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Contents

Boards and Directors

Governance Changes at the top European banks post GFC: Data from the 25 largest listed banks in Europe shows that boards today are smaller, work harder, and have a higher level of expertise than a decade ago according to research by Nestor Advisors.

To mark the ten year anniversary of the global financial crisis (GFC), Nestor Advisors have released a summary of their research into key changes and governance trends they've observed across the top 25 European banks since the GFC. A high level overview of the key findings is below.

About the report

- The findings are based on analysis of public disclosures including: annual reports; articles of association; corporate governance reports; regulatory filings; terms of reference of board committees; board and management regulations; press releases; and company websites over the period 31 December 2007 to 31 December 2016.
- The following 25 banks were included in the analysis: Banco Santander SA, Barclays Plc, BNP Paribas, Caixabank, Crédit Agricole S.A., Credit Suisse Group AG, Danske Bank Group, Deutsche Bank AG, DnB Group, HSBC, ING Bank N.V, Intesa Sanpaolo, KBC Group, Lloyds Banking Group PLC, Natixis SA, Nordea Bank AB, Royal Bank of Scotland, Skandinaviska Enskilda Banken, Société Générale, Standard Chartered, Svenska Handelsbanken, Swedbank, UBS AG, UniCredit SpA and Banco Bilbao Vizcaya Argentaria S.A.

Key changes since the GFC

- **Boards are getting smaller and busier**: According to the research, boards of the top European banks are overall smaller, but busier, than they were in 2007. The average size of the board is now 14 (as compared with 16 in 2007), and only four of the top 25 banks had a board consisting of 20 members or more in 2016. The researchers also found that boards are also busier today than before the crisis, with the average workload of a non-executive director (NED) in 2016 now at a similar level to the mid-crisis peak of 2008-2009. Though there are 'significant differences' among the European banks in terms of the number of board meetings held during the year, the average has increased from 11.5 meetings held in 2007, to nearly 14 in 2016 according to the researchers. The increased number of board and committee meetings has also been accompanied by a higher attendance rate at meetings. While the average has remained relatively steady since 2007, rates has gone up across all banks. In 2016 the minimum attendance was at 91%.
- **More committees:** The research found that the number of committees supporting the board has consistently grown since the GFC increasing from 3.7 in 2007 to 5 in 2016. This is attributed by the report writers in part to the mandatory separation of the audit and risk committee into two separate committees, and also to a general trend towards establishing more committees focusing on specific regulatory and compliance issues, as well as bank culture, conduct and reputation.
- **Conduct and culture committees:** While only two out of the 25 banks had a separate committee overseeing conduct, culture and values prior to the crisis, this is now the case, according to research, for 28% (or 7), of the top European banks.
- **Cybersecurity remains less of a priority?** The researchers found that contrary to the trend in the US, only two of the top European banks had established a board committee focusing specifically on technology and cybersecurity. However, 86% of the top European banks include in their 2016 disclosures that the board examined issues related to cyber risk and security during the year.
- **Board change:** According to the researchers, 32% of the top European banks have changed their board completely since 2008 and on average, 86% of board membership has been refreshed post-GFC.
- **Board effectiveness is now regularly assessed:** According to the research, all the bank boards in the group now conduct regular assessments of the effectiveness of the board, in line with the Capital Requirements Directive IV (CRD IV) requirement. The disclosure of this process was also found to

have improved significantly, with 48% of banks now disclosing specific challenges identified and actions taken to address these.

- **Profile of the board chair has changed:** The profile of the board chair was also found to have changed post-GFC. Compared to 2007, more and more chairs are now independent non-executives (independent or independent on appointment), 12% are executive chairs, while 15% of the non-executive chairs have previously held an executive responsibility in the bank. Many non-executive chairs have financial expertise, and 59% have held a senior executive role within the financial industry within the past 10 years. As was found to be the case for the rest of the board, the workload and time commitment of the board chair was found to have increased significantly in recent years while the number of external directorships held by the non-executive board chairs decreased, with only a very small minority (9%) holding an external executive position in addition to their board responsibilities.
- **Role of non-executive directors has changed:** On average, the researchers found that the workload per director increased by over 30% compared to pre-crisis levels. From this, they conclude that the role of a bank NED has 'evolved post-crisis' with NEDs now 'required to adopt a more hands-on approach, requiring a greater time-commitment by their non-executive directors'.

[Source: Harvard Law School Forum on Corporate Governance and Financial Regulation 11/06/2018]

Diversity

Top Story | Latest AICD report released: 30% female board representation across the ASX 200 by 2018 looks achievable? According to the report, the ASX100 has reached the 30% female board representation target and representation in ASX 200 overall is currently at 27.7%.

The Australian Institute of Company Directors (AICD) has released its latest report on progress towards the 30% female board representation target: *30% by 2018: Gender diversity progress report for March 2018 – May 2018*. The report has found among other things that women now comprise 30% of ASX100 boards and that overall, representation in the ASX 200 is at 27.7%. The AICD has called for all boards to ensure that 30% of their directors are women, and has urged ASX 200 companies to meet this target, by 2018.

Key Findings

- **Improvement since 2008**: Overall, ASX 200 companies have increased women's board representation from 8% in 2008 to over 27% in 2018.
- **Improvement in representation since last quarter**: There have been 18 additions to the list of companies with at least 30% female directors since February. The appointment rate for 2018 YTD is at 49% (47 women v 49 men).
- **Female representation on ASX 200 boards**: Overall 27.7% (84 boards) of boards in the ASX 200 have met the 30% target. In the ASX 100, 30% of boards have met the 30% target. This figure slightly increases to 30.2% for ASX 50 and ASX 20 boards.
- **Still five companies in the ASX 200 with zero female directors**: According to the report there are five companies in the ASX 200 without any female directors. The number has remained constant since the last quarterly report for the period December 2017 – February 2018.
- **Continued advocacy is required to drive change**: Non-Executive Director and Founding Male Champions of Change member Kevin McCann comments in the report that without continued advocacy, continued progress is unlikely to occur citing the fact that 'in 2008, women on ASX 200 boards fell from 8.3% to 8%'. He observed that 'A laissez-faire approach will not overcome bias, conscious or unconscious, nor the obstacles which prevent women from obtaining leadership roles in Australian institutions. Only after 10 years of effort from AICD, Chief Executive Women, MCC and the 30% Club, is Australia achieving significant female representation on ASX200 boards' he writes.
- **The benefits of diversity are clear, any deterioration in governance standards is unrelated to the increased number of female board members:** Responding to media reports asserting that the push for increased female board representation has led to unqualified directors being appointed to

Australian boards and to a consequent deterioration of governance standards, AICD Chair Elizabeth Proust, Non-Executive Director and Founding Male Champions of Change member Kevin McCann and Australian Shareholders' Association CEO Judith Fox (among others) featured in the report, challenge this view. They point to the evidence of the benefits of financial and non-financial benefits diversity (many citing McKinsey research on the issue), as well as their own experience. Non-Executive Director and Founding Male Champions of Change member Kevin McCann stated: 'My personal experience on Australian boards across a number of sectors – financial, energy, health, hospitality and technology – corroborates the McKinsey research. The arrival of a critical mass of women directors to boards raises the quality of board deliberations as a result of the collective intelligence from different perspectives'. Mr McCann adds that appointing unqualified directors whether male or female would be a breach of directors' duties to act in the best interests of the company and that in his experience 'this has not occurred'.

