its fuels (Scope 3 emissions)

[Source: ExxonMobil media release 18/01/2021]

In Brief | The Australian Energy Council has announced its support for an 'economy-wide' emissions reduction target of 55% on 2005 levels by 2035 as a 'realistic interim target to get Australia to net zero emissions by 2050'. The AEC is also calling for increased focus on planning for an orderly exit from coal and maintaining Australia's energy security

[Source: AEC media release 16/12/2021]

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