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Diversity

Pushing for gender equality makes financial sense says P&G: P&G's chief brand officer has told Bloomberg that the company's commitment to improving gender equality is designed to drive growth. 'If we just achieve equality in economic empowerment between women and men, it could add $28 trillion to world economy. That's a lot of purchasing power' he said.

Procter and Gamble Co (P&G) has recently announced a series of gender equality initiatives to improve gender balance both within the company, and more broadly in the advertising industry. Marc Pritchard, P&G's chief brand officer is quoted as explaining that the initiatives are aimed at driving growth: 'equality drives growth. If we just achieve equality in economic empowerment between women and men, it could add $28 trillion to the world economy' he said.

50% advertising target: Reportedly, P&G is the 'world's biggest advertiser' spending an estimated $7bn per year on advertising. According to media reports, the company has set a target for 50% of its commercials to be directed by women by 2023 (up from 10% currently). Fortune comments that though P&G does not create its own commercials, its huge spending power gives it substantial influence. Fortune suggests that the initiative is likely to 'force' a shift in the advertising industry given currently only 30% of senior marketing and creative roles in advertising agencies are filled by women.

Close gender gap in senior positions at the company: In addition, P&G has also reportedly committed to closing its own gender gap at the creative director level within 5 years. Currently, 41% of these roles are filled by women.

[Sources: Fortune 19/06/2018; Bloomberg 18/06/2018]

In Brief | New York City Comptroller Scott Stringer has reaffirmed his support for the LGBTQ+ community and his commitment to advancing LGBTQ+ equality ahead of the Pride March: equality initiatives listed by Mr Stringer in his statement include pushing pension fund investors to speak out against discrimination (and to call for corporate diversity efforts to explicitly include the LGBTQ+ community); and in response to the recent SCOTUS 'cakeshop' ruling, the introduction of new non-discrimination evaluations for investment managers seeking to do business with NYC pension funds. 'Here in New York City, we won't stop until every person is free from hate and discrimination' he writes.

[Source: New York City Comptroller media release 22/06/2018]

In Brief | Bloomberg writes that Goldman Sachs Group has launched a new program to fund more female entrepreneurs and investors. Reportedly it will invest $500m worth of firm and client capital in businesses and financial products run by women through an initiative called 'Launch with GS.' Separately Bloomberg reports that funding remains difficult to secure for US female tech founders with less than 5% of venture capital deals in Q1 2018, going to female founders.

[Source: Bloomberg 20/06/2018; 19/06/2018]

In Brief | Efforts by California Public Employees' Retirement System (CalPERS) to increase corporate board diversity are beginning to have an effect? Reportedly 1 in 5 US companies targeted by CalPERS in early July 2017 now have, or have concrete plans to have, women and minority board members.

[Source: Chief Investment Officer 18/06/2018]

Remuneration

Setting the 'tone from the top'? The Governance Institute 6th annual board and executive remuneration survey results were released. The survey found that 30% of boards surveyed received no pay rise this financial year, a higher proportion than has previously been the case.

In collaboration with McGuirk Management Consultants (MMC) the Governance Institute, has announced the results of their 6th Australian board and executive remuneration survey.

About the survey: The survey was based on remuneration data covering 1,181 boards, current to the financial year ending 30 June 2018. Participants were primarily Governance Institute and MMC clients.

Key Findings

According to a statement issued by the Governance Institute the survey found that:

- Overall average pay was $101,653 for a chair; $50,690 for a director; $475,477 for a managing director and $308,386 for a CEO.
- The average annual package for company secretaries at ASX 200 companies was $284,566; decreasing to $187,974 at small listed companies; $227,513 at superannuation funds and $114,795 at charities.
- The median increase for governance professionals and senior executives (managing directors, CEOs, CROs, general counsels and company secretaries) was 2.2%.
- 30% of boards for ASX listed companies received no pay increase. Commenting on this, Governance Institute CEO Steven Burrell said that this represents 'fewer boards handing out raises than we have seen in the past. This may indicate that in a time of stagnant wages for many Australian workers, and a harsh spotlight falling on corporate cultures, that taking a conservative approach to board remuneration is a chance to set the tone from the top'.
- Of the 70% of boards that did receive pay increases, the increase was highest (5%) for board members sitting on boards of listed companies. This decreased to 4.4% for board members of superannuation fund boards, and further decreased to 4% for unlisted and private companies. The increase was 2.5% for government boards and 2% on not for profit boards.

[Source: Governance Institute media release 20/06/2018]

Shareholder Activism

In Brief | US CEO views on shareholder activism: A New York Times survey of the CEOs who attended the Yale CEO Summit found (among other things) that 90% think activist shareholder campaigns often unfairly smear management teams and 72% think activist investors lead to excessive short-termism in financial thinking.

[Source: The New York Times 18/06/2018]

Meetings and Proxy Advisers

In Brief | ASIC Commissioner John Price has reaffirmed the regulator's expectation that companies constructively engage with shareholders, including proxy advisers, in the interests of good governance: Mr Price said that 'in a period where corporate governance is increasingly under the spotlight, culture and conduct should be a key focus area for companies….One of the ways that companies can ensure they are on the right side of discussions about culture, conduct, and corporate governance, is to engage with their shareholders' (including engaging with proxy advisers).

[Note: In his speech Mr Price reiterated the views set out in *ASIC Report 564 Annual general meeting season 2017* (REP 564) ASIC which, among other things, sets out the regulator's 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.]

[Source: ASIC update: Informing and engaging shareholders A speech by John Price, ASIC Commissioner, at the Australasian Investor Relations Association 2018 – Annual half-day seminar 07/06/2018]

Disclosure and Reporting

Top Story | ASIC's new focus on climate change risk disclosure - what does it mean for corporate boards? MinterEllison has prepared a guide on climate risk disclosure to assist boards and their committees - *The climate risk reporting journey: a corporate governance primer.*

Earlier this month, ASIC identified the disclosure of information on climate change-related risks as one of the key issues for its focus in the forthcoming annual report season. ASIC's position has now been expanded in an important speech for the Centre for Policy Development by Commissioner John Price (Financing a Sustainable Economy, Sydney, 18 June 2018). Commissioner Price emphasised that climate change is a foreseeable, and in many cases material, financial risk, that ASIC expects to be governed and disclosed in the same way as any other financial issue. He also repeated ASIC's suggestion that companies consider the influential Recommendations of the G20 Financial Stability Board's Taskforce on Climate-related Financial Disclosures (TCFD) in formulating their disclosures (issued in June 2017). However, many directors (and the executives on which they rely) are ill-prepared to navigate the step-change in expectation that ASIC's call represents.

MinterEllison has prepared a guide on climate risk disclosure to assist boards and their committees - *The climate risk reporting journey: a corporate governance primer*. It proposes key questions relevant to the assurance of a corporation's reporting on climate-related financial issues – and to the robust processes of governance and oversight on which those disclosures must be based.

[Source: MinterEllison Partners Sarah Barker, Maged Girgis, Mikes Hales, Brendan Clark, Keith Rovers, Simon Scott: The climate risk reporting journey: A corporate Governance primer]

Top Story | Companies take note: climate risk confirmed as a key ASIC priority both from a governance and a disclosure perspective.

In a recent speech at the Centre for Policy Development: Financing a Sustainable Economy Event, Australian Securities and Investments Commission (ASIC) Commissioner John Price, has reconfirmed climate risk as a key priority for the regulator, both from a governance (risk management) and a disclosure perspective and called on Australian companies to regard it as such.

Among other things, Mr Price called to consider going beyond strict legal requirements and to consider adopting the voluntary Task Force on Climate-related Financial Disclosures (TFCD) recommendations as a framework for reporting. He also cautioned of the potential risks for directors in ignoring and failing to manage climate risk suggesting that, dependent on circumstances, 'it may be difficult for directors who have not even considered the issue to later seek to invoke the business judgement rule into account, to undertake formal modelling of the risks posed by climate change to their businesses and cautioned that directors may be unable to rely on the business judgement rule if they fail to assess it'.

A social licence to operate: climate risk in the context of corporate governance

Mr Price commented that there has been a fundamental shift in the way companies are evaluated ie a move away from a primary focus on financial returns, to a focus on delivery of community benefit, including increased focus on, and expectations around, climate change and management of climate risk. This change in expectation represents he said, both opportunities and risks for companies. 'For some company stakeholders, the social and environmental impact of corporate activity is an increasingly acute criterion considered in deciding which company to invest in or transact with. A salient question for boards and directors to ask now is therefore: "how do we identify the risks and opportunities presented by this new environment and respond in a manner that is both consistent with the social contract under which we operate and nurturing of long-term business success?" For our part, we [ASIC] will continue to encourage boards and directors to ask these questions of themselves and shine the light on their own culture and corporate governance practices, two drivers which we believe are critical in answering them' he said.

Two key priorities on climate risk

Mr Price confirmed climate risk is a key priority for ASIC, both from a governance (risk management) and a disclosure perspective. He identified ASIC's two key priorities on climate risk as follows:

1. **ASIC is focused on the promotion of sound corporate governance (including prudent risk management):** Mr Price said that ASIC considers that 'the prudent and appropriate management of issues such as climate change (be it climate risk or opportunity) begins with the core fundamentals of corporate governance - integrity, transparency, accountability and acting for a proper purpose. This must be led by directors and senior management'.

