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Boards and Directors

In Brief | Have the increasingly onerous demands on directors resulted in weaker not stronger corporate governance? The Australian reports that in a recent speech for the Australian Centre for Corporate Public Affairs, AMP Chair David Murray, questioned whether the imposition of, and trend towards, imposing more stringent requirements on boards has led to management responsibilities being 'delegated up' to boards, preventing them from taking a broader view of issues facing a company.

[Source: [registration required] The Australian 29/06/2018]

Diversity

Japan | The revised Japanese Corporate Governance Code includes measures to increase diversity on Japanese boards, but Bloomberg suggests that the focus on improving representation of 'women and foreigners' is only part of the answer to addressing the lack of innovation in Japanese firms.

Following consultation (see: Governance News 09/04/2018) The Tokyo Stock Exchange and the Financial Services Agency released a revised Corporate Governance Code on 1 June. Among the changes incorporated into the code were measures to improve board diversity ('including gender diversity and international experience') as well as to ensure boards have necessary skills, experience and knowledge (in particular, sufficient financial and accounting knowledge).

Commenting on this, Bloomberg writes that the need to increase the diversity of ideas, perspectives and experience on Japanese boards is necessary to address the lack of innovation that is hampering Japanese companies from competing successfully in a global market.

The article goes on to comment that the focus on increasing board representation of 'women and foreigners' is understandable given the very low representation of both groups. According to the article, women comprise 10.6% of director positions in the top 2000 Japanese companies listed on the Tokyo Stock Exchange and represent just over 1% of directors.

Having said this, Bloomberg questions the 'focus' on appointing women and non-Japanese directors to address the broader issue of the lack of innovation, arguing that though appointing more women and more non-Japanese directors will improve diversity, 'what is necessary is diversity in sector expertise, thinking styles and geographical experience'.

[Sources: Japan's Corporate Governance Code (Revised June 2018) [English]; Bloomberg 26/06/2018]

In Brief | Hiring women isn't enough without support and a change in mindset: Despite efforts by the agencies in question to bolster female representation, a report issued by the US inspector general has found women in US law enforcement agencies remain underrepresented in leadership roles, are promoted less often than their male colleagues, and are unlikely to report discrimination because they distrust the process The WSJ reports.

[Source: [registration required] The WSJ 26/06/2018]

In Brief | The New York City Comptroller is expected to soon announce an initiative to overhaul corporate governance including mandatory disclosures about directors' ethnicity, gender and experience writes the New York Times.

[Source: The New York Times 27/06/2018]

Directors' and Officers' Duties and Liabilities

In Brief | ASIC has announced that Kimberley Diamonds executive chair Mr Alexandre Alexander has been acquitted on two charges in relation to issuing false or misleading information to the market

following a jury trial in the district court of NSW after the jury was unable to reach a unanimous decision.

[Source: 18-186MR Former Kimberley Diamonds executive chairman acquitted on two charges of misleading the market. Jury unable to agree on remaining charges]

Remuneration

France | French 'entrepreneur associations' Medef and Afep have reportedly brought forward plans to introduce a tougher corporate governance code for private companies and entrepreneurs which includes stricter regulation of executive departure clauses in response to the public outcry over recent excessive executive payouts.

Board Agenda reports that French 'entrepreneur associations' Medef and Association française des entreprises privées (Afep) have brought forward plans to introduce a 'tougher' revised corporate governance code for their members. Reportedly the move is largely in response to recent public criticism of excessive payouts to outgoing executives eg the public outcry over the €13.2m euros paid to the former Carrefour CEO Georges Plassat while the company simultaneously announced plans to cut jobs.

According to Board Agenda central features of the revised code include the following.

- Stricter regulation of executive departure clauses, including additional pensions with performance conditions and non-compete indemnities.
- Strong focus on long term value creation and social and environmental issues. These, the associations said, are the 'missions of the board'.
- Stronger requirements regarding non-discrimination and diversity.
- Stronger enforcement: To strengthen enforcement of the code, the High Corporate Governance Committee, which oversees the implementation of the Afep/Medef code, will have more members and will be given stronger powers of sanction, including the right to 'name and shame' companies.

Medef and Afep are quoted as stating that they are 'anxious to participate in a constructive manner in the debate on the missions of companies and the public interest…This step is part of a process of constant evolution of the norms of corporate governance which are revised every two years, allowing the French corporate governance code to be one of the most discerning at the international level'.

[Source: Board Agenda 26/06/2018]

Meetings and Proxy Advisers

ASIC Report 578 has reiterated calls for proxy advisers and companies to work together to ensure shareholders have the information they need to make informed voting decisions.

The Australian Securities and Investments Commission (ASIC) has released a report: Report 578 *ASIC review of proxy adviser engagement practices* providing an overview of ASIC's review of proxy adviser engagement practices during the 2017 annual general meeting (AGM) season and including recommendations for advisers and companies as to how engagement practices could be improved.

Constructive engagement on both sides

Ultimately, the report calls for constructive engagement between companies and proxy advisers in the interests of ensuring shareholders have the information they need to make informed voting decisions. More particularly, the report calls on proxy advisers to note their obligations under s1041H of the Corporations Act 2001 (Cth) and to actively seek out confirmation of factual matters where some uncertainty or ambiguity exists and for companies to engage with proxy advisers to resolve any ambiguities or uncertainties.

ASIC Commissioner John Price said: 'Proxy advisers play an important role in our market by assisting shareholders to make voting decisions on company resolutions. Voting is a key shareholder right which enables investors to hold boards to account. Meaningful engagement between companies and proxy

advisers can assist shareholders by improving the quality of information provided to shareholders in proxy adviser reports.'

[Note: As previously reported in Governance News 25/06/2018, in a recent speech at the Australasian Investor Relations Association 2018, Mr Price said that it is ASIC's expectation that companies constructively engage with shareholders including proxy advisers in the interests of good governance. This is consistent with the views set out in A*SIC Report 564 Annual general meeting season 2017* (REP 564) in which the regulator, among other things, outlines its observations on the role of proxy advisers and Australian listed companies, and its observations on the reports they produced for the 2017 AGM season. See: Governance News 02/02/2018.]

Further detail: Recommendations for companies and proxy advisers

- **The purpose of engagement with proxy advisers:** ASIC states that 'The focus of these engagements must always be on ensuring investors receive independent, well-informed recommendations based on accurate information. It should be an opportunity for proxy advisers to ensure the factual bases or contexts for their conclusions are correct. It should not be viewed simply as an advocacy opportunity by companies to influence a proxy adviser's recommendation in relation to a particular resolution'.

- **Proxy advisers:** ASIC suggests proxy advisers might wish to consider disclosing in their reports: the nature, extent and outcome of engagement with the subject company; a summary of the subject company's view on a particular issue where that view is different from the proxy adviser's; or any additional information that has been provided by the company as a result of engagement. In addition, ASIC suggests proxy advisers should also promptly consider feedback in relation to factual errors in their reports and take steps to rectify any substantive errors as soon as possible.

