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Diversity

Federal Budget 2018/2019 | Minister Kelly O'Dwyer has issued a statement highlighting a number of budget measures which she says (if enacted) will have specific benefits for women.

Minister for Revenue and Financial Services, Kelly O'Dwyer has issued a statement highlighting how a number of measures in the 2018-2019 Federal Budget will support women. 'A key priority for the Government is to provide the right economic settings for women to help them work, save and make choices about their lives' she said.

Measures highlighted by Minister O'Dwyer in her statement include:

- The delivery of a Women's Economic Security Statement in Spring 2018.
- Measures highlighted by Ms O'Dwyer promoting women's 'economic capability' include:
  - $4.5m funding over four years for measures to encourage women to pursue STEM education and careers
  - $64.3 million in funding to establish a Jobs and Market Fund to grow the National Disability Insurance Scheme's workforce which Ms O'Dwyer says will help women take advantage of opportunities in the health care and social assistance industry.
  - $10 million in funding to develop women's financial capability (as part of a $50 million fund to promote the financial capabilities of Australian consumers).
  - The 'Protecting your super package' (discussed in a separate post in this issue of Governance News under the topic heading: Financial Services) which Ms O'Dwyer said would assist nearly 2 million women with low and inactive superannuation accounts.
  - The Skills Checkpoint for Older Workers Program which Ms O'Dwyer said would benefit women (and men) between 45 and 70 years of age by providing $3.3 million as part of the More Choices for a Longer Life Package; and
  - Lowering personal income taxes through the Government's Personal Income Tax Plan.

[Note: The implications of the 3 step personal income tax plan included in the Federal 2018-2019 budget is discussed in a separate article written by the MinterEllison tax team entitled *Tax Reform: Highlights from the Federal Budget 2018-19.* The article can be accessed on the MinterEllison website by clicking on this link]

- **Protecting women's safety and welfare**: Ms O'Dwyer also highlighted additional funding ($54.4 million) for services for women affected by violence and for online safety initiatives as well as funding ($22 million over five years) to address abuse of older Australians, which she noted affects up to 20% of elderly women.
- **Enhancing women's health and wellbeing**: Ms O'Dwyer also flagged a number of measures aimed at enhancing women's health eg $20.9 million over five years to improve the health of new families, particularly pregnant women and children; $1 million over three years to improve diagnosis and treatment of endometriosis; and listing a number of new drugs on the Pharmaceutical Benefits Scheme.

'The Government's focus on women's economic capability and leadership, safety, health and wellbeing, will support women and help them continue their significant contributions to Australia in the years ahead' Ms O'Dwyer said.

[Sources: Minister for Revenue and Financial Services Kelly O'Dwyer media release 08/05/2018; Budget 2018-2019 Budget Paper No. 2 2018-2019 08/05/2018; Women's Agenda 07/05/2018]

Double standards on diversity? The FT comments that though asset managers are pushing for companies to promote and improve board diversity, they are less willing to provide data on their own fund boards.

The FT writes that a small number of asset managers, including BlackRock, Fidelity Investments and Franklin Templeton (among others) have been accused of double standards on diversity due to their alleged unwillingness to disclose diversity data on their own fund boards.

More specifically, the criticism is being made, The FT writes, following the refusal by some asset managers (including those listed above) to provide diversity information to BoardIQ, a Financial Times publication for US mutual fund directors on the composition of fund boards; and following calls made by various asset managers for the companies in which they invest to improve/promote diversity (eg calls by BlackRock in February for companies with fewer than two women directors to explain the low number of women and to outline their plans to increase board diversity).

The article adds that on request, BlackRock did provide some information on the gender diversity of its fund boards, stating that 30% of independent directors on its US mutual fund boards were women.

[Source: [registration required] The FT 05/05/2018]

Data suggests very few women run mutual funds? In a similar article, the New York Times (NYT) reports only 10% of portfolio managers across the US funds industry are women.

Among the largest 25 companies, representation of women at portfolio manager level ranged from a low of 6% (at MFS) to a maximum of 30% (at Dodge and Cox). According to the article: 9% of managers at both BlackRock and Vanguard are women, rising to 18% at JP Morgan and 19% at Franklin Templeton Investments. The article adds that the data was not 'easy to extract' as there is no requirement for companies to disclosure the gender composition of their workforces.

[Source: New York Times 04/05/2018]

Shareholder Activism

Top Story | International activist activity has surpassed US campaigns for the first time according to JP Morgan research, with 52% of activist campaigns launched globally during 2017 involving non US targets.

JP Morgan's latest report on global trends in shareholder activism: *Shareholder Activism in Asia*: *confrontation gaining momentum* has found that while US shareholder activism activity has plateaued, activity outside the US continues to increase significantly and more particularly, that activism in Asia is gaining momentum.