[Sources: Australian Institute of Company Directors media release 13/06/2018; 14/06/2018; Australian Institute of Company Directors report: 30% by 2018: Gender diversity progress report for March 2018 – May 2018 14/06/2018]

United Kingdom | A UK Treasury Committee Report into female representation and progression in the financial sector has concluded that the underrepresentation of women in senior positions is 'unacceptable' and has made various recommendations for both industry and government to address the issue. The report also recommends that the focus on diversity in the sector be extended beyond gender diversity.

The UK Treasury Committee has released a report: *Report of Session 2017-19: Women in Finance*, which has found that despite the financial and non-financial benefits of gender diversity, there is 'clearly an underrepresentation of women in senior positions in the financial services sector'. The report states that 'The near exclusion of any group within society, intentional or unintentional, is not acceptable'.

A high level overview of some of the findings and recommendations suggested by the committee, to address this is below.

- **Current levels of female representation in the finance sector are low**: The report states that 'There is clearly an underrepresentation of women in senior positions in the financial services sector' and adds that 'The gender distribution of financial firms typically follows a "pyramid" model where the number of women diminishes in line with seniority. Furthermore, women are generally better represented in firms' support functions rather than profit generating functions'.

- **The financial and non-financial benefits of diversity are clear and the lack of representation is 'not acceptable':** The report cites evidence of both the financial and non-financial benefits of gender diversity including research that found that firms with higher numbers of women in senior management positions perform better financially than counterparts with lower numbers of women in senior management. In addition, the report identifies a number of non-financial benefits of gender diversity including that gender balance can 'be conducive' to diverse thinking and have benefits for building client relationships. The report goes on to comment that 'Notwithstanding the benefits of gender diversity from a business perspective, the representation and progression of women in finance should also be regarded as intrinsically right. The near exclusion of any group within society, intentional or unintentional, is not acceptable'.

- **Barriers to gender diversity**: Culture, unconscious bias in the recruitment process and lack of flexibility are identified in the report (among other factors) as barriers to improving gender diversity and the report makes various recommendations as to how these could be addressed by both industry and government. Commenting on the recruitment process, the report observes that 'firms can have unnecessary legacy requirements in their recruitment processes, such as particular academic qualifications or requiring certain hours to be worked or frequent travel to be almost compulsory'. To address this, the report recommends that firms 'revisit their recruitment policies and practices on a regular basis to ensure that unconscious bias is eliminated at every stage of the process'.

- **Pay gap reporting:** Commenting on the issue of the gender pay gap and pay gap reporting, the report makes a number of recommendations including the following.

- The Government should consider expanding gender pay gap reporting to encompass reporting by job role and by corporate function, to offer greater transparency.
- The government should amend guidance on gender pay gap reporting surrounding the disclosure of partners' remuneration to prevent firms from 'circumventing the spirit of the legislation': The report observes that 'in many large professional services firms that are partnerships, partners have a similar status to senior executives and should therefore be included in gender pay gap calculations. Omitting partners' remuneration could reduce the gender pay gap for these firms, rendering the reported figures disingenuous'. To address this, the report recommends that the government amends its guidance on gender pay gap reporting 'to prevent firms from circumventing the spirit of the legislation'.
- Exclusions to the pay gap reporting requirement should be reconsidered: The report 'encourages the government to reconsider whether it is appropriate that subsidiaries of large companies with less than 250 employees are exempt from gender pay gap reporting. This exemption could impact the trends emerging from gender pay gap reporting data and the conclusions drawn'.
- Inaccurate gender gap reporting data should be corrected: According to the report, much of the reported pay gap data is incomplete or inaccurate which 'renders sectoral analysis of the gender pay gap reporting data difficult'. The report recommends that the government review the gender pay gap database to identify and correct omissions and errors in order to provide as much sectoral information as possible.

- **Time to extend focus beyond gender diversity**: The report notes that though gender representation and the progression of women in finance had been the focus of the inquiry, 'the issue of representation of other forms of diversity within the financial services sector was raised throughout'. The report goes on to confirm that the committee 'recognises that gender diversity is only one element of the diversity agenda and the work carried out to promote this is vital; nevertheless, more work needs to be done for the representation of other forms of diversity within finance'. On this basis, the report 'encourages firms to widen their diversity initiatives and consider the representation of other forms of diversity within their organisations' and calls on Treasury to also extend its focus to other forms of diversity in finance. 'The Treasury should start by understanding its own treatment of employees from diverse backgrounds' the report states.

[Sources: House of Commons Treasury Committee Report: 15th Report of Session 2017-19: Women in Finance HC 477 13/06/2018; The Independent 14/06/2018]

In Brief | Proposed UK diversity measures likely to be adopted across Europe? A recent post on the University of Oxford Law Faculty blog suggests that diversity initiatives included in the proposed (draft) FRC Corporate Governance Code are likely to be adopted throughout Europe over coming years. The post also suggests that the revised code is unlikely to be finalised until July of 2018 and that this may have knock-on effects for the review and finalisation of the Stewardship Code and ultimately for the implementation of both.

[Note: In December 2017, the UK Financial Reporting Council (FRC) released a revised Corporate Governance Code for consultation and announced the review of the UK Stewardship code (see: Governance News 15/12/2018). Consultation on the draft Governance Code closed on 28 February 2018 and the FRC indicated that it intended that the new code (in final form) would be released by 'early summer' 2018 and apply to accounting period beginning on or after 1 January 2018.]

[Source: University of Oxford Faculty of Law blog 05/06/2018]

Directors' and Officers' Duties and Liabilities

Possible breach of s180? ASIC has launched civil penalty proceedings against former Quintis managing director but not against Quintis. ASIC's investigations into Quintis are continuing.

The Australian Securities and Investments Commission (ASIC) announced that it has commenced civil penalty proceedings in the Federal Court of Australia against former managing director of Quintis Ltd

(Quintis) Frank Cullity Wilson for alleged breach of his duties as a director under s180 of the *Corporations Act 2001* (Cth). ASIC states that Quintis is not a defendant to the proceedings.

Details

ASIC alleges that Mr Wilson did not discharge his duties with 'the degree of care and diligence that a reasonable person in the position of managing director would exercise'. More particularly, ASIC alleges that:

- Mr Wilson was aware that key contracts with Nestle-owned Galderma (Galderma agreements) had been terminated in early 2017.
- Mr Wilson did not inform the Quintis board of this until 9 May 2017.
- Mr Wilson allowed Quintis to release information to the market on 27 March 2017, regarding the status of the Galderma agreements that was 'misleading or deceptive'. The announcement said that the Galderma agreements had been terminated effective 1 January 2017, that the directors of Quintis had been advised of the termination of the agreements on 9 May 2017 and were previously unaware.