2. **ASIC is focused on disclosure:** 'Where the law requires disclosure of climate risk, we are strongly focussed on ensuring that the law is complied with in a way that is useful and relevant to the market' Mr Price said.

ASIC initiatives on climate change and climate risk

- **Focus on impairment testing and asset values in 30 June 2018 financial reporting:** 'We are continuing our focus on impairment testing and asset values in our upcoming review of 30 June 2018 financial reports. As we have noted elsewhere, in some cases climate change may affect asset values' Mr Price said.

- **Review of current regulatory guidance:** Mr Price said that in line with the government's response to the senate report, ASIC has commenced a review of relevant regulatory guidance 'to ensure that it continues to provide appropriate principles and high-level guidance that stakeholders can apply in meeting their disclosure obligations under the Corporations Act 2001 (Cth) insofar as climate risk is concerned'. Mr Price said that ASIC is aiming to finalise the review and respond to the government 'before the year is out'.

[Note: The senate report referenced by Mr Price appears to be the Senate Economics Committee of Inquiry into Carbon Risk Disclosure. On 2 February 2016, the Senate referred an inquiry into carbon risk disclosure to the Senate Economics References Committee. The committee report, released on 21 April 2017, recommended among other things that ASIC review its guidance to directors on meeting their disclosure obligations in the context of climate risk and that the ASX Corporate Governance Council review guidance material regarding the circumstances in which a listed entity's exposure to carbon risk requires disclosure under Recommendation 7.4 of the Australian Stock Exchange Corporate Governance Principles. The Government response to the report, released on 7 March, expressed 'agreement in principle' with both of these recommendations. See: Governance News 12/03/2018. The draft ASX Principles and Recommendations, also reflect the report recommendations. See: Governance News 04/05/2018]

- **Review of climate related disclosures across ASX 300**: Mr Price said that ASIC is undertaking a review of climate change related disclosures across the ASX 300 to 'better understand current market practices. Our current intention is to publish our findings later this year'.

- **Establishment of a climate risk working group**: ASIC, with APRA, the RBA and Treasury are part of a climate risk working group the aim of which is to 'help ensure there is a coordinated response to climate risk and its impact on our financial system and markets'.

- **Monitoring of, participation in, international developments:** Mr Price said that ASIC continues to participate in international discussions about reporting of environmental and sustainability risks and that ASIC is 'monitoring international developments' eg the recent release of the European Commission’s Action Plan on Financing Sustainable Growth.

Existing ASIC guidance on climate risk disclosure

Referencing ASIC report 567 (see: Governance News 02/03/2018) Mr Price outlined the guidance ASIC has given already on its expectations in relation to climate risk disclosure. Including for example: *Regulatory Guide 247: Effective disclosure in an operating and financial review*; and Regulatory Guide 228: Prospectuses: effective disclosure for retail investors. Mr Price added that 'Of course, in addition to these, the law may require climate risk to be disclosed in other contexts such as by way of continuous disclosure announcement or elsewhere and we have a range of guidance to assist our regulated populations in complying with their statutory obligations'.

Adoption of the voluntary Task Force on Climate-related Financial Disclosures (TFCD) reporting framework should be considered

Mr Price called on directors to go beyond meeting strict legal disclosure requirements, and instead to 'carefully consider the general information needs of investors'.

He went on to suggest that the 'voluntary framework developed by the TCFD may help companies and advisors in considering how to disclose climate change related risks and opportunities and what type of information to disclose, both when there is an obligation under law and in circumstances where a company voluntarily discloses additional information, for example in a sustainability report'. He added that a number of Australian companies have already indicated they intend to report, or commence reporting over time under the TCFD framework.

Responding to feedback from some stakeholders concerned about the implications of the TCFD recommendations for director liability for forward looking statements, Mr Price said that while concerns are 'understandable given the uncertainties surrounding future climate risk impacts…we [ASIC] do not think that director liability should be a major impediment to reporting under TCFD Recommendations provided that the modelling adopts reasonable assumptions and inputs and discloses them in full. This can be achieved by making sure the disclosure is the product of a robust assessment of the best evidence available at the time'.

Commenting on the TCFD recommendations more generally Mr Price said that ASIC encouraged 'companies and directors to carefully consider the TCFD's report, not just in the disclosure context, but as a key resource to assist in understanding, identifying and managing climate risk and opportunity'.

[Note: MinterEllison Special Counsel (Climate Risk Governance) Sarah Barker has commented previously, that there is growing support for, and use of, the TCFD Recommendations as a guide for reporting, and that though the TCFD Recommendations are yet to integrated into mandatory reporting requirements in Australia, there have been strong 'suggestions' from regulatory authorities that corporations should have regard to them. See: Governance News 12/06/2018.]

ASIC expects directors to take lead

Mr Price called on directors, as end of financial year approaches, 'to take a proactive approach to strategy and risk management. Directors need to understand and continually reassess existing and emerging risks that may be applicable to their business and ask the relevant questions of management. This should extend to both short-term and long-term risks and opportunities'.

Directors cannot afford to ignore climate risk given the potential consequences

Mr Price said that directors 'would do well to carefully consider' the memorandum of opinion by Noel Hutley QC and Sebastian Hartford-Davis on climate change and directors duties commissioned by the Centre for Policy Development in 2016 (see: Governance News 07/11/2016). Mr Price added that ASIC views the opinion as 'reinforc[ing] the need for directors to adopt a probative and proactive approach in assembling the information reasonably required to inform their decision making in this area'. Mr Price went on to say that ASIC considers that the opinion 'legally sound and is reflective of our [ASIC's] understanding of the position under the prevailing case law in Australia in so far as directors' duties are concerned… Depending on the circumstances, it may be difficult for directors who have not even considered the issue to later seek to invoke the business judgement rule.'

[Sources: Keynote address by ASIC Commissioner John Price, at the Australian Centre for Policy Development: Financing a Sustainable Economy, 18/06/2018; The SMH 19/06/2018; [registration required] The Australian 19/06/2018; [registration required] The AFR 19/06/2018]

Related News

Australia's first report on progress towards meeting the SDGs released; new Australian SDG website launched

On 15 June, Minister for Foreign Affairs Julie Bishop launched Australia's first Voluntary National Review (report) on progress towards the implementation of the Sustainable Development Goals (SDGs). The report, sets out Australia's progress towards achieving each of the 17 goals ahead of delivering it formally to the UN forum on sustainable development in July. In launching the report, Ms Bishop reaffirmed Australia's commitment to the achievement of the SDGs and commented that though the 2030 timeframe is ambitious it 'doable if all nations, all people work together to achieve the goals'. Commenting specifically on Australia's progress towards implementing the goals, Ms Bishop said that 'While we have achieved much here in Australia and we are a prosperous, stable, peaceful country, there is still so much more for us to do'.

Ms Bishop also announced the launch of an Australian SDG website to raise awareness of the SDGs, enable entities to share their own projects, and provide information about the SDGs. Australian Council for International Development (ACFID) CEO Marc Purcell issued a statement welcoming the release of the progress report and the government's commitment to achievement of the goals within the 2030 timeframe. However, commenting specifically on progress towards meeting environmental goals and targets, he expressed concern about Australia's rate of progress and has urged immediate action. 'Economic growth cannot continue to be tied to environmental degradation…We urgently need intervention to protect our environment and create affordable, reliable and clean energy for the future' he said in a statement. Referencing the ACFID recommendations to accelerate progress towards Australia's implementation of the goals put forward in its submission to the senate inquiry, he called on the federal government to implement actions to speed progress.

[Note: The senate inquiry referenced by Mr Purcell appears to be the Senate Economics Committee of Inquiry into Carbon Risk Disclosure. The committee's final report was released on 21 April 2017. The Government's response to the report, was released on 7 March. See: Governance News 12/03/2018.]

[Sources: Minister for Foreign Affairs Julie Bishop speech 15/06/2018; Report on the Implementation of the Sustainable Development Goals 2018; Pro Bono Australia 19/06/2018; Australian Council for International Development media release 15/06/2018; The Conversation 19/06/2018]

Top Story | Watch this space? The UK FRC has released a report on the potential impact of blockchain technology on the future of corporate reporting processes. It concludes that, whilst cost, complexity and lack of standardisation of blockchains might be inhibiting factors, the growing use of the technology means that 'those involved in corporate reporting processes need to consider its potential disruptive impact'.

The UK Financial Reporting Council (FRC) has released a report: *Blockchain and the future of corporate reporting: How does it measure up*?, which considers the potential impact of blockchain technology on the future of corporate reporting processes. The report concludes that, whilst 'cost, complexity and lack of standardisation of blockchains might be inhibiting factors', the growing use of the technology means that 'those involved in corporate reporting processes need to consider its potential disruptive impact'. A high level summary of the report in below.

To what extent could blockchain be used to address specific reporting challenges?