- **Companies:** ASIC 'encourages companies' to take the following steps to improve engagement practices:
  - actively seek out information about the engagement practices of proxy advisers;
  - proactively engage with proxy advisers outside of peak periods as an extension of ongoing active engagement with their shareholders (ASIC states that it envisages a large part of this engagement would involve understanding the proxy adviser's policies and views on particular governance issues);
  - release their notices of meeting to the market as early as possible (to maximise the time proxy advisers have to consider the materials and request clarification if required);
  - ensure disclosure to the market is 'fulsome, clear and not overly complex – proxy advisers should be able to base their analyses on publicly available information' (particularly with respect to the basis upon which remuneration will be paid or will vest); and
  - continue engaging directly with investors regarding any voting decision – shareholders are ultimately responsible for making a decision on how they wish to vote.
  - In relation to 'against' recommendations, ASIC encourages companies to seek to understand the concerns underlying the recommendation through engaging with the proxy adviser and their voting policies to assist the company in responding to those concerns. ASIC writes that companies should also ensure that confidential, price-sensitive information is not selectively disclosed to proxy advisers during engagement.
  - Should a company identify 'materially false or misleading' information in a proxy adviser report, ASIC suggests that companies should: notify the proxy adviser of the matter promptly and seek a correction and also consider whether it would be appropriate to respond to the matter by way of an ASX announcement or other communication to investors.

About the Report

The report is based on ASIC's observations of the engagement policies of the major proxy advisers in Australia (ISS Australia, CGI Glass Lewis, Ownership Matters and the Australian Council of Superannuation Investors (ASCI)); 80 proxy adviser reports where an 'against' recommendation was made in relation to one or more resolutions considered at a meeting held during the 2017 annual general meeting season and other

information voluntarily provided by the proxy advisers on their engagement practices and activities during the 2017 annual general meeting season.

[Sources: 18-187MR ASIC reports on proxy adviser engagement practices; ASIC Report 578: ASIC review of proxy adviser engagement practices; [registration required] The AFR 27/06/2018]

Regulators

Australian Prudential Regulation Authority (APRA)

'Still more work to do': Parliamentary committee annual review of APRA has found that the regulator has more work to do to improve responsible lending practices.

The House of Representatives Standing Committee on Economics has released its annual Australian Prudential Regulation Authority (APRA) review: *Review of the Australian Prudential Regulation Authority Annual Report 2017.*

Key Points

- **More work to do to improve responsible lending practices:** The report concludes that though the financial regulators have been 'seeking to improve responsible lending practices in the Australian financial sector…it is clear that there is still a lot of work to be done in this area. The disturbing evidence coming out of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, suggests that in a number of cases the major banks are moving from a low base when improving their responsible lending practices'.
- **Welcomes the introduction of the BEAR regime from 1 July:** 'The committee notes that the Banking Executive Accountability Regime (BEAR) comes into effect from 1 July 2018. This was a key recommendation of the committee's Review of the Four Major Banks. The BEAR will provide mechanisms to make senior bank executives more accountable and subject to additional oversight by APRA'.
- **Reiterates the need for increased competition in the banking sector**: The report concludes that there is 'a need to continue to improve competition in the banking sector' and welcomes recent changes to the restrictions on institutions using the term 'bank' in lifting this barrier to new entrants.
- **Welcomes the passage of the Crisis Powers legislation:** 'The new crisis management powers introduced by the Government provide important new tools for APRA. They will empower APRA to better prepare, and take decisive action, to more quickly and effectively address crises in Australia's financial system'.
- **Committee to monitor APRA's performance in superannuation sector**: 'The proposed changes to superannuation will improve governance and transparency in the industry. APRA has indicated that once the measures are implemented, it will better position APRA-related superannuation licensees to deliver sound outcomes for their members. The committee notes that APRA has extended its strategic focus to superannuation, and will monitor APRA's performance in this area' the report concludes.

[Sources: House of Representative Standing Committee on Economics: Review of the Australian Prudential Regulation Authority Annual Report 2017 26/06/2018; [registration required] The Australian 28/06/2018]

In Brief | The *Treasury Laws Amendment (APRA Governance) Bill 2018* which proposes to amend the APRA Act to give the Governor-General the discretion to appoint a second APRA Deputy Chair has passed the House of Representatives and is currently before the Senate.

[Source: Treasury Laws Amendment (APRA Governance) Bill 2018]

Australian Securities and Investments Commission (ASIC)

Minister for Revenue and Financial Services Kelly O'Dwyer has welcomed the passage of the ASIC industry funding model legislation.

On 24 May the government introduced four Bills to enact the second and final phase of the Australian Securities and Investments Commission (ASIC) industry funding model – fees-for-service (see: Governance News 28/06/2018):

1. *Corporations (Fees) Amendment (ASIC Fees) Bill* 2018.
2. *Superannuation Auditor Registration Imposition Amendment (ASIC Fees) Bill* 2018.
3. *Superannuation Industry (Supervision) Amendment (ASIC Fees) Bill* 2018.
4. *National Consumer Credit Protection (Fees) Amendment (ASIC Fees) Bill* 2018.

The legislation will enact changes to enable ASIC to charge entities a fee reflective of the actual (rather than then nominal) cost of providing specific services to them.

On 28 June, Minister for Revenue and Financial Services Kelly O'Dwyer issued a media release welcoming the passage of legislation stating that it builds on the government's commitment to boosting ASIC's resources and capability. She added that regulations that provide additional detail on the operation of the industry funding fees-for-service bill will be made shortly, ahead of the commencement of the regime.

Timeline: The proposed timeline for implementation of the scheme is unchanged. ASIC states that regulated entities will receive their first invoices for the 2017-18 financial year in January 2019. These will be payable the following month in February 2019.

[Sources: Corporations (Fees) Amendment (ASIC Fees) Bill 2018; Superannuation Auditor Registration Imposition Amendment (ASIC Fees) Bill 2018; Superannuation Industry (Supervision) Amendment (ASIC Fees) Bill 2018; National Consumer Credit Protection (Fees) Amendment (ASIC Fees) Bill 2018; ASIC Industry Funding Update Issue 1]

SMSF advice needs significant improvement says ASIC: ASIC SMSF reports (Report 575 and Report 576) released.

The Australian Securities and Investments Commission (ASIC) has released the findings of a recent review of member experiences in setting up and running a self-managed superannuation fund (SMSF) (member research); and assessing whether advice providers are complying with the law when providing personal advice to retail clients to set up an SMSF (advice review).

ASIC issued two reports:

- *Report 575 SMSFs: Improving the quality of advice and member experiences (Report 575)* which summarises the findings of the review, provides an overview of SMSF market characteristics and includes guidance for advice providers to improve the quality of SMSF advice.
- ASIC also released *Report 576*: *Member experiences with self-managed superannuation funds* (Report 576) which provides an overview of research commissioned by ASIC into the experiences Australians have when setting up and running self-managed superannuation funds (SMSFs). The research was conducted by an independent market research agency, and was a mix of qualitative research (interviews) and quantitative research (online survey) to explore member experiences with SMSFs.

Report 575: Key Points

Based on review of 250 client files randomly selected based on Australian Taxation Office (ATO) data and assessed compliance with the Corporations Act's 'best interests' duty and related obligations, ASIC found that in 91% of files the adviser did not comply with *Corporations Act* 2001 (Cth) 'best interests' duty and related obligations.

The non-compliant advice ranged from record-keeping and process failures to failures likely to result in significant financial detriment. ASIC states that in 10% of files reviewed, the client was likely to be significantly worse off in retirement due to the advice and in 19% of cases, clients were at an increased risk of financial detriment due to a lack of diversification.

ASIC Deputy Chair Peter Kell said the standard of advice on SMSFs must improve 'The financial advice sector has significant work to do to lift their performance on this issue.'

Follow up regulatory action: ASIC states that it will be taking follow up regulatory action, in particular where consumers have suffered detriment.

[Sources: ASIC media release 28/06/2018; Report 575 SMSFs: Improving the quality of advice and member experiences]

ASIC Report 579 has called on the OTC derivatives sector to raise standards: 'The integrity of the retail OTC derivatives sector is a key focus for ASIC' says ASIC Commissioner Cathie Armour.