ASIC is seeking declarations of contravention, civil penalty orders and an order prohibiting Mr Wilson from managing corporations for such period as the court thinks fit. The matter has been listed for a further hearing on 28 June 2018. ASIC adds that its investigation is ongoing.

[Sources: 18-174MR ASIC launches civil penalty proceedings against former Quintis managing director Frank Wilson; [registration required] The AFR 14/06/2018]

Remuneration

United States | Revision of SEC stock buyback rules on the cards? In a recent speech, SEC Commissioner Robert Jackson has called for the revision of SEC buyback rules and for compensation committees to exercise greater scrutiny to address the trend towards executives using buybacks to cash out shares.

In a recent speech, Securities and Exchange (SEC) Commissioner Robert J Jackson Jr outlined the findings of research into corporate stock buybacks and has called on SEC to update current rules to 'limit executives from using stock buybacks to cash out from America's companies'. An overview of the key points of his address is below.

Not operating as intended — many executives use buybacks as a chance to cash in their shares: Mr Jackson explained that his research had found 'clear evidence that a substantial number of corporate executives today use buybacks as a chance to cash out the shares of the company they received as executive pay'. As such, he suggests, the current system operates to incentivise pursuit of short term rather than long term value. He said: 'what we are seeing is that executives are using buybacks as a chance to cash out their compensation at investor expense. Executives often claim that a buyback is the right long-term strategy for the company, and they're not always wrong. But if that's the case, they should want to hold the stock over the long run, not cash it out once a buyback is announced. If corporate managers believe that buybacks are best for the company, its workers, and its community, they should put their money where their mouth is'.

Suggested 'path forward': To address these issues Mr Jackson called for:

1. Revision of SEC rules governing buybacks (which were last reviewed in 2003) to introduce limits on boards and executives using the buyback as an 'opportunity to cash out'. Mr Jackson said: 'SEC rules should encourage executives to keep their skin in the game for the long term. That's why our rules should be updated' he said. He went on to call for 'an open comment period' to re-examine SEC rules in this area to ensure 'they protect American companies, employees, and investors given today's unprecedented volume of buybacks'.
2. Call for corporate boards and compensation committees to pay 'closer attention to the implications of a buyback for the link between pay and performance'. Mr Jackson said that compensation committees should be required 'review the degree to which the buyback will be used as a chance

for executives to turn long-term performance incentives into cash. If executives will use the buyback to cash out, the committee should be required to approve that decision and disclose to investors the reasons why it is in the company's long-term interests'. He added that this information should be disclosed to investors: 'It is hard to see why a company's buyback announcement shouldn't be accompanied by this kind of disclosure'.

In conclusion, Mr Jackson said that his proposed changes are in line with SEC's mission to 'protect investors': 'Investors deserve to know when corporate insiders who are claiming to be creating value with a buyback are, in fact, cashing in. A level playing field requires that shareholders selling into a buyback know what managers are doing with their own money. And investors who feel assured that buybacks won't be used as a chance for insiders to cash in will be more willing to fund the kinds of long-term investments our economy needs' he said.

[Sources: Speech by SEC Commissioner Robert J Jackson Jr: Stock Buybacks and Corporate Cashouts 11/06/2018; CNBC 11/06/2018]

Disclosure and Reporting

Top Story | Consultation on Code of Conduct for UK Private Companies: The FRC has released the Wates Corporate Governance Principles for Large Private Companies (the Principles) for consultation in the same week as new corporate governance reporting requirements are under consideration by parliament.

New corporate governance reporting requirements for large private companies; FRC consultation on a draft corporate governance code for large private companies.

The UK Department for Business, Energy & Industrial Strategy (BEIS) has released a guidance document setting out how and when companies will be effected by new corporate governance reporting requirements in the proposed Companies (Miscellaneous Reporting) Regulations 2018 currently before parliament for approval. The BEIS notes that the regulations are not yet law, and will not become so until approved by parliament, but that the guidance is being released to give companies and stakeholders as much time as possible to understand the proposed changes.

Separately, The Financial Reporting Council (FRC) has released the Wates Corporate Governance Principles for Large Private Companies (the Principles) for consultation. The FRC states that in addition to improving corporate governance standards, compliance with the Principles will satisfy the reporting requirements under the proposed: Companies (Miscellaneous Reporting) Regulations 2018.

A high level overview of both the new corporate governance reporting requirements as outlined in the BEIS guidance document and a broad overview of the Wates Corporate Governance Principles is below.

Key Points: New Corporate Governance Reporting Requirements

The regulations will require certain companies (all companies that do not have an existing corporate governance reporting requirement and which have more than 2000 employees and/or a turnover of more than £200 million, and a balance sheet of more than £2 billion) to include additional content in their annual reports.

In particular, the BEIS highlights the following additional requirements.

- Compliance with corporate governance code: Very large private and public unlisted companies will be required to include a statement as part of their directors' report stating which corporate governance code (if any) has been applied and how. If the company has departed from any aspect of the code, the company will be required to outline how it did so and to provide reasons. If the company has not applied any corporate governance code, the statement must explain why that is the case and what arrangements for corporate governance were applied.
- Report on how directors have had regard to their duty to promote the success of the company: Large companies will be required to include a statement as part of their strategic report describing how the directors have had regard to the matters in section 172(1)(a) to (f) of the Companies Act 2006 (UK). Specifically, the legislation states:

172 Duty to promote the success of the company
(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—

a. the likely consequences of any decision in the long term,
b. the interests of the company's employees,
c. the need to foster the company's business relationships with suppliers, customers and others,
d. the impact of the company's operations on the community and the environment,
e. the desirability of the company maintaining a reputation for high standards of business conduct, and
f. the need to act fairly as between members of the company.

[Note: The proposed changes to the UK Corporate Governance Code released by the FRC for consultation in December 2017 included (among other things) proposals for annual reports to include new information on how the interests and the matters included in *s172 of the Companies Act* 2006 UK had influenced the board's decision making. In putting forward the proposal, the FRC noted the government's intention to introduce secondary legislation to require all companies of significant size (private as well as public) to explain how their directors comply with the requirements of s172 and noted further, that the code would be finalised pending the outcome of the government's measures in this regard. Consultation on the revised Code closed in February of this year, and a final version is yet to be released. See: Governance News 15/12/2018. A recent post on University of Oxford, Faculty of Law blog suggests that the final version of the FRC Corporate Governance Code is unlikely to be released until the end of July 2018 which may delay implementation. See: University of Oxford, Faculty of Law blog 05/06/2018]

- Employee engagement: Companies with more than 250 UK employees will be required to include a statement as part of their directors' report summarising how the directors have engaged with employees, how they have had regard to employee interests and the effect of that regard, including on the principal decisions taken by the company in the financial year.
- Business relationships: Large companies will be required to include a statement as part of their directors' report summarising how the directors have had regard to the need to foster the company's business relationships with suppliers, customers and others, and the effect of that regard, including on the principal decisions taken by the company during the financial year.
- Median pay: Quoted companies with more than 250 UK employees will be required to publish, as part of their directors' remuneration report, the ratio of their CEO's total remuneration to the median (50th), 25th and 75th percentile full-time equivalent (FTE) remuneration of their UK employees. Companies will also have to publish supporting information eg how the median ratio is consistent with the company's wider policies on employee pay, reward and progression and the reasons for changes to the ratios from year to year.
- Director remuneration: All quoted companies will be required to explain, in the directors' remuneration policy within their directors' remuneration report, the effect of future share price increases on executive pay outcomes. Companies will also be required to include a summary in their directors' remuneration report of any discretion that has been exercised on executive remuneration outcomes reported that year in respect of share price appreciation or depreciation during the relevant performance periods.