The report considers how blockchain technology (also referred to as distributed ledger technology) may eventually impact, and whether it could be used to potentially improve, different aspects of corporate reporting. More specifically the report identifies three 'challenges' with the current system of corporate financial reporting and considers in each case, whether/the extent to which blockchain could assist in addressing them. The challenges are:

1. **Production challenges:** The cost and complexity of recording and aggregating transactions across multiple entities. The report considers whether transactions processed on a blockchain might assist in improving accounting records.

2. **Distribution challenges:** The difficulty of identifying a single source from which users can obtain credible, up-to-date/prompt company reporting across multiple-jurisdictions and companies. The report considers how a blockchain based European corporate reporting platform (European Financial Transparency Gateway) might help to open up access to corporate reporting.

3. **Consumption challenges:** Challenges associated with making reporting engaging and flexible in a multiformat and multi-stakeholder environment, 'whilst maintaining an assurance/regulatory boundary'. The report considers whether 'blockchain might help to rethink the way that reporting content is defined'.

Is blockchain the answer? Report conclusions and recommendations

Ultimately, the report concludes that 'blockchain is not going away, but its growth in corporate reporting is likely to be gradual and restricted to certain use-cases'.

1. **Blockchain will not address product challenges**: The report concludes that though use of blockchain could potentially improve the 'efficiency and timeliness of error/tamper-free records (across markets, industries and companies) and increase the speed of consolidation within groups, particularly where there are multiple participants' this is dependent on solving cost and interoperability issues.
2. **Blockchain will not address distribution challenges**: The report concludes that the use of blockchain as 'a single source of credible, useable corporate data across Europe is a real possibility (and it is already being worked on by the European Commission), but ultimately success is dependent upon any solution being easy to use'.
3. **Blockchain will not address consumption challenges:** 'Using blockchain to form an unalterable group of communications (to meet reporting requirements) across different formats and entities has some potential, and could lead to different ways to meet regulatory requirements, perhaps leading to more engaging reports. However, the need for wider adoption may reduce the likelihood of its use' the report states.

Recommended next steps for interested parties

The report goes on to say that 'as a source of disruption to the current financial process, blockchain merits consideration and cautious experimentation by preparers, regulators and others involved in the corporate reporting ecosystem'. The report recommends specific actions for regulators and industry; the technology community and for preparers and users of reports. These include the following.

1. **Actions for the regulatory community, professional bodies and the accounting industry**: The report states that 'The regulatory community, professional bodies and the accounting industry need to monitor the developments and invest in their knowledge and skills'.

   Creation of a blockchain forum? To facilitate this, the report suggests the creation of a forum (Reporting, Accounting and Auditing on the blockchain forum). The proposed forum would have a number of benefits including: providing a space to discuss ideas, risks and opportunities; provide support education and learning on blockchain across participants; promote standardisation efforts and encourage innovation an experimentation as well as provide a 'focal point for relevant opinion and help support governments or other appropriate consultation activity'.

2. **Actions for preparers and users of corporate reporting:** The report recommends that 'preparers and users should focus on gaining a greater level of understanding and consider experimentation and cautious innovation when costs and benefits are balanced'. More specifically the report recommends report preparers and users should: actively seek to understand the impact and opportunities of blockchain and its potential to change business processes; interact with government, regulators and others to ensure concerns, issues and opportunities are fully understood; recognise the fact that adoption of 'blockchains don’t remove the need to have robust controls and processes over data. Before adopting a blockchain, users should ensure that they are comfortable with the design of the chain, as well as inbuilt and supplementary controls'.
3. **Actions for the 'technology community':** The report states that there is 'a real risk that expectations about the technology may create a significant expectation gap in the minds of business and the public' and that the 'technology community' should act to mitigate this by supporting efforts to educate businesses and boards, to engage with auditors and audit standard setters to 'explore how blockchain might fit into the assurance environment'; engage in discussion with regulators and continue 'to support standardisation efforts (such as ISO/TC 307), where relevant and effective'.

Context

In 2016, UK Financial Reporting Council (FRC)'s Financial Reporting Lab (the Lab) the Lab launched the Digital Future project, an initiative to investigate the impact of technology on corporate reporting communications (see: Governance News 08/05/2017). This report is part of that project.

The Lab will next investigate and report on how Artificial Intelligence (AI) and related technologies are, and will be, used in the production and consumption of corporate reporting.

[Sources: The Financial Reporting Council media release 19/06/2018; Blockchain and the future of corporate reporting: How does it measure up?]

Support for proposed review of existing continuous disclosure obligations? The AFR reports that the ASX has indicated its support for a review of existing requirements as recommended in the recent ALRC discussion paper: *Inquiry into Class Action Proceedings and Third-Party Litigation Funders discussion paper.*

As reported previously in Governance News (see: Governance News 04/06/2018), The Australian Law Reform Commission recently released a discussion paper for consultation on 31 May: *Inquiry into Class Action Proceedings and Third-Party Litigation Funders discussion paper* (DP 85) which, among other things, recommended the review of existing continuous disclosure obligations.

The AFR reports that the ASX's head of compliance, Kevin Lewis, has said that the ASX is supportive of the review of the continuous disclosure framework. 'The ASX believes the continuous disclosure framework has served the Australian marketplace very well overall…We also think it's appropriate that the law is subject to review from time to time to ensure it continues to meet the market's needs' the article quotes Mr Lewis as saying.

The AFR quotes Professor Ian Ramsay, of the University of Melbourne, as stating that though supportive of a review of the interaction between the continuous disclosure laws, shareholder class actions and the rising cost of directors and officers liability insurance, it is 'premature to conclude that the continuous disclosure laws need amendment'.

[Source: [registration required] The AFR 20/06/2018]

In Brief | Consequences of failure to meet disclosure obligations: ASIC has restricted Henry Morgan Ltd (HML) from eligibility to issue a reduced content prospectus until 8 June 2019 due to HML's failure to lodge a financial report, directors' report and auditors' report within the timeframe required.

[Source: 18-179MR ASIC restricts Henry Morgan Limited from issuing a reduced content prospectus]

Markets and Exchanges

ASX has 'foreshadowed' an proposed changes to the ASX Listing Rules due to be released for consultation later this year.

Following the release of the draft revised ASX Corporate Governance Principles and Recommendations for consultation (see: Governance News 04/05/2018), the ASX conducted a national roadshow to inform listed entities and other interested stakeholders about the proposed changes.

As part of the roadshow, ASX also 'foreshadowed' proposed changes to the ASX Listing Rules, which the ASX will release for consultation later this year. Proposed changes to the Listing Rules (as outlined in the ASX roadshow presentation) will include 'Well over 100 pages of rule amendments and two new, and updates to 13 existing, Guidance Notes' the ASX writes. Proposed changes include changes in connection with: admissions; new education requirements for 'persons responsible for communication with ASX', among other changes to disclosure requirements; changes relating to share issuance rules; and related party approvals among others. The proposed changes are outlined in more detail below.

Indication of proposed changes to the ASX Listing Rules

- **'Enhanced guidance':**
  - 'Substantial updates' to existing guidance notes: GN 11 Restricted securities and voluntary escrow; GN 13: Disposal of a major asset involving an entity to be listed: Listing Rule 11.4; and GN 24: Acquisition and disposal of assets between related parties: Listing Rules 10.1 and 10.10. Changes to GN 12: Significant Changes to activities (removal of the '2 cent' waiver for back door listings, updating ASX's guidance on the '20 cent' rule and minimum

option exercise price); and changes to GN 33: Removal of entities from the ASX Official list ('tightening ASX's policy on the automatic removal of long-term suspended entities and shortening period for automatic removal').

  - New guidance notes to be issued: New GN 21 on the restrictions on issuing securities in chapter 7; and New GN 25 on share issues to persons in a positon of influence.

- **Proposed changes in connection with admissions** include: proposed extension of the 'good fame and character' requirement for new listings to CEOs; simplification of the notification by profit test listings of continuing profits under rule 1.2.5A; clarification of working capital requirements for assets test listings in rule 1.3.3 and simplifying the escrow regime for restricted securities.

- **Improving market integrity and disclosures**: Changes flagged in the presentation include: 'requiring persons responsible for communication with ASX on listing rule issues to undertake an online course provided by ASX and pass an exam on the listing rules; introducing quarterly activity reports for Appendix 4C reporters; enhancing disclosures in quarterly activity reports for Appendix 5B reporters; standardising Net Tangible Assets (NTA) disclosures by listed investment entities (LICs); clarifying rules about disclosure of closing dates for receipt of director nominations; standardising disclosure of voting results at meetings of security holders; expanding the information disclosed in shareholder distribution schedules'; and 'fixing inconsistencies regarding the disclosure of underwriting arrangements'.

- **Share issuance rules:** ASX writes that changes will include: 'rationalising the regime for announcing issues of securities and seeking their quotation; improving the reporting of CDIs on issue by foreign issuers; fixing drafting issues in the 15% placement formula in rule 7.1; streamlining the requirements for entities to access the extra 10% placement capacity in rule 7.1A; allowing security holders to ratify an agreement to issue securities under rule 7.4 and rationalising the lists of equity issues that can be made without security holder approval under rules 7.2, 7.6, 7.9 and 10.12 and making them consistent'.

