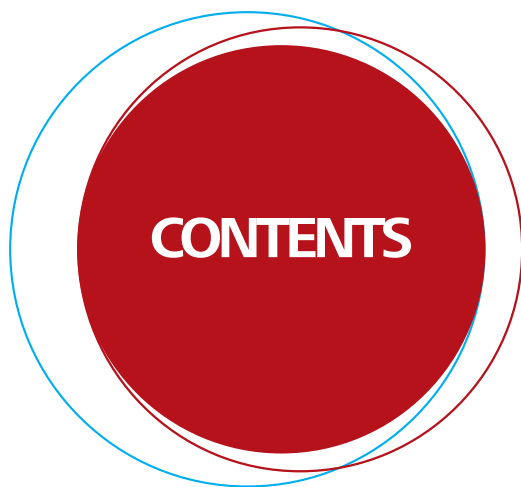


MALLESONS STEPHEN JAQUES



DIRECTIONS 2012

Current issues and challenges facing
Australian directors and boards



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INTRODUCTION

2011 proved to be another tough year for Australian directors and boards, and the broader business community. The challenging economic environment was marked by low growth and poor business and consumer confidence, particularly in sectors and industries operating in the slow lanes of Australia's multi-speed economy, a further tightening of credit markets spooked by the ongoing sovereign debt crisis in Europe and the threat of the collapse of the Eurozone, volatile equity markets, and concerns about productivity and industrial relations.

The year also saw regulatory reform efforts across a range of industries and sectors, with significant new regulation in areas such as executive remuneration, carbon, occupational health and safety and mining. This wave of reform meant that companies and boards were required to assess and respond to a wide range of regulatory developments and issues at a time when they were already facing significant business challenges and risks.

This raises the question whether the time that boards and directors are now required to devote to regulatory and compliance matters is detracting too significantly (and therefore detrimentally) from the time that would otherwise be available for them to pursue their traditional role – the oversight of the strategic direction and management of the company.

The highly politicised environment surrounding much of the recent wave of reform has also highlighted some of the deficiencies in the current law reform and regulatory processes, and the need for a more rigorous cost/benefit analysis to be undertaken in conjunction with the introduction of new laws and regulation.

In November 2011, we conducted our annual online survey of directors to capture their opinions on a variety of issues. This report reflects the results of that survey and our analysis of some of the key legal and regulatory issues currently facing directors and boards, including:

- the impact of continued economic and regulatory uncertainty;
- directors' duties and governance practices in light of recent court decisions;
- challenges relating to executive remuneration, the threat of board spills and AGMs;
- the implications of recent occupational health and safety, industrial relations and taxation reform issues;
- domestic business and cross border investment issues; and
- the outlook and key challenges for 2012.

We recognise that directors and boards face a wide range of business challenges, beyond legal and regulatory issues. The purpose of this report is to explore current legal and regulatory issues, and the challenges facing Australian directors and boards, having regard to that broader economic and business context.

We hope that our report makes a useful contribution to the ongoing debate regarding the appropriate role and responsibilities of boards and directors, and to the shaping of your (and your board's) approach to dealing with legal and regulatory developments this year.



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KEY THEMES

Cross border investment a key opportunity for growth

Tough domestic business environment

Engagement with stakeholders

Productivity and capital management key challenges

Aftershocks from GFC still felt in Europe, UK and US

Assisted by strong A\$

China presents opportunities and challenges

Far reaching implications of anti-bribery laws

Executive remuneration regulation a blunt instrument

But motivates increased dialogue with shareholders

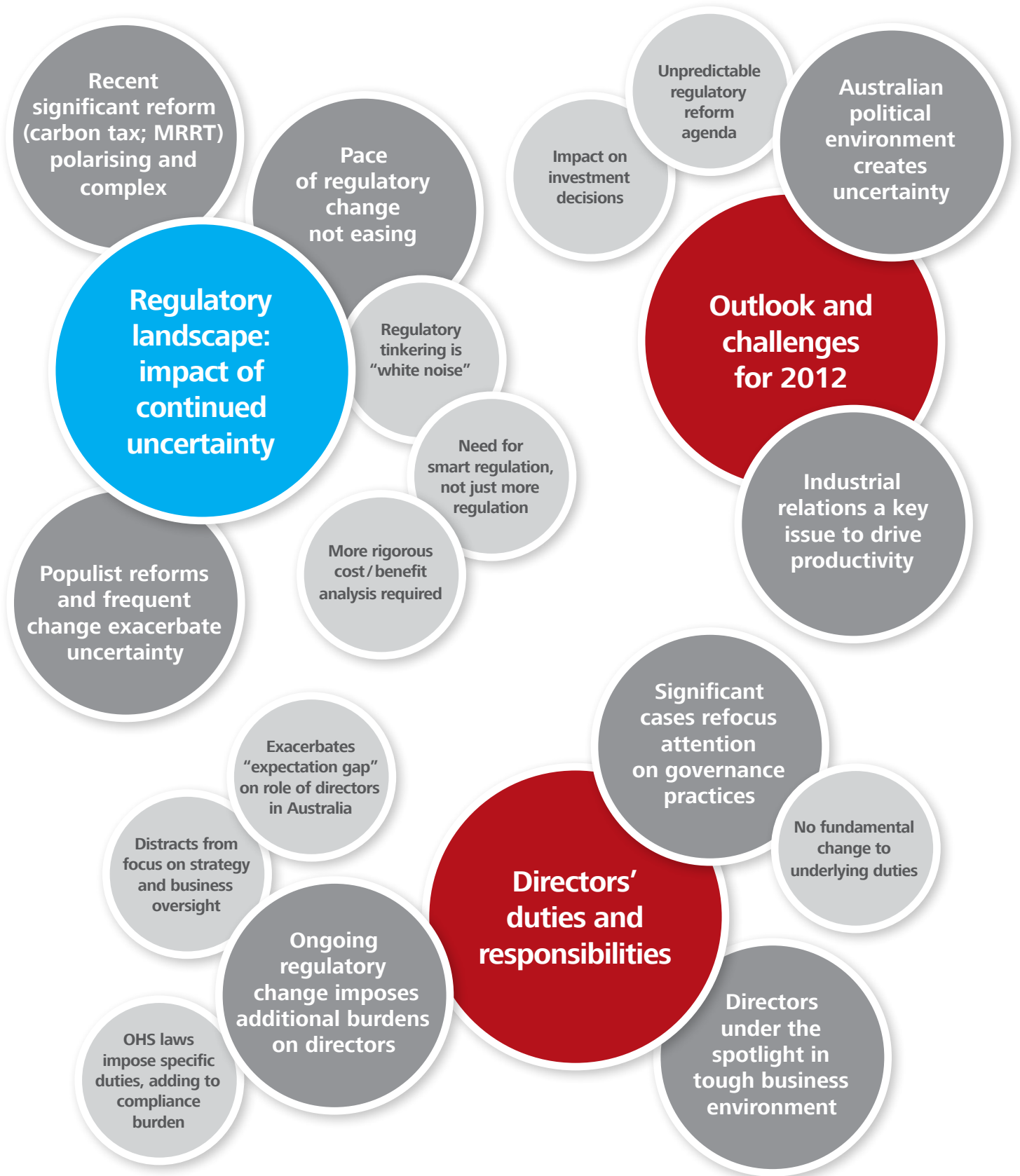
Forum to vent general discontent

Challenging AGM season

Multi-speed economy creates challenges and opportunities

Australian economy reshaping

Domestic industry focussed on survival and relevance



REGULATORY LANDSCAPE: IMPACT OF CONTINUED UNCERTAINTY

“Increasing government regulation and related issues adding to uncertainty”

“...time and energy devoted ... was out of proportion to the business performance and bottom line impact...”

The past 12 months have seen ongoing focus on regulation and regulatory change in Australia, across a range of industries and sectors.

With the **pace of change not easing**, companies and boards have had to remain constantly alert to developments, and review and respond to these shifts at a time when they are facing significant business challenges.

This continued regulatory change prompts a series of questions. In particular, what is, and should be, the purpose of regulatory reform? Is it to address a market failure? Do we need a more rigorous cost / benefit analysis of proposed reforms? And, **is the time directors have been required to devote to regulatory and compliance matters detracting too much from the time they could otherwise dedicate to their traditional role, being the strategic direction and oversight of the company?**

The December 2011 announcement by the Minister for Finance and Deregulation, Senator the Hon. Penny Wong, of an independent review of the Federal Government’s regulatory impact assessment process is a positive step and a recognition from the Federal Government of the need to review the impact and pace of regulatory change.

There is a loss of purpose and the creation of uncertainty

The survey responses in our Directions 2011 Report expressed a general frustration at the volume and populist focus of regulatory reforms, and made it clear that directors were devoting a significant amount of time to regulatory and compliance issues. A similar theme emerged again this year.

It is generally accepted that certain regulatory reforms are required to address market failings (and other issues) and can have a positive impact. However, there is a need to ensure that proposed reforms are not ineffective or merely re-regulation or further regulation in response to

populist issues which then just become “white noise” and a distraction.

The fact that there are new regulatory developments to consider on a regular basis means that it is hard to predict what is around the corner, who it is going to impact and in what manner. **It is important that a considered cost / benefit analysis is performed prior to the implementation of any regulatory change to consider what a particular reform is intended to address, how it is to be implemented and its potential impact on stakeholders.**

In 2011 Federal Parliament continued to debate and pass a large amount of new legislation

| | Bills presented | Bills passed |
|--------------------|-----------------|--------------|
| House of Reps 2011 | 238 | 199 |
| House of Reps 2010 | 195 | 179 |

House of Representatives, Statistical Digests for 43rd Parliament and 42nd Parliament available at www.aph.gov.au/house/pubs/statistics/index.htm

“Completely unnecessary regulatory tinkering which, in all cases, is highly unlikely to achieve its stated aims”

| Top three regulatory reform issues which received attention during the past year | Ranked 1st | Ranked top 3 |
|--|------------|--------------|
| Carbon emissions policies and the carbon tax | 20.0% | 43.2% |
| Directors' duties (implications of Centro case etc) | 16.8% | 51.2% |
| Executive and director remuneration | 14.4% | 42.4% |
| Occupational health and safety laws | 11.2% | 36.0% |
| Basel III regulatory standards on bank capital adequacy and liquidity | 9.6% | 20.0% |
| Industrial relations laws | 5.6% | 16.0% |
| Mining tax | 5.6% | 10.4% |
| ASIC / ASX structural and regulatory oversight changes | 3.2% | 12.0% |
| Tax law changes | 2.4% | 9.6% |
| Environmental laws (including sustainability reporting requirements) | 1.6% | 10.4% |

Key legal and regulatory issues in 2011

Many of the regulatory changes introduced in 2011 were once again the subject of public debate. As part of our survey this year, directors were asked to nominate the top three regulatory reform issues which received their attention during the past year. [The results revealed four key issues of focus.](#)

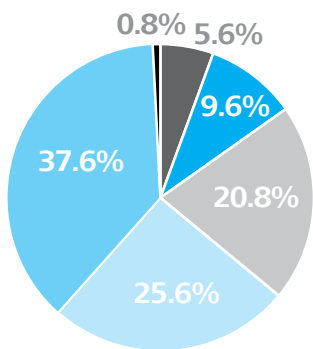
Firstly, more than 51% of survey respondents included directors' duties and the implications of decisions such as *Centro* and *James Hardie* in their top three issues. This was closely followed by the carbon emissions policies and carbon tax, as well as executive and director remuneration, both of which were in the top three issues of more than 40% of survey respondents. The carbon emissions policies and carbon tax was also the issue ranked as the top issue by the most directors, with 20% citing it as their number one focus. The fourth key issue concerned the changes to the occupational health and safety

laws, which approximately 36% of survey respondents cited as a top three issue. Further detail and analysis regarding each of these issues is contained later in this report.

[The results were largely unsurprising given these were all topical issues in 2011, and are all issues which impact on a wide range of companies across a large number of industries.](#) In addition, industrial relations laws (which 16% of survey respondents included in their top three issues) has become a key area of focus generally for directors and is expected to continue to be so given the recent events involving lockouts and industrial relations disputes.

It was also interesting that [other topical regulatory issues in 2011 received less attention from directors than expected.](#) In particular, a little more than 10% of those surveyed ranked the minerals resource rent tax in their top three issues. This is likely a reflection of the fact that the tax will not flow through to non-mining companies in the same way as the carbon tax is expected to. Two other issues

Hours spent during the past year dealing with the top regulatory reform issue



- Less than 5 hours
- 5 to 10 hours
- 10 to 20 hours
- 20 to 30 hours
- Over 30 hours
- No answer

which were well down the list were the price signalling laws (3.2% of the survey respondents ranked this issue in the top three) and the new *Personal Property Securities Act 2009* (Cth) (PPSA), which was the issue least included in the top three by survey respondents. Perhaps this reflects that these issues are more relevant to day-to-day operations which are a focus of management, rather than high level strategic issues on which the board is more generally focused. Price signalling and PPSA have also not had the same level of publicity and political focus as some of the other issues noted above.