[Note: The pay ratio proposal was outlined by Prime Minister Theresa May in 2016, when she called for 'responsible capitalism' and curbs to excessive executive remuneration (see: [registration required] The FT 11/07/2016). The additional requirements also follow the introduction of pay gap reporting requirements in the UK . Broadly, the remuneration reporting requirements appear similar to those recently implemented in the US. See: Securities and Exchange Commission media release 21/09/2017]

Timeframe

Subject to Parliamentary approval, the new reporting requirements will apply to company reporting on financial years starting on or after 1 January 2019 ie the first actual reporting under the new regulations will start in 2020.

[Sources: Department for Business, Energy & Industrial Strategy media release 12/06/2018; The Companies (Miscellaneous Reporting) Regulations 2018 - Frequently Asked Questions 12/06/2018; The Companies (Miscellaneous Reporting) Regulations 2018; Explanatory Note]

The Financial Reporting Council has released the *Wates Corporate Governance Principles for Large Private Companies* (the Principles) for consultation.

Following the release of the UK government's 2016 Green Paper and the Business, Energy & Industrial Strategy (BEIS) Select Committee's report of April 2017, The Financial Reporting Council (FRC), has released the *Wates Corporate Governance Principles for Large Private Companies* (the Wates Principles) (and accompanying guidance) for consultation. The FRC has urged companies to engage in the consultation process, and to adopt the Code once finalised, both to inform and develop their corporate governance practices and to help restore trust in the sector. FRC Executive Director, Corporate Governance and Reporting Division Paul George commented: 'These principles pave the way for more clarity of purpose and positive corporate behaviours amongst this significant sector of the business community. This work has the potential to help restore trust in business and contribute to long-term sustainable growth in the UK economy.'

Consultation on the Wates Principles is open until 7 September 2018. The final version of the Principles will be published in December 2018. The FRC writes that companies will be able to apply them to meet anticipated new reporting requirements (outlined above).

Six Principles

The six principles are:

1. 'Purpose – An effective board promotes the purpose of a company, and ensures that its values, strategy and culture align with that purpose'.
2. 'Composition – Effective board composition requires an effective chair and a balance of skills, backgrounds, experience and knowledge, with individual directors having sufficient capacity to make a valuable contribution. The size of a board should be guided by the scale and complexity of the company'.
3. 'Responsibilities – A board should have a clear understanding of its accountability and terms of reference. Its policies and procedures should support effective decision-making and independent challenge'.
4. 'Opportunity and Risk – A board should promote the long-term success of the company by identifying opportunities to create and preserve value and establish oversight for the identification and mitigation of risk'.
5. 'Remuneration – A board should promote executive remuneration structures aligned to sustainable long-term success of a company, taking into account pay and conditions elsewhere in the company'. in order to assess how workforce pay and conditions have been taken account in setting directors' remuneration?
6. 'Stakeholders – A board has a responsibility to oversee meaningful engagement with material stakeholders, including the workforce, and have regard to that discussion when taking decisions. The board has a responsibility to foster good relationships based on the company's purpose'.

Consultation questions

Among the issues on which the FRC has requested feedback are the following.

- Whether the principles provide 'sufficient visibility' of remuneration structures 'in order to assess how workforce pay and conditions have been taken account in setting directors' remuneration?'
- Whether the draft Principles should be 'more explicit in asking companies to detail how their stakeholder engagement has influenced decision-making at board level?'
- What approach to monitoring of the application of the principles would encourage best practice and whether the 'apply and explain' approach to reporting is the best approach.

Comments on the Wates Principles

- James Wates CBE, Chair of the Coalition Group that developed the principles stated: 'Good business well done is good for society…These principles will provide a flexible tool for companies of all sizes, not just those captured by the new legislative reporting requirement, to understand good practice in corporate governance and, crucially, adopt that good practice widely. The principles are about fundamental aspects of business leadership and performance.'
- Director-general of the Institute of Directors Stephen Martin is quoted in The Times as commenting: 'As we saw in the case of BHS, the collapse of a large private company can have far-reaching consequences for a range of individuals…It is right that these organisations should be required to report on their governance arrangements so they can provide a degree of transparency to employees, customers and suppliers.'
- Director of the Institute for Family Business Elizabeth Bagger is quoted in The Times as saying: 'Whilst most family businesses act responsibly, the actions of a few businesses has damaged trust in UK business as a whole. We hope that the adoption of new corporate governance principles will help to repair that trust.'

Australian Position

Commenting on the proposed changes, MinterEllison Partner Mark Standen suggested that they are part of a global trend towards holding companies to a higher standard of behaviour than has previously been the case. 'Increasingly, companies are expected to deliver more than strong financial returns. They are also expected, as BlackRock's Larry Fink suggested in his 2018 letter to CEOs, to contribute to society' he said. 'What is interesting is that this trend is now translating into formal regulation of both private and public companies, where previously, this has not been the case'.

Though there are no parallel formal requirements for private companies in Australia Mr Standen said, there are some signs of a similar shift in community expectations, and to some extent a shift in regulators' expectations of corporate behaviour for both private and public entities in this country. The release of APRA's recent report corporate governance, culture and accountability within the CBA which called for greater focus on the management of non-financial risk; recent speeches by ASIC Chair James Shipton on the topic of rebuilding 'trust' calling for industry to raise standards of professionalism if further regulation is to be avoided; and the focus not only on meeting minimum legal requirements, but on meeting community standards of behaviour at the Financial Services Royal Commission is evidence of this shift in thinking, Mr Standen suggested.

There are also signs that industry is proactively moving to implement changes in this regard, Mr Standen added. For example, the release by ACSI of the first stewardship code for asset owners and the recently revised Banking Code of Practice (currently awaiting APRA approval) have a similar focus on raising standards. 'Though Australia has not moved as far as the UK towards formally regulating governance and culture, no company can afford not to focus on building strong corporate governance standards into their everyday business' Mr Standen said.