- **Related party approvals:** ASX writes that changes will include amending rule 10.1 'to deal more appropriately with agreements to acquire or dispose of substantial assets; expanding and rationalising the requirements for notices of meetings in chapters 7 and 10; rationalising the rules dealing with the approval of employee incentive schemes by merging rules 10.15 and 10.15A into the one rule; providing that securities held by or for an employee incentive scheme must only be voted on a resolution under the listing rules if and to the extent that they are held for the benefit of a nominated participant in the scheme who is not excluded from voting on the resolution under the listing rules and who has directed how the securities are to be voted; and amending the list of voting exclusions in the table in rule 14.11.1 for greater consistency and to give greater certainty as to which parties must have their votes excluded'.

- **Compliance measures:** Changes flagged in the presentation include 'giving ASX the power to grant class waivers and removing the need for 7 standard waivers; enhancing ASX's compliance powers – imposing conditions, requesting information, imposing compliance requirements and publishing censures'.

- **Simplification measures:** Changes flagged in the presentation include 'removing a number of forms from the appendices to the rules so they can be kept up to date without a rule amendment; simplifying the agreements for admission and quotation in Appendices 1A, 1B and 1C; clarifying the timetables for corporate actions in Appendices 6A and 7A; a raft of other drafting fixes and improvements'.

[Source: ASX presentation slides for the ASX's roadshow in June 2018 on the proposed changes in the fourth edition of the ASX Listing Rules]

In Brief | Saudi Arabia has reportedly been 'upgraded' by index provider MSCI to be included in its Emerging Market index for the first time following its semi-annual review, while Argentina also re-enters the index after being downgraded in 2009.

[Source: Investment Week 20/06/2018]

Regulators

Australian Securities and Investments Commission (ASIC)

Top Story | ASIC's views on corporate culture: Address by ASIC Commission John Price at the Governance and Risk Management Forum.

In a recent speech entitled Reinforcing Culture in a Climate of Low Trust, Australian Securities and Investments Commission (ASIC) Commissioner John Price has outlined ASIC's views on corporate culture and touched on the themes of corporate social licence to operate, and the importance of good governance. Citing the recent Australian Prudential Regulation Authority (APRA) report into the culture and governance of the Commonwealth Bank of Australia (CBA), Mr Price said that the report recommendations are of relevance to all organisations and called on every board to take note.

A high level overview of the key points of his speech is below.

Key Points

- **Social Licence to operate — good culture and conduct is the best interests of companies (as well as regulators, investors and the broader community):** Mr Price said that there has been a shift in the expectations of companies, 'I would argue that our society has come to expect much more from companies than short-term shareholder returns. The concept of corporate social licence to operate now extends a company's legitimacy in our society'. He added that that good culture has been demonstrated to be in the best interests of companies and for generating long term shareholder value. Mr Price went on to highlight the potential costs of failure to ensure strong culture: 'Good culture enhances brand loyalty and bolsters reputation, which has a very real financial impact. And, as we all know, there have been some very recent examples where the market value of a company has been significantly eroded as a result of poor culture and conduct' he said. Mr Price also flagged that cultural failure could have regulatory consequences and outlined ASIC's recent enforcement outcomes.

- **ASIC's areas of focus:** Mr Price said that ASIC's role is 'not to dictate a company's culture nor how a business is run' but that ASIC did expect companies to 'shine a light on their own culture and see if it is sufficiently fit for purpose'. He added that where ASIC identifies elements of poor culture it will 'make this clear to the firms in which we [ASIC] see it'. He then outlined issues ASIC takes into consideration in this regard. These include: how standards of behaviour are set within firms; and 'whether values are being translated into business practices, especially when these may affect customer outcomes'. He added that 'When we [ASIC] identify poor conduct in a firm, ASIC will not only look for any breaches of the law, we may also examine how culture is contributing to that poor conduct as part of our ongoing supervision work'.

- **Boards are expected to be active, vigilant and effective in their oversight of culture:** Mr Price noted that in some cases, boards are 'surprised' by issues raised in ASIC reviews, despite the fact that the issues identified are based on the firm's own data. This suggests, Mr Price said, 'a deficiency in the risk governance, oversight and, sometimes, the accountability frameworks within the firm'. Mr Price emphasised that the regulator expects boards to actively monitor and oversee culture. 'The board plays a role in setting the tone, influencing and overseeing culture, and ensuring the right governance framework is in place – one that functions in a manner which elevates material risks to the board for attention and action. This requires non-executive directors to be active in their oversight – to constructively challenge and question management' he said. He added that 'boards need to ask themselves whether their company has a "good news" culture, where problems are buried rather than dealt with appropriately' and that functions supporting the risk governance framework are adequately resourced. Mr Price acknowledged that for directors not involved in the daily operations of a company, monitoring culture could pose challenges but said 'there are a range of matters a board can consider' to assist in this respect (eg those outlined in the guide, Managing culture: A good practice guide (see: Governance News 15/12/2018.))

- **Australian Prudential Regulation Authority's (APRA) report into the Commonwealth Bank of Australia:** Commenting on the recent APRA report (see: Governance News 04/05/2018) Mr Price stated that it 'neatly encapsulates some areas of good governance worthy of consideration' and that the recommendations should be considered by all organisations. In particular, he highlighted the following issues (identified in the APRA report): more rigorous board and executive governance of non-financial risks; exacting accountability standards reinforced by remuneration practices; substantial operational risk management and compliance functions; asking the question ‘Should we?’ in relation to all decisions and dealings with customers; cultural change to support enhanced risk identification and remediation.

[Sources: Reinforcing culture in a climate of low trust, speech by ASIC Commissioner John Price 07/06/2018]

Details of ASIC oversight of the Australian Financial Complaints Authority (AFCA) released: RG 267 Oversight of the Australian Financial Complaints Authority.

Ahead of the commencement of the Australian Financial Complaints Authority (AFCA) on 1 November 2018 (see: Governance News 16/02/2018; 07/05/2018, 04/06/2018) the Australian Securities and Investments Commission (ASIC) released *Regulatory Guide 267 Oversight of the Australian Financial Complaints Authority (RG 267)* to 'provide policy certainty for stakeholders and to support an efficient transition to the new single scheme'.

Further details: RG 267

The new guidance sets out how ASIC will perform its oversight role and also sets out financial firms’ AFCA membership obligations. More particularly the guide outlines: the financial services dispute resolution framework and ASIC's role in it; details of AFCA membership (who can join AFCA and financial firms' EDR requirements); the principles of the governance framework, ASIC's powers within it and reporting requirements as well as AFCA compliance requirements.

ASIC writes that the guide should be read in conjunction with *Regulatory Guide 165 Licensing: Internal and external dispute resolution* (see: Governance News 12/03/2018).

[Sources: 18-180MR ASIC releases guidance for its oversight of the Australian Financial Complaints Authority (AFCA); Regulatory Guide 267 Oversight of the Australian Financial Complaints Authority; Regulatory Guide 165 Licensing: Internal and external dispute resolution]

Latest ASIC red tape report released: Report 574: Overview of decisions on relief applications (October 2017 to March 2018).

The Australian Securities and Investments Commission (ASIC) has released: *Report 574 Overview of decisions on relief applications (October 2017 to March 2018)* (REP 574). The report outlines some examples of decisions on relief applications during the period and summarises examples of situations where ASIC has exercised, or refused to exercise, it's exemption and modification powers from the financial reporting, managed investment, takeovers, fundraising or financial services provisions of the *Corporations Act* 2001 and the *National Consumer Credit Protection Act* 2009. The report also refers to a number of publications issued by ASIC during the period that may be relevant to prospective applicants for relief, including legislative instruments, consultation papers, regulatory guides and reports.

ASIC writes that the report highlights its efforts 'to reduce red-tape and achieve a practical, positive outcome for companies seeking some regulatory flexibility'.

During this period ASIC:

- received 762 applications;
- granted relief in 52% of cases;
- refused relief in 4% of cases;
- 20% of applications were withdrawn
- the remaining applications (20% were decided outside this period).

Costs of relief applications set to increase: ASIC notes that the costs of relief applications (ie ASIC fees for processing applications for relief) are expected to increase from 1 July 2018 (subject to legislation passing) as part of the implementation of ASIC’s industry funding model.

[Note: The legislation in question appears to be the four Bills introduced on 24 May to enact the second and final phase of the ASIC industry funding model: *Corporations (Fees) Amendment (ASIC Fees) Bill* 2018; *Superannuation Auditor Registration Imposition Amendment* (ASIC Fees) Bill 2018; *Superannuation Auditor Registration Imposition Amendment* (ASIC Fees) Bill 2018; and *National Consumer Credit Protection (Fees) Amendment* (ASIC Fees) Bill 2018. The Bills propose changes to enable the ASIC to charge entities a fee reflective of the actual (rather than then nominal) cost of providing specific services to them. See: Governance News 28/05/2018. As at 25 June, all four Bills have passed the House of Representatives and are currently before the Senate.]