Key Points

- **Rise of global activism**: According to the report, international activist activity outstripped US activity in 2017 with 52% of activist campaigns (or 344 of 662 campaigns) launched globally during 2017 involving non US targets. JP Morgan states that it expects the trend to continue as institutional investors 'begin to flex their muscle more actively around the world and domestic investors continue to study their global peers and become more comfortable with the strategy'.
- **Trend toward 'large and mega-cap activism' set to continue?** According to the report, over 60% of global campaigns in 2017 were initiated against non US targets with market capitalisation greater than $10bn (eg Third Point campaign against Nestle; Elliott Management campaigns against BHP and Samsung among). The report suggests that this trend also looks set to continue, commenting: 'No issuer, regardless of size or location is protected from shareholder activism any more'.
- **Evidence that shareholder activism in Asia is gaining momentum**: According to the report, activist activity in Asia has risen substantially over the period 2011 to 2017. In 2011 ten activist campaigns were launched in Asia as compared with 106 campaigns in 2017, accounting for 31% of total non US activism activity, up from 12% in 2011. Last year 4 of the 10 most targeted non US countries were in Asia the report adds. Given the number of campaigns launched during Q1 2018 is

in line with those initiated during the same time period in 2017, the report suggests that the trend looks set to continue adding that in 'a region where private engagement is still the preferred conduit for investor dissatisfaction, available data likely underestimates the true number of shareholder interventions'.

- **Drivers of change in the region?** The report suggests that regulators are helping to drive change in the region by enacting reform geared towards the adoption of international best practices in investor engagement and corporate governance. 'A series of recently adopted corporate governance and stewardship codes, as well as listing rule amendments and others, are fuelling activism by encouraging investors to be more engaged, and companies to be more responsive and transparent' the report states.

- **Activism observed in all major economies in Asia**: The report found that activism has now been seen in all major economies in Asia with campaigns more evenly distributed across industry sectors than in other regions. In 2017, Japan experienced the highest level of activity (32%) followed by Hong Kong (24%), Singapore (14%), China (10%), India (8%) and Korea (6%). The report comments that as activism 'continues to develop and solidify its place in Asian capital markets, we expect to see the total number of activist campaigns increase significantly and for activists to begin targeting companies in secondary Asian markets'.

- **Common themes in Asia activism:** The report identifies a number of common themes in activism in Asia chief of which is board representation (which the report comments is a worldwide theme). Other themes identified in the report include: capital structure (eg return capital to shareholders; restructure debt) which accounted for 24% of activism activity in Asia in the period 2011-2017; opposition to announced deals (eg oppose acquisition, oppose merger, oppose transaction terms) which accounted for 14% of activity in the same period; and corporate strategy (spin-off business; split company; divest assets; seek sale or merger) which accounted for 13% of campaigns in the period.

- **Trend is driven by 'domestic' activists:** Despite media attention given to high profile international hedge fund activists, the report comments, 'domestic activists have been, and remain, the main driving force behind shareholder activism in Asia'. According to the report, though a significant number of campaigns are still initiated by 'occasional dissidents', the emergence of specialist funds who pursue activism as a primary strategy, some of whom are adopting US activist tactics (eg white papers, campaign websites and shareholder proposals) where private negotiations are unsuccessful, is contributing to this.

- **US based activists targeting Asia?** According to the report, though not the driving force behind the increase in activist activity in Asia, prominent hedge fund activist investors are increasingly launching campaigns outside their domestic markets, including in Asia eg 3 of the 6 activist campaigns launched by US based activist Third Point during the past three years targeted non US companies 2 of them, Japanese. Since 2015 and throughout 2017, Elliott Management has initiated 17 campaigns against non US issuers representing about 37% of all new campaign announcements during that time period. Recent targets include companies based in South Korea and Hong Kong the report notes.

- **Time for Asian companies to adopt a proactive approach?** The report suggests that given the trend towards increased activism in the region, Asian company boards should consider adopting a more proactive approach to engaging with and communicating with activists and shareholders.

[Sources: JP Morgan: Shareholder activism in Asia: confrontation gaining momentum May 2018; [registration required] The FT 07/05/2018; Reuters 07/05/2018; Bloomberg 07/05/2018; [registration required] The WSJ 08/05/2018]

In Brief | Activist Glaucus vindicated? Blue Sky Alternative Investments has withdrawn profit guidance for the 2018 and 2019 financial years and the Chief Investment Officer and Chair will step down.