[Sources: Financial Reporting Council media release 13/06/2018; Consultation: The Wates Corporate Governance Principles for Large Private Companies 13/06/2018; [registration required] The FT 13/06/2018; The Times 13/06/2018; Board Agenda 13/06/2018]

Financial Services

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

Round 4 hearings to focus on farming finance, natural disaster insurance, and interactions between Aboriginal and Torres Strait Islander people and financial services entities.

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Financial Services Royal Commission) will hold the fourth round of public hearings in Brisbane from 25 June to Friday 29 June, and in Darwin from Monday 2 July to Friday 6 July.

The hearings will focus on issues affecting Australians who live in remote and regional communities, which relate to farming finance, natural disaster insurance, and interactions between Aboriginal and Torres Strait

Islander people and financial services entities. As previously, the hearings will proceed by way of case studies.

Schedule of topics and case studies

Topics	Case Studies
Farming finance	▪ CBA (Bankwest) ▪ Rabobank ▪ NAB ▪ CBA ▪ Bendigo and Adelaide Bank (Rural Bank) ▪ ANZ (Landmark)
Natural disaster insurance	[The case studies will consider issues arising from: Tropical Cyclone Debbie in March 2017; the hail storm in Broken Hill in November 2016; the bushfires near Wye River in December 2015; and the floods in the Hunter Valley in April 2015.] ▪ Youi ▪ Suncorp
Interactions between Aboriginal and Torres Strait Islander people and financial services entities	▪ Select AFSL, trading as Let's Insure ▪ ACBF Funeral Plans ▪ ANZ

Background papers: The Commission released two background papers: *Background Paper 15: Catastrophes and Natural Disasters* and *Background Paper 14: General Insurance* to assist in preparing for the hearings.

[Sources: Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry: Background Paper 15: Catastrophes; Natural Disasters; Background Paper 14: General Insurance; Round 4 Hearings: schedule of topics and case studies]

In Brief | The Financial Services Royal Commission has released responses to the specific and general submissions made by Counsel Assisting David Hodge QC at the conclusion of Round 3 hearings. Among other things, ASIC states that it has not yet made a determination as to whether it will approve the proposed Australian Banking Association (ABA) Code of Banking Practice.

[Note: The specific and general submissions made by Counsel Assisting Michael Hodge QC in his closing address to the Round 3 public hearings were outlined in Governance News 08/06/2018]

[Source: Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry Round 3 Hearings: loans to small and medium enterprises written submissions.]

Other Developments — Australia

Pre-empting the regulator? Dover Financial Advisers Pty Ltd has elected to cancel its AFSL at short notice, reportedly to avoid the threat of likely suspension or cancellation of its licence by ASIC.

On 8 June, Dover Financial Advisers Pty Ltd (Dover) reportedly notified its authorised representatives that the organisation would cease operating as an Australian Financial Service Licensee (AFS licensee) with immediate effect leaving the company's advisers unable to provide new advice. 'Your authority to represent Dover will terminate on or before the 6 July 2018. Between now and the time your termination becomes final, you cannot provide any new advice to clients. You can implement only that advice which was agreed to, in writing, by your clients on or before 8 June 2018' The AFR quotes the company as stating.

According to The AFR approximately 10,000 clients (and $4bn in funds under management) are believed to be impacted by this decision, as well as the company's 408 advisers across the country.

Reportedly, advisers were informed by Dover that the decision was primarily due to the intervention of the Australian Securities and Investments Commission (ASIC) and that the timeframe was dictated by ASIC and 'outside of our [Dover's] control'.

Independent Financial Adviser quotes ASIC as commenting in relation to this that, 'As part of an ongoing investigation commenced in 2017, ASIC served a notice of hearing on Dover that ASIC was minded to suspend or cancel Dover's AFSL…As a result of this notice, Dover…have advised that, amongst other things, Dover will cease providing financial services.'

ASIC statement

ASIC issued a statement on 12 June:

- Advising ex-Dover clients that they may wish to 'look for a new adviser' and cautioning that if they wish to continue using their ex-Dover adviser, they should ensure that the adviser has been authorised by another AFS licensee.
- Confirming that ex-Dover advisers cannot give financial advice unless licensed or authorised by an AFS licensee: 'ASIC understands Dover has revoked the advice authorisation of all its representatives. This means ex-Dover advisers cannot give new advice until authorised by another AFS licensee' ASIC writes.
- Providing guidance for AFS licensees considering authorising ex-Dover licensees: ASIC states that any licensee considering authorising an ex-Dover licensee should: conduct background checks before authorising the adviser, have arrangements to address deficiencies in the advice from ex-Dover advisers and 'have heightened oversight (for instance, vet all advice from ex-Dover advisers for a period)'.

Association of Financial Advisers (AFA) is reportedly taking steps to assist ex-Dover advisers: Reportedly, AFA CEO Phil Kewin has said that the AFA has contacted affected members and is taking steps to introduce them to new licensees, but has said that ex-Dover advisers may face difficulty joining other dealer group's due to Dover's recent appearance before the royal commission and the regulator's concerns over its compliance. Reportedly, Mr Kewin also said that the sudden close of Dover was 'not a good look for the industry' and will have implications for the financial advice industry's reputation more generally.

[Sources: [registration required] The AFR 11/06/2018; 12/06/2018; Independent Financial Adviser 08/06/2018; 11/06/2018; 12/06/2018; Dover Financial Advisers media release ASIC media release 12/06/2018]

ASIC has commenced proceedings in the Federal Court of Australia against Westpac in relation to alleged poor financial advice provided by one of its former financial planners (who has since been banned by the regulator).

The Australian Securities and Investments Commission (ASIC) has announced that it has commenced civil penalty proceedings against Westpac, for alleged breaches of the 'best interests' duty under the *Corporations Act 2001* (Cth) (the Act), by a former Westpac financial adviser during his employment with the lender.

The adviser in question was an employed representative of Westpac from 2001 to 10 November 2014, and has already been banned (in 2017) by ASIC from providing financial services until 2 June 2022. As the advisers' responsible licensee during the period when the alleged breaches occurred, ASIC alleges that:

- Westpac is liable for the alleged breaches of the 'best interests' obligations by the adviser under s961K of the Act.
- ASIC also alleges that Westpac contravened sections 912A(1)(a) and (c) of the Act, which requires Westpac to do all things necessary to ensure that the financial services covered by its licence are provided efficiently, honestly and fairly, and to comply with financial services laws.

ASIC comments that s 961K of the Act is a civil penalty provision, and attracts a maximum penalty of $1 million per contravention.

ASIC notes that Westpac has 'a significant remediation programme underway in respect' of the advisers' conduct and has paid approximately $12 million in compensation to clients impacted.

[Sources: 18-175MR ASIC commences civil penalty proceeding against Westpac for poor financial advice; Independent Financial Adviser 15/06/2018]

ASIC has taken steps to implement the new financial benchmark regulatory regime: ASIC has finalised and published benchmarks rules, a significant benchmarks declaration, and issued a regulatory guide (Regulatory Guide 268 Licensing regime for financial benchmark administrators).