We expect that regulatory issues and government responses will remain high on the agenda for the next 12 months, particularly in overseas jurisdictions, as the European debt crisis continues to be a major focus of world attention.

All this regulatory change is requiring a significant time commitment from directors

Directors were asked to indicate how many hours they had spent during the past year dealing with the issue they identified as their top ranked regulatory issue. 37.6% had spent over 30 hours on that issue alone, more than 60% had spent in excess of 20 hours and for nearly 85% it was more than 10 hours. In the survey responses for our Directions 2011 Report, more than two-thirds of survey respondents indicated that they were spending between 5 and 20 hours per board per month on board commitments, although that commitment was much greater when an exceptional circumstance (such as a significant transaction) was on foot.

This data suggests that, for a great number of directors, the key regulatory issue they are addressing is taking up somewhere between 10% and 50% of the time they spend on board commitments. While it is not surprising that the key regulatory issue facing a company requires significant director time, when we consider that there were multiple issues receiving attention

from directors, it indicates that the time focused on regulatory reform matters has been substantial.

This suggests that there is an impact on the amount of time directors are able to dedicate to consideration of the strategic direction and business of the company.

This is consistent with what directors are telling us. There has been a fundamental and sustained shift such that directors are being required to devote a significant amount of time to operational and compliance matters as regulatory developments increasingly impose potential responsibility and personal liability on directors. Many of these matters have traditionally been the responsibility of management, with the role of boards to give strategic oversight and guidance. This raises the question of whether the adoption of some features of alternative governance models, discussed in more detail on page 10 of this report, may be appropriate in the current climate.

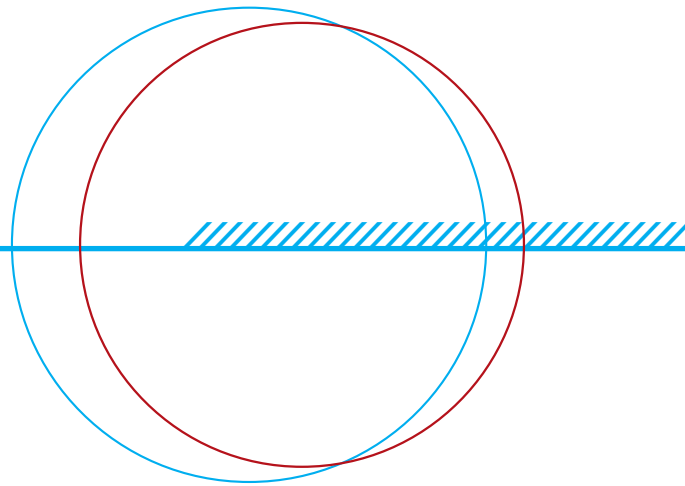
There may be help on the way

In December 2011, the Minister for Finance and Deregulation, Senator the Hon. Penny Wong, announced that she had commissioned an independent review of the Federal Government's regulatory impact assessment process. This process is the means by which the Federal Government assesses "the regulatory impact of proposals which are likely to impose an obligation on business or the not-for-profit sector".¹

A key focus of the review is to report on the consistency of that process with the OECD's guiding principles for regulatory quality and performance.² The review will be conducted by Robert Milliner, former Chief Executive Partner of Mallesons Stephen Jaques, and David Borthwick

¹ Terms of Reference, "Review of the Australian Government's Regulatory Impact Analysis Process", Department of Finance and Deregulation. Available at: http://www.finance.gov.au/about-the-department/media-centre/secretary/media-releases/2011/mr_022011.html

² Terms of Reference, "Review of the Australian Government's Regulatory Impact Analysis Process", Department of Finance and Deregulation. Available at: http://www.finance.gov.au/about-the-department/media-centre/secretary/media-releases/2011/mr_022011.html



AO PSM. Their report is due to be given to the Minister on 20 April 2012. We believe this is a very positive step.

“As a starting proposition when Governments are considering new legislation, the question that should be asked and thoroughly considered is whether it is necessary to make new rules or change rules and are they going to achieve the intended outcomes? In most cases Governments should only regulate if markets are failing or to provide reasonable assurance around market behaviours, as opposed to imposing further regulation to try to stop bad actors. If regulation is necessary, it is important to ensure that a considered cost / benefit analysis of the options is undertaken prior to the introduction of any regulatory reform to properly inform the rule making process.” Robert Milliner

Directors continue to be mindful of other features of the legal and regulatory landscape

In addition to regulatory reform, there are two other features which mark the regulatory landscape, being private enforcement actions (ie class actions) and scrutiny from regulators.

In response to a question regarding how serious a threat the rise of class actions in the securities law area is considered, more than 65% of the survey respondents said it was a mild to significant threat. Of that 65%, nearly 45% saw securities class actions as being either a significant threat (10.4%) or some threat (34.4%). This suggests that class actions continue to be an area of real concern to directors. This is consistent with the survey findings from our Directions 2011 Report, where 34% of survey respondents indicated that their organisation had given attention to class action issues in the previous 12 months.

Scrutiny from regulators such as the Australian Securities and Investments Commission (ASIC) and the Australian Competition and Consumer Commission (ACCC) has been maintained with a continued focus on investigation and enforcement

actions throughout the past year. The most public of these was the ACCC’s opposition to the Metcash/ Franklins merger, which it unsuccessfully sought to block through the courts. It appears that the trend of increased regulator scrutiny is set to continue and this adds to the uncertainty faced by companies and directors. This looks to be particularly so on the part of the ACCC, with new Chairman Rod Sims publicly stating that the ACCC *“will take on more cases where the outcome may be less predictable”*.³ However, it will be interesting to see whether the decision in the Metcash/ Franklins matter impacts the ACCC’s approach. There may have already been an insight into this, with Rod Sims having since commented that the ACCC *“will not be taking on theoretical points, we will be making proper, commercial assessments”*.⁴

While the precise effects of the Metcash decision on the ACCC’s merger clearance process remains to be seen, we predict that the ACCC will fine tune its merger clearance process as a result of the Metcash decision. We also predict that the ACCC will commence at least one high profile misuse of market power case and at least one high profile case where the ACCC alleges that conduct has an anti-competitive purpose or effect.

Rod Sims has also indicated that his key regulatory aims are to:

- make full use of the ACCC’s new powers (for example, infringement notices);
- take a coordinated approach with other government agencies (for example, FIRB) and within different arms of the ACCC;
- advocate for legislative change to increase the regulator’s powers;
- become more vigilant about mergers, especially minority stakes; and
- contribute to policy.⁵

³ The Law Council Competition and Consumer Workshop 2011, Gold Coast, ACCC: Future Directions, 27 August 2011.

⁴ Patrick Durkin, The Australian Financial Review, “ACCC vows to get real on corporate deals”, 16 January 2012.

⁵ The Law Council Competition and Consumer Workshop 2011, Gold Coast, ACCC: Future Directions, 27 August 2011.

DIRECTORS' DUTIES AND RESPONSIBILITIES

Significant cases

In 2011, we saw significant judgements concerning the duties of directors and other officers in *Fortescue Metals*, *James Hardie* and *Centro*. It has been widely debated in the market whether those cases place additional burdens on directors and whether those cases might result in qualified persons no longer wishing to take up board seats.

Our survey shows that directors are not considering stepping aside as a result of these cases, and [nor do most survey respondents appear to consider that the cases go much beyond what was otherwise existing practice on their boards](#). Those results are highlighted in more detail below.

In response to questions about the appropriateness of the penalties imposed by:

- the Supreme Court (at first instance) in *James Hardie*, approximately 38% of respondents considered the penalties imposed unreasonably harsh; and
- the Court in *Centro*, more than 80% of respondents considered the penalties imposed reasonable or too lenient.

What has been done as a result?

We asked survey respondents whether, as a result of the cases outlined below, the practices of the boards on which they sit have changed.

More than 80% of survey respondents indicated that they had seen changes to their board's practices. However, many of the changes do not appear to have been substantial. Approximately 45% of survey respondents have seen little or no change. Of those that have seen change, most involved [minor procedural changes rather than a major overhaul of board practice](#). This is reflected in the most common changes to board practices, which include:

- lengthier review of more voluminous board materials;
- longer and more frequent committee meetings;
- review and improvement of minute keeping practices; and
- review of D&O insurance coverage.

| Fortescue Metals | James Hardie | Centro |
|---|--|---|
| The Full Federal Court found that Fortescue had engaged in misleading and deceptive conduct and contravened the continuous disclosure provisions of the Corporations Act, and its chairman and CEO, Mr Forrest, was involved in the contraventions and breached his duties as a director. | Proceedings arose out of the establishment by James Hardie of the Medical Research and Compensation Foundation. An ASX announcement stated that the arrangements were sufficient to fund all present and future asbestos claims, which was not the case. At first instance, the Supreme Court found a breach of the duties of diligence and care in approval of the announcement and imposed banning orders and pecuniary penalties. The former non-executive directors won their appeal against that decision. | The case considered liability for breaches of directors' and officers' duties in connection with deficiencies in the annual financial reports for certain Centro entities. Declarations were made that the directors and officers had breached certain provisions of the Corporations Act and their applications for relief from liability were dismissed. |



In the words of one respondent, “increased boredom... for arse covering purposes”.

ASIC has stated that *“the key elements of the financial position of the company are things directors should understand.”*⁶ While less than 6% of survey respondents have seen an increase in financial or accounting training or an increase in the provision of public disclosure materials, this does not necessarily mean directors are not focusing on their role in understanding the key elements of the company’s financial position. Directors do not see their role as financial experts, but acknowledge a need to sufficiently understand the company’s finances in order to bring their business judgement to decision-making.

Supporting this view, many survey respondents noted a change in their personal approach to their duties. [Respondents attended more meetings, but also cited other activities demonstrating a more active, questioning role - increased risk analysis and diligence and decreased reliance.](#) These personal changes may be more effective than formal training in ensuring directors understand the financial position of the company. Despite some commentary suggesting directors should be sceptical of management or their advisers, survey respondents did not appear to be taking a questioning approach that far.

What should be done as a result?

The cases act as a reminder to boards to maintain best practice. [Mallesons recommends boards use the following list](#) as a check of how your board is meeting its obligations in the context of *Centro*:

- satisfy yourself that a sufficient process has been established and followed to prepare the accounts;
- ensure the board has enough time to consider the accounts;
- analyse the accounts and identify treatment of key last period and post-balance date issues;

- focus on notes to the accounts, especially statements and assumptions attributed to the board;
- take the opportunity to meet with the auditors without management;
- identify non-delegable areas and the processes required in respect of them;
- review committee charters to ensure adequate processes for reporting back are in place;
- receive and check the s 295A declarations;
- review board paper and board minute processes and protocols; and
- D&O insurance won’t cover everything: know your policy.

Business judgement rule

These cases have also reawakened the debate over reform of the business judgement rule.⁷

The business judgement rule shields directors who make business decisions that are in good faith, for a proper purpose, appropriately informed, with a rational belief that they are in the best interests of the company, and without personal conflict.

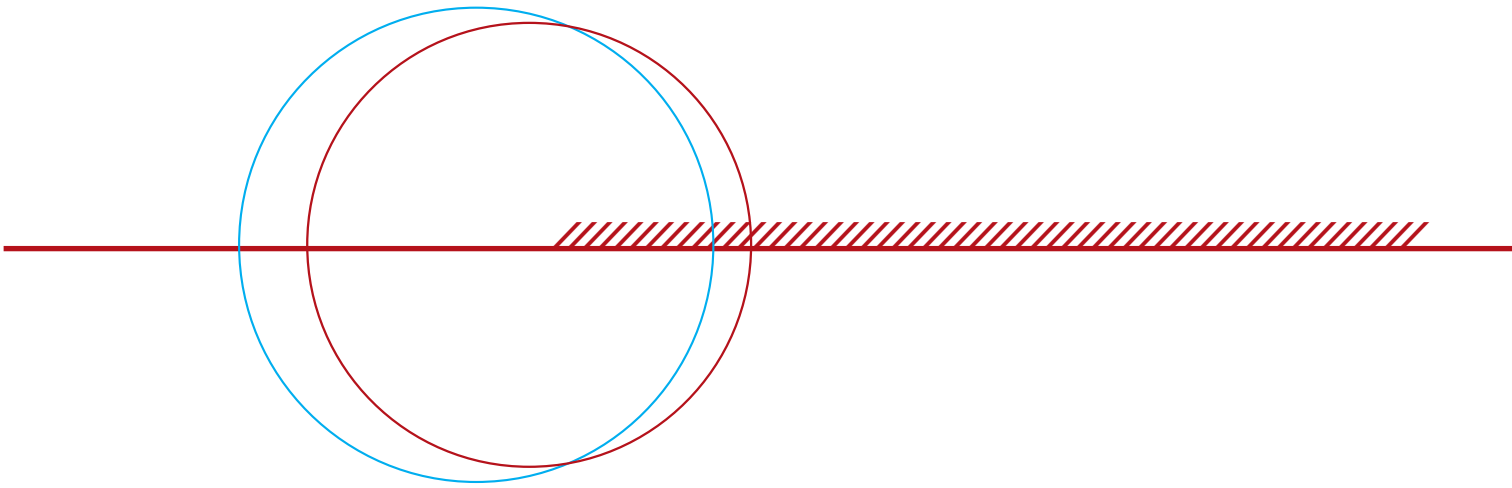
The business judgement rule has no role to play in the Australian insolvent trading framework. This is a potential ongoing problem for directors, who may be uncertain whether a company is insolvent at a particular time.⁸ [Corporate insolvency is particularly topical this year, with the number of companies entering administration in the quarter to September 2011 the highest on record at 2,961.](#)⁹ Administrations for the 2010/2011 financial year reached 9829 which was 5.9% up on 2009/2010.