[Sources: BlueSky announcement 07/05/2018; [registration required] The AFR 07/05/2018; [registration required The Australian 08/05/2018]

Disclosure and Reporting

Top Story | One step closer to implementing a modern slavey reporting requirement? An anti-slavery unit to manage the implementation of a Modern Slavery Reporting Requirement was among the announcements in the Federal Budget 2018-2019.

In the Federal Budget 2018-2019 delivered on 8 May, the government announced that it will provide $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.
The government states that the measure will 'support businesses to mitigate this risk [ie the risk that modern slavery is occurring supply chains and business operations] and strengthen Australia's overall ability to combat modern slavery, including strengthening criminal justice outcomes and enhancing victim support'.

[Note: There is currently no modern slavery reporting requirement legislated, though the government released a proposed model for consultation in 2017. The proposed model was briefly outlined See Governance News 20/10/2017. Separately, The Joint Standing Committee on Foreign Affairs, Defence and Trade delivered its final report into establishing a Modern Slavery Act in Australia in December 2017. Key report recommendations included the introduction of a Modern Slavery Act, the establishment of a new Independent Anti-Slavery Commissioner, mandatory supply chain reporting for some entities and the establishment of a national compensation scheme for victims. See: Governance News 08/12/2017]

Australian Centre to Counter Child exploitation: In a related measure, the government also said that it will provide $68.6 million over four years from 2018-19 to establish an Australian Centre to Counter Child Exploitation.

More particularly, the funding will be used to create a 'hub of expertise' within the Australian Federal Police led Centre of Home Affairs portfolio agencies. Existing investigative, intelligence, forensic assessment and victim identification personnel resources will be increased by 50%.

The Business Council of Australia (BCA) issued a statement on 10 May welcoming the move by the government to introduce a Modern Slavery Act. 'The government has taken a sensible approach, harnessing transparency to drive better practice and reveal which companies are working to maintain clean supply chains…We also commend the government for leading by example and extending the same reporting requirements to the federal government's public procurement' said BCA CEO Jennifer Westacott.

[Sources: Budget 2018-2019 Budget Paper No. 2 2018-2019 08/05/2018; Business Council of Australia media release 10/05/2018]

ASIC takes action against Big Un Ltd for failure to lodge half year financial reports: Big Un must issue a full prospectus if it wishes to raise funds from retail investors: ASIC has restricted Big Un Limited (Big Un) from eligibility to issue a reduced-content prospectus until 2 May 2019.

Following the failure of Big Un Ltd to lodge its half year financial reports (directors' report and auditor's report for the half-year of the company, ended 31 December 2017) within the required timeframe, and in line with statutory reporting requirements, the Australian Securities and Investments Commission (ASIC) has restricted the company from offering reduced content prospectuses until 2 May 2019. The impact for the company being that it will need to issue a 'full prospectus' if it wishes to raise funds from retail investors.

ASIC writes that it 'considers the ability to use a reduced disclosure prospectus a privilege, one dependent on compliance with other aspects of the law, including companies meeting their on-going disclosure obligations'. ASIC adds that 'Where a company fails to comply with its periodic disclosure obligations in a full, accurate and timely manner, ASIC will intervene to ensure that retail investors are protected. In such circumstances, subsequent fundraisings should occur only with the benefit of a full prospectus so that there is adequate disclosure of a company's prospects and financial position'.

ASIC notes that Big Un Ltd has the right to appeal to the Administrative Appeals Tribunal for review of ASIC's decision. ASIC adds that its own and the ASX's enquiries in relation to Big Un, as announced to the market on 23 February 2018, are continuing and Big Un remains suspended from trading on the ASX.

Big Un Ltd issued a short statement acknowledging ASIC's determination and adding that 'this is a discrete determination by ASIC and BIG is still in discussions with ASIC with regard to other matters and there is no certainty at this stage as to when the securities of BIG will be reinstated to quotation'. The company states that it is 'currently working diligently towards completion of its reviewed half yearly accounts. At this stage, there remains uncertainty as to when these accounts can be lodged'.

[Note: ASX has issued additional guidance on continuous disclosure obligations in March following disclosure issues and subsequent trading halts at a number of companies. See: Governance News 26/02/2018 and 19/03/2018. Additional funding for the regulator to improve the quality of financial reporting was also announced in the 2018-2019 Federal Budget. This is discussed in a separate post in this issue of Governance News under the topic heading: Regulators.]

[Sources: 18-133MR ASIC restricts Big Un Limited from issuing a reduced content prospectus; Big Un Ltd ASX announcement 08/05/2018; [registration required] The AFR 08/05/2018]

In Brief | Orica will increase the amount of its environmental provision by $115m in its financial report for half year ended 31 March 2018. ASIC writes that it has previously raised concerns as to whether environmental provision in previous financial reports was sufficient given the likely duration and cost of remediation obligations at its Botany Industrial Park site.