Following the passage *Treasury Laws Amendment (2017 Measures No 5) Act* 2018 which enacted a regime for the regulation of financial benchmarks, and more particularly enables ASIC to may make financial benchmark rules that apply in relation to licensees and the financial benchmarks they administer, ASIC has finalised and published benchmarks rules, a significant benchmarks declaration, and issued a regulatory guide (Regulatory Guide 268 Licensing regime for financial benchmark administrators).

ASIC describes the measures as a step 'towards establishing a comprehensive regulatory regime for financial benchmarks'. ASIC states that the measures are also important in aligning financial benchmarks in the Australian economy with the IOSCO Principles for Financial Benchmarks.

5 significant financial benchmarks: On 6 June, ASIC made the ASIC Corporations (Significant Financial Benchmarks) Instrument 2018/420, which specifies five significant financial benchmarks.

Regulatory Guide 268 Licensing regime for financial benchmark administrators provides information about the administration of the financial benchmark licensing regime and when ASIC's compulsion powers may be used in relation to significant benchmarks.

The guide is intended for entities subject to the *ASIC Financial Benchmark (Administration) Rules 2018* (which impose certain key obligations on licensed benchmark administrators and require contributors to licensed benchmarks to cooperate with ASIC) and the *ASIC Financial Benchmark (Compelled) Rules 2018* (which enable ASIC to require, by written notice, the continued administration of a significant benchmark or compelled submissions to a significant benchmark).

[Sources: 18-171MR ASIC implements financial benchmark regulatory regime; RG 268 Licensing regime for financial benchmark administrators; ASIC Corporations (Significant Financial Benchmarks) Instrument 2018/420; ASIC Financial Benchmark (Administration) Rules 2018; ASIC Financial Benchmark (Compelled) Rules 2018]

Consultation on proposed corporate collective investment vehicle (CCIV): Exposure draft Bill: *Treasury Laws Amendment (Corporate Collective Investment Vehicle) Bill 2018* and explanatory materials released for consultation.

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 (the draft Bill) and accompanying explanatory for public consultation. The draft Bill proposes to insert Chapter 8B into the *Corporations Act 2001* (Cth) to establish the regulatory framework for CCIVs.

Minister O'Dwyer said that the 'vehicle complements the Asia Region Funds Passport initiative, which the Government introduced into Parliament earlier this year' and added that the CCIV will 'allow Australian fund managers to market to participating Asian financial markets using a well-recognised corporate structure vehicle'.

[Note: The Minister is referring to the *Corporations Amendment (Asia Region Funds Passport) Bill 2018* which was introduced into the House of Representative on 28 March (see: Governance News 03/04/2018). The Senate Standing Committee for the Scrutiny of Bills considered the legislation on 9 May. The Committee requested additional information from the minister regarding various aspects of the Bill which were considered not to have been addressed or adequately addressed in the explanatory materials. These include: the minister's detailed justification for the reversal of the evidential burden of proof in proposed subsections 1213L(2) and 1213M(6); more detailed justification for the application of strict liability to the offences created or extended by items 91, 98, 101, and 105, which attract penalties of between three months' and one years' imprisonment and consideration of the inclusion of guidance concerning the exercise of ASIC's powers (among others). As at 18 June, the Bill before the House of Representatives and is yet to pass either house. See: Senate Standing Committee for the Scrutiny of Bills: Scrutiny Digest 5 of 2018]

Treasury notes that the government previously consulted on the draft Bill from 25 August to 25 September 2017 (see: Governance News 28/08/2017) and that this exposure draft includes revisions from that consultation.

'First tranche': The draft Bill proposes to amend the *Corporations Act 2001* (Cth) to establish how the CCIV and its sub-funds operate and to make amendments to apply Chapters 2A to 2P of the *Corporations Act* (such as the meetings rules and members' rights and remedies) to CCIVs.

Timeline: The consultation period for the exposure draft ends on 11 July 2018.

'Second tranche': The 'second tranche' of consultations will cover the remaining substantive aspects of the regulatory framework for CCIVs, including external administration, consequential amendments to apply the Chapter 7 financial services regime to CCIVs, and penalty provisions.

[Sources: Exposure draft: Treasury Laws Amendment (Corporate Collective Investment Vehicle) Bill 2018, Explanatory Materials, Minister for Revenue and Financial Services Kelly O'Dwyer media release 13/06/2018]

Early release of superannuation on compassionate grounds: ATO to administer the early release of superannuation from 1 July 2018.

Minister for Revenue and Financial Services Kelly O'Dwyer has welcomed measures to transfer responsibility for the administration of the early release of superannuation on compassionate grounds, from the Department of Human Services (DHS) to the Australian Taxation Office (ATO) from 1 July 2018.

The changes are intended to streamline the current assessment process for early release applications, enable the funds to be released more quickly to successful applications and also to improve the integrity of the process Ms O'Dwyer said.

The Minister added that 'A key improvement under the new process is the ATO providing electronic copies of approval letters to superannuation funds at the same time as to the applicant. This will mitigate fraud risk and negate the need for superannuation funds to independently verify the letter with the Regulator. Individuals will also upload accompanying documentation simultaneously with their application, rather than the current "two-step process".'

The DHS will continue to accept early release applications up until 30 June 2018. From 1 July 2018 the ATO will process all new applications.

[Source: Minister for Revenue and Financial Services Kelly O'Dwyer 12/06/2018]

In Brief | Superannuation guarantee (SG) integrity package one step closer to passing? The Senate Economics Legislation Committee has released its report on the *Treasury Laws Amendment (2018 Measures No 4) Bill* 2018 and recommended the Bill be passed. Among other things, the Bill proposes to allow the ATO, to issue directions to employers who fail to comply with their SG obligations to pay unpaid SG and undertake SG education courses and introduces criminal penalties for failure to comply with a direction to pay an estimate of unpaid SG. As at 18 June, the Bill is before the House of Representatives.

[Source: Senate Economics Legislation Committee Report: Treasury Laws Amendment (2018 Measures No. 4) Bill 2018 [Provisions] 13/06/2018]

Overseas developments

United States | SEC has charged Merrill Lynch for overcharging customers for mortgage-backed securities

The Securities and Exchange Commission (SEC) has announced that Merrill Lynch, Pierce, Fenner & Smith Inc (Merrill Lynch) has agreed to pay more than $15 million to settle charges that its employees allegedly misled customers into overpaying for Residential Mortgage Backed Securities (RMBS). Without admitting or denying the findings, SEC writes that Merrill Lynch has agreed to repay more than $10.5 million to its customers and to pay penalties of approximately $5.2 million.

Details: In its order SEC found that Merrill Lynch traders and salespersons overcharged customers for RMBS by 'deceiving them' about the price Merrill Lynch paid to acquire the securities. The order also found that Merrill Lynch's RMBS traders and salespersons 'illegally profited from excessive, undisclosed commissions' which, SEC writes were, in some cases more than twice the amount the customers should have paid.