⁷ *Corporations Act 2001* (Cwlth), section 180(2).

⁸ Australian Institute of Company Directors, Submission to Treasury on Regulatory Framework for Insolvency Practitioners in Australia, 29 July 2011.

⁹ ASIC, Australian Insolvency Statistics – Table 1.3, 4 January 2012.

⁶ G Medcraft “Centro civil proceedings”, ASIC Publication 31 August 2011.



Advocates for widening and strengthening the business judgement rule argue that such reform would protect directors who attempt to rescue companies in difficulty by adopting an entrepreneurial, but responsible approach.¹⁰

In their view, such a change would shift the focus of directors from minimising liability in the event of collapse to saving the company from collapse in the first place.¹¹

In January 2010, as part of a corporate insolvency law reform package, the Federal Government released a discussion paper proposing a modified business judgement rule.¹² The modified rule would protect directors who breach their duty not to trade while insolvent if the director diligently pursued restructuring on the basis of accurate accounts and advice, and acted in the interests of both the company's creditors and members. While some of the proposed reforms, including the *Sons of Gwalia* amendments,¹³ have been enacted, the Federal Government has expressed reluctance to proceed with the reforms to the business judgement rule.¹⁴ It remains to be seen whether this issue will be revisited in 2012.

Other legislative reform

Nevertheless, there is a growing recognition at the policymaker level of directors' views that some penalties imposed on directors for their company's statutory breaches (including criminal sanctions) are excessive. The *Personal Liability for Corporate Fault Reform Bill*, released in January 2012 for public comment, removes criminal liability for company secretaries who breach the administrative requirements in section 188 of the Corporations Act, and imposes a wider range of civil penalties that reflect the seriousness of a statutory breach.

These long-awaited amendments are the first part of the Federal Government's response to the 2006 report of the Corporations and Markets Advisory Committee, which recommended the imposition of criminal sanctions on directors for the misconduct of the company only where there are compelling public policy reason for doing so, liability of the company alone is unlikely to sufficiently promote compliance, and it is reasonable to do so in the circumstances.

The reform agenda, pursued through the Council of Australian Governments, will see the implementation of a harmonised approach to directorial liability across Federal and State jurisdictions. Further amendments are expected to be formalised in the first quarter of 2012.

¹⁰ "Directors Counsel NED duties in the firing line again", Australian Institute of Company Directors, 1 June 2009.

¹¹ James Eyers, The Australian Financial Review, "Directors lash out on insolvency", 30 September 2011.

¹² Discussion Paper, "Insolvent Trading: A 'safe harbour' for re-organisation attempts outside of external administration", 19 January 2010.

¹³ Corporations Amendment (Sons of Gwalia) Act 2010 (Cwlth). These amendments reversed the High Court decision in *Sons of Gwalia Ltd v Margaretic* (2007) 231 CLR 160, ensuring that claims that arise from the purchase, sale or holding of shares (for example, claims arising from misleading financial statements) are postponed to other claims (including the claims of unsecured creditors) in the winding-up of a company.

¹⁴ James Eyers and Brad Hatch, The Australian Financial Review, "Directors lose bid for legal protection", 29 September 2011.

“No more good intentions - we want good outcomes”²¹

Restructuring boards

Current global challenges have seen some reconsideration of governance structures to manage liability. 12% of survey respondents said that they had considered introducing different governance structures such as advisory boards or a two-tiered board structure.

Some initiatives have seen support from Australian commentators. One prominent commentator has discussed the operation of a two-tiered structure with an operating board and supervisory board, but noted the lack of industry support and significant corporations legislation amendments that would be required.¹⁵

The adoption of a single board of non-executive directors, with executive directors forming a management committee, has also been considered by some commentators. The board would have the functions and powers of a board identified by the ASX Corporate Governance Council, with management power and responsibility vesting in the management committee.¹⁶

Gender diversity on boards

In our Directions 2011 Report, diversity at board level was discussed as a high profile corporate governance issue. The majority of survey respondents agreed that there was a lack of diversity on boards and in senior executive positions in Australia.

In accordance with amendments to the 2nd edition of the ASX Corporate Governance Council Corporate Governance Principles and Recommendations, entities whose financial year began after 1 January 2011 were required to adopt and publicly disclose a diversity policy.¹⁷

The policy should require the board to establish *“measurable objectives for achieving gender*

diversity” and requirements for assessing these objectives and the progress made towards meeting them.

The biggest challenge to achieving gender diversity at board level identified by survey respondents and industry commentators has been the difficulty of ensuring a sufficient pipeline of women at senior management level for consideration when board positions become available.

What progress has been made in 2011?

Almost 63% of survey respondents reported gender or other diversity attributes were key priorities for board appointments in 2011.

The latest statistics from the Australian Institute of Company Directors indicate that, as at 10 January 2012, 13.7% of ASX 200 board seats were held by women. This compares positively with 10.7% as at 31 December 2010, but falls well short of the target of 17% set by the Australian Human Rights Commission.¹⁸

In 2011, there were a total of 68 female director appointments to the ASX200, which represented 28% of total board appointments, up from 56 female appointments in 2010 (which represented 25% of total appointments).¹⁹

However, 64 boards in the ASX200 still do not have any women.²⁰

¹⁵ For example, Australian Institute of Company Directors, Company Director Magazine, “Double trouble?”, 1 August 2010.

¹⁶ Australian Institute of Company Directors, Company Director Magazine, “Double trouble?”, 1 August 2010.

¹⁷ Recommendation 3.2, ASX Corporate Governance Principles and Recommendations with 2010 Amendments.

¹⁸ “Getting on Board: Quotas and Gender Equality” – speech by Elizabeth Broderick, Sex Discrimination Commissioner, 29 April 2011.

¹⁹ Australian Institute of Company Directors, Statistics, 10 January 2012.

²⁰ Australian Institute of Company Directors, Statistics, 10 January 2012.

²¹ The Hon. Kate Ellis MP “Celebrating 100 years of International Womens’ Day - where to from here?” 9 March 2011.

*“The road to gender equality is paved with many good intentions – **but good intentions are not enough.** We need continuing and sustained action.”²⁹*

Steps for the future

The key focus of boards should be on achieving an appropriate level of judgement and mixture of skill sets across board members. This is not inconsistent with increasing diversity at board level but it is important that this focus is not compromised in order to satisfy diversity goals. Some survey respondents indicated frustration with the potential side effects of the positive goal of diversity at the expense of other criteria relevant to selection of suitable candidates for appointment to boards.

In the words of one survey respondent, *“...Boards are now populated with more lawyers and accountants and a gender balance that is often at the expense of the entrepreneurs who understand how to manage the risks and grow the business...”*

There is no doubt that changing the overall gender composition of Australia’s corporate boards is proving to be a slow task. However, some clear improvement was demonstrated in 2011, and further improved results are likely to be a function of time.

Many female candidates for board positions possess the skills, judgement and experience required of directors. Of course, formal and informal leadership training and mentoring initiatives are important mechanisms for developing commercial skills and judgement.

Industry commentary provides the following advice.

- **Commitment to gender diversity at CEO level²² and from other top management** is key to achieving cultural change.
- A focus on **improved gender representation in the management pipeline** pays off, and companies should seek to adopt a range of measures at management level, focusing on

building a **supportive culture and ongoing career development.**²³

- To be successful, any gender diversity initiatives need to **engage with employees** and be **adequately resourced.**²⁴
- **Flexible work arrangements**, which aim to retain both men and women, need to be **de-stigmatised and visibly successful.**²⁵

According to the Financial Services Institute of Australasia, companies should not only put career progression and development practices for women in place, but also report specifically on those practices.²⁶ Proposed amendments to the *Equal Employment Opportunity for Women in the Workplace Act 1999* (Cth) indicate a shift in focus from the development of diversity policies to scrutiny of their implementation and success. The amendments will shift the mandatory reporting requirements from reporting on workplace programs to reporting on actual figures, including the gender breakdown of employees and a gender breakdown of remuneration at all levels of the organisation.²⁷

Looking to the future, the option of quotas for women on boards has not been taken off the table as a way of meeting targets and making the talent and experience of women visible.²⁸

²² Australian Human Rights Commission – Report “Our experiences in elevating the representation of women in leadership”, October 2011.

²³ “Diversity Drives Corporate Performance” – AICD Media Release, 9 August 2011.

²⁴ “The Great Disappearing Act: Gender Parity up the Corporate Ladder” – Bain & Company Insight, 30 January 2010.

²⁵ “What Stops Women from Reaching the Top? Confronting the Tough Issues” – Bain & Company Brief, 14 November 2011.

²⁶ Principle 3, “Promoting gender equality through transparency: Principles for reporting on gender composition within Australia’s Financial Service Industry” – Finsia, Report, May 2011.

²⁷ Media Release, “Retaining and Improving the Equal Opportunity for Women in the Workplace Act 1999”, March 2011.

²⁸ Speech by Elizabeth Broderick, Sex Discrimination Commissioner, “Getting on Board: Quotas and Gender Equality”, 29 April 2011.

²⁹ Speech by Elizabeth Broderick, Sex Discrimination Commissioner, “Getting on Board: Quotas and Gender Equality”, 29 April 2011.

EXECUTIVE REMUNERATION, BOARD SPILLS AND THE AGM SEASON

The Federal Government's executive remuneration reforms have attracted the attention of organisations and their directors and caused them to respond through changes in board practices and greater stakeholder engagement. However, the reforms have been quite polarising and the effectiveness of specific rules such as the "two strikes" rule has been at best debatable.

The reforms appear to have drawn the attention of boards away from matters of greater strategic value to organisations and have largely been used as a punitive mechanism by disgruntled shareholders frustrated by challenging market conditions, rather than as a means of communicating shareholders' assessments of executive remuneration. In the words of one survey respondent, "the reforms ... only add compliance costs and provide a larger voice to activist minority shareholders."

The 2011 AGM season has been especially challenging, with survey respondents attributing much of the difficulty to the executive remuneration reforms.

Executive remuneration

Executive remuneration has been the subject of significant regulatory reform over the past few years. In 2009, reforms placed restrictions on the value of termination benefits that could be provided to directors and senior executives without shareholder approval. In June 2011, the Federal Government passed the *Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Act 2011* (Cth), which introduced a number of measures to further regulate executive remuneration. The reform package included:

- a "two strikes" rule, which gives shareholders the right to vote to spill a board of directors if the remuneration report receives two consecutive "no" votes of at least 25%;
- regulations regarding the use of remuneration consultants, including a requirement for further disclosure of consultants' fees;

- restrictions on voting by Key Management Personnel (KMP) with respect to remuneration-related resolutions;
- a prohibition on the hedging of incentive remuneration by directors and senior executives; and
- "cherry picking" rules that apply where a proxy does not vote a "directed" proxy.

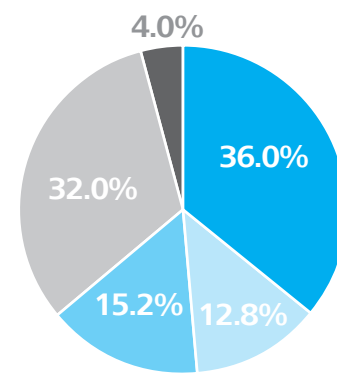
As noted earlier in this report, when asked to indicate their level of concern regarding regulatory reform issues, survey respondents ranked executive remuneration third among a list of issues that included the mineral resource rent tax, industrial relations and the emissions trading scheme (among others).

The most notorious of the executive remuneration-related reforms, having received the most attention from boards and other stakeholders, is the "two strikes" rule. The Corporations Act has for some time required a listed company to put its remuneration report to a non-binding shareholder vote at the AGM. However, under the new "two strikes" rule, the result of the non-binding vote now has greater potential "bite".

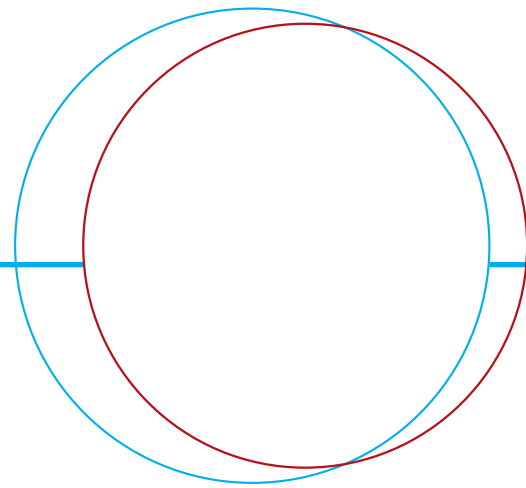
A company will incur a "first strike" where 25% or more of the votes cast by shareholders are against the company's remuneration report. A "second strike" is incurred where the votes cast by shareholders against the remuneration report at the subsequent AGM equal 25% or more.