The Australian Securities and Investment Commission (ASIC) has released a new report: *ASIC report 579: Improving practices in the retail OTC derivatives sector* which highlights practices in the sector which fall short of ASIC expectations and which calls on participants to improve.

ASIC writes that these practices include: misleading marketing materials; unclear pricing methodologies; inadequate risk management practices; inadequate monitoring of counterparties and inappropriate referral arrangements.

More particularly, ASIC states that the practices of most concern are:

- 'actual client profits being inconsistent with marketing materials
- a lack of transparency around pricing
- risk management practices that relied on the use of client money were outdated and needed to be reviewed
- some referral arrangements that may be in breach of conflicted remuneration requirements and referral selling prohibitions
- some issuers that were providing wholesale services or allowing third parties to 'white label' their products did not have adequate risk management practices and operational capital to supervise counterparties and support their exposures'.

To address these risks, ASIC has called on issuers to 'review and update their risk management and client money practices; and assess whether their arrangements with counterparties and referrers meet their AFS licence obligations'.

ASIC Commissioner Cathie Armour said: 'The integrity of the retail OTC derivatives sector is a key focus for ASIC. ASIC expects licensed issuers to conduct themselves appropriately and ensure consumers trade in retail OTC derivatives with a clear understanding of the products and the risks to which they're exposed. We will be working with issuers to raise industry standards and improve compliance with their Australia financial services licence obligations.'

[Sources: ASIC media release 28/06/2018; Report 579: Improving practices in the retail OTC derivatives sector]

Financial Services

Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Financial Services Royal Commission)

Top Story | Financial Services Royal Commission Round 4 Hearings: Week 1 Farming Finance

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Financial Services Royal Commission) commenced its fourth round of public hearings on 25 June. This round of hearings, which will run until 29 June, will focus on issues affecting Australians who live in remote

and regional communities relating to farming finance, and on interactions between Aboriginal and Torres Strait Islander people and financial services entities.

Change in the scope of Round Four hearings: National disaster insurance case studies delayed until September

Though originally included in the schedule of case studies and topics to be covered in Round Four hearings, the topic of natural disaster insurance will now be covered in Round 6 (September) to ensure adequate time is allocated to farm finance case studies.

Possible extension of time? Commenting on the change, The Australian has suggested that it may 'add pressure' on the government to extend the timeline for completion of the inquiry (under the current timeline, the Commission will submit an interim report no later than 30 September 2018 and a final report by 1 February 2019). Separately, The AFR reports that the senate passed a motion on 28 June, calling for the government to extend the inquiry by 12 months.

[Sources: The Australian 27/06/2018; Financial Services Royal Commission Round 4 hearings: Experiences with financial services entities in regional and remote communities; 25 June 2018 – Draft Transcript for Day 30; [registration required] The AFR 28/06/2018]

Commissioner's opening comments: CBA takeover of Bankwest and the work of the commission more generally.

Commissioner Hayne said that the Commission had received a number of communications since the conclusion of the Round 3 Hearings 'by persons seeking to agitate for the Commission to devote more attention to the investigation of the CBA takeover of Bankwest, either generally or in relation to particular cases'. He said that a number of 'misconceptions about the Commission's procedures', had emerged from these communications and briefly outlined and explained why in each case, the issues raised were misconceptions.

- Commissioner Hayne said that some communications received had asserted that witnesses had not been given the opportunity to cross-examine bank witnesses (where banks have been allowed to cross-examine consumers). The Commissioner said that 'the opportunity for cross-examination has been available [to witnesses]' though it hadn't been taken up.
- Some communications had said that witnesses had not been given sufficient time to brief lawyers and/or that witnesses had been given no access to financial assistance to secure legal representation. Commissioner Hayne said that consumer witnesses are being given sufficient time to brief lawyers to represent them at the hearings and that there is a process available for consumer witnesses to seek financial assistance to legal representation. He added that 'The Commission is not aware of any instances where a consumer witness has not been able to cross-examine due to lack of financial assistance'.
- CBAs conduct after its takeover of Bankwest in 2008: Commenting on the question of CBA's conduct after its takeover of Bankwest in 2008, Commissioner Hayne emphasised that 'the work of the Commission regarding the CBA takeover of Bankwest…had been intensive and was not limited to consideration of the circumstances of the four witnesses who gave evidence'. He added that in his view, proceeding by way of case study is the best approach. The Commissioner went on to say that any additional information received in relation to the CBA takeover of Bankwest would be carefully considered, but that the Commission would 'derive most assistance if those who take up this invitation focus on identifying matters which have not already been raised with us and identifying evidence, not mere assertions and conjecture, that is said to be relevant to the consideration of these matters'.
- Role of the commission: Commenting on the role of the Commission, the Commissioner said that the Commission's role is not to 'advance the interests of those who describe themselves as Bankwest's victims', but 'to inquire, without fear or favour, into matters falling within the terms of reference. Neither I, nor Counsel Assisting, or the solicitors assisting the Commission, carry any brief for those who assert a grievance arising from the takeover of Bankwest or, indeed, any other issue. We are here to inquire' he said.

- No findings have been made: 'Another misconception which has appeared in many of these further communications is that findings have already been made by me. They have not. Counsel Assisting has made submissions as to the findings that they submit are open on the basis of the evidence heard during the course of the third round of hearings, but I have not yet made any findings. My findings about these matters and my reasons as to why those decisions are ultimately made are matters to be dealt with when I report in accordance with my terms of reference, a task that remains some time away, and in the meantime, the Commission continues to consider, and will keep under constant review, how best it should execute the tasks committed to it by the Letters Patent' the Commissioner said.

Lending to small and medium agricultural businesses

In her opening statement, Counsel Assisting Rowena Orr QC, provided an overview of the agricultural, forestry and fishing industry and its significance to the Australian economy and identified challenges faced by agricultural businesses in Australia. She then described the main types of agricultural finance in Australia and the key features of the legal framework governing the operation of loans to agricultural business. Ms Orr then identified the forms of dispute resolution accessible to agricultural businesses before summarising the key concerns raised in public submissions and the information provided by financial services entities.

Issues most commonly raised public submissions

Ms Orr said that the following key issues had emerged from public submissions and submissions from rural financial counsellors who represent farmers.

1. **Non-monetary default related issues:** A number of submissions involved banks initiating non-monetary defaults through a revaluation of property or security assets which altered loan to value ratios. Banks then relied on these lower loan to value ratios to trigger non-monetary defaults. Ms Orr added that submissions relating to non-monetary default issues also referred to customers being given unreasonably short timeframes to repay substantial proportions of their loans.

2. **Issues with access and support:** A number of submissions involved difficulties with farmers accessing appropriate banking services and support due to distance from local branches, and difficulties contacting their business manager, particularly during times of financial hardship Ms Orr said. She added that some submissions also 'highlighted the failure of financial services entities to take into account the cash flow impact of seasonal productivity and drought or other natural disasters on agribusiness ventures when making decisions about calling in loans or acting upon loan defaults'.

3. **Issues related to changes to lending conditions:** A number of issues raised in submissions related to changes to conditions of lending (eg changes to interest rates, access to facilities such as overdrafts or trading facilities) in a way that was unfavourable to the customer Ms Orr said. Ms Orr added that a number of submissions referred to modifications in lending conditions as a result of structural or ownership changes to the lending institution which had resulted in financial hardship to the borrower in some cases.

Ms Orr explained that another issue, the conduct of receivers, was also raised frequently in submissions, but explained that this would not be inquired into because the conduct of receivers is not within the Commission's terms of reference.