The SEC alleges that the Merrill Lynch traders and salespersons violated antifraud provisions of the federal securities laws in purchasing and selling RMBS and that Merrill Lynch failed to reasonably supervise them.

Chief of the SEC Enforcement Division's Complex Financial Instruments Unit Daniel Michael commented: 'In opaque RMBS markets, lying to customers about the acquisition price can deprive investors of important information…The Commission found that Merrill Lynch failed in its obligation to supervise traders who allegedly used their access to market information to take advantage of the bank's own customers'.

[Sources: United States Securities and Exchange Commission 12/06/2018; Market Watch 12/06/2018]

In Brief | The Monetary Authority of Singapore (MAS) is consulting on proposed guidelines for the provision of financial advisory services. 'As part of the financial advisory process, financial advisers will need to engage clients to better understand their personal and financial situation, risk tolerance and financial objectives. It is important for clients to be fully engaged in this process and to understand that providing full disclosure of material information enables suitable recommendations to be made to them' MAS writes. Consultation closes 5 July 2018.

[Source: Monetary Authority of Singapore: Consultation paper P008-2018 June 2018: Guidelines on the provision of financial advisory service and design of advisory and sales forms]

Accounting and Audit

United Kingdom | The FRC has issued 'record penalties' for admitted misconduct in relation to audit work: The FRC has separately announced sanctions against PwC and KPMG and instituted fines and non-financial sanctions against both firms.

In separate statements, The Financial Reporting Council (FRC) has announced that it has sanctioned PriceWaterhouseCoopers (PwC) and audit partner Steve Denison in relation to the 2014 audits of BHS and the Taveta Group (Taveta) following an investigation under the Accountancy Scheme opened in June 2016. Separately, the FRC announced that it had sanctioned KPMG LLP and the audit engagement partner William Smith in relation to the audit of the financial statements of Quindell plc for the period ended 31 December 2013. Media reports suggest that the £6.5 million fine imposed on PwC is the largest ever issued by the regulator.

Details

- **PwC fined £6.5 million and partner fined £325,000 and banned for 15 years:** The FRC writes that both PwC and Mr Denison admitted misconduct and accepted substantial fines and non-financial sanctions in relation to the BHS audit. (For context, The Guardian writes that the audit in question was conducted ahead of the sale of department store chain BHS for £1, twelve months before its collapse). Under the terms of the settlement, the FRC writes that:
    - PwC agreed to pay a fine of £10 million (reduced by 35% to £6.5 million for early settlement), agreed to new monitoring conditions and to implement improved quality control policies and procedures.
    - Mr Denison agreed to pay a fine of £500,000 (reduced by 35% to £325,000 for early settlement) and has gave an undertaking to remove his name from the register of statutory auditors and not to apply to have his name re-entered on the register for a period of 15 years.

The Guardian quotes PwC as stating: 'We recognise and accept that there were serious shortcomings with this audit work and that it is important to learn the necessary lessons. We are sorry that our work fell well below the professional standards expected of us and that we demand of ourselves.' The article adds that Mr Denison is understood to have resigned from his position at PwC.

- **KPMG fined £3,150,000 and partner fined £84,000**: The FRC writes that KPMG and Mr Smith, members of the Institute of Chartered Accountants in England and Wales (ICAEW), admitted that their conduct fell 'significantly short of the standards reasonably to be expected of a Member and a Member Firm and that they failed to act in accordance with the ICAEW's Fundamental Principle of Professional Competence and Due Care'. More particularly, the FRC writes that the misconduct related to two audit areas (revenue recognition for legal services; and a series of transactions relating to the sale and purchase of software licenses, related services and investments) and included failure to obtain reasonable assurance that the financial statements as a whole were free from material misstatement, failure to obtain sufficient appropriate audit evidence and failure to exercise sufficient professional scepticism. KPMG was fined £4,500,000 (discounted for settlement to £3,150,000) and agreed to pay £146,000 towards Executive Counsel's costs. Mr Smith was fined of £120,000 (discounted for settlement to £84,000).

The FT comments the time taken by the FRC to take action in each case, and the complexities associated with the exercise and scope of its powers to take action, raises questions about the regulator's approach to enforcement.

[Note: On 17 April, the UK government announced the launch of an independent 'root and branch' review of the FRC in the wake of the Carillion plc collapse and following criticism of the regulator's approach to enforcement. The purpose of the review is to 'make the FRC the best in class for corporate governance and transparency, while helping it fulfil its role of safeguarding the UK's leading business environment'. The review is to be completed by the end of 2018. See: Governance News 20/04/2018.]

[Sources: The FRC media release 11/06/2018; 12/06/2018; [registration required] The FT 14/06/2018; The Guardian 13/06/2018]

In Brief | The Financial Reporting Council (FRC) has issued a briefing setting out the current 'hot topics' of its corporate reporting review function to assist in the preparation and audit of interim accounts. Among the issues identified are FRC expectations in respect of new standards IFRSs 9 and 15 and other areas (eg supplier financing arrangements) where recent monitoring activity has identified room for improvement.

[Source: FRC media release 12/06/2018; FRC Corporate Reporting Review Briefing 12/06/2018]

Risk Management

Another step closer to an Australian Deferred Prosecution Agreement scheme? Consultation on new Deferred Prosecution Agreement (DPA) scheme code of practice, setting out the practical operation of the proposed DPA scheme has been released by the Attorney General for feedback.

The Attorney-General's Department has released a draft code of practice outlining the proposed deferred prosecution agreement (DPA) process for industry, from the point of entering into DPA negotiations to fulfilling the terms of a DPA, for feedback. The purpose of the draft code is to provide guidance on the intended operation of the DPA scheme.

Further details

- **Context:** On 6 December 2017, The government introduced The *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* (the Bill), schedule 2 of which, proposes to implement a Commonwealth Deferred Prosecution Agreement (DPA) scheme (see: Governance News 11/12/2018). On 8 June, The Attorney-General's Department released a draft DPA Code of Practice (draft code), designed to provide detail on the practical operation of the provisions in schedule 2, for feedback.

- **Draft Code of Practice:** The draft code of practice, developed in consultation with key government agencies, outlines the DPA process for industry, from the point of entering into DPA negotiations to fulfilling the terms of a DPA and is intended to provide guidance on the intended operation of the DPA scheme. The government notes that the draft code also reflects stakeholder views received in the 2016 Deferred prosecution agreements public consultation and 2017 Proposed model for a deferred prosecution agreement scheme in Australia public consultation (see: Governance News 03/04/2017).
- **Focus of consultation:** The government is seeking views on whether the draft code adequately describes the DPA process, provides sufficient information on matters of interest to industry and provides effective guidance. The government states that feedback received through the consultation process will inform the finalisation of the draft code prior to publication.
- **Timeframe:** Consultation on the draft DPA code of practice closes on 9 July 2018. The final code will be published when the scheme commences.

[Note: The *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* was referred to the Senate Legal and Constitutional Affairs Legislation Committee on the 7 December for report by 20 April. The Committee Report made four recommendations, including that the Bill be passed. As at 18 June, the Bill is before the senate and is yet to pass either house.]