If a company incurs two consecutive "strikes", then a "spill resolution" must be put to shareholders at the second AGM. If the spill resolution is supported by a simple majority, the company must convene an extraordinary general meeting within 90 days, immediately before the end of which all directors in office at the time of the second AGM must stand down, but may stand for re-election.

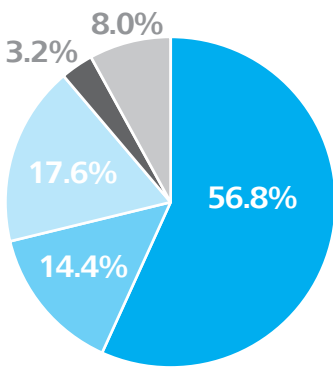
As a result of the executive and director remuneration reforms, have any of the organisations of which you are a director changed their remuneration strategy or plan to do so?



- Already implemented changes
- In the process of implementing changes
- Currently reviewing our practices
- Not intending to make any changes
- Not sure



Do you support the government repealing the 'two-strikes rule' at the current time?



- Strongly support
- Mildly support
- Happy with the current rule
- Would like to see the rule strengthened further
- No opinion

Mallesons recommends that votes on remuneration reports be put to shareholders through a 'show of hands' in the first instance. If 25% or more of the votes of shareholders in attendance are cast against the remuneration report, then a 'poll' should be called. This would have the effect of accounting for the proxy votes of absent shareholders.

During the 2011 AGM season, at least 60 listed companies incurred a "first strike". This level of shareholder opposition to remuneration reports is lower than the level widely anticipated upon enactment of the reforms and, according to the Australian Financial Review's annual survey of executive salaries, is largely unchanged or even lower than that experienced in previous years (when the resolution was a non-binding indicator of shareholder support for executive remuneration).³⁰

Questions therefore arise as to whether the executive remuneration reforms were needed to begin with and whether they have achieved their intended effect.

A significant proportion of survey respondents (48.8%) indicated that the organisations of which they are directors have either already implemented changes to remuneration strategies or are in the process of doing so as a direct result of the executive remuneration reforms.

When asked to identify the three issues that were given the most attention as a result of these reforms, changes in base remuneration, changes in LTI and STI, and changes to disclosure in notices of meeting were referred to most frequently.

An intended effect of the "two strikes" rule was to promote greater stakeholder engagement with respect to executive remuneration, and this appears to have been achieved to a substantial degree.³¹ The survey data, as well as anecdotal evidence, indicates that, in response to the rule, companies

are accorded significantly greater attention and resources to shareholder concerns regarding the level and structure of executive remuneration and are actually responding to those concerns.

This dialogue may explain the relatively low number of strikes against companies during the 2011 AGM season. One survey respondent indicated that directors of the board on which he /she sits are now personally involved in the roadshowing of the company's remuneration report. Through this and other similar means of enhancing stakeholder engagement, most of those companies whose "no" votes last year exceeded 25% were able to avoid that threshold by significant margins during the 2011 AGM season. For example, after having faced a 60% "no" vote on its remuneration report last year, one listed company worked closely with its largest shareholders to review and amend its remuneration policies and consequently faced a "no" vote of only 9.5% at its recent AGM. This experience was not unique.

However, the executive remuneration reforms have been quite unpopular. When asked about the "two strikes" rule, 71.2% of survey respondents supported the Federal Government repealing the rule (of these, 56.8% "strongly supported" repeal). It is apparent that the majority of survey respondents view the reforms as unnecessary and, in any case, ineffective. This view might be justified for a number of reasons, which are explained below.

The tenuous link between executive remuneration and the re-election or removal of directors

The "two strikes" rule assumes a correlation between the remuneration concerns of shareholders and a desire to spill the board. However, this link appears tenuous. A review of the results of the 2011 AGM season shows that the same companies that received a "first strike" on their remuneration reports typically had resolutions for the re-election of directors pass

³⁰ Michael Smith and Patrick Durkin, 'Reality check on CEO pay', Australian Financial Review, 23 November 2011.

³¹ The Hon. David Bradbury (Parliamentary Secretary to the Treasurer), 'One World – The Global View of Governance' (Keynote address to Chartered Secretaries Australia, Sydney, 6 November 2011).

with high majorities at the same AGM. This indicates that, [even where a substantial proportion of a company's shareholders express concern about executive remuneration through a "strike", most shareholders are not influenced by those concerns in their evaluation of the performance of directors](#). In reality, the "two strikes" rule has often been relied upon as a punitive mechanism by disgruntled shareholders frustrated by challenging market conditions rather than as a means of communicating shareholders' assessments of executive remuneration.

Furthermore, two alternative mechanisms for the removal of company directors by shareholders have been in place for some time. These mechanisms operate through sections 249D and 249F of the Corporations Act. Under section 249D, directors must call for a general meeting at the request of:

- members who collectively hold 5% or more of the voting rights; or
- 100 members who are entitled to vote at a general meeting.

Under section 249F, members can call a general meeting without requisitioning directors. To exercise this power, members must collectively hold 5% or more of the voting rights. All costs incurred in this process must be paid by the members who instigated the meeting.

There has been a fairly consistent (albeit low) usage of these provisions in recent years, which does not appear to have been impacted by the introduction of the "two strikes" rule. In the 11 months to December 2011, there were approximately 24 instances of section 249D being used by shareholders to attempt to remove directors of ASX listed companies (excluding withdrawn requests). Of these, 18 instances involved an attempt to remove three or more directors, indicating that shareholders had issues with the board generally rather than individual directors. Issues with the board identified by the requisitioning shareholders largely focused on issues of independence, performance or strategic direction.

As a result of the executive remuneration reforms, what are the top three issues that have received the greatest focus in 2011?

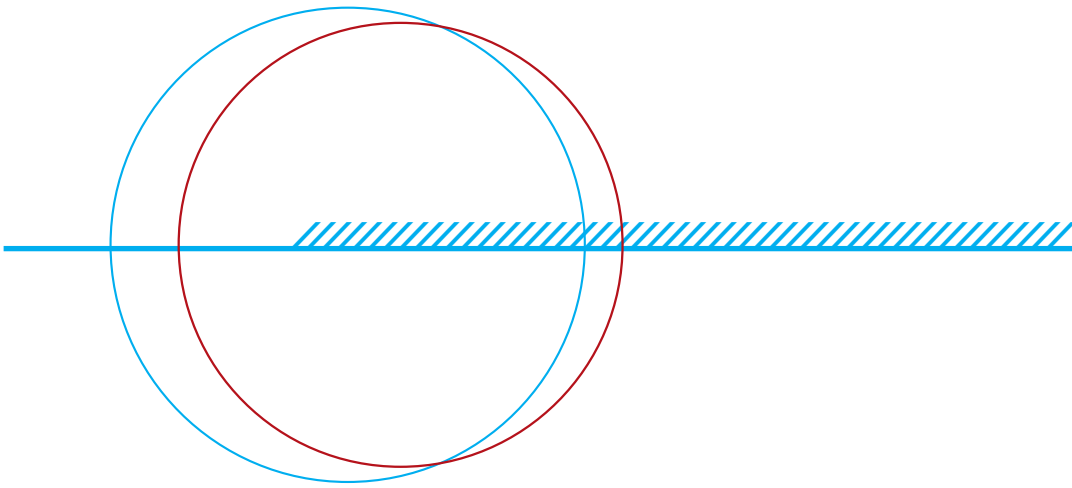
| | 1st | 2nd | 3rd |
|--|-------|-------|-------|
| Changes in base remuneration | 16.0% | 3.2% | 8.0% |
| Changes in LTI | 15.2% | 14.4% | 10.4% |
| Change in approach to disclosure (Notice of Meeting) | 13.6% | 11.2% | 13.6% |
| Changes in STI | 10.4% | 16.8% | 5.6% |
| Increased use of remuneration consultants | 8.0% | 13.6% | 12.8% |
| Executive termination benefits | 7.2% | 2.4% | 9.6% |
| Risk of activist use of remuneration forms (e.g. to cause a board spill) | 5.6% | 4.0% | 5.6% |
| Other | 5.6% | 4.0% | 5.6% |
| Role of proxy advisers | 4.8% | 11.2% | 8.0% |

There were only two instances where the remuneration of directors was cited as a reason for the requisition. In both cases, the remuneration of directors was only one of several reasons cited by the requisitioning shareholder.

The continuing availability and use of these provisions argues against director removal as a driving purpose of "two strikes" and is another indication that [shareholders do not, by and large, view the removal of directors as a necessary consequence of remuneration concerns](#).

The implications of voting exclusions

Interestingly, some of the companies that received a first "strike" had a proportion of shareholders excluded from voting on the remuneration report under the new voting restrictions (also part of the executive remuneration reforms). These new rules prevent KMPs and their "closely related parties" from voting on the remuneration report, thereby



“[The “two strikes” rule is] a government-initiated nuisance which has had no practical impact on outcomes”

preventing “interested” parties from voting and giving uninterested parties a greater say.

The allocation of disproportionate power to shareholders not excluded from voting

A number of prominent public company directors have suggested that the “two strikes” rule is problematic to the extent that it entails a 25% voting threshold and that the rule would operate much more effectively if the voting threshold was raised to 50%.³² The problem with the lower threshold is that it arguably allocates a disproportionate amount of power to shareholders who are not excluded from voting (e.g. as KMPs or closely related entities) and therefore gives effect to a “tail wagging the dog” scenario. Moreover, the relative ease with which a “strike” might be incurred means that a resolution giving rise to a “strike” is significantly more likely to be carried than a resolution to which two consecutive “strikes” would give rise, being the spill resolution to which a 50% threshold applies. Survey respondents commented that the 25% threshold allows *“a small percentage of shareholders to cause a spill.”* In these respects, the 25% threshold has become a source of considerable uncertainty for boards.

In response to these concerns, the Federal Government should consider amending the rule excluding KMPs in order to allow them to vote their own shares on remuneration report resolutions.

Remuneration disclosure

There has been a significant focus in recent years on providing shareholders with better information (albeit in a simplified format) regarding executive remuneration in companies’ remuneration reports. This is especially so following the enactment of the executive remuneration reforms and the release in April 2011 of a Corporations

and Markets Advisory Committee (CAMAC) report considering reform of the remuneration disclosure requirements in the Corporations Act.³³

However, this increased disclosure may have actually impaired the ability of boards to contain the salaries of key executives. One survey respondent proffered the point in the following terms: *“In an attempt to provide transparency, the new rules have created public insight into how much you have to pay to poach a competitor’s senior management team.”*

It is therefore possible that greater remuneration disclosure has actually contributed to the inflation in executive remuneration in recent years.

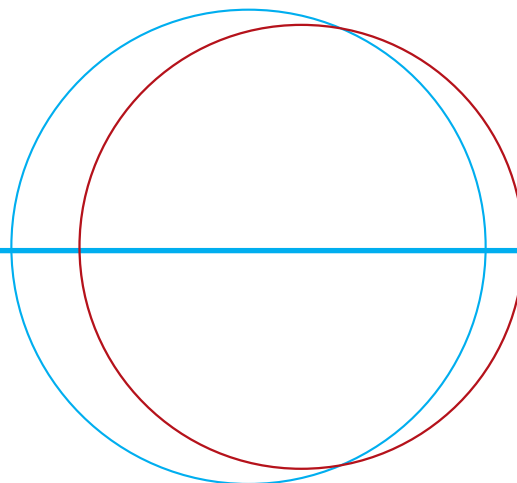
Weighing the costs and benefits of the “two strikes” rule

The executive remuneration reforms have apparently demanded from companies significant attention and the allocation of significant resources. Some survey respondents suggested that the increased cost of compliance and management / board time was inappropriate considering the ordinary role of a board of directors and the materiality of executive remuneration when compared to other issues facing organisations (e.g. the emissions trading scheme and the mining tax) that go directly to shareholder value. One survey respondent noted:

“The executive and director remuneration ‘reforms’ have no long-term positive effect on corporate governance or shareholder value creation, and occupy an inordinate and disproportionate amount of director and management attention, together with cost on remuneration consultants, lawyers and other advisors, while spawning a new industry in proxy-advisors and remuneration consultants. Overall these politically-motivated reforms have destroyed and will continue to destroy significant shareholder value.”

³² Damon Kitney, ‘Directors back two strike rule at 50pc’, The Australian, 19 December 2011.

³³ Corporations and Markets Advisory Committee, ‘Executive Remuneration — Report’ (April 2011).