Common issues for farmers: Evidence from ASIC, the Rural Financial Counselling Service in Western Australia and Legal Aid QLD

The Commission heard concurrent evidence from three witnesses with experience in rural and agricultural finance: Mr Denis McMahon of Legal Aid Queensland, Mr Warren Day of ASIC, and Mr Chris Wheatcroft of the Rural Financial Counselling Service in Western Australia. The witnesses largely reconfirmed that the issues raised by Ms Orr in her opening statement (see above) are prevalent in their experience.

Other issues raised by Ms Orr included the following (among others).

- **ASIC's role in the regulation of farm finance**: The Commission heard that ASIC's role is currently limited, but there is 'an argument' for extending it. 'Farm finance is, in some respects, a subset of small business lending and the Corporations Act effectively has very little coverage, if any, of – in relation to small business lending and farm finance, therefore. The only real provisions are in

relation to unfair contract terms, which are quite recent… so limitations in those types of spaces is – is really what we're dealing with' said Mr Day (ASIC). Asked whether ASIC should play a greater role in the regulation of farming finance, Mr Day said that 'there's certainly an argument for that' on the basis that non-bank lending in this context has many of the features of a licensing regime, but without the 'minimum standards of responsible lending' in place and that perhaps this should be considered.

- **Farm debt mediation process**: Asked to comment on the effectiveness of the voluntary farm debt mediation scheme in Western Australia, Mr Wheatcroft (Rural Financial Counselling Service in Western Australia) said: 'The most effective aspect of it is that it's early' in the process and 'it starts the conversation'. This is important, Mr Wheatcroft explained because in circumstances where farmers are 'toughing it out' and under stress, there was often a lack a communication with the bank and that the process whereby banks communicate via letter was not always effective. 'From the farmer's point of view, the bank sends a lot of letters of which none of them really seem to matter. That's incorrect, because the bank is following a legal process that has an end point, but I think very often – the bank's views are somewhat dismissed by the farmers, because it's not part of – behaviourally, they've had letters that don't matter' he said. On this basis, the mediation scheme was effective in starting/restarting communication between the parties he said. Mr Day (ASIC) commented that ASIC 'supports external dispute resolution at all times in these types of matters. We can see from farm debt mediation it has a number of strengths' including that in circumstances where mediation is unsuccessful, there is recourse to the ombudsman scheme.

Farm Finance Case Studies

A high level overview of some of the issues emerging in the Landmark case study (ANZ) and the Brauer case study (Rabobank) is below.

Landmark case study (ANZ)

The first case study considered by the Commission concerned ANZ's conduct in connection with the acquisition of the Landmark loan book. In her opening statement, Ms Orr said that of 6892 submissions received by the Commission ahead of the hearings, 268 related to agricultural finance and that of these, 32 related to the ANZ acquisition of Landmark in 2010. Ms Orr went on to say that in its submissions, ANZ accepted that in certain respects its management of some former Landmark customers, 'fell below community standards and expectations'. In addition, Ms Orr said ANZ acknowledged in submissions that in a small number of cases its conduct in relation to former Landmark customers may have constituted a breach of the obligation in the Code of Banking Practice to act fairly and reasonably towards its customers and that it 'should have been more responsive and empathetic' given their difficult financial circumstances.

Mr Benjamin Steinberg, head of lending services at ANZ, was questioned in relation to the way in which the transfer of customers to ANZ systems was handled. It was alleged that ANZ did not have sufficient systems in place to manage the transition smoothly (and that errors occurred as a result); that aspects of a due diligence report warning of poor risk controls were not addressed; and that a letter sent to former Landmark customers after the takeover advising that current relationship management visits would continue was not reflective of the changes the lender was making to staffing levels and to loan facilities.

Mr Steinberg was also questioned in relation to ANZ's handling of complaints received from former Landmark customers and the lender's approach to debt recovery generally and in relation to a number of specific cases. The Commission alleged that in some cases ANZ's actions fell short of community expectations or breached the Banking Code of Conduct in some instances. For example, the refusal by ANZ to accept a request from the Harleys (farm owners) (after Mr Harley had suffered a heart attack) to delay selling their properties and instead proceeding with the sale at what was alleged to be less than market value, was put forward as an example of falling short of community expectations/breaching the Banking Code of Conduct. Mr Steinberg maintained in this case, 'I agree the story is a sad one, but nonetheless, what we were doing here is pursuing our…contractual rights to get…paid…managing money that belongs to our…depositors. And whilst it's a very sad list of events to read out and to listen to, I think the community would expect us to do whatever we can to recover the money that's owed'.

The question of whether sufficient weight was given to behavioural factors in assessing performance at the bank was also questioned. Changes implemented to ANZ systems and policies, and the setting up of the

ANZ Landmark Taskforce, was also explored. The Commission asked whether the changes to systems and policies were indicative of systemic issues, which Mr Steinberg denied was the case. Asked whether 'ANZ's policies and processes for dealing with agribusiness customers were now reflective of the community's expects about how a bank will treat customers in financial difficulty' Mr Steinberg said that they are.

Two sides to the equation: The meaning of acting 'fairly, reasonably, consistently' in the Code of Banking Practice

Commenting on the nature and content of community and expectations, Commissioner Hayne suggested that there are 'two sides of the equation'. The Commissioner asked Mr Steinberg 'And in your view, when the Code of Banking Practice speaks, as it does, of fairly, reasonably, consistently, in ethical manner – so fair, reasonable, consistent, ethical – is that adding anything of real substance to the notion of fair to both bank and customer? That is, is it just a longer way of saying that the community expects that banks will act fairly – fairly to their customers – but the community accepts also that banks have got to act fairly for the bank?.'

Mr Steinberg agreed with this adding that 'one of the things that I take into account when I do the work that I do is the fact that the money that we are managing belongs to people, it belongs to our depositors, and it belongs to the – the people who we borrow money from, and it belongs to our shareholders. But the – the stakeholders that I have the most concern about amongst those three are our depositors, and our depositors expect that every single day when we deal with their money, that we deal with their money in the way that I would want my money dealt with, and I want to be sure that every day when I turn up to my bank to withdraw money as a depositor that my bank is able to meet those commitments'.

Issues for investigation: Rabobank, BankWest and NAB case studies

Three case studies considered the conduct of Rabobank (Brauer case study), Bankwest (Ruddy case study) and NAB (Smith case study) in connection with loans made to cattle farmers. In her opening statement to the Commission, Counsel Assisting Ms Rowena Orr QC said that the issues experienced by these cattle farmers 'expose a number of the difficulties faced by Queensland cattle farmers in the past 10 years' including difficulties were triggered or exacerbated by a series of external factors eg a decline in property prices, a decline in cattle prices, a number of severe weather events, including both drought and cyclone related flooding, and the live cattle export ban.

More particularly, Ms Orr said that the case studies raised issues concerning the following:

- responsible lending;
- the use of property valuations;
- the provision of hardship assistance by banks;
- the adequacy of the farm debt mediation process; and
- bank practices in connection with the charging of default interest.

Brauer case study (Rabobank Australia Ltd (Rabobank))

Rabobank's submissions to the Commission did not include any reference to the Brauer case study. Following the delivery of Mr Orr's opening statement (25 June), Ms Orr said that Rabobank's lawyers sent the Commission a letter saying that Rabobank now wished to add its conduct in relation to the Brauers to the acknowledgements that it had made in submissions.