[Source:18-128MR Orica increases environmental provision]

Regulators

Additional funding for regulators to implement specific measures announced in the Federal Budget 2018-2019 including additional funds for ASIC and APRA to assist the Financial Services Royal Commission and for ASIC to strengthen the quality of financial reports.

In the Federal Budget 2018-2019 the government announced that it would provide additional funding to regulators to undertake specific measures including the following.

- **Additional funds for ASIC and APRA to assist the Financial Services Royal Commission**: The government will provide $10.6 million over two years from 2017-18 to the Australian Securities and Investments Commission (ASIC) and $2.7 million in 2018-19 to the Australian Prudential Regulation Authority (APRA) to assist in their involvement in the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. The government writes that the cost of this measure will be offset by an increase in the APRA Financial Institutions Supervisory Levies of $2.7 million in 2018-19 and an increase in levies of $10.6 million over two years from 2018-19 under the ASIC industry funding model.

- **Additional funds for ASIC to strengthen the quality of financial reports**: The government will provide $2.2 million over four years from 2018-19 for the Australian Securities and Investments Commission (ASIC) to strengthen the quality of listed entity financial reports. The government notes that the cost of this measure will be offset by revenue received through ASIC's industry funding model.

- **Additional funds for ASIC to fund a comparison home insurance website for North Qld residents:** The government will provide additional funding over two years from 2018-19 to ASIC to continue administering the North Queensland Home Insurance Comparison Website. The website is an Australian government initiative designed to help North Queensland residents compare home insurance policies and indicative premiums.

- **Additional funds for the Australian Competition and Consumer Commission (ACCC)** to assist in the implementation of the Consumer Data Right and to develop and implement rules to govern the data right and the content of data standards.

  [Note: The establishment of the Consumer Data Right and the roll out of the Open Banking scheme is discussed in a separate post in this issue of Governance News under the topic heading: Financial Services.]

- **Additional funding to assist in establishing AFCA**: The government will provide $1.7 million in 2018-19 to provide a grant to the Australian Financial Complaints Authority (AFCA) to support its establishment.

[Source: Budget 2018-2019 Budget Paper No. 2 2018-2019 08/05/2018]

Actually a funding cut to ASIC (and the DPP)? The AFR reports that Labor have said that despite the additional funding described above, ASIC's permanent funding has actually been cut by $10.6m (from $346m to $320m) and further that 30 investigators will be terminated. In addition, Labor says that cuts have also been made to the Office of the Director of Public Prosecutions staffing levels and funding. The article quotes Labor MP Matt Keogh as stating that this is at odds with the regulator taking a firmer line on the prosecution of white collar crime.

[Source: [registration required] The AFR 09/05/2018]

United States | New anti 'pile on' enforcement policy announced by the US Department of Justice: Agencies to coordinate in imposing multiple penalties on a company for the same conduct to address the issue of companies facing multiple enforcement actions for the same conduct.

In a recent speech at the American Institute's 20th Anniversary New York Conference on the Foreign Corrupt Practices Act, Deputy Attorney General Rod J Rosenstein announced a new enforcement policy to address the issue of companies facing multiple enforcement actions for the same conduct or the issue of 'piling on'. He explained that '"Piling on" [ie multiple agencies pursuing enforcement actions for the same conduct] can deprive a company of the benefits of certainty and finality ordinarily available through a full and final settlement' an issue which could dissuade companies from reporting.

Key aspects of the new policy include the following.

1. The new policy confirms that the threat of criminal prosecution cannot be used against a company for purposes unrelated to the investigation and prosecution of a possible crime eg the threat of criminal prosecution should not be used to persuade the company to pay a larger settlement in a civil case. Mr Rosenstein commented that this is 'not a policy change. It is a reminder of and commitment by the Department to principles of fairness and the rule of law'.
2. The policy is intended to encourage department attorneys, when possible, to coordinate with other federal, state, local, or foreign enforcement authorities seeking to resolve a case with a company for the same misconduct to achieve an 'overall equitable result' and avoid 'disproportionate punishment'. Mr Rosenstein added that the coordination may include crediting and apportionment of financial fines, forfeitures, and penalties, and other means of avoiding disproportionate punishment.
3. Though there is an emphasis on encouraging cooperation between agencies, Mr Rosenstein emphasised that 'cooperating with a different agency or a foreign government is not a substitute for cooperating with the Department of Justice'. He commented: 'we will not look kindly on companies that come to us after making inadequate disclosures to secure lenient penalties with other agencies or foreign governments. In those instances, the Department will act without hesitation to fully vindicate the interests of the United States'.
4. The new policy sets forth some factors that Department attorneys may evaluate in determining whether multiple penalties serve the interests of justice in a particular case. Factors identified in the policy that may guide this determination include:
   - the egregiousness of the wrongdoing;
   - statutory mandates regarding penalties;
   - the risk of delay in finalising a resolution; and
   - the adequacy and timeliness of a company's disclosures and cooperation with the department.