The Australian Institute of Company Directors (AICD) has similarly stated that the reforms *“will harm Australian companies through creating instability and reducing flexibility, which in turn will disadvantage corporate stakeholders including employees and shareholders and others that indirectly benefit from a prosperous business sector,”*³⁴ and that *“[t]he Australian Government is saddling its boards with restrictions, which go further than any other country in the world.”*³⁵

Criticism of the executive remuneration reforms and the “two strikes” rule has been intense and widespread. The lower than expected number of “strikes” during the 2011 AGM season suggests that shareholders (the parties on whom the power to “strike” has been conferred) also appear to have been quite cautious about actually using that power. And when shareholders have been willing to use the power to protest levels of executive pay, they have still been willing to re-elect directors by significant majorities.

It is expected that in time the “two strikes” rule will have caused companies to “wake up” to the issue of executive remuneration (which will likely only remain an issue as long as market conditions remain as challenging as they have been in recent years) rather than fundamentally rethink the manner in which, and the extent to which, executives are remunerated. To this extent, it is debatable whether the executive remuneration reforms have achieved, or will ever achieve, their intended effect.

Executive remuneration reforms in the United Kingdom

The United Kingdom appears likely to follow Australia’s lead in regulating executive remuneration. The British Government is proposing to give shareholders the right to veto executive pay packages. Other possible reforms include rules which may require executives to receive a certain proportion of their pay in shares that cannot be traded for at least five years and require non-executives to sit on remuneration committees with the aim of preventing executives setting their own salaries.³⁶

Notably, the binding shareholder vote on executive remuneration, if legislated for, would give shareholders the right to directly vote on a company’s executive remuneration arrangements. This reform addresses some of the principal shortcomings of the Australian “two strikes” rule in that the shareholder vote on remuneration is subject to a relatively high, 50% voting threshold and, in line with the stated purpose of the Australian and British reforms, enables direct shareholder influence over executive remuneration.

The proposed UK reforms reflect a global trend towards increased regulation of executive remuneration. Companies globally will continue to face regulatory challenges with respect to executive remuneration in the short to medium term.

AGM season

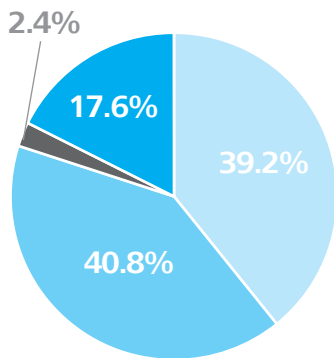
There was a strong sense among survey respondents that preparing for AGMs in 2011 was challenging, with 40.8% of survey respondents identifying the 2011 AGM season as more challenging than previous years. The comments from survey respondents indicate that the executive remuneration reforms, including the “two strikes” rule, were *“needlessly complex”*

³⁴ Australian Institute of Company Directors, ‘Executive pay laws are fundamentally flawed, say directors’, 28 January 2011.

³⁵ Australian Institute of Company Directors, ‘Executive pay laws are fundamentally flawed, say directors’, 28 January 2011.

³⁶ At the time of preparing this report, it was not certain exactly how the new arrangements would work or when they were expected to be introduced.

Your reaction to the 2011 AGM season thus far has been:



- Consistent with previous AGM seasons
- More challenging
- Less challenging
- No answer

and created *“considerable uncertainty”* in preparing for AGMs.

Companies have had to devote significant time and effort to, for example, identifying the KMPs that will be excluded from voting and documenting their holdings and those of their related parties, as well as to engaging legal advisors and remuneration consultants and liaising with proxy advisors, whose role continues to increase in significance. Despite these efforts, however, the reforms (the “two strikes” rule in particular) have been a source of significant uncertainty for boards in the lead up to AGMs.

It is expected that boards will find future AGMs no less challenging following the introduction of reforms that are likely to arise from the Federal Government’s proposed rethink of how AGMs are structured. This initiative has arisen in response to various bodies increasingly questioning whether the AGM, in its current form, is serving the best interests of companies and their stakeholders. Many view the current standard format of the AGM as an anachronism given significant declines in the attendance of shareholders at AGMs in recent years. On this point, the AICD has stated:

*“Traditionally, the AGM had provided shareholders with an opportunity to personally engage with a company’s directors. However, in recent times, the numerous legal requirements around AGMs, including the remuneration and annual reports that companies must comply with, have made the process more expensive, less shareholder friendly and in some cases even dysfunctional.”*³⁷

Our Directions 2011 Report indicated that 64% of survey respondents either agreed or strongly agreed with the proposition that the current AGM format should be revised. From the options provided to these survey respondents, the most popular choices nominated as methods of improvement were:

- online shareholder voting (nominated by 50% of survey respondents);
- direct voting facilitation (28%);
- abolition of AGMs and replacement by informal briefings (26%); and
- requiring committee chairmen to report to shareholders at the AGM (20%).

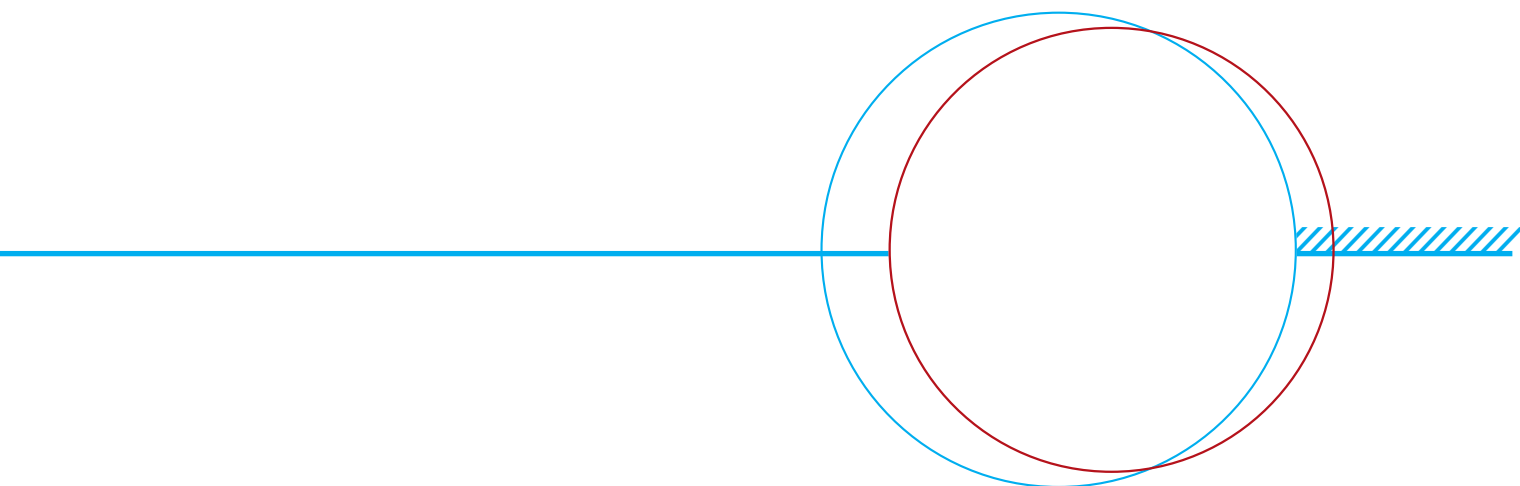
Since then, relevant proposals have included:

- separation of the deliberative and voting components of the AGM by a period of up to two weeks as, under the current model, a large proportion of votes are cast before shareholders are given the opportunity to participate in the deliberative processes of the AGM;³⁸ and
- the facilitation of remote shareholder attendance at AGMs through webcasts combined with electronic, internet-based voting.³⁹

³⁷ Australian Institute of Company Directors, ‘Government orders inquiry into AGMs’, The Boardroom Report, 14 December 2011.

³⁸ The Hon. David Bradbury (Parliamentary Secretary to the Treasurer), ‘One World – The Global View of Governance’ (Keynote address to Chartered Secretaries Australia, Sydney, 6 November 2011).

³⁹ Patrick Durkin, ‘Radical rethink called for on AGMs’, Australian Financial Review, 3 December 2011.



On 6 December 2011, the Hon. David Bradbury, Parliamentary Secretary to the Treasurer, announced that he had asked CAMAC *“to examine the future of the AGM, with particular regard to the impact of technological innovations and globalisation on methods of information distribution and the way in which shareholders interact with companies,”* in consideration of the *“importance of shareholder engagement”* and the fact that *“[t]he AGM plays a vital role in providing information to shareholders and holding directors accountable.”*⁴⁰

With the Federal Government’s principal objective being to promote a more informed shareholder vote and make AGMs more relevant for investors, the terms of reference for the inquiry are:

- the future of the AGM in Australia, including how documents and meeting forms should change to meet the needs of shareholders in the future;
- the risks and opportunities presented by advancements in technology, in the context of maintaining the ongoing relevance and efficacy of the AGM; and
- the challenges posed to the structure of the AGM by globalisation, including potential increases in international share-ownership and dual-listing.⁴¹

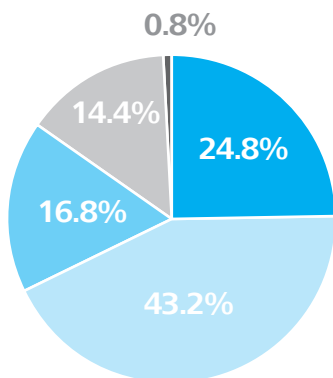
While the current AGM format is widely viewed as largely ceremonial and several proposals have been proffered to improve the format of AGMs, the AGM remains the only opportunity for shareholders to directly and personally confront those running the companies in which they hold shares. We regard electronic attendance and voting as a virtually inevitable innovation and expect the facilitation of these changes (and more generally promotion of the flexibility and accessibility of AGMs) to be a principal focus of any future reforms in this area. However, an ideal and feasible replacement for the AGM is unlikely to arise. We expect that any change in the structure and format of AGMs arising from the Federal Government’s review is therefore unlikely to be radical.

⁴⁰ The Hon. David Bradbury (Parliamentary Secretary to the Treasurer), Media Release: Inquiry into the future of the AGM, 6 December 2011.

⁴¹ The Hon. David Bradbury (Parliamentary Secretary to the Treasurer), Letter to Ms Joanne Rees, Convenor, Corporations and Markets Advisory Committee, 5 December 2011.

SIGNIFICANT REFORM: OHS, IR AND TAX

Have any of the organisations of which you are a director considered the impact of the new national harmonised OHS laws which are expected to commence in most States and Territories on 1 January 2012?



- Considered in great deal at board level
- Given some consideration at board level
- We are aware of the new laws, but have not taken any action
- No formal consideration at board level
- No opinion

Harmonisation of occupational health and safety laws

Road to harmonisation of the occupational health and safety laws

Harmonisation of Australia's work health and safety laws has been on the reform agenda for several years. Following an independent review of Australia's work health and safety laws, a proposed model bill was released for public comment and, following review of the submissions, a model *Work Health and Safety Bill* was released and endorsed by the Workplace Relations Ministers' Council. This model bill forms the basis to nationalise occupational health and safety laws.

The harmonised laws were to have come into effect across the country on 1 January 2012. However, with various stakeholders seeking to preserve varied interests, the result of the "harmonisation" will be as close to harmony as the political process will allow. The current results of this process are set out in the table on the next page.

Harmonisation of the OHS laws are a focus for boards

The harmonised laws will result, or have already resulted, in many changes needing to be implemented by companies in order to ensure compliance. The key changes include:

- positive duties of due diligence being placed on officers (including directors) and senior managers;
- the primary duty for safety shifting to a "person conducting a business or undertaking" instead of an "employer" (a concept which imposes the duty to take all reasonably practicable steps for safety on a much broader group of people in recognition of the changed nature of business and contractual arrangements);
- introducing in all states duties of consultation with workers about matters that will directly

impact on their safety, including explaining the reasons for any policies or decisions affecting their safety;

- a significant increase in maximum penalties – up to \$3 million for a corporation and \$600,000 or imprisonment for an officer (per breach) (although penalties will not increase to this level in Western Australia);
- in the designated mining states, requiring a mining work health and safety management plan - that is a plan which identifies key risks and how they will be managed;
- changes to the rules for the appointment of a principal contractor for construction works; and
- increased rights for health and safety representatives.

The survey results showed that there is a [general level of awareness among directors of the significance of the changes](#) that have recently or will soon come into effect. More than two-thirds of directors surveyed responded that their organisations have given board consideration to the new laws, being either in great detail (24.8%) or some consideration (43.2%). Given the extent of the changes, and the new duties for officers in particular, it is perhaps concerning that more than 32% of survey respondents indicated that their organisations were either aware of the new laws but had not taken any action or had not given these new duties any consideration.

Australian companies are making changes to their safety practices

The process to 'harmonise' safety laws nationally provides a significant opportunity for a refresh and improvement in the safety of Australian workplaces. Legislative change with bigger penalties should drive improved behaviour and safety outcomes. However, at least as importantly, the process of ensuring legal compliance will drive workplaces to look closely at what they do and how they do it.

The survey results suggest that [Australian corporations are making changes to their](#)



workplace safety management systems (including reporting on safety issues) as a result of the new OHS laws. Approximately 50% of the survey respondents answered that they had either already implemented changes (19.2%) or were in the process of implementing changes (31.2%). In addition to this, a further 25.6% of survey respondents said that their organisations were currently reviewing their practices, so it is expected that even more organisations will be implementing changes in the near future. 16.8% of survey respondents said that there was no intention at their organisations to make any changes and only 6.4% were not sure of the position.