The Commission heard that in this case a Rabobank manager contacted existing Rabobank customers the Brauers (cattle farmers) while they were in the US, to alert them to an opportunity to purchase another property (which would enable them to expand their cattle business) and offered them a loan with which to do so. The Brauers understood that the manager also offered them funding to purchase cattle (on their return to Australia) to enable them to stock the new property, as the income from the lease on their existing property would be insufficient to enable them to service either loan in its entirety. They went ahead with the loan for the new property and purchased the stock on the strength of the manager's assurances. However, the Commission heard that the manager in question made various miscalculations in the loan assessment process, which raised internal questions at Rabobank. Rabobank ultimately did not to fund the purchase of

the cattle, and required the loan to be repaid within two years. Rabobank made this decision immediately after the 2011 floods when income from the Brauer's existing property (and primary source of income) was nil and they were unable to service their loan repayments.

The Commission heard that, due to financial pressure, the family was forced to move back to Australia, and after a lengthy mediation process with Rabobank, sold the new property and paid down their debts losing an estimated $1m in the process.

Ms Brauer said that in addition to the financial loss, there had also been an emotional cost: 'It nearly wrecked us…They put us backwards. They came hunting for us. They came looking for us to buy this block. And 12 months later they wanted us to pay them back more than we had borrowed. I don't understand.'

Counsel Assisting Ms Rowena Orr QC questioned Rabobank as to the circumstances in which the Brauers were offered the loan in the first instance, its assessment of the serviceability of the loan (alleging that the loan should not have been granted); the approach taken by the bank to hardship; and the approach taken to recovery of the debt. Ms Orr also questioned the bank's 'reluctance' to admit misconduct/falling short of community expectations in this case, alleging that the misconduct would not have been admitted but for the Commission's investigation. The bank denied that this was the case.

The remuneration practices at Rabobank were also questioned, in particular the link between loan sales and remuneration. Questioned as to whether the remuneration practices at Rabobank were consistent with the Sedgwick Review recommendations, Mr Bradley James (Rabobank) said: 'rural managers, they are still incentivised to grow our business through loan sales.' He added that 'rural managers are also disincentivised to write loans that aren't sustainable, and from that I believe there's a balance within our discretionary system'. However, Ms Orr alleged that 'the balance isn't enough' because the exercise of the discretion is 'predominantly driven by sales' and that on this basis, the remuneration practices at Rabobank are 'not consistent with the position that Mr Sedgwick requires all banks to move to by 2020'. Mr James agreed that this is the case and said he was unsure what changes would be made to current systems to bring remuneration practices into line with the Sedgwick recommendations by 2020.

[Note: An overview of the Bankwest and NAB case studies will be considered in the next issue of Governance News which will be available on 9 July.]

[Sources: Royal Commission into misconduct in the banking, superannuation and financial services industry: Round 4 hearings; 25 June 2018 – Draft Transcript for Day 30; 26 June 2018 – Draft Transcript for Day 31; 27 June 2018 – Draft Transcript for Day 32; 28 June 2018 – Draft Transcript for Day 33]

In Brief | Research commissioned by the Customer Owned Banking Association has found that trust in customer owned banks has increased in the wake of the Financial Services Royal Commission with 47% of the 1000 people polled stating that they have less trust in the big four banks and trust in credit unions, mutual banks and building societies rising between 15-18%.

[Source: Customer Owned Banking Association media release 25/06/2018]

Insurance

Top Story | Consultation opened on extending unfair contract terms protections [UCT provisions] to insurance contracts.

On 27 June, the government released a proposal paper: *Extending Unfair Contract Terms Protections to Insurance Contracts* outlining a model to extend unfair contract term (UCT) provisions to insurance contracts regulated under the *Insurance Contracts Act* 1984 (Cth) (IC Act) for consultation.

The consultation period closes on 27 July.

Purpose of the proposed changes

In announcing the consultation, Minister for Revenue and Financial Services Kelly O'Dwyer said: 'Consumers and small businesses who enter into standard form insurance contracts should have confidence that the contract accurately reflects the cover agreed with the insurer. They should also have appropriate remedies when they suffer detriment as a result of terms in the contract which are unfair…The [proposed] model ensures that consumers and small businesses who purchase insurance are provided with the same

protections that are already available for other financial products and services while ensuring the laws are appropriately tailored for the specific features of insurance contracts'.

The proposal paper adds that, if implemented, the proposed change will bring Australia into alignment with comparable jurisdictions including the UK, The EU and NZ where insurance contracts are not excluded from those jurisdictions' UCT laws.

Proposed Model: Key Points

The proposed model involves:

1. Amending section 15 of the IC Act to allow the UCT provisions in the *Australian Securities and Investments Commission Act* 2001 (ASIC Act) to apply to insurance contracts regulated by the IC Act, which includes both general and life insurance contracts.
2. Tailoring the application of the UCT provisions to 'take account of the specific features of insurance where necessary'. More specifically, it's proposed that:
    - 'a contract will be considered as standard form even if the consumer or small business can choose from various options of policy coverage;
    - the 'main subject matter' of an insurance contract will be defined narrowly as terms that describe what is being insured, for example, a house, a person or a motor vehicle;
    - clarification will be provided that the 'upfront price' will include the premium and the excess payable and that these will not be subject to review;
    - when determining whether a term is unfair, a term will be reasonably necessary to protect the legitimate interests of an insurer if it reasonably reflects the underwriting risk accepted by the insurer in relation to the contract and it does not disproportionately or unreasonably disadvantage the insured;
    - examples specific to insurance will be added to the list of examples of kinds of terms that may be unfair which could include terms that permit the insurer to pay a claim based on the cost of repair or replacement that may be achieved by the insurer, but could not be reasonably achieved by the policyholder;
    - where a term is found to be unfair, as an alternative to the term being declared void, a court will be able to make other orders if it deems that more appropriate;
    - the definition of 'consumer contract' and 'small business contract' will include contracts that are expressed to be for the benefit of an individual or small business, but who are not a party to the contract;
    - for life policies, as defined by the Life Insurance Act 1995, which are guaranteed renewable, it will be made clear that a term which provides a life insurer with the ability to unilaterally increase premiums will not be considered unfair in circumstances in which the premium increase is within the limits and under the circumstances specified in the policy'.

Other options

The proposal paper notes that in addition to the proposed model, other options also exist for extending the UCT laws to insurance contracts regulated by the IC Act. These options include enhancing the existing IC Act remedies and introducing the existing UCT laws into the IC Act. The proposal paper also seeks feedback on these other options.

Proposed timeline

It's proposed that a 12 month transitional period will be provided before the new provisions take effect. After the transition, it is proposed that the UCT provisions will apply as follows:

- **New contracts**: New provisions will apply to all new contracts originally entered into on or after the commencement.

- **Renewed contracts**: If a contract that was originally entered into before the commencement is renewed, the new provisions will apply to the contract as renewed, on or after the day on which the renewal takes effect.
- **Contract variations**: If a contract was originally entered into before the commencement is varied on or after the day, the new provisions apply to the term as varied, on or after the day the variation takes effect. Other terms of that contract will not be made subject to the UCT provisions because of the variation, until such time as the contract is renewed.

[Sources: Minister for Revenue and Financial Services Kelly O'Dwyer media release 27/06/2018; Treasury media release 27/06/2018; Extending Unfair Contract Terms Protections to Insurance Contracts]

ACCC 2016-2017 annual PHI report released: ACCC has called on industry to deliver simpler, more transparent health insurance products.