[Source: Report 574 Overview of decisions on relief applications (October 2017 to March 2018) (REP 574); 18-176MR ASIC reports on decisions to cut red tape – October 2017 to March 2018]

Has ASIC 'taken the foot off the accelerator'? Federal government data reportedly shows ASIC is less active than at any time over the last three years in enforcing compliance and prosecuting misconduct writes The AFR.

The AFR reports that, according to federal government information, the Australian Securities and Investments Commission (ASIC) is performing fewer investigations, issuing fewer breach notices and completing fewer criminal cases than at any other time over the last three years (though other statistics such as the number of search warrants obtained, or the number of persons disqualified from managing corporations have risen). According to the article, the statistics were provided in response to questions on notice made by Senator Rex Patrick of the Centre Alliance Party last month.

Mr Patrick has reportedly questioned the efficiency of the regulator given that the number of investigations being carried out was similar to much smaller entities such as the Australian Building and Construction Commission (ABCC). 'Considering the ABCC has around a tenth of the number of staff that ASIC has, it's surprising that there is not a significant difference in the number of investigations' Mr Patrick is quoted as saying. Mr Patrick reportedly went on to say that: 'Consistent with my call for considerable reform of ASIC, the data suggests that they have taken the foot off the accelerator in some areas. I will continue to keep an eye on these statistics as we go forward.'

The AFR comments that criticism of ASIC's enforcement approach has increased following evidence heard at the Financial Services Royal Commission regarding ASIC's preferred regulatory approach (ie to work closely with industry to resolve issues rather than to enforce compliance through the courts), a trend which is supported by the new data the AFR comments.

According to the article, an ASIC spokesperson rejected this criticism stating that the regulator is 'determined to make sure our regulatory system works and that we will use every inch of our powers and tools to get the outcomes the community deserves'. The AFR notes that this is in line with recent comments by ASIC Chair James Shipton regarding ASIC's approach to enforcement.

Separately, The AFR reports that incoming AMP Chair David Murray has also raised questions about ASIC's regulatory approach under former chair Greg Medcraft. In particular, The AFR reports that Mr Murray has suggested that responsible lending laws would be better and more appropriately enforced by the Australian Prudential Regulation Authority (APRA) as opposed to ASIC and has questioned ASIC's opposition to 'vertical integration'. 'ASIC are the cops…So a supervisory approach is not appropriate for them' Mr Murray is quoted as stating.

[Source: [registration required] The AFR 19/06/2018; [registration required] The Australian 21/06/2018; [registration required] The AFR 20/06/2018]

In Brief | In his opening address to the Senate Economics Committee, Australian Securities and Investments Commission (ASIC) Chair James Shipton has given evidence of ASIC's 'strong enforcement record' and confirmed that the regulator uses 'every regulatory tool available' within the existing regulatory framework (including litigation). He also welcomed plans to strengthen the existing regulatory framework.

[Source: House of Representatives Economics Committee: Opening statement by ASIC Chair, James Shipton 22/06/2018]

Overseas developments

United States | 'The law may not prohibit all forms of lying but your culture should reject it' SEC Chair Jay Clayton has cautioned financial institutions.

In a recent speech entitled *Observations on culture at financial institutions and the SEC*, US Securities and Exchange Commission (SEC) Chair Jay Clayton has, among other things, called on US financial institutions to go beyond meeting minimum compliance requirements and focus instead on ensuring their culture and conduct is in line with the needs of those reliant on them to deliver financial services. 'We are counting on you, and, importantly, more importantly, the public is counting on you' he said.

Key Points

- **Important role of financial institutions play in the lives of their clients**: Mr Clayton emphasised that 'Every organization’s culture should reflect 3 realities and these 3 realities need to be recognized by professionals at every level of an organization. First, it is a privilege to work as a professional in the financial sector. Second, firms have systemic responsibilities with widespread significance. Finally, firms and their professionals have important, individual responsibilities to real people that make up the investing public. We are counting on you, and, importantly, more importantly, the public is counting on you to develop cultures that recognize and responsibly address these realities'. Mr Clayton added that 'this is a continuous exercise' and that organisations can expect that SEC will provide feedback on culture, and in turn invites feedback on its own culture.
- **Understand existing culture before it can be changed:** Though leaders of financial institutions are often tasked with driving cultural change within their organisations, Mr Clayton said, they often fail to recognise that they are 'not writing on a blank slate or, for that matter, a single slate'. Referencing a recent discussion paper issued by the UK Financial Conduct Authority: *Transforming Culture in Financial Services* (see: Governance News 19/03/2018), Mr Clayton expressed agreement both with the idea that 'culture is not optional' and that culture is by nature collective ie a collection of 'countless internal and external actions' at every level of an organisation rather than a single statement. Mr Clayton said that in order to be effective, leaders tasked with overseeing culture, and/or driving cultural change need to recognise this and assess the positive and negative aspects of existing culture before they can effectively 'manage, preserve and enhance' it.
- **Changes of achieving cultural goals increase if the existing culture of the organisation is understood** Mr Clayton said as '…whatever the cultural goals for your organization may be, the chances of achieving them go up dramatically if you understand where your culture stands relative to those goals. In driving organizational culture, it is difficult, if not impossible, to get from A to B unless you have a clear sense of what A is'.
- **'Gap filling' properties of culture has benefits for the organisation:** Among the benefits of ensuring strong organisational culture identified by Mr Clayton was what he described as the 'gap filling' function that culture could play to ensure that conduct, at all organisational levels, remains in line with community and regulatory expectations in the absence of specific/clear regulatory requirements. 'The law may not prohibit all forms of lying, but your culture should reject it. Said another way, if any financial institution thinks behavior of this type is acceptable or does not require prompt, clear and significant action, that financial institution has a cultural problem. To me, there is no debate on that score. Faced with this or a similar scenario, the financial institution should not be asking “Do we have a problem?” It should be asking “What do we do to address this problem in a way that is clear, consistent with, and reinforces, our cultural goals?”' he said.
- **Culture also has implications for dealing with regulators:** Commenting on the implications of cultural failure from a regulatory perspective, Mr Clayton said: 'If there is a disconnect between what management thinks the firm’s culture is today and what the regulator thinks the firm’s culture is today, agreeing on measures to enhance the culture will be difficult – very difficult. Said starkly, if the regulator is convinced a firm has a cultural problem and the firm continues to fight that conclusion, tension is likely to be high and progress — which involves fostering mutual regulator-firm respect and trust — will be slow and costly all around'.
- **SEC expectations?** Mr Clayton said that SEC 'do not expect perfection; we do expect commitment and action'. He then suggested a number of 'key questions' firms should ask themselves, where

mistakes are made. These include: 'whether the conduct represented a clear breach of the firm's controls and culture as well as whether the firm's remediation efforts, in addition to any controls enhancements, sent an appropriate and lasting cultural message' as well as whether meaningful sanctions were applied.

[Sources: US Securities and Exchange Commission, speech given by SEC Chair Jay Clayton: 'Observations on Culture at Financial Institutions and the SEC' 18/06/2018; [registration required] The WSJ 19/06/2018]

Related News

Federal Reserve Bank of New York former President calls on organisation to continually review its culture, and for the entities it regulates to do the same.

Speaking on the theme of culture, at a recent New York Federal Reserve Conference, former Federal Reserve Bank of New York President William Dudley, has reportedly emphasised that no culture is perfect, including that at the New York Federal Reserve. Instead, he said, culture should be continually reviewed to 'improve performance' both at the Federal Reserve and within the financial institutions it regulates. According to The WSJ, Mr Dudley acknowledged that two of his ideas — a database recording 'bad banker behaviour' and a mechanism to delay a portion of banker compensation four to five years (the money to be available to pay bank fines or recapitalise firms should they get into distress) — had failed to gain traction.

[Source: [registration required] The WSJ 18/06/2018]

United States | SEC has released its draft strategic plan for fiscal years 2018-2022 for a 30 day consultation period. Protection of the interests of 'main street investors'; an increased focus on cyber security risk and the 'modernisation' of disclosure are among the goals identified.

The US Securities and Exchange Commission (SEC) has released its draft strategic plan for fiscal years 2018-2022 — which includes a draft of the SEC's mission, vision, values, strategic goals, and planned initiatives — for a 30 day comment period. 'The plan highlights the SEC's commitment to serving the long-term interests of Main Street investors; becoming more innovative, responsive, and resilient to market developments and trends; and leveraging staff expertise, data and analytics to bolster performance' SEC writes.

SEC writes that its mission remains unchanged: 'The SEC's long-standing tripartite mission — to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation — remains our touchstone' the SEC writes.

Areas of focus: Areas on which the SEC will focus include the following (among others).

- **Focus on the long-term interests of main street investors:**
    - Investor education: SEC writes that it will enhance 'our outreach, education, and consultation efforts, including in ways that are reflective of the diversity of investors and businesses'.
    - Improving disclosure: Modernising the 'design, delivery, and content of disclosure so investors, including in particular retail investors, can access readable, useful, and timely information to make informed investment decisions'.