[Sources: Attorney General's Department media release 08/06/2018; Deferred prosecution agreement scheme — Draft code of practice]

Restructuring and Insolvency

United Kingdom | IoD has urged the UK government to exercise restraint in its response to the recent consultation on proposed changes to corporate governance within companies which are in, or are approaching, insolvency.

As previously reported in Governance News on 26/03/2018, the UK Department for Business, Energy & Industrial Strategy (BEIS) recently conducted a consultation on proposed improvements to corporate governance within companies which are in, or which are approaching, insolvency.

The Institute of Directors (IoD) recently released its submission on the proposed changes. While the IoD supported some of the proposed changes (eg the proposal to increase the investigative powers of the Secretary of State to look into directors of dissolved companies among others) was not supporting of all changes. In particular, IoD raises concerns about two aspects of what was proposed.

- Under the proposed changes holding company directors could remain personally liable for losses incurred up to two years after the subsidiary has been sold to a third party, the IoD writes. Though in agreement that holding company directors should accept accountability for what happens to the stakeholders of subsidiary entities, the IoD states that 'we feel that it is problematic for directors to be held liable for companies that are no longer under their influence or control…In our view, this is neither equitable nor supportive of proper board accountability'.
- Under the proposed changes, holding company directors would be held liable for harm that could be 'reasonably foreseen' at the time of the sale the IoD writes. The IoD argues that this is an unreasonable requirement coming that 'Hindsight is a wonderful thing. However, in real time it will always be difficult to predict if a potential buyer will ultimately harm or save an insolvent company'.

Commenting generally on the proposed changes, IoD Head of Corporate Governance Dr Roger Barker said that 'the Government must show restraint, a kneejerk reaction to the highly specific circumstances of recent high-profile cases [for example the collapse of Carillion plc and the collapse of BHs] is not good policy making, and would not be relevant to the concerns of the wider business community. Furthermore, the attempts of the Government to impose liability on directors for "reasonably foreseeable" company insolvencies - which occur after they have been sold - is unrealistic. Hindsight is a wonderful thing, but in the real world it is difficult for anyone, including directors, to predict if a company will survive under a new owner.'

[Sources: UK Department for Business, Energy & Industrial Strategy and The Insolvency Service Insolvency and Corporate Governance Consultation 20/03/2018; Institute of Directors submission Insolvency and Corporate Governance Consultation 07/06/2018]

Confidence in the system requires compliance with publication and lodgement requirements: ASIC has released report *573 Registered Liquidators compliance with lodgement and publication requirements* which provides guidance to registered liquidators to improve their practice management and efficiency regarding lodgement and publication compliance.

The Australian Securities and Investments Commission (ASIC) released report *573: Registered liquidators compliance with lodgement and publication requirements* on 13 June. ASIC found that 'while registered liquidators are mostly doing the right thing when complying with their lodgement and publication obligations [lodging certain forms with ASIC and publishing insolvency notices on ASIC's published notices website], there is room for improvement'. This is of significance, ASIC states because it considers that 'the failure by registered liquidators to lodge forms with ASIC or to publish insolvency-related notices on ASIC's published notices website can be symptomatic of wider systemic failure by registered liquidators in the conduct of external administrations' and that 'confidence in the system or corporate insolvency may be undermined, and the interest of creditors and stakeholders may not be properly protected' if obligations are not adhered to.

ASIC Commissioner John Price stated: 'Registered liquidators are the custodians of other people's money and any compliance failure can be a sign of wider systemic failure. By being fully compliant, registered liquidators contribute to maintaining the integrity of the market.'

A high level overview of the key findings, report outcomes and guidance for registered liquidators is below.

Context

The report was released following an ASIC review of 26,000 insolvency administrations over a 3 year period to June 2017 which tested how registered liquidators complied with their obligations.

Key Findings and Outcomes

- **Room for improvement:** ASIC found that 3.3% of required forms were not lodged and 7% of the required notices were not published. ASIC comments that while the overall percentage of non-lodgements was low, 70% of registered liquidators reviewed, had at least one non-lodgement and were therefore not fully compliant with their obligations.

- **The most common types of non-lodgements** across those reviewed were: lodgements relating to annual meetings; lodgements of *Form 524 Presentation of accounts and statement*; and lodgements of *Form 505 Notification of appointment or cessation of an external administrator*. ASIC also found there is no correlation between the size and nature of a registered liquidator's firm and non-compliance.

- **Outcomes:** As a result of the project, ASIC states that a majority of the 12,419 identified non-lodgements were subsequently rectified by registered liquidators; negotiated resolution agreements were reached with 17 registered liquidators; 7 'Directions to comply with a requirement to lodge documents' were issued and a small number of registered liquidators were informed that ASIC would review their ongoing compliance with lodgement and publication. Five registered liquidators' registrations were cancelled at their request. ASIC also published *Information Sheet 29 External administration: Most commonly lodged forms (INFO 29)* to assist registered liquidators comply with their obligations.

Guidance for registered liquidators

The report includes guidance for registered liquidators intended to assist in improving their practice management and efficiency regarding lodgement and publication compliance.

In particular, ASIC highlights the following guidance to liquidators.

- 'it is the registered liquidators' responsibility to ensure all aspects of external administrations are conducted properly;

- ongoing review and update of internal systems and procedures by registered liquidators is vital to ensuring compliance with lodgement and publication obligations; and

- registered liquidators must ensure they supervise staff and provide timely and regular education and training for their staff.'

[Sources: 18-172MR ASIC works to ensure registered liquidators comply with obligations; ASIC Report 573 Registered liquidators' compliance with lodgement and publication requirements]

Other News

Fair Entitlements Guarantee Scheme (FEG) reforms: draft legislation has been released for consultation the purpose of which is to address the corporate misuse of the FEG scheme.

The government has released an exposure draft of proposed legislation: *Corporations Amendment (Strengthening Protections for Employee Entitlements) Bill* 2018 (FEG Bill) intended to address corporate misuse of the Fair Entitlements Guarantee (FEG) Scheme. The measure was previously announced by the government on 5 October 2017 and follows extensive public consultation undertaken in 2017.

Key Points

Minister Kelly O'Dwyer said that, if enacted, the proposed changes would:

- 'penalise company directors and other persons who engage in transactions that are directed at preventing, avoiding or reducing employer liability for employee entitlements;
- strengthen the ability under the law to sanction directors and company officers with a track record of insolvencies where FEG is repeatedly relied upon; and
- ensure recovery of FEG from other entities in a corporate group where it would be just and equitable and where those other entities have benefited from the work done by the insolvent entity's employees'.

Consultation on the draft legislation will close on 9 July 2018.

[Sources: Exposure Draft: Corporations Amendment (Strengthening Protections for Employee Entitlements) Bill 2018; Explanatory Memorandum; Minister for Revenue and Financial Services Kelly O'Dwyer media release 12/08/2018]