The Australian Competition and Consumer Commission (ACCC) has released its nineteenth annual private health insurance report: *Private Health Insurance Report 2016-2017* on competition and consumer issues in the private health insurance (PHI) industry. The report highlights, affordability, the 30% rise in the number of complaints since the last report and the lack of clarity in consumer information as key issues and has called on industry to be clearer in their communication.

ACCC Acting Chair Delia Rickard said: 'Consumers rely on private health funds engaging with them honestly so they can avoid unexpected out-of-pocket costs and make informed decisions about the policies they choose…However, we've found it's currently very difficult for consumers to properly compare and choose policies for their needs, meaning many are shocked when presented with expensive bills for medical services and products they thought they were covered for… We believe private health insurers are capable of providing consumers with significantly more detail about extent of coverage under their policies. Clear and prominent disclosures are one measure that can rebuild waning trust in an industry where complaints increased by 30 per cent last financial year.'

Trends and developments

Trends and developments identified in the report include the following.

- Premium increases have been greater than inflation and wage growth in recent years. Australian consumers paid $1bn more in private health insurance premiums for the reporting period ($23.1 billion in 2016-17), than they did for the 2015-2016 period.
- The number of Australians with hospital or general insurance cover decreased 0.6% to 54.9% in from 55.5% in 2016.
- Average out-of-pocket expenses incurred by consumers from hospital episodes decreased by 0.8% but increased 2% for general or extras treatments.
- The amount of hospital benefits paid by health insurers per person increased by 5.2%, along with a 3.4% increase in general or extras benefits per person.

Issues highlighted in the report include the following.

- **Affordability remains a key concern for consumers and there is evidence that consumers are shifting to lower cost policies**. Premium increases have been greater than inflation and wage growth in recent years, the report writes, and a consumer survey conducted in 2016–17 found that the affordability of private health insurance is the second biggest cost of living concern for Australian households, after electricity prices. In response to this, some consumers are switching to more affordable policies with greater exclusions and restrictions — in June 2017, 40% of hospital policies held had exclusions, compared with 38% in June 2016 — or (to a lesser extent) opting to exit the PHI market altogether.
- **Complaints about private health insurers have increased for a fourth consecutive year**. According to the report, complaints about private health insurance to the Private Health Insurance Ombudsman (PHIO) continued to rise, with the volume increasing 30%, since the last report. The report adds that the PHIO reports that 88% of complaints received related to health insurers and that 30% of total

complaints relate to the benefits paid by insurers to consumers. The most common issue of concern is hospital policies with unexpected exclusions and restrictions.

- **ACCC enforcement activity**. Among the enforcement activities highlighted in the report are: ACCC actions and investigations in relation to NIB, Australian Unity, and Ramsay Health Care Australia; and the granting of authorisation to health insurer HCF and participating dentists to agree on a maximum price for some dental services. The report notes that the ACCC is awaiting the outcome of an appeal against Medibank alleging the insurer 'engaged in misleading or deceptive conduct, made false or misleading representations to consumers, and engaged in unconscionable conduct', in relation to its failure to notify members and members of its subsidiary brand, ahm, of its decision to limit benefits paid to members for in-hospital pathology and radiology services, despite representing across a number of its communications and marketing materials that it would. The appeal was heard by the Full Federal Court in May 2018 and the matter is awaiting judgment.
- **Policy developments relating to private health insurance**: The report welcomed government reforms aimed at addressing 'continuing challenges' in how information is provided to consumers of private health insurance. In particular, the ACCC has welcomed the announcement that the standard information statement will be replaced with a new minimum data set and suggests that the data set should include provision of more detail on 'gap arrangements' in addition to other information. Acting Chair Delia Rickard said: 'The ACCC welcomes this significant reform and considers it crucial that the new minimum data set is effective in providing consumers with clearer information about their cover'. She added that the ACCC also supports additional funding for the Private Health Insurance Ombudsman to enable it to widely promote its website and comparison service.

[Sources: ACCC media release: 25/06/2018; Private Health Insurance Report 2016-2017 25/06/2018; The SMH 26/06/2018; [registration required] The Australian 26/06/2018]

In Brief | APRA has released its general insurance claims development statistics publication, which details trends in claims payments and services across the general insurance industry by class of business for the December 2017 reference period.

[Source: APRA media release 28/06/2018]

Other Developments

Signs of a trend away from the 'vertical integration' model? The CBA has announced it will demerge its wealth management and mortgage broking businesses and undertake a strategic review of its general insurance business including a potential sale.

The Commonwealth Bank of Australia (CBA) announced:

- changes to the executive leadership team; and
- structural changes: plans to demerge its wealth management and mortgage broking businesses and to undertake a strategic review of its general insurance business (CommInsure General Insurance) including a potential sale.

Changes to leadership team: CBA CEO Matt Comyn announced six appointments and changes to the executive leadership team.

- Chief Risk Officer (CRO) David Cohen has been appointed Deputy CEO, effective 5 November 2018. Mr Cohen will be replaced as CRO, by Nigel Williams.
- Angus Sullivan has been promoted to Group Executive Retail Banking Services, effective from 1 July 2018 (The Retail Banking Services (RBS) division will now include Bankwest).
- Pascal Boillat has been appointed Group Executive Enterprise Services and Chief Information Officer, with responsibility for all technology and operations across the Bank, commencing 1 October 2018.
- Sian Lewis has been promoted to Group Executive Human Resources and will commence in the role, effective from 1 August 2018.

- Andrew Hinchliff has been promoted to Group Executive Institutional Banking and Markets, effective from 1 August 2018.

Mr Comyn said, 'All other roles on my leadership team remain unchanged. We are still completing the search process for the final ELT position of Chief Financial Officer, considering both internal and external candidates. We expect to be ready to make a permanent appointment after the full year results in August.'

Structural changes

- CBA states that the demerger will 'unlock value for shareholders through the creation of a leading independent wealth management business' which will benefit from a 'separate listing and the ability to pursue its own growth strategies'.
- The demerged business, CFS Group, will include: CBA's Colonial First State, Colonial First State Global Asset Management; Count Financial; Financial Wisdom and Aussie Home Loans businesses.
- The Chair of CFS Group will be John Mulcahy. The search for a CEO is underway.
- The statement added that CBA would benefit from an 'enhanced focus on its core banking businesses in Australia and New Zealand'.

Commenting on the announcement, CBA CEO Matt Comyn said: 'Today's announcement is another step in our stated priority to become a simpler, better bank and has followed a thorough review of the Group's businesses and its optimal organisational structure to drive growth and shareholder value for all businesses. It also responds to continuing shifts in the external environment and community expectations, and addresses the concerns regarding banks owning wealth management businesses'.

[Source: CBA ASX Announcement 25/06/2018]

Will CBA's new business will meet definition of 'independent'? IFA quotes an unnamed Australian Securities and Investments (ASIC) spokesperson as commenting: 'Under s923A [of the *Corporations Act* 2001 Cth] a financial services licensee can only describe itself as "independent" if it meets certain requirements, including not receiving commission and operating without any conflicts of interest…We [ASIC] would need to make further inquiries before we could determine if the new CBA wealth management business, once established, could call itself "independent", but it is important that the current management understands this principle.'

[Source: The IFA 26/06/2018]

Anticipating the recommendations of the Financial Services Royal Commission?

Noting that the CBA announcement follows similar moves by other banks eg NAB and ANZ, the Canberra Times suggests that the banks are opting to move away from a 'vertical integration' model in anticipation of possible recommendations by the Financial Services Royal Commission.

[Sources: [registration required] The AFR 26/06/2018; The SMH 25/06/2018; [registration required] The Canberra Times 27/06/2018]

Asia Region Funds Passport update| The Minister for Revenue has welcomed the passage of Asia Region Funds Passport Bill and released draft regulations for consultation.