[Note: SEC recently took what it described as the 'first steps' towards modernising disclosure in announcing the adoption of a new rule implementing paperless reporting for mutual funds and investment companies ie requiring shareholder reports and other specified documents to be available to investors on a publicly available website. See: Governance News 12/06/2018]

- Continued focus on enforcement and examination initiatives focused on identifying and addressing misconduct that impacts retail investors.

SEC writes that these goals were identified in the context of the needs of the ageing population; the trend away from company managed retirement schemes which has meant a greater number of people are directly managing their own investment decisions and confusion on the part of investors around the standards of conduct to be expected from financial advisers/sellers of securities.

- **Focus on improving responsiveness to developments and trends in capital markets (including technological changes and cyber risk)**
    - Identification and updating of 'existing SEC rules and approaches that are outdated'.
    - Examination of strategies to address cyber and other system and infrastructure risks faced by our capital markets and our market participants.
    - Promotion of agency preparedness and emergency response capabilities.

SEC writes that these goals have been identified in the context of the technological change impacting the way in which markets operate, the way in which investors interact with markets and the emerging risks associated with these changes. 'The scope and severity of risks that cyber threats present have increased dramatically, and vigilance is required to protect against intrusions and disruptions. Consistent with our legal authority, the SEC will focus on ensuring that the market participants we regulate are actively and effectively engaged in managing cybersecurity risks and that these participants and the public companies we oversee are appropriately informing investors and other market participants of these risks and incidents' SEC writes.

- **Enhancement of SEC's internal capabilities and human capital development**
    - 'Enhancement of SEC internal systems and analytics of market and industry data to prevent, detect, and prosecute improper behaviour'.
    - 'Enhancement of SEC's internal control and risk management capabilities, including developing a 'robust and resilient program for dealing with threats to the security, integrity, and availability of the SEC's systems and sensitive data'.
    - Focus on the SEC's workforce to increase 'capabilities, leverage our shared commitment to investors, and promote diversity, inclusion, and equality of opportunity among the agency's staff'.

[Sources: SEC media release 19/06/2018; US Securities and Exchange Commission Strategic Plan Fiscal years 2018-2022 draft for comment; SEC Request for comment (on the draft strategic plan)]

United States | SEC has fined Merrill Lynch $42m for misleading customers about trading venues.

The Securities and Exchange Commission (SEC) has announced that it has charged Merrill Lynch, Pierce, Fenner & Smith (Merrill Lynch) with misleading brokerage customers about how their trades were processed.

Details: SEC states that Merrill Lynch falsely informed customers it had executed millions of orders — 15 million portions of larger orders, comprising more than five billion shares — internally when it actually had routed them for execution at other broker-dealers. This involved reprogramming Merrill Lynch's systems to falsely report execution venues, altering records and reports, and providing misleading responses to customer inquiries. By this practice, SEC writes, Merrill Lynch made itself appear to be a more active trading centre and reduced access fees it typically paid to exchanges.

SEC adds that after Merrill Lynch stopped the practice in May 2013, it did not inform customers about it but instead took steps to hide the 'misconduct'.

According to SEC, Merrill Lynch has agreed to settle the charges, admit wrongdoing, and pay a $42 million penalty.

Stephanie Avakian, Co-Director of the SEC's Enforcement Division commented: 'By misleading customers about where their trades were executed, Merrill Lynch deprived them of the ability to make informed decisions regarding their orders and broker-dealer relationships. Merrill Lynch, which admitted that it took steps to ensure that customers did not learn about this misconduct, fell far short of the standards expected of broker-dealers in our markets.'

Reuters comments that this settlement follows a similar agreement with SEC earlier in the year, under which Merrill Lynch also admitted to wrongdoing and agreed to pay a $42 million fine.

[Source: US Securities and Exchange Commission media release 19/06/2018; Reuters 20/06/2018]

Financial Services

Superannuation

Protecting your super package legislation introduced: *Treasury Laws Amendment (Protecting Your Superannuation Savings Package) Bill* 2018. Among other things, the Bill proposes to introduce a range of reforms intended to 'protect against the undue erosion of superannuation balances through excessive fees and inappropriate insurance arrangements'.

Treasury Laws Amendment (Protecting Your Superannuation Savings Package) Bill 2018 was introduced into the House of Representatives on 21 June following consultation and the Bill appears very similar to the exposure draft. (see: Governance News 11/05/2018).

Among other things, the Bill proposes to introduce a range of reforms intended to 'protect against the undue erosion of superannuation balances through excessive fees and inappropriate insurance arrangements'.

Minister for Revenue and Financial Services Kelly O'Dwyer said that the Bill 'adds to earlier legislation introduced into the Parliament by the Turnbull Government to improve fund governance, transparency and accountability to members, and to provide greater powers to the regulator to better protect members and their money'.

Committee Referral: The Bill has been referred to the Senate Economics Legislation Committee for inquiry and report by 13 August 2018.

[Note: The 'protecting your super package' was announced in the Federal Budget 2018-2019 and exposure draft legislation was released for consultation at that time. Consultation on the draft legislation closed on 29 May. See: Governance News 11/05/2018.]

[Sources: Treasury Laws Amendment (Protecting Your Superannuation Package) Bill 2018; Explanatory memorandum; Minister for Revenue and Financial Services Kelly O'Dwyer media release 21/06/2018]

Progress update | Superannuation Guarantee Amnesty Bill: *Treasury Laws Amendment (2018) Superannuation Measures No 1) Bill* 2018 has passed the House of Representatives and will now be considered by the senate.

The *Treasury Laws Amendment (2018 Superannuation Measures No 1) Bill* 2018 (Superannuation Guarantee Amnesty Bill) (see: Governance News 28/05/2018; 14/05/2018; 11/05/2018) passed the House of Representatives on 20 June without amendment and now moves to the senate.

Among other things, the Bill proposes to give employers a 12 month amnesty to pay any unpaid superannuation to workers or risk new penalties, among other measures (see: Governance News 28/05/2018).

[Source: Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2018]

In Brief | Superannuation industry critical of PC draft report? Media reports suggest that some superannuation industry stakeholders have raised concerns regarding various aspects of the productivity commission draft report into the superannuation sector at recent public hearings. Reportedly, ASIC counsel professor Pamela Hanrahan has called for a rethink of the current 'regulatory architecture'.

[Note: The Productivity Commission released its draft report assessing the efficiency and competitiveness of the superannuation system on 29 May: *Superannuation: Assessing Efficiency and Competitiveness.* The Report makes 22 draft recommendations to 'modernise' the superannuation system. Among the proposed changes are reforms to address the issue of unintended multiple accounts (which comprise one third of superannuation accounts) and the issue of underperforming default funds. Consultation on the draft report closes on 13 July. See: Governance News 04/06/2018.]

[Sources: Financial Standard 20/06/2018; [registration required] The AFR 20/06/2018; Productivity Commission: Assessing Efficiency and Competitiveness Public Hearings; [registration required] The Australian 21/06/2018]

Banking

The Federal Court has separately approved the CBA/AUSTRAC and CBA/ASIC settlements

- **The Federal Court has approved the CBA/AUSTRAC settlement:** Commonwealth Bank of Australia (CBA) has issued a statement noting the Federal Court's approval of the agreement between CBA and the Australian Transaction Reports and Analysis Centre (AUSTRAC) to resolve the civil proceedings commenced by AUSTRAC on 3 August 2017. CBA will pay a civil penalty of $700m, together with AUSTRAC's legal costs of $2.5m. AUSTRAC's civil proceedings were otherwise dismissed.
- **The Federal Court has approved the BBSW CBA/ASIC settlement:** The Federal court has approved the CBA $25m settlement with the Australian Securities and Investments Commission (ASIC) to resolve civil proceedings brought by ASIC in relation to alleged market manipulation and unconscionable conduct said to have been engaged in by the CBA concerning trading in Prime Bank Bills in the Bank Bill Market during the period 31 January 2012 to 5 June 2012.

[Sources: CBA media release 20/06/2018; Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v Commonwealth Bank of Australia Limited [2018] FCA 930; Australian Securities and Investments Commission v Commonwealth Bank of Australia [2018] FCA 941]

In Brief | The US Commodities Futures Trading Commission (CFTC) has ordered JPMorgan Chase Bank to pay a $65m penalty for attempted manipulation of the US dollar ISDAFIX benchmark swap rates. JPMC has taken specified steps to implement and strengthen its internal controls and procedures relating to the fixing of interest-rate swaps benchmarks.

[Source: US Commodities and Futures Trading Commission media release 18/06/2018]

In Brief | The New York State Department of Financial Services (DFS) has announced that Deutsche Bank AG has agreed to pay a $US205m fine for 'unlawful, unsafe and unsound' conduct in its foreign exchange trading business. The bank also agreed to submit written plans and programs to improve senior management oversight, internal controls, risk management and internal audit functions to DFS as part of the consent order.

[Sources: New York State Department of Financial Services media release 20/06/2018; [registration required] The AFR 21/06/2018]

In Brief | APRA has released quarterly ADI performance statistics for March 2018; and released statistics on ADI property exposures for March 2018.