   Mr Rosenstein added that in circumstances where penalties that seem duplicative but 'really are essential to achieve justice and protect the public' the DOJ would not 'hesitate to pursue complete remedies, and to assist our law enforcement partners in doing the same'.

Establishment of a Working Group on Corporate Enforcement and Accountability: Mr Rosenstein also announced that in order to promote consistency, the DOJ has established a new Working Group on Corporate Enforcement and Accountability to make internal recommendations about white collar crime, corporate compliance, and related issues.

'Most American companies are serious about engaging in lawful business practices. They want to do the right thing. They need and deserve our support to help protect them from criminals who seek unfair advantages' Mr Rosenstein said.

[Source: Department of Justice, Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 20th Anniversary New York Conference on the Foreign Corrupt Practices Act 09/05/2018]

In Brief | The *Treasury Laws Amendment (ASIC Governance) Bill 2018* which amends the *Australian Securities and Investments Commission Act* 2001 to enable the Governor-General to appoint a second Deputy Chairperson to ASIC has passed both houses without amendment and awaits royal assent.

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

Financial Services

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

Top Story | An end to commissions? ASIC's submission to the Financial Services Royal Commission expresses the view that the grandfathering of commissions should cease as soon as reasonably practicable.

Following the completion of the second round of hearings on the issue of financial advice, the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Financial Services Royal Commission) has released written submissions. The Australian Securities and Investments Commission (ASIC) submission expresses the view, among other things, that 'the grandfathering of commissions [paid to financial advisers] should cease as soon as reasonably practicable' on the basis that they 'operate to incentivise advisers to keep clients in legacy products with a continuing commission structure, even where there may be better products available to meet client's needs'. Media reports suggest that some entities are already taking steps to end sales-based commissions.

Key Points

ASIC's submission, responding to the 28 questions put by Counsel Assisting in closing submissions, addresses a range of issues in addition to the question of the payment of commissions. What follows is a high level overview of some of the points put forward in ASIC's submission.

- **Client benefit from ongoing service arrangements does not justify the fees:** ASIC states that it is 'concerned that many, perhaps even most, clients who are currently paying for ongoing advice may not receive benefit from that advice commensurate with its cost to them'.

  More particularly, ASIC questions whether the provision of an annual review is of value to clients 'whose personal financial circumstances are unlikely to be sufficiently volatile or investments sufficiently complex to justify them paying a significant fee'. ASIC adds that 'Certainly, in ASIC's opinion, it is hard to see how an arrangement under which the client receives the mere "offer" of an annual review could sensibly, of itself, justify a significant ongoing service fee'.

  ASIC goes on to comment that the current practice of fees being deducted from the customer's investment funds and remitted to the licensee 'may not suffice to bring the fact that they are being charged significant ongoing frees for service sufficiently to the attention of the customers' and that 'it would be more likely that any ongoing service would provide meaningful value to a customer if the fee for that service were required to be invoiced to the customer and that payment specifically authorised, as and when the service was provided'.

- **Grandfathered commissions:** ASIC states that in its view 'it is plausible that a continuing culture among licensees and advisers of receiving ongoing commissions which bear no direct relationship to the provision by them of service to the customer (a culture condoned to at least some extent by the grandfathering of commissions) may have contributed to those licensees and advisers paying insufficient regard to the need to charge ongoing service fees only where the service was provided'. ASIC goes on to express the view that 'In principle, any exception to the ban on conflicted remuneration has the ability to create misaligned incentives, which can lead to inappropriate advice' and adds that it is concerned that 'almost five years after the implementation of the FOFA reforms, grandfathered commissions continue to form a significant proportion of licensee/adviser remuneration and grandfathered commissions operate to incentivise advisers to keep clients in legacy products with a continuing commission structure, even where there may be better products available to meet the client's needs'. Accordingly, ASIC believes that the grandfathering of commissions should cease as 'soon as reasonably practicable'. ASIC states that it accepts that consideration may need to be given to a short transition period to allow licensees and advisers to adjust their businesses.