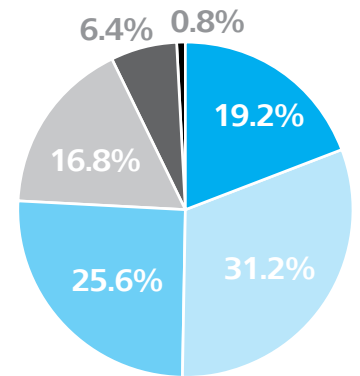
Reporting to boards needs to improve given the new due diligence obligation on directors

Officers (including directors) are required to exercise due diligence to ensure compliance with obligations under the updated occupational health and safety legislation.⁴²

The new due diligence obligation means:

- officers must be familiar with OHS obligations and applicable codes of practice. Organisations must ensure their officers are briefed on current systems and the risks of each site;

Have any of the organisations of which you are a director changed their workplace safety management systems?



- Already implemented changes
- In the process of implementing changes
- Currently reviewing our practices
- Not intending to make any changes
- Not sure
- No answer

| Jurisdiction | Progress to implementing nationalised laws |
|------------------------------|--|
| Commonwealth | Implemented 1 January 2012. |
| Australian Capital Territory | Implemented 1 January 2012. Will retain current asbestos and hazardous chemicals regulations. |
| New South Wales | Implemented 1 January 2012. Retained union rights of prosecution. Will maintain separate mining safety legislation. |
| Northern Territory | Implemented 1 January 2012. |
| Queensland | Implemented 1 January 2012. Will retain separate mining safety legislation. |
| South Australia | Debate on draft legislation deferred until February 2012. |
| Tasmania | Due to commence 1 January 2013. |
| Victoria | Unlikely until 1 January 2013. |
| Western Australia | Unlikely until 1 January 2013 and will not adopt provisions relating to penalty levels, union rights of entry, reverse onus of proof in discrimination, and an HSR's capacity to direct the cessation of work. Will retain separate legislation for mining and dangerous goods safety. |

⁴² Officers include directors, persons who make or participate in making decisions that affect the whole of a substantial part of the business and persons who have the capacity to affect significantly the company's financial standing.

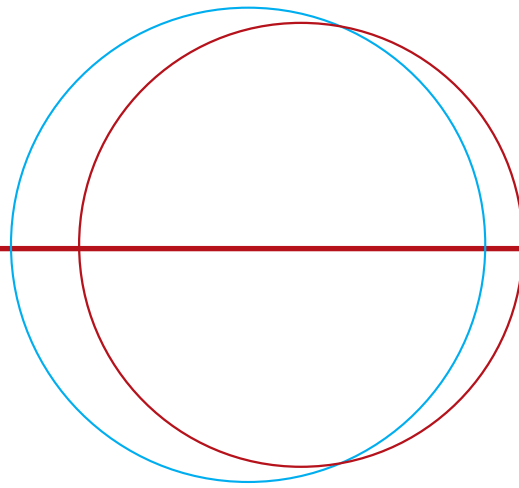
“...one thing for sure is that business is looking for change in this area and companies are increasingly developing strategies to try and avoid the impact of damaging industrial action.”

- officers must have a robust and comprehensive safety management system that complies with industry standards and drives managers to:
 - monitor and verify compliance; and
 - review systems to ensure that they comply with the requirements of the new laws – the differences in duties need to be clearly identified and addressed and safety management systems amended accordingly;
- it is no defence to say the individual did their best given skills, ability and resources – there is a need to skill up and have a real understanding of safety risks in the business;
- officers need to concentrate on “like risks”, risks of a similar nature and category to those present in the business, and take steps to manage them;
- officers need to ensure incidents are properly investigated and corrective action taken;
- officers do not need to be involved in the day-to-day operations of the business, but safety should be on the agenda at management and board meetings:
 - focusing on risk and risk management measures rather than performance statistics and ensuring that health and safety issues are addressed in a timely manner; and
 - verifying that risk management steps are being implemented; and
- positive steps need to be taken by officers to ensure systems are in place and complied with and to verify that they are working.

In order to move towards compliance with the due diligence obligation, the survey shows that [significant changes must still be made in relation to the reporting to the board on health and safety matters in almost 40% of the organisations of those directors who responded to the survey.](#) Alarming, 12% of boards do not receive reports on workplace safety issues at all and 27.7% limit safety reporting to safety performance statistics. Positively, 59.2% of those surveyed stated that their boards receive comprehensive and regular reports identifying key safety risks and how these are being controlled.

Calls for industrial relations reform

Business is calling for certainty on the industrial relations front, arguing that the economy is too fragile to withstand industrial action and strikes like those that grounded the Qantas fleet late last year. These disputes have been attributed to demands unions are allowed to press under the expanded good faith bargaining rules, which typically extend beyond wages and conditions. This sentiment is seen in the action taken by the Business Council of Australia (BCA) to set up a task force to assess and report on the *Fair Work Act* in 2012 to coincide with the government’s review of that Act. BCA president Tony Shepherd has said that the BCA is worried that the Act restricts the capability of management to respond in a competitive global market. There are growing calls from the business community for increased flexibility in the industrial relations system and a greater focus on improving efficiency and lifting productivity outcomes.



Carbon tax

After a considerable period of speculation, 2012 will see the introduction of a carbon pricing mechanism (CPM) in Australia. The announcement of the scheme in July 2011 followed months of intense negotiations between the Labor government, the Greens and two key lower-house Independents. The deal struck in mid-2011 ensured the passage of the enacting legislation through Parliament late in the spring term of last year.

Survey respondents have devoted significant attention to carbon policy in 2011 and the introduction of the CPM will have considerable implications for Australian businesses and directors in 2012.

Overview of the CPM

The CPM is based on an emissions trading scheme and will commence on 1 July 2012. Under the scheme, liable entities must report on their emissions and surrender to the government a carbon unit for each tonne of carbon pollution they produce. In most cases, liability will attach

to facilities generating emissions in excess of 25,000 tonnes of CO₂-e per year. It is estimated that around 500 Australian businesses will face direct liability.

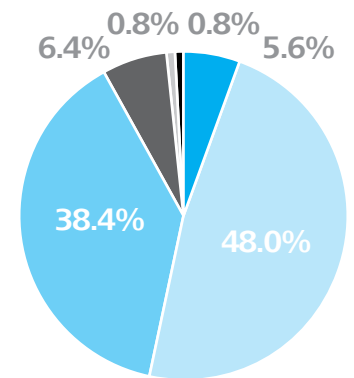
For the first three years the permit price will be fixed at \$23 per tonne of CO₂-e (increasing at 2.5% per annum) establishing an effective carbon tax. Following this initial phase the CPM will transition into a cap-and-trade scheme where the total volume of units are capped, units are tradeable between businesses and the price will fluctuate with the market. A price ceiling and a price floor will operate during the first three years of this flexible price phase to prevent large fluctuations.

A number of compensation programs have been included to assist heavily affected industries. For example, the emissions intensive trade exposed (EITE) industries will receive assistance at a rate of 94.5%, with second-tier assistance provided at 66% (rates reducing by 1.3% per annum). This program will provide \$9.2 billion in assistance over 2011-12 to 2014-15. In addition, the electricity sector will receive compensation for strongly affected coal-fired power generators.

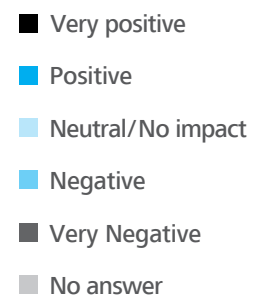
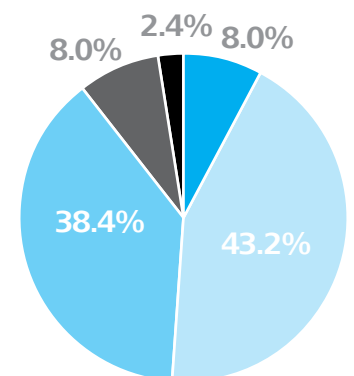
Scope of Carbon Pricing Mechanism coverage

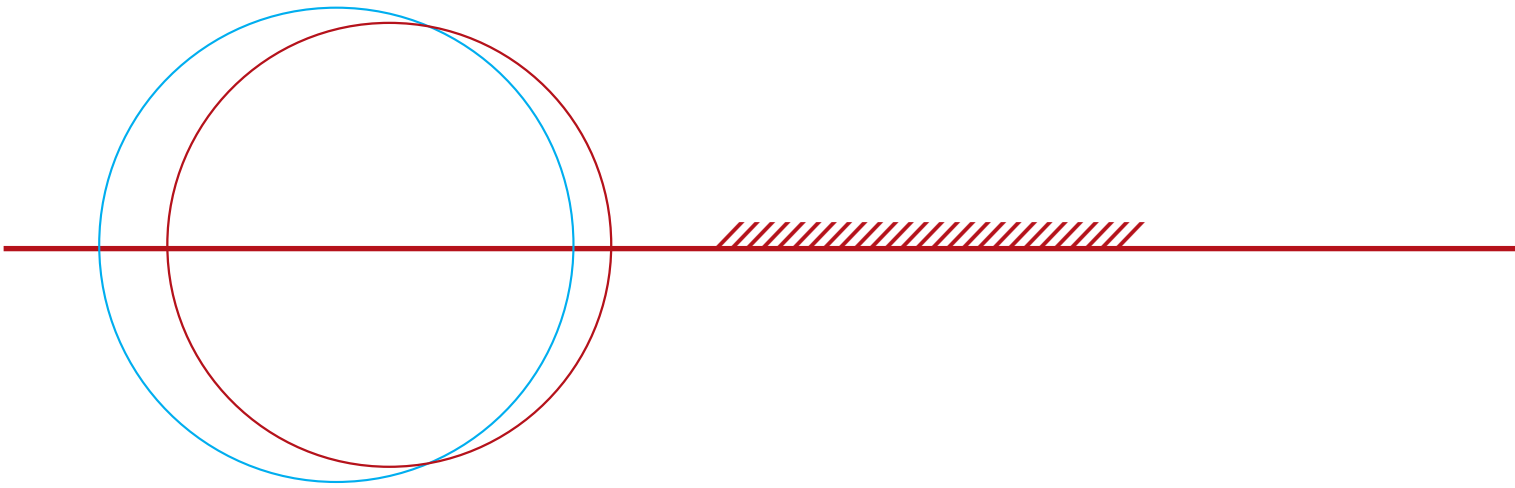
| Coverage will extend over: | Notable exclusions include: |
|---|--|
| <ul style="list-style-type: none"> Industrial processes sector Stationary energy sector Rail, domestic aviation and shipping components of the transport sector Fugitive emissions Emissions from non-legacy waste | <ul style="list-style-type: none"> Agricultural sector Emissions from most on-road vehicles (Note: it is expected that heavy on-road vehicles will be included from 2014) Emissions from decommissioned coal mines Emissions of certain synthetic greenhouse gases Emissions from biodiesel, ethanol and renewable diesel |

What overall impact do you think the carbon tax will have on the organisations of which you are director - On implementation?



- In the medium term?





Reaction to CPM

The survey reflects that the introduction of a carbon scheme has attracted significant attention in 2011. As noted earlier in this report, when survey respondents were asked to rank their top three regulatory reform issues over the last 12 months, carbon emission policies and the CPM had the most number one rankings and was the second highest issue cited by survey respondents overall.

The survey results tell a varied story of how directors are dealing with the introduction of the CPM and indicate that directors have significant reservations about the CPM. When asked what overall impact the carbon scheme will have in the medium term, 10.4% of survey respondents said the impact would be “positive” or “very positive”, 43.2% said “neutral”, 38.4% said “negative” and 8% said “very negative”. As shown in the pie charts on page 23, the percentage splits were almost identical between the anticipated impact of the carbon scheme on implementation and in the medium term. This shows that survey respondents expect the impact of the scheme to mostly be consistent in the short and medium term and in part may suggest an expectation that carbon unit prices will not rise significantly when the CPM transitions into a cap-and-trade scheme.

What is clear from the results is that a large number of survey respondents do not expect to successfully pass-through all associated costs of the CPM to their end customers given more than 46% expect a negative or very negative impact on their organisation in the medium term.

However, a significant proportion of survey respondents expect no impact from the CPM and in some ways this result defies the significant amount of media attention the issue has received. As pass-through mechanisms are established by companies and expanded, it would be expected that the number of unaffected companies will increase further unless those companies have misjudged the impact on them and their ability to pass through those costs.

When asked whether they prefer that the carbon scheme be retained or repealed if there is a change of government, a majority of survey respondents (51.2%) preferred outright repeal of the scheme. 27.2% of survey respondents preferred retention of the scheme and 21.6% selected “neutral”. A further break-down of the results shows that more than three quarters of survey respondents who expect to be negatively impacted in the medium term would prefer the carbon scheme to be repealed. On one hand this is not surprising. However, the argument has been made that business would prefer the certainty of a legislated carbon scheme over regulatory uncertainty which has so far hindered the investments and adjustments required to decarbonise the economy. In short, business would prefer to know the rules, even if they have an adverse impact. The survey results do not support this - the majority of survey respondents would prefer repeal despite this giving rise to ongoing uncertainty as to how Australia will approach carbon reductions.