[Sources: APRA: Quarterly ADI performance statistics for March 2018; Statistics on ADI property exposures for March 2018]

Insurance

In Brief | APRA Life Insurance Statistics released: The Australian Prudential Regulation Authority has released institutional level statistics as at December 2017 and separately, supplementary statistical tables as at December 2017.

[Sources: Life Insurance Institution-level Statistics as at December 2017; Life Insurance Supplementary Statistical Tables as at December 2017]

Other Developments

In Brief | The Bank for International Settlements (BIS) annual economic report has questioned whether cryptocurrencies can 'play any role as money'. The report concludes that 'Cryptocurrencies cannot scale with transaction demand, are prone to congestion and greatly fluctuate in value. Overall, the decentralized technology of cryptocurrencies, however sophisticated, is a poor substitute for the solid institutional backing of money. That said, the underlying technology could have promise in other applications such as the simplification of administrative processes in the settlement of financial transactions. Still, this remains to be tested'. The AFR suggests this may signal the 'death' of bitcoin.

[Sources: BIS media release 17/06/2018; BIS Annual Economic Report, Cryptocurrencies: looking beyond the hype 17/06/2018; BIS Annual Economic Report 17/06/2018; [registration required] The AFR 19/06/2018]

In Brief | Financial Adviser Standards and Ethics Authority (FASEA) has announced that Stephen Glenfield has been appointed to the role of CEO.

[Source: FASEA media release 20/06/2018]

In Brief | Financial Elder Abuse campaign launched: The Australian Banking Association (ABA), National Seniors, the Council on the Ageing, the Older Persons Advocacy Network and the Finance Sector Union have launched a campaign calling on the public to write to their state or territory Attorneys General demanding change to 'empower bank staff to properly detect and safely report elder financial abuse'.

[Source: ABA media release 18/06/2018]

Accounting and Audit

United Kingdom | The UK Financial Reporting Council (FRC) has issued a statement in which it has called on 'The Big Four audit practices' to act to 'reverse the decline' in the quality of the most recent audit inspection results. In particular, the statement calls on KPMG to lift standards.

The UK Financial Reporting Council (FRC) has issued a statement in which it has called on 'The Big Four audit practices' to act to 'reverse the decline' in the quality of the most recent audit inspection results. The FRC attributes the deterioration in the quality of audits at these firms to a 'number of factors' including 'a failure to challenge management and show appropriate scepticism across their audits'.

KPMG subject to 'increased scrutiny by the FRC': The statement goes on to say that 'There has been an unacceptable deterioration in quality at one firm, KPMG. 50% of KPMG's FTSE 350 audits required more than just limited improvements, compared to 35% in the previous year. As a result, KPMG will be subject to increased scrutiny by the FRC'. The increased FRC scrutiny of KPMG will include inspecting 25% more KPMG audits over its 2018/19 cycle of work; and monitoring closely the implementation of the firm's Audit Quality Plan.

The FRC writes that KPMG has agreed that its efforts in recent years have not been sufficient and adds that the FRC will hold KPMG's new leadership to account for the success of their work to improve audit quality.

FRC CEO Stephen Haddrill states: 'At a time when public trust in business and in audit is in the spotlight, the Big 4 must improve the quality of their audits and do so quickly. They must address urgently several factors that are vital to audit, including the level of challenge and scepticism by auditors, in particular in their bank audits. We also expect improvements in group audits and in the audit of pension balances. Firms must strenuously renew their efforts to improve audit quality to meet the legitimate expectation of investors and other stakeholders.'

General improvements overall: According to The FRC, overall results from the most recent inspections of eight firms showed that in 2017/18 72% of audits required 'no more than limited improvements' compared with 78% in 2016/17. Among FTSE 350 company audits, 73% required no more than limited improvements against 81% in the prior year.

[Sources: FRC media release 18/6/2018; [registration required] The FT 19/06/2018]

Risk Management

Supply Chain Risk

Top Story | Modern slavery & global supply chain reporting: Australia is moving closer to establishing modern slavery legislation, including a modern slavery reporting requirement writes MinterEllison Partner, Geraldine Johns Putra.

Background and where we are now

Australia is moving closer to establishing modern slavery legislation, including a modern slavery reporting requirement.

In New South Wales, the *Modern Slavery Bill* 2018 was introduced to combat modern slavery, slavery-like practices and human trafficking, provide support for victims, and to provide for the appointment and functions of an anti-slavery commissioner. The Bill passed the Legislative Assembly with amendments on 6 June 2018. These will now be considered by the Legislative Council.

At a federal level, in the Federal Budget 2018-2019 delivered on 8 May 2018, the Commonwealth Government announced that it will provide A$3.6 million over four years from 2018-19 to establish an Anti-Slavery Unit within the Department of Home Affairs, to manage the implementation of a Modern Slavery Reporting Requirement.

In December 2017, the Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade (Committee) delivered its final report into establishing a Modern Slavery Act in Australia entitled Hidden in Plain Sight.

Proposed modern slavery legislation

Committee report recommendations

Key recommendations in the Committee's report included the introduction of a Modern Slavery Act and that the Act should include provisions for:

- The establishment of an Independent Anti-Slavery Commissioner.
- The establishment of mandatory supply chain reporting requirements to require certain entities to report on modern slavery risks in their supply chains.
- Support for victims of modern slavery, including establishing a national compensation scheme.
- Improvement of criminal justice responses to modern slavery.
- Addressing orphanage trafficking and child exploitation in overseas residential institutions.
- Addressing labour exploitation, including establishing a labour hire licensing scheme and making changes to Australia's visa framework.
- Referencing in one location Australia's existing modern slavery offences as outlined in Division 270 and 271 of the *Criminal Code Act* 1995, as well as offences relevant to combatting modern slavery such as withholding passports under section 21 of the *Foreign Passports (Law Enforcement and Security) Act* 2005, offences relating to sexual and labour exploitation and offences under the *Migration Act 1*958.

For Australian businesses, the corporate governance issue to understand will be the reporting requirement. The Committee was supportive of the reporting model proposed by the government in its consultation paper released in August 2017.

Who does it affect?

Under the Commonwealth Government's proposed model, the reporting requirement will require large corporations and other entities operating in Australia (with annual turnover in excess of A$50m on the Committee's recommendation) to publish annual statements outlining their actions to address modern slavery in their operations and supply chains.

The four reporting criteria

The consultation paper noted that the proposed reporting requirement would require companies to report against 'substantially the same' four criteria as set by the UK reporting requirement to ensure the business community does not need to comply with inconsistent regulation across jurisdictions.

As with the reporting requirement currently found in modern slavery legislation in the UK, the statements would need to be approved at board level (signed by a director).

The proposed criteria are:

1. The entity’s structure, its operations and its supply chains.

2. The modern slavery risks present in the entity's operations and supply chains.
3. The entity's policies and process to address modern slavery in its operations and supply chains and their effectiveness (such as codes of conduct, supplier contract terms and training for staff).
4. The entity's due diligence processes relating to modern slavery in its operations and supply chains and their effectiveness.

In addition, the Committee noted that having prescribed reporting areas would result in a more consistent reporting. The Committee suggested including an additional area inviting entities to report on any further action taken, on the basis that this would 'encourage entities to develop further innovative approaches to reporting, helping to avoid a "tick box" exercise'.

Next steps

MinterEllison has a depth of experience in helping our clients assess and manage their corporate governance requirements including the examination of operating models and supply chains.

We approach operational and supply chain risk by getting to know your business, identifying potential threats and risks, and developing strategies to mitigate risk and ensure you're protected as well as meeting your governance requirements. This may include undertaking risk analysis, compliance and audits; risk mitigation strategies and training; reviewing policies, contracts, negotiation terms and policy termination and disputes.

There is no 'one size fits all' approach, though the proposed Act means there will be a detailed legal framework within which to report.

All relevant entities should already have a compliance plan and supply chain checklist which they should start reviewing in light of their potential new obligations. We would be happy to assist with that process or discuss any questions you may have regarding the proposed legislation.

Other recommendations of the Committee

1. Definition of modern slavery: The Committee agreed that the definition of modern slavery should refer to the human trafficking and slavery offences set out in the Criminal Code, which are consistent with international law. The Committee also considered that the definition should include reference to child labour and the worst forms of child labour, as well as child exploitation through orphanage trafficking.
2. Entities to which the requirement should apply: The Committee noted that the government had proposed the reporting threshold apply to a broad definition of 'entities' to include bodies corporate, unincorporated associations or bodies of persons, superannuation funds and approved deposit funds. In its interim report, the Committee had supported a broad definition of 'entities' required to report, subject to a certain revenue threshold (discussed below). The Committee reaffirmed in its final report that 'entities' should have a broad definition to cover companies, businesses, organisations, governments and other bodies as outlined in the consultation paper.
3. Threshold to determine which entities should report: In its consultation paper, the government proposed entities with a total annual revenue of at least A$100 million be required to report. The Committee recommended a lower threshold of A$50 million 'to capture most large entities operating in Australia, and to be internationally consistent with the UK threshold under the Modern Slavery Act 2015'. Consistent with the consultation paper, the Committee recommended that there be a legislated 'opt-in' option for smaller entities below the threshold that wish to voluntarily submit a modern slavery statement.
4. Timeframe for reporting: The Committee recommended, consistent with the government consultation paper, that the government require annual modern slavery statements to be provided within five months after the end of the Australian financial year. The Committee also supported a phased introduction of any penalties or compliance measures to ensure smaller entities have adequate time to develop processes to map, assess and address supply chain risks.
5. Approval of modern slavery statements at board level: The Committee noted that the government had proposed that modern slavery statements be approved at the equivalent of board level and be

signed by a director, similar to the UK Modern Slavery Act. The Committee supported this approach and recommended that the modern slavery statements be required to be approved at the equivalent of board level and signed by the equivalent director.