  Commenting on the same point, The Financial Planners Association of Australia (FPA) submission to the Commission comments: 'Ongoing fee arrangements where the ongoing advice is not provided contravene reasonable community expectations, regardless of whether they are technically grandfathered. The FPA would support the removal of grandfathering for ongoing advice fees and all ongoing advice fees being subject to the Opt-in requirement. Grandfathered commissions has led to an environment where many clients are paying fees and yet receiving no services. Ceasing grandfathered commissions and making all ongoing fee arrangements subject to opt-in will result in grandfathered fee arrangements quickly coming to an end where no services are being provided to consumers'.

- **ASIC views on the vertical integration model:** Asked to comment on whether the vertical integration of platform operators with advice licensees serves the interests of clients, ASIC referred to the findings in ASIC Report 562: *Financial advice: Vertically integrated institutions and conflicts of interest* (see: Governance News 29/01/2018) and reiterated that though vertical integration may provide some benefit to clients (in certain circumstances), this could not be assumed in every case and added that 'a vertically integrated business model gives rise to an inherent conflict of interest, which needs to be carefully managed by a licensee to ensure that advice given to the client complies with the best interests duty and related obligations and is not tainted by that conflict'.

  Commenting on the viability of successfully managing conflicts of interest in the vertical integration model, ASIC reiterated the view expressed in report 562, that there remain 'significant challenges around effectively managing the conflicts of interest that are inherent in vertically integrated businesses' but that ASIC's present view is that it 'should be possible for licensees to effectively manage the conflicts of interest associated with providing personal advice to clients and manufacturing financial products and it should not be necessary to enforce the separation of products and advice'.

- **No justification for sales-based remuneration and incentives for financial advisers:** ASIC states that 'A remuneration or incentive arrangement which rewards a financial adviser for generating revenue from customers creates a conflict of interest' and added that 'In ASIC's view, it is very far from clear why there is a need for this risk to be embedded, to any extent, in the remuneration or incentive arrangements for financial advisers…evidence [heard at the second round hearings]…tends to suggest that there is no good reason why the remuneration of employed financial advisers should be structured so as to incentivise them, to any degree, to maximise the revenue generated from their clients'.

- **How should the provision of good quality financial advice be incentivised?** ASIC comments that 'If the financial advice industry had a true professional ethos then, in ASIC's view, it ought not to be necessary to incentivise financial advisers to provide good quality advice' or to reward them for 'ethical conduct'.

[Note: ASIC Chair James Shipton has previously called for the finance sector to raise standards of professionalism and suggested that the industry currently has a 'window of opportunity' to raise standards without the 'imposition of a regulatory catalyst'. See: Governance News 23/03/2018]

Having said this, ASIC goes on to suggest that incentivising the provision of good quality financial advice should be based on an objective review of the advice in question (which could be done in conjunction with a routine compliance audit) with the integration of 'customer satisfaction' as a measure of the quality of the advice to identify that the advice is of good quality. 'Once objectively good quality advice is identified, it can be rewarded by the licensee' ASIC writes.

ASIC adds that in its view 'there should be no difference in the remuneration for advice that is in the client's best interests, whether it be to recommend change or no change to an existing investment strategy'.

Commenting on the need to reward ethical conduct, ASIC states that rewarding ethical conduct requires that licensees and advisers have appropriate systems and processes in place to enable them to identify ethical and unethical conduct. Once identified, ASIC suggests that ethical and unethical conduct should be rewarded or punished as appropriate via performance management and remuneration systems. ASIC suggests that his could mean aligning adviser remuneration to good quality client service rather than to revenue/product sales. Measures of this kind, ASIC notes are more likely to be effective, where the necessary systems and processes are supported by a strong culture.

- **Improving compliance and audit processes:** Referring to the recommendations in ASIC Report 515: *Financial advice: Review of how large institutions oversee their advisers* (see: Governance News 20/03/2018) ASIC reiterated a number of ways in which the advice and audit process could be improved eg by improved use of key risk indicators to target audit work (among other measures). ASIC comments that 'Ultimately, however, the appropriate monitoring and supervision of advisers comes back to whether the licensee has the commitment to do so, has devoted sufficient and appropriate human, technological and financial resources to the task and is appropriately incentivising the auditors and managers involved in the task'.

- **Manual systems are no excuse for poor monitoring:** Asked whether it is possible for financial services licenses to adequately monitor the quality of advice provided by employees and authorised representatives in a manual environment ASIC said that it is possible. ASIC added that though improvements in technology could enhance the monitoring and supervision of advisers to detect poor advice and facilitate good advice, 'improvements in technology are neither a prerequisite for quality advice, nor a substitute for other forms of monitoring and supervision'.