Liability of directors and officers

Directors and officers should be aware of their exposure to personal liability under the CPM. Personal liability can arise if a company fails to comply with the scheme and a director or officer fails to take reasonable steps to prevent the contravention. Introducing carbon compliance and training strategies would serve not only to minimise the risk of any breach, but would also provide a defence if any civil case was alleged.

Minerals Resource Rent Tax (MRRT)

As was noted earlier, directors have not been as focused on the MRRT as on the carbon tax, with just 5.6% of those surveyed ranking it as the top regulatory reform issue that has received their attention over the past year. This is likely to include the relevant MRRT taxpayers and highlights the significant impact of the MRRT to those taxpayers.

The MRRT is a new tax regime which is intended to apply to certain Australian iron ore and coal mining projects from 1 July 2012. At the time of writing this report, the legislation to implement this tax regime is currently before the Senate. Under the MRRT regime, relevant mining entities will be assessed, in addition to ordinary income tax and the payment of existing State and Territory royalties, on their "MRRT profits" which are based on the value of minerals extracted. The effective tax rate is to be 22.5% on the MRRT profits, with payments of MRRT deductible for income tax purposes, and a credit mechanism for payments of State and Territory royalties, which operates to provide an effective tax offset for these payments. Deductions for certain expenditures will also be allowed.

The MRRT will require boards, senior executives and tax advisors to dedicate time and resources to interpreting and complying with the new requirements and to manage the related recording, monitoring and reporting obligations. ASIC also announced in December 2011 that it will focus on MRRT compliance in 31 December 2011 financial reports. In its announcement, ASIC noted that it appeared the MRRT would need to be accounted for as an income tax and that entities impacted by the tax may need to re-measure their deferred tax balances. Careful attention will therefore need to be paid by these taxpayers to the impact of the MRRT on deferred tax balances, as well as to whether any disclosure is required of expected future impacts on deferred tax balances.

Comments that were made by survey respondents included highlighting the uncertainty related to the increasing government regulation. This was reflected in the finding that approximately 36% of those surveyed believed that the MRRT would have some form of negative impact on the dealings between the organisations of which they were a director and entities that will be subject to the MRRT.

Further, 37.6% of the directors surveyed did not consider that there would be any impact on the dealings between the organisations of which they were a director and entities that will be subject to the MRRT. Again, this reflects the narrow focus of the MRRT regime (which is predicted to apply to approximately 350 mining entities only).

DOMESTIC BUSINESS AND CROSS BORDER INVESTMENT ISSUES

The changing state of the Australian and global economies over the past 12 months provided further challenges for Australian directors considering domestic and cross border investment.

Within Australia, the large volume of new legislation, increasing responsibilities placed on directors and an environment of political instability, has made it difficult for directors to act with certainty. Added to these circumstances was a high Australian dollar, a multi speed economy and difficulties obtaining and utilising capital.

Outside of Australia, consideration of issues in Europe and the United States and opportunities in Asia also required directors to reassess their approach to foreign investment. While a soaring Australian dollar provided significant opportunities for Australian companies to invest in foreign assets, the volatility surrounding these foreign markets, as well as uncertainty regarding sources of funding, presented a unique set of challenges which required careful consideration of the macro assumptions supporting strategic decisions.

Top challenges of doing business in Australia

The Australian economy has proven resilient in recent years, however it is not without challenges. The top three challenges of doing business in Australia noted by directors were (i) the multi speed economy; (ii) political instability; and (iii) capital management issues.

A constructive response to addressing these challenges may be for directors to work harder to engage with the government and the opposition to determine strategies to address key concerns.

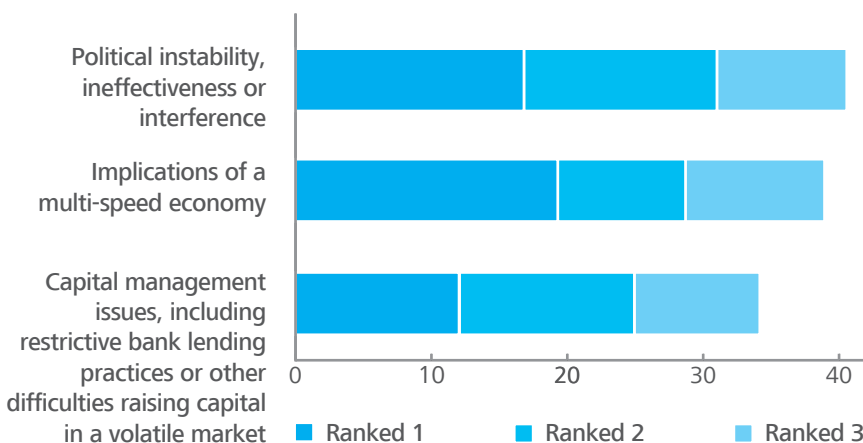
Multi speed economy

The current resources boom in Australia has prompted much discussion of a multi speed economy. Many argue [that the gains of the rapidly growing economy spurred by our mining industry are flowing predominantly to our resources grounded states](#). Because of the inability of the Australian governmental and fiscal system to re-distribute these gains selectively, the boom figures are attributed to the country as a whole, as are the mechanisms triggered, such as higher inflation and interest rates. Parts of the country, which may not be experiencing a growing economy or increased income, are impacted by these conditions as if they in fact are.

The focus on the multi speed economy by the directors surveyed reflects the high level of concern regarding this issue across a range of industries.

However, as highlighted by a number of commentators, although there may be down sides to a multi speed economy, the alternative of having one, slow speed economy would be a far worse outcome.

The top three challenges that currently arise in the context of doing business in Australia



Political instability, ineffectiveness and interference

The second key challenge nominated by directors was 'political instability, ineffectiveness or interference'. With 2011 seeing much discussion around major regulatory change, including the introduction of the carbon and mining taxes, and opposing positions and internal conflict from the major political parties, [directors have faced political instability in an already uncertain environment](#). The issue is augmented by Australia's minority government, as Labor must secure the support of the Greens and Independents in order to make key decisions.

A key concern is the possibility that a number of policy changes implemented by the Gillard government, including the new taxes, could be reversed if there is a change of government. A potential by-product of this uncertainty is the inherent deterrent it provides to major investment into the Australian economy.

Capital management issues

A close third most concerning challenge identified was capital management issues, including restrictive bank lending practices and other difficulties raising capital in a volatile market.

One of the key issues facing directors in the current environment is how to determine the best use of their company's cash. If a company has cash on its balance sheet and is reluctant to invest or undertake mergers and acquisitions activity, mechanisms to distribute that cash to shareholders, for example buy-backs, may need to be considered.

The financial challenges faced in many regions, including much of Europe, have meant that [global banks are less willing than previously to provide financing](#). This is driving many companies to seek alternative sources of funding. One example of this in 2011 was the issuance of covered bonds by Australian banks. This followed a decision by the Federal Government in 2010 to enable Australian authorised deposit-taking institutions to issue covered bonds. As covered

bonds offer maximum investor protection, they have been popular in the context of Europe's financial crisis. Indeed, covered bond reform is an example of recent regulation that has provided tangible benefits to Australian companies.

What is a covered bond?

A covered bond is a security that is given recourse to a pool of assets in the event that the originator becomes insolvent. Covered bonds are a growing source of funding for banks diversifying from unsecured debt.

Another area of development in 2011 is dividend reform. In December 2011, the Federal Government released a discussion paper on proposed reforms to the Corporations Act provisions relating to payment of dividends. The current provisions, which are based on a test of balance sheet solvency, were introduced by the government in 2010, and replaced a long standing position of being able to pay dividends out of profits. This change has been much criticised and a further review is welcome.

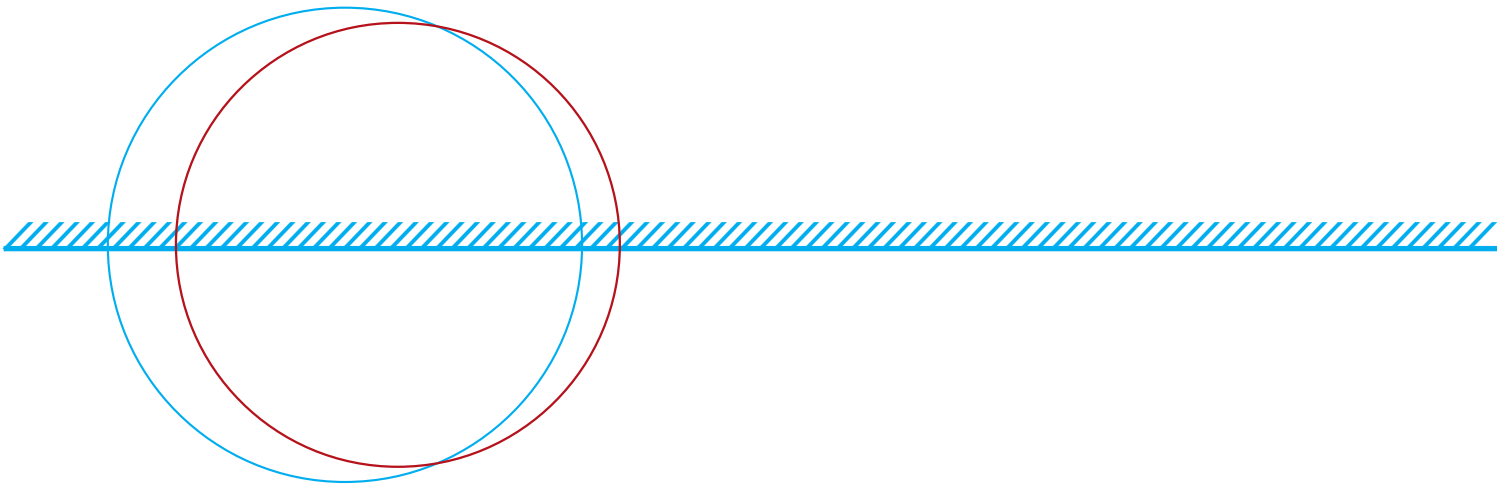
Cross border investment

Over the past year there has been a renewed focus on cross border transactions, and, in particular, the impact of international economies on the Australian market.

[Directors have had to balance the risk of potential collapses in European markets against some thriving economies in the Asian region, where governments are seeking to restrain the pace of economic growth.](#)

To add further to this backdrop, there has been much speculation about the state of the United States economy. As this region remains by far the largest economy in the world, directors of some companies have been forced to reflect on their existing investment practices and reliance on US exports.⁴³

⁴³ "2011 Benchmark Report: Australia A Wealth of Opportunities", Australian Trade Commission.



| Jurisdictions in which cross border investments were made | % of survey respondents |
|---|-------------------------|
| European community | 15.2% |
| USA | 14.3% |
| China | 11.7% |
| Asia Pacific (ex-China, Japan, Indonesia) | 10.4% |
| Indonesia | 5.7% |
| India | 3.9% |
| Africa | 3.9% |
| Other | 3.9% |
| Middle East | 3.5% |
| Japan | 3.0% |
| Brazil | 1.7% |
| Russia | 1.3% |

According to Austrade statistics, China is the largest source of Australia’s merchandise imports, overtaking the US in 2005-6, with a total value of A\$41.1 billion in 2010-11.⁴⁴ In line with these figures, of the directors surveyed whose organisations had been involved in cross border investment, the majority of this investment was into the Asian region, with 11.7% to China, 5.7% to Indonesia, 3% to Japan and 10.4% to Asia Pacific excluding China, Indonesia and Japan.

The European region maintained a reasonably high level of investment, with 15.2% of directors identifying that their companies had

invested in Europe in the past year, despite the European debt crisis.

14.3% of directors whose organisations had been involved in cross border investment stated that their organisations had invested into the US in the past year. According to ABS data, as at 31 December 2010, the US was the leading source of Australian investment, receiving 35% of Australia’s outbound investment.⁴⁵ Further, in 2011, the US had by far the largest economy in the world, with over 20% of the total world nominal GDP, as compared with China, the next largest economy with a share of 9.5%.⁴⁶

It will be interesting to revisit these figures in future years to assess the impact of the broader economic crises. As noted by the Lowy Institute for International Policy in August 2010, *“40% of Australians expect the United States’ relative position as an economic power to be weaker in the next decade...”*⁴⁷

Top challenges of cross border investment

When asked what the top challenges were in the context of cross border investment, unsurprisingly foreign exchange rates were nominated as the main cause of concern.

The strength of the Australia dollar over the past 12 months has proven a major concern for Australian companies who have traditionally succeeded on exports, or are facing increased pressure from cheaper imports. A number of these companies have noted the high Australian dollar as one of the main reasons behind their losses over the past year.