Legislation to introduce the Asia Region Funds Passport: *Corporations Amendment (Asia Region Funds Passport) Bill* 2018 passed both houses on 28 June (see: Governance News 03/04/2018, 18/06/2018).

In welcoming the passage of the legislation, Minister for Revenue and Financial Services Kelly O'Dwyer said that the passport (which Treasury describes as a 'common framework of coordinated regulatory oversight to facilitate cross border issuing of managed investment funds') would provide the following benefits:

- improve outcomes for consumers by providing them with greater choice of products and increased competition;
- offer Australian fund managers an opportunity to gain 'economies of scale through selling to Asia's growing middle class'; and

- benefit Australian investors through 'greater choice of funds and increased competition, which in turn will ensure access to more reasonably priced investment products, as well as boost Australia's services economy.

Draft regulations released for consultation: Minister for Revenue and Financial Services Kelly O'Dwyer has released draft regulations which provide additional detail on the operation of the Passport Bill for consultation. Treasury writes that the regulations: 'require an operator of a notified foreign passport fund to lodge copies of documents in the prescribed form and set out other requirements regarding lodging documents with ASIC; list the particulars which are to be included on the new register of passport funds and give the public a right to search the register; extend many of the disclosure requirements and exemptions that currently apply to managed investment products to foreign passport fund products; and amend various fee regulations to prescribe new fees for certain matters relating to notified foreign passport funds'.

Timeline: Consultation on the draft regulations closes on 13 July 2018. 'This consultation will enable the regulations to be made and commence together with the Passport legislation when it receives proclamation. This will be the final step in the Government's delivery of its commitments set out in the Passport Memorandum of Co-operation' Minister O'Dwyer writes.

Related legislation: On 13 June, the Minister for Revenue and Financial Services Kelly O'Dwyer released the 'first tranche' of the draft *Corporate Collective Investment Vehicle (CCIV) Bill* 2018 and accompanying explanatory for public consultation. Minister O'Dwyer said that the 'vehicle complements the Asia Region Funds Passport initiative'; and will allow 'Australian fund managers to market to participating Asian financial markets using a well-recognised corporate structure vehicle'. Consultation on the CCIV Bill closes on 11 July. See: Governance News 18/06/2018]

[Sources: Corporations Amendment (Asia Region Funds Passport) Bill; Treasury media release 29/06/2018; Exposure Draft; Explanatory Statement; Minister for Revenue and Financial Services Kelly O'Dwyer media release 29/06/2018]

Progress update | *Treasury Laws Amendment (Protecting Your Superannuation Package) Bill* 2018 has passed the House of Representatives; KPMG report cautions the measures will increase premiums.

The *Treasury Laws Amendment (Protecting Your Superannuation Package) Bill* 2018 — which proposes to implement 2018-19 Federal Budget measures to prevent the erosion of super balances from excessive fees and inappropriate insurance (see: Governance News 11/05/2018) — was passed by the House of Representatives on 28 June.

It was then introduced into the senate and has been referred to the Senate Economics Legislation Committee for report by 20 August 2018.

A KPMG report has cautioned that the measures may have 'unintended consequences' including premium increases.

[Sources: Treasury Laws Amendment (Protecting Your Superannuation Package) Bill; KPMG: Insurance in Superannuation: The Impacts and unintended consequences of the proposed Federal Budget Changes June 2018]

ASIC has launched civil penalty proceedings against AMP Financial Planning for alleged failures relating to insurance advices.

The Australian Securities and Investments Commission (ASIC) has commenced proceedings in the Federal Court against AMP Financial Planning (AMPFP) in relation to alleged failure by AMPFP to ensure its authorised financial planners were compliant with the best interests duty and related obligations under the *Corporations Act* 2001 Cth.

The proceeding is listed for a directions hearing in Sydney on 27 July 2018.

ASIC states that it continues to separately investigate AMP in relation to fees for no service conduct and in relation to the making of false and misleading statements to ASIC.

ASIC Allegations

ASIC alleges certain AMPFP financial planners engaged in 'rewriting conduct' which is providing advice that results in the cancellation of client's policies, rather than the transfer of clients to similar policies, in order to receive the higher commissions attaching to new applications.) ASIC alleges that 'this type of advice was inappropriate, and that the financial planners failed to act in the best interests of the clients and to prioritise the interests of the clients'.

ASIC contends that by '1 July 2013, AMPFP knew or ought to have known that its authorised financial planners were (or there was a risk that they were) engaging in rewriting conduct and the detriment this conduct caused to the clients, yet in the period from 1 July 2013 to 30 June 2015 AMPFP failed to take reasonable steps to deal with the conduct in contravention of section 961L of the Act'.

ASIC will also allege that AMPFP has breached s912A(1)(a), (c) and (ca) of the Act, which require a licensee to ensure that the financial services covered by its licence are provided efficiently, honestly and fairly; to comply with financial services laws; and to take reasonable steps to ensure that its representatives comply with the financial services laws.

The proceeding is listed for a directions hearing in Sydney on 27 July 2018.

[Source: 18-188MR ASIC takes civil penalty action against AMP Financial Planning for alleged failures relating to insurance advices]

In Brief | Black economy advisory board chair announced: Mr Michael Andrew AO, who led the Black Economy Taskforce in 2018 will chair the new board.

[Source: Minister for Revenue and Financial Services Kelly O'Dwyer media release 22/06/2018]

In Brief | ASIC has announced it has accepted an enforceable undertaking from Dover Financial Advisers Pty Ltd and its sole director. Dover will cease operating its financial services business by 6 July 2018, apply to ASIC to commence the process to cancel its AFSL and the sole director will remove himself permanently from the financial services industry.

[Source: 18-195MR Dover Financial Advisers' financial services licence to be cancelled]

In Brief | Update on new educational requirements for financial advisers: FASEA has confirmed that there are no approved AQF 8 graduate diplomas currently available and that it will consider such programs for accreditation in H2 2018 after further consultation with industry and with stakeholders. Reportedly up to one third of financial advisers are expected to exit the industry in response to new educational standards.

[Sources: FASEA Standards Authority: Guidance Note: Graduate Diploma Qualifications; media release 28/06/2018; The ABC 26/07/2018]

In Brief | Past its peak? Reserve Bank of Australia's head of payments policy, Tony Richards has said: 'Distributed ledger technology has got big implications for the future. But trustless blockchains might not'.

[Sources: Speech by Tony Richards, Reserve Bank of Australia Head of Payments Policy Department, at the Australian Business Economics Briefing: Cryptocurrencies and Distributed Ledger Technology 26/06/2018; itnews 26/06/2018]

In Brief | Brexit plans: The Bank of England announced that HM Treasury has outlined its approach to onshoring financial services legislation under the *European Union (Withdrawal) Act* (EUWA) to ensure that there is a 'complete and robust legal framework for financial regulation in the UK, whatever the outcome of negotiations between the EU and the UK, when the UK withdraws from the EU on 29 March 2019'. This includes plans to lay a number of Statutory Instruments (SIs) to make the necessary legal changes, as a 'contingency against a scenario in which the implementation period, which has been agreed in principle as part of the UK's Withdrawal Agreement with the EU, does not take effect on 29 March 2019'.

[Source: Bank of England media release 27/06/2018]

Accounting and Audit

In Brief | The UK FRC has launched an investigation into the audit by Deloitte LLP of the financial statement of SIG plc for the years ended 31 December 2015 and 2016.