- **Support for the establishment of a last resort compensation scheme:** Asked to respond to the question: 'Taking into account that it may never be possible to reduce the risk to zero, what is an acceptable risk that customers will be provided with inappropriate advice?' ASIC expressed the view that 'Given that some level of non-compliant advice leading to client loss is inevitable, consumer protection would be enhanced in ASIC's view by the creation of a last resort compensation scheme'.

- **Timeframes for informing and remediating clients (that they have or may have been provided with inappropriate financial advice) are too long.**

  - ASIC states that 'when a licensee becomes aware that a client has been, or may have been, provided with inappropriate advice it should immediately inform the client'. ASIC goes on to comment 'It is not acceptable in ASIC's view for licensees to fail to undertake any investigation or otherwise to make a concerted effort to determine whether inappropriate advice has been or is likely to have been provided, so that clients are not informed for months or even years'.

  - Commenting on what it considers to be an acceptable timeframe for remediating clients 'where a licensee determines that a client has been provided with inappropriate advice' ASIC states that the client should be informed and remediated 'immediately' though ASIC acknowledges that this may not be feasible in practice. On this basis, ASIC states that 'remediation should occur as soon as is reasonably practicable' and adds that it expects licensees to devote sufficient resources to enable compensation to occur in an efficient an timely way. ASIC comments that 'In that regard, ASIC's experience (which has been further illustrated by evidence in the current round of hearings) has been that remediation is often far too slow, reflecting a failure by licensees to discharge that onus'.

- **ASIC's views on ensuring customers are protected during investigations of poor adviser conduct:** In situations in which a licensee has identified a risk that an adviser has provided non compliant advice leading to client loss and is undertaking an investigation to establish if this is so, ASIC says that the licensee should 'immediately inform clients that inappropriate advice may have been, or has been, provided, take steps to review the advice provided and remediate clients as appropriate' and take appropriate measures, suitable to the circumstances of each case, to ensure that no further non-compliant advice is provided eg suspending the adviser pending the outcome of the investigation (in a serious case) to imposing pre-vetting and close management supervision of the adviser (in a less serious case).

- **Mandatory reference checks**: Commenting on the adequacy of current reference checking and information sharing requirements that apply when financial advisers transfer between licensees, ASIC expresses the view that the current ABA reference checking and information sharing protocol, while a step in the right direction, is not 'sufficient to protect the public when financial advisers transfer between licensees' and that in ASIC's view, 'consideration should be given to law reform to introduce mandatory reference checking and information provision (including qualified privilege) when financial advisers transfer between licensees'.

  Commenting on the current system for professional discipline of financial advisers ASIC states that if the current system is maintained, ASIC's ability to ensure that only appropriate persons are able to participate in the financial services and credit industry would be enhanced if the grounds for exercising ASIC's power to ban individuals were expanded.

- **Impact of limited resources:** ASIC states 'With limited resources, it is inevitable that ASIC's regulatory choices will entail difficult decisions as to what matters to investigate and to take action on and in what manner, so as to most effectively change the behaviour of industry participants and improve consumer outcomes. Difficult choices and trade-offs are required to be made, not only in the context of the financial advice sector, but across the full range of ASIC's jurisdiction and responsibilities' ASIC writes.

- **Regulatory culture:** Commenting on regulatory culture, ASIC states, that a 'fundamental element of the regulatory regime is the responsibility that licensees have to ensure compliance by their businesses and advisers with the financial services laws. However, it is apparent from ASIC's experience…that licensees have not consistently fulfilled that role' and that consequently ASIC has adopted a progressively more 'hand-on', and more resource intensive, approach. ASIC goes on to state that the case studies heard by the Commission served to both to illustrate the gap between the views expressed by banking and financial services institutions and the practices within those institutions and their lack of willingness to engage with ASIC, 'there are a range of circumstances in which ASIC has found that the large financial services entities too often engage with it in a manner which is less than constructive' ASIC writes.

  Commenting on what changes in the regulatory culture within licensees might assist in reducing the incidence of misconduct in the industry, ASIC writes that: 'changes must start at the top, with a firm commitment by the Boards and senior management of licensees to put compliance with their legal and ethical duties to customers at the forefront of the organisation's priorities, and then permeate every aspect of the engagement of licensees with their financial advisers, including in their recruiting, training, monitoring and supervision, and remuneration. At the individual adviser level, what is required is the sincere adoption of proper professional standards, as contemplated by the pending reforms required by the Corporations Amendment (Professional Standards of Financial Advisers) Act 2017'.

- **Reform of the obligations set out in s912A is unnecessary but reforms to further strengthen the impact of banning powers should be considered:** Asked to comment on whether the obligations set out in section 912A of the Corporations Act 2001 (Cth) are expressed at 'too high a level of generality to be capable of being effectively enforced', ASIC said that in its view they are not, and that the fact that the general obligations facilitate 'principles based' and 'outcome-based' regulation rather than regulation by strict rules is appropriate.