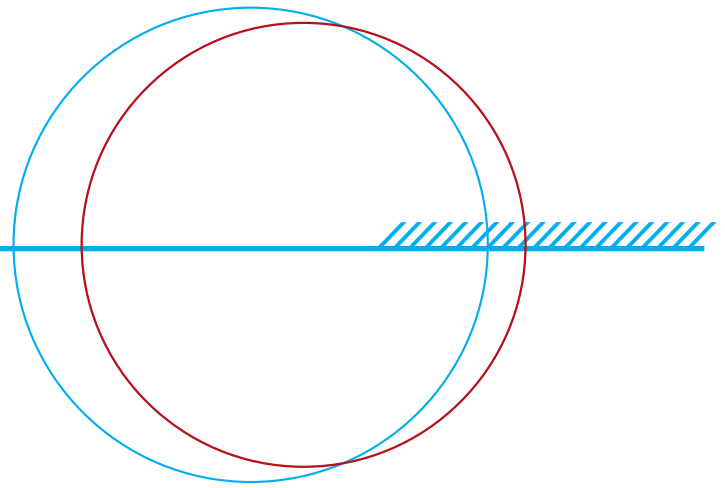
The second challenge noted by directors in the context of cross border investment was the European sovereign debt crises. Europe’s financial issues remain a key concern for directors, particularly as the impact on key

⁴⁵ Note this figure is based on dollar spend rather than percentage of responses.

⁴⁶ “2011 Benchmark Report: Australia A Wealth of Opportunities”, Australian Trade Commission.

⁴⁷ “Sweet and sour: Australian public attitudes towards China”, Lowy Institute for International Policy, August 2010.

⁴⁴ “2011 Benchmark Report: Australia A Wealth of Opportunities”, Australian Trade Commission.



European investors is starting to constrain developing markets such as China.

Challenges with investments in China

Increased investment in Asia, and particularly China, has presented new challenges for Australian directors. Major structural changes to China's growth model are anticipated over the next few years, and are likely to produce a new generation of Chinese companies which are better able to compete, positioned higher up the value chain and determined to operate on a global basis. As a result, Australian companies are keen to pursue opportunities in this rapidly expanding region, and to try and align their own strategies with those opportunities presented.

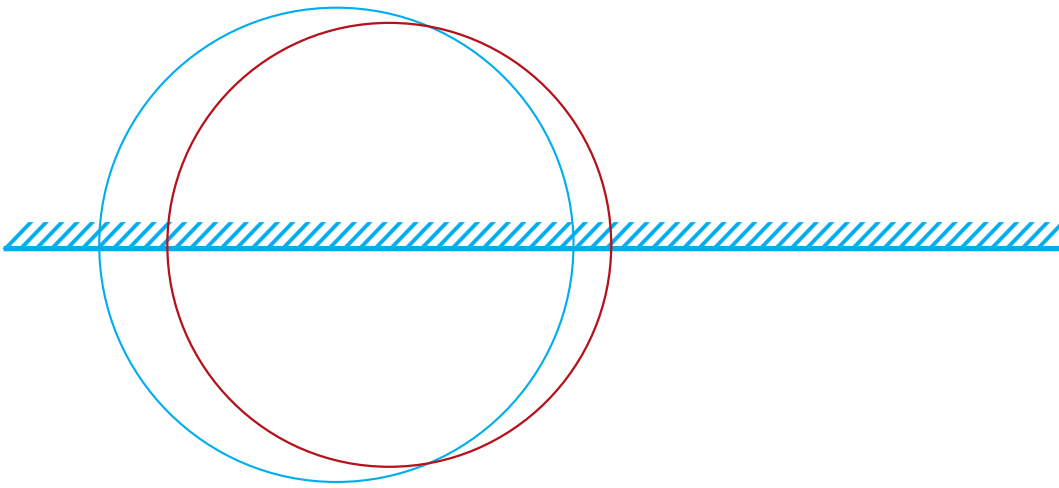
However, the need to adapt to a vastly different regulatory system has been a challenge for many doing business in China. The top challenges of investing in China nominated by directors surveyed related to obtaining relevant licences and approvals, and unclear laws and regulations.

The Chinese economy and regulatory system has matured considerably over the last decade. Many new laws and regulations have been implemented and now underpin a structurally sound legal and regulatory system. However local enforcement often remains a challenge. Transparent, fair and consistent implementation of regulations is necessary not only to ensure that efficient, competitive and law-abiding firms succeed, but also to boost the confidence of foreign investors looking to make investments in China. Progress has been made in recent times towards free and open markets but our survey indicates that, for many, more certainty is required.

Snapshot: China's legal system

- The Chinese legal system is a relatively new system, established predominately under the 1982 PRC Constitution.
- Over the last 30 years the legal system has been built from the ground up, creating protection of a whole range of rights for its citizens. But there are still major challenges.
- The system draws influence from the Soviet legal system and the civil legal systems of various continental European nations, but also incorporates some principles of the common law, e.g. contract law and the newly introduced torts liability law and competition law.
- The courts are not independent of the government. The enforcement of laws, particularly in relation to human and political rights, are often distorted for political reasons.
- However, China's leaders have made it clear that they wish to strengthen the rule of law, reduce government interference in economic activities, and improve the enforcement of intellectual property rights. At a commercial level, there is now much greater certainty of legal outcomes than existed even recently, but more remains to be done.

*"Australia and our government and businesses must **embrace China** as a long-term business partner or risk becoming a "stepping-stone" for the China revival"*



Snapshot: China's foreign investment policy

- China's policy is aimed at attracting foreign investment. Its objective is economic development through overseas participation.
- China's Foreign Investment Catalogue divides sectors into encouraged, restricted, prohibited and permitted, with unlisted sectors treated as "permitted" sectors.
- Encouraged sectors are those where foreign investment is eligible for tax and other investment incentives. The focus is on high-end manufacturing, new technologies, advanced services, new energy, energy saving and environmentally friendly industries, consistent with the state's strategic priorities outlined in its 12th Five Year Plan (2011-2015).
- Restricted sectors are those where foreign investment is subject to a higher level of government scrutiny and imposes a ceiling on foreign ownership and limitations on choice of corporate forms (e.g. joint ventures and minority stakes preferred).
- The prohibited category bars any foreign investment in sectors such as telecommunications and publishing.
- Despite some recent favourable developments, there remain many barriers to foreign entry and participation.

"Everyone needs a China strategy...but for some the right strategy is 'don't go'."

UK bribery laws

Another key challenge faced by directors in relation to cross border investments is understanding the implications of foreign legal developments. For example, new bribery laws were recently introduced in the UK. These contain provisions which make it easier to hold corporations accountable for the conduct of their employees and agents. Importantly for Australian corporations, [the laws have far-reaching extra-territorial application and apply to foreign entities which conduct business in the UK](#). When asked whether their organisations had considered the impact of these new laws, just over 26% of respondents had considered the new laws at board level to some degree, while more than half the survey respondents indicated that no formal consideration had been given at board level, and a further 17.6% were aware of the new laws but had not taken any action. Given the harsh penalties which can be imposed under this and similar Acts (such as the *US Foreign Corrupt Practices Act*) and Australia's own anti-corruption laws, we expect this to be an increasing level of board focus in the coming 12 months.

Proposed FIRB changes

Concern regarding foreign investment in the rural land and agribusiness sector has been a key government focus in 2011-2012. A Senate Committee is reviewing the national interest test which is applied by the Federal Treasurer, with a focus on acquisitions of rural land, and is expected to make a number of recommendations to the Senate in March 2012. [It is anticipated that the Committee will recommend significantly lowering the value threshold for which Foreign Investment Review Board \(FIRB\) approval is required for the acquisition of rural land \(currently A\\$244 million of land\)](#). Alternatively, a threshold based on the area may be introduced. The definition of "rural land" may also be changed. Many more FIRB notifications would be required as a result of these possible reforms.



OUTLOOK

Global economic issues impacting Australia

The ongoing fallout from the global financial crisis, particularly the European sovereign debt crisis, had a significant escalating impact on business and commercial activity in Australia throughout 2011. In 2012, capital management remains a key concern, given that sources of funding usually considered reliable and predictable are either restricted or not available. This has had the effect of limiting borrowing capacity and liquidity, and increasing borrowing costs, and resulted in increased activity in the hybrid and corporate bond markets. These factors have had a negative effect on investment and market sentiment which is expected to continue for at least the near term.

The challenging Australian business environment

A lack of confidence and restrained business activity, particularly in the retail, financial services, property/construction, manufacturing and other non-resources based sectors, persists in 2012.

Almost half of the survey respondents reported that the level of M&A activity in 2011 was less than they had expected. However, over 63% of survey respondents expect that organisations of which they are a director will be involved in M&A activity in 2012 (a similar percentage result to last year's survey).

Buoyed by our proximity to Asia and our abundant natural resources, Australia's economy remains comparatively strong, and our financial system has proven relatively robust. Australia therefore remains attractive for inbound investment, particularly in resources and agriculture. Furthermore, Australian investors continue to have a comparative advantage for investing overseas, aided by the strong \$A. The Thomson Reuters M&A league tables for 2011 showed that M&A activity in

Australia increased 11.9% to US\$173 billion, from US\$154.7 billion in 2010, despite a slowdown in the latter half of 2011.

While the short-term global and domestic outlook will be largely driven by sentiment, Australia's current relative economic strength is expected to continue into the medium term. Activity is expected to be driven by a broader reshaping of the structure of, and reallocation of resources and capacity within, the Australian economy. This will fuel strategic acquisitions and divestments, and investment and restructuring, to ensure that Australian business and industry remains globally competitive.

Political environment creates uncertainty

Directors and boards, and the Australian business community, continues to operate in a relatively unpredictable, and potentially unstable, political environment. Uncertainty regarding the direction and expected outcomes of reform proposals is expected to remain an ongoing source of frustration for companies and boards. In particular, it is expected that industrial relations reform will be a hot topic in 2012. The possibility of a change in Prime Minister and/or the Federal Government is also contributing to an unpredictable and populist regulatory reform agenda.

In this environment, we expect that the regulatory compliance burdens imposed on directors and boards are likely to escalate in 2012. It will therefore be important for directors, boards and the business community to actively engage with government on proposed reforms to seek to ensure that their views are heard, and that new laws and regulation will contribute to improved productivity, wealth creation and appropriate management and governance practices.

KEY CHALLENGES IN 2012?

*"a big challenge [is] maintaining **confidence in the ability to do business** in Australia heightened by unstable government, federal and state"*

*"Government **hostility** to business, fuelling community hostility..."*

*"Directors need to be **freed from formulaic compliance burdens** in order to focus on strategy and pending structural change to Australian business"*

*"Australia needs to **get more serious about reducing red tape** and encouraging the exercise of business judgement"*

*"The role of director of listed companies is becoming **increasingly unattractive** as the level of activism among shareholders rises"*

*"The Government's review of the Fair Work Act seems to offer **little promise of substantive reform** and employers will need to wait to see if the coalition is prepared to put IR reform back on the political agenda"*

*"Big issue remains **retention of executive talent**, especially compared to private equity, given challenge to executive pay arrangements in public companies"*



BACKGROUND TO THE REPORT

The report

This report examines key issues and challenges facing Australian boards and directors in 2012. It reflects our experience and expertise advising on mergers and acquisitions and regulation, and reports on directors' responses to our survey.

The Mallesons team that worked on this report and the survey included Meredith Paynter, Greg Golding, Nicola Charlston, Sarah Turner, Tim Downing, Vanessa Coffey, Adrienne Trumbull, Mark Srour and members of the Business Development and Marketing team, with the support of a number of other colleagues including Andrew Gray, Sarah Harrison, Vishal Ahuja, David Olsson, Philip Willox, Scott Heezen, David Eliakim, Peta Stevenson, Darren McClafferty, Kate Johnson, Jonathan Mitchell, Anthony Sciuto and Ari Rosenbaum.

The survey

The report captures the responses of directors representing more than 300 organisations across a wide range of industries to an online survey carried out in November 2011.

Survey respondents were asked to respond to a number of multiple choice and free-form questions around six key themes: the impact of continued market uncertainty, cross border investment, regulation, executive remuneration, directors' duties and liability and the M&A outlook for 2012.

This survey was conducted by Mallesons to gain a better understanding of the issues and challenges facing Australian directors today.

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About Mallesons

Mallesons Stephen Jaques is a leading law firm in the Asian region. For over 180 years, the world's leading organisations have entrusted us to advise on their most critical legal challenges. We couple high performance with intellectual rigour to provide legal solutions that are innovative and often ground breaking. This approach enables us to help our clients adapt to the increasingly challenging markets in which they operate - no matter where they are in the world - and ensures that they have a voice to help them shape the legal and regulatory landscape.

Mallesons has one of Asia Pacific's leading mergers and acquisitions and corporate advisory practices. We have advised on many of the region's largest and most complex transactions, and our experience is recognised by leading independent industry commentators such as Asia Pacific Legal 500, IFLR 1000 and Chambers Global.

On 1 March 2012, Mallesons will combine with China's leading law firm King & Wood, creating a new regional powerhouse legal brand - King & Wood Mallesons.

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