6. Public procurement: The Committee agreed that government has an important role to play in setting a positive example for businesses and other entities required to report. On this basis, it recommended that the government introduce a requirement to only procure from entities that complete a modern slavery statement; that Commonwealth public bodies over the prescribed threshold amount, including the Australian Government, be required to provide a modern slavery statement and that the government, through the Council of Australian Governments (COAG) and local government associations, encourage state, territory and local governments to introduce requirements to only procure from entities that comply with the modern slavery supply chain reporting requirement, as well as to submit modern slavery statements.
7. Establishment of a central repository of modern slavery statements: The Committee expressed support for the government's proposal to establish a free, publicly accessible, searchable, central repository of anti-slavery statements. The Committee recommended that: the government establish and support a legislated and government funded central repository of modern slavery statements under the proposed Modern Slavery Act; that an independent third party (eg. a civil society NGO or NGOs) run and administer the central repository, as well as undertake benchmarking and analysis of modern slavery statements and that the Independent Anti-Slavery Commissioner have powers to make recommendations to improve the operation of the central repository. In addition, the report recommended that the government consult with organisations operating existing repositories in the UK.
8. Government consider publishing a list of entities required to report: to improve accountability and transparency, the report also recommended that the government publish a list of entities required to report under the proposed mandatory supply chain reporting requirement, as soon as possible after the commencement of the proposed Modern Slavery Act. The list should be published alongside the central repository of statements.
9. Penalties for non-reporting should apply from second year: The report recommended that the government introduce penalties and compliance measures for entities that fail to report under the proposed Modern Slavery Act, applying in the second year of reporting onwards. This would include publishing a list of entities above the reporting threshold that fail to report after the second year of reporting onwards. In addition, the committee recommended that the government consider the appropriate level of penalties in the proposed Modern Slavery Act and how penalties should be administered, including a possible role for the Australian Securities and Investment Commission and that the proceeds from any penalties collected should be used to support victims of modern slavery (ie. to fund the National Compensation scheme).

[Source: MinterEllison: Modern slavery & global supply chain reporting: Gearing Up for Compliance 18/06/2018]

Whistleblowing

The US National Whistleblower Center (NWC) has formally requested Bank of England governor Mark Carney to remove a 2014 report entitled, *Financial Incentives for Whistleblowers*, from the BoE website within ten days on the basis that the principal finding in the BoE report, 'that reward laws do not increase the number or the quality of reports from whistleblowers is not true.'

The US National Whistleblower Center (NWC) has formally requested Bank of England governor Mark Carney to remove a 2014 report entitled, *Financial Incentives for Whistleblowers*, from the BoE website within ten days on the basis that the principal finding in the BoE report, 'that reward laws do not increase the number or the quality of reports from whistleblowers is not true.'

The letter to Mr Carney states: 'In the US there is cross-agency consensus that whistleblowing works, and that monetary rewards are an integral part of incentivizing those with information to come forward. In light of this fact, we request that the BoE remove its deleterious report from all of its websites within 10 working days. Alternatively, we request that our report is published alongside the BoE Report so that readers may be better informed of the tremendous support and success of US whistleblower programs'.

The NWC argues that removing report is necessary because 'it is critical that the UK Parliament and others interested in the use of whistleblower rewards are given accurate information. The BoE Report contains too many misleading statements and errors to be of any continued use'.

At time of writing, no official statement has been issued by the BoE or by Mr Carney. The WSJ quotes a BoE spokesperson as stating that the bank has seen no evidence to change its view that bounties are unlikely to work in the UK and has no plans to introduce them.

The WSJ comments that the NWC request comes as the EU is considering strengthening whistleblower protection laws, including the possible introduction of bounty programs.

[Sources: National Whistleblower Center: Creating an effective anti-corruption program: A rebuttal to the Bank of England's findings on Whistleblower Incentives; Bank of England Prudential Regulation Authority: Financial Incentives for Whistleblowers July 2014; NWC letter 20/06/2018; FCPA blog 21/06/2018; [registration required] The WSJ 20/06/2018]

Culture

#MeToo national inquiry announced: The Australian Human Rights Commission has announced a 12 month national inquiry into sexual harassment in Australian workplaces.

In response to the 'global conversation' about sexual harassment, the impact of the #MeToo movement, and evidence that sexual harassment in the workplace is increasing (the fourth national survey into the prevalence of workplace sexual harassment seems to indicate that rates of harassment are higher than they were in 2012, when the last survey was completed), the Australian Human Rights Commission (AHRC) has launched a national, 12 month inquiry into sexual harassment in Australian workplaces.

The inquiry will be conducted by Sex Discrimination Commissioner Kate Jenkins, and will examine the drivers of sexual harassment, existing laws and the financial (and other) impacts on victims of harassment.

Commissioner Jenkins said that the inquiry will involve nationwide consultation and extensive research. 'Importantly, the Inquiry will provide employees, employers and all members of the public with an opportunity to participate in developing a solution to ensure Australian workplaces are safe and respectful for everyone' Ms Jenkins said.

Federal minister for women Kelly O'Dwyer has reportedly welcomed the inquiry, describing it as a 'world first' and suggesting that the outcomes will be watched closely by other nations.

[Sources: Australian Human Rights Commission media release 20/06/2018; The ABC 20/06/2018; The SMH 20/06/2018]

Related News

The launch of the inquiry follows media reports of alleged #MeToo issues at various Australian and overseas firms. Recent examples in the news over the past week include the following.

- Independent Financial Adviser reports that a blog post by a US financial adviser and blogger, Michael Kitces describing a recent instance of sexual harassment he witnessed at a financial adviser conference, and his views of 'what needs to be said to curtail problematic behaviour,' has sparked extensive online debate about sexual harassment in the financial advice industry.
- The SMH reports that Intel Corp's CEO Brian Krzanich has resigned after an internal investigation determined that his consensual relationship with an employee violated company policy, 'the latest in a line of powerful men in business and politics to lose their jobs or resign over relationships viewed as inappropriate' the SMH comments.

[Sources: [registration required] The AFR 20/06/2018; Nerd's Eye View blog: What do you say when you witness Sexual harassment at a financial adviser conference? 07/06/2018; IFA 20/06/2018; The SMH 22/06/2018]

Other Developments

'Deiselgate' | Audi AG CEO Rupert Stadler has reportedly been detained in custody (though not charged with any offence) in connection with a German investigation into his role in the alleged use of illegal software by VW to 'cheat' carbon emissions tests.

Reportedly, Audi AG CEO Rupert Stadler (Audi AG is the 'luxury arm' of Volkswagen Group (VW)) has been remanded in custody by German authorities in connection with an ongoing investigation into the alleged use of illegal software by VW to cheat emissions tests, though he has not been charged with, or convicted of, any offence. Mr Stadler, is reportedly the third person to be arrested by German authorities so far in connection with their investigation.

Separately, the company was previously investigated by US authorities in relation to the same conduct. Following admissions by the company in 2015, 8 executives were reportedly indicted in the US, and $25 billion has since been paid by the company in penalties, fines and compensation for customers stemming from the admission.

Media reports suggest further arrests in connection with the German investigation are now expected.

According to media reports, Mr Stadler, who has been a VW group board member since 2010 and CEO since 2007, has faced 'numerous calls from minority shareholders and some analysts' to step down from his roles in the wake of the US investigation and subsequent admissions by the company. However, according to The FT, VW has consistently defended his conduct, stating that there is nothing to suggest that he had knowledge of/was involved in the conduct in question. The FT comments that such is the confidence of the board in Mr Stadler, that it extended his contract for a further five years and promoted him to head of a new 'premium' cars division as part of a restructure last year.

[Sources: Business Insider (Reuters) 19/06/2018; Business Insider 19/06/2018; [registration required] The WSJ 18/06/2018; [registration required] The FT 18/06/2018]

In Brief | JP Morgan Australia non-executive chairman Robert Priestley has resigned from the boards of the Australian Securities Exchange (ASX) and the Future Fund while the ACCC criminal cartel conduct investigation is resolved. ASX Chairman, Mr Rick Holliday-Smith commented: 'Rob's decision to step down in these circumstances demonstrates his commitment to the highest standards of corporate governance. We understand the difficulty of his position, and appreciate that he has made a decision that puts ASX ahead of other considerations. Rob has been a valued member of the ASX board and we look forward to this matter being resolved'.

[Sources: ASX media release 19/06/2018; Financial Standard 19/06/2018]