[Source: UK Financial Reporting Council media release 28/06/2018]

In Brief | The absence of the numeral 4 in reports could be a predictor of other issues? US SEC has reportedly adopted methodology used by Stanford researchers to identify (potential) improper accounting issues (improperly rounding up their earnings per share to the next highest cent) at a number of US firms, The WSJ writes.

[Sources: [registration required] The WSJ 22/06/2018; [registration required] Malenko, Nadya and Grundfest, Joseph, Quadrophobia: Strategic Rounding of EPS Data (July 2, 2014). Rock Center for Corporate Governance at Stanford University Working Paper No. 65; Stanford Law and Economics Olin Working Paper No. 388 03/07/2014]

In Brief | Jelena McWilliams is expected to take a more conservative approach to bank regulation as the new head of the US Federal Deposit Insurance Corporation The WSJ writes.

[Source: [registration required] The WSJ 25/06/2018]

Risk Management

Supply Chain Risk

Top Story | Federal Modern Slavery Bill 2018 introduced: MinterEllison Partner Geraldine Johns-Putra, has commented that entities subject to the reporting requirements should be conducting assessments of their operations and supply chains and their risk management frameworks, to ensure they are ready to comply with the new requirements.

The *Modern Slavery Bill* 2018 (Cth) was introduced into the House of Representatives on 28 June and has been referred to the Senate Legal and Constitutional Affairs Legislation Committee for report by 24 August.

[Note: For background on this legislation and its implications see: MinterEllison Geraldine Johns Putra, Rhett McPhie*: Modern Slavery and Global Supply Chain Reporting: gearing up for compliance* 18/06/2018.]

Commenting on the Bill, MinterEllison Partner Geraldine Johns-Putra, said that though it will be interesting to see whether the Bill will pass without amendment, ultimately its passage is assured given the support for modern slavery reporting on both sides of politics and in the community. 'Regulatory developments and governance standards are moving towards broader stakeholder protection and heightened transparency and accountability. Businesses today are expected to operate responsibly and ethically, not just profitably.' she said. She added that entities subject to the reporting requirements should be conducting assessments of their operations and supply chains and their risk management frameworks, to ensure they are ready to comply with the new requirements.

Key Points

- The Bill proposes to establish a Modern Slavery Reporting Requirement. This will require businesses with annual consolidated revenue of more than $100m (including foreign entities carrying on a business in Australia), to publish annual statements on the steps they are taking to address modern slavery in their supply chains and operations.
- Entities will be required to report on all modern slavery practices criminalised under Commonwealth law (eg trafficking in persons; forced labour, forced marriage) in line with mandatory reporting criteria.
- Reporting entities will need to publish Modern Slavery Statements within six months from the end of their financial year.
- The Australian government will also publish an annual statement covering possible modern slavery risks in commonwealth procurement.

- Review of the legislation in three years.
- Detailed guidance for businesses will be developed in consultation with stakeholders before the Modern Slavery Reporting Requirement enters into force.

Initial response to the Bill

- The Law Council has reportedly said that the revenue threshold for reporting requirements should be no higher than $60m (rather than the proposed $100m); that the Bill should include access to a national redress scheme for victims of modern slavery; and that an anti-slavery commissioner should be established to enforce the legislation.
- Oxfam Australia's economic policy adviser Joy Kyriacou has reportedly welcomed the Bill but said that said it should include penalties for companies that fail to report, or report misleading information on, the steps they have taken to combat modern slavery. Shadow Minister for Justice Clare O'Neil has also reportedly welcomed the Bill but expressed disappointment at the absence of penalties and the lack of redress for victims.

Related News

NSW Legislation

Separately, the NSW *Modern Slavery Bill* 2018 passed both houses on 21 May and is awaiting assent.

[Sources: Modern Slavery Bill 2018; Explanatory Memorandum; Assistant Minister for Home Affairs Alex Hawke 28/06/2018; Factsheet: Modern Slavery Reporting Requirement; Modern Slavery Bill 2018 (NSW); The Guardian 28/06/2018; The SMH 27/06/2018]

In Brief | Thomson Reuters Foundation Annual Poll ranking the world's most dangerous countries for women specifically regarding healthcare, access to economic resources, customary practices, sexual violence, non-sexual violence and human trafficking has found India is the most dangerous country in the world for women. The US ranks tenth in the same survey.

[Sources: Thomson Reuters Foundation Annual Poll: The world's most dangerous countries for women 2018; CNN 26/06/2018]

Whistleblowing

United States | Strengthening whistleblower protections: New legislation has re-authorised, renamed and made permanent the whistleblower protection ombudsman role.

US President Donald Trump has signed into law the *Whistleblower Protection Coordination Act* which, among other things, renames and reauthorises a 'Whistleblower Protection Coordinator' (previously referred to as the Whistleblower Protection Ombudsman) at each agency's Office of Inspector General (OIG). The role of the Protection Coordinator is to oversee protections for whistleblowers within the inspector general's offices at federal agencies.

Context: Pursuant to the *Whistleblower Protection Enhancement Act* 2012, each Office of Inspector General (OIG) designated a Whistleblower Protection Ombudsman. Their role was to educate their agency's employees about prohibitions on retaliation for whistleblowing and about employee's rights and remedies as well as to assist the OIG in coordinating with the US Office of Special Counsel (OSC), Congress, and other relevant entities to ensure the appropriate handling of allegations. Authorisation for the ombudsman position was subject to a 5 year sunset and expired in November 2017. The *Whistleblower Protection Coordination Act* codifies and makes permanent this function.

Special Counsel Henry Kerner commented: 'By signing this important legislation into law, whistleblowers will now have a dedicated official permanently at each agency to educate the workforce and work with OSC to protect against retaliation. This is an important step to ensure whistleblowers who disclose waste, fraud, and abuse know their rights and are protected.'

[Sources: Whitehouse media release: President Donald J Trump Signs S 1869 and S. 2246 into law 25/06/2018; US Office of Special Counsel media release 25/06/2018; S 1869: Whistleblower Protection Coordination Act]

Climate Risk

In Brief | Setback for landmark climate law suits? A US Federal Judge has dismissed lawsuits by the cities of San Francisco and Oakland alleging oil companies: BP PLC; Royal Dutch Shell PLC; Exxon Mobil Corp; ConocoPhillips; and Chevron Corp should pay to protect the cities' residents from the impacts of climate change. Media reports suggest this has broader implications for many similar lawsuits still pending.

[Sources: The People of the State of California v. BP P.L.C. et al; Manufacturers' Accountability Project media release 25/06/2018; New York Times 25/06/2018; [registration required] The WSJ 25/06/2018]

Other Developments

United Kingdom | The Serious Fraud Office has charged Unaoil for alleged payment of bribes in Iraq.

As part its ongoing corruption investigation, the UK Serious Fraud Office (SFO) announced that it has commenced criminal proceedings against Unaoil Monaco SAM and Unaoil Ltd (Unaoil) in relation to alleged corrupt payments in Iraq.

According to the FRC statement:

- Unaoil Ltd has been summonsed with two offences of conspiracy to give corrupt payments, contrary to section (1) of the Criminal Law Act 1977 and section 1 of the Prevention of Corruption Act 1906.
- Unaoil Monaco SAM has been summonsed with two offences of conspiracy to give corrupt payments, contrary to section (1) of the Criminal Law Act 1977 and section 1 of the Prevention of Corruption Act 1906.

The FRC notes that this follows charges already brought against four individuals for alleged conspiracy to make corrupt payments to secure the award of contracts in Iraq.

[Sources: SFO media release 26/06/2018; FCPA blog 26/06/2018]