Referencing recent proposed changes to ASIC's regulatory powers eg making s912A a civil penalty provision (among other changes) ASIC suggests that 'further law reform measures which would enhance the transparency and denunciatory impact of the banning process' would be to provide for: 'an entry to be made in the Financial Advisers Register on the sending out by ASIC of notice to an adviser of a hearing to consider whether a banning order will be made; and/or the publication by ASIC of the ASIC delegate’s reasons for decision'.

[Sources: The Australian Securities and Investments Commission Round 2: Financial Advice submission to the Royal Commission into Misconduct in the banking, Superannuation and Financial Services Industry; [registration required] The AFR 10/05/2018; The Financial Planning Association of Australia (FPA) Round 2: Financial Advice submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry]

ANZ has committed to remove all sales incentives for financial planning bonuses: ANZ has announced a that it will 'remove all sales incentives for financial planning bonuses, speed up customer remediation, quickly remove planners that provide inappropriate advice, and demand new professional standards'. More particularly, ANZ has committed to:

- 'Remove all sales incentives for bonuses and only assess performance on customer satisfaction, ANZ values, and risk and compliance standards
- Quickly identify and remove planners that provide inappropriate advice – two audit fails and their contract will be terminated.
- Only employ new planners with a relevant under graduate degree and industry certification, and require existing planners to be enrolled in further necessary training by January 2019.
- Commit to completing compensation on about 9000 current inappropriate advice cases by the end of the year.
- Offer an advice review, at no expense, for any of our financial planning customers who may have concerns about their current financial position'.

The WSJ comments that ANZ is the 'first' of the banks to make changes of this kind.

Westpac: The SMH reports that Westpac has indicated it has no plans to end sales based incentives for financial planners. Reportedly, Westpac has said that doing so would only mean planners elect to work for organisations where the sales-based bonuses are in place, or to work for themselves: 'If we don't offer some element of incentive to the planners to stay on our books, it will beg the question as why they would continue to work for us' Westpac CEO Brian Hartzer is quoted as saying. The article goes on to comment that Westpac also remains committed to the 'vertical integration' business model on the basis that it provides a valuable service to customers, and on the basis that issues with conflicted pay have been addressed by the Future of Financial Advice Reforms. The SMH comments that the chairman of the 2014 financial system inquiry and former Commonwealth Bank CEO David Murray (who will chair AMP), has also defended the vertical integration model.

[Sources: ANZ media release 07/05/2018; [registration required] The WSJ 07/05/2018; The SMH 07/05/2018; Independent Financial Adviser 08/05/2018]

Royal Commission | Round three public hearings to focus on secured and unsecured loans to small and medium businesses; schedule of topics and case studies and a new background paper released.

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Financial Services Royal Commission) has released the schedule of topics and case studies to be heard at the third round of public hearings into loans to small and medium enterprises.

The hearings will 'consider the conduct of financial services entities in respect of their dealings with small and medium enterprises, in particular in providing credit to businesses. The hearings will also explore the current legal and regulatory regimes, as well as self-regulation under the Code of Banking Practice'.

The hearings will be held from Monday 21 May to Friday 1 June 2018.

Schedule of topics and case studies to be considered.

Topic	Case studies
1. Responsible lending to small businesses	ANZ Bank of Queensland CBA Westpac Suncorp
2. Approach of banks to enforcement, management and monitoring of loans to businesses	CBA / Bankwest NAB
3. Product and account administration	CBA Westpac
4. Extension of unfair contract terms legislation to small business contracts	ASIC
5. The Code of Banking Practice	ABA ASIC

The Commission adds that evidence will also be given by business owners and customers of their particular experiences together with other witnesses providing context for the case studies.

Background paper released: The commission has also released a background paper, ahead of the hearings, *Background Paper 10: Credit for small business - An overview of Australian law regulating small business loans* which provides an overview of the relevant issues in relation to the provision of secured and unsecured loans to small and medium businesses. The paper notes that as small business credit is 'treated in either the same or substantially the same way as consumer credit', Background Paper 10 draws (where relevant) on information from, *Background paper 4: Everyday Consumer Credit – Overview of Australian Law Regulating Consumer Home Loans, Credit Cards and Car Loans* in some areas.

[Sources: Schedule of topics and case studies for Round 3 hearings: Loans to small and medium enterprises; Background Paper 10: Credit for small business - An overview of Australian law regulating small business loans 07/05/2018; [registration required] The AFR 08/05/2018]

New Zealand | FMA and RBNZ have requested licenced NZ banks to undertake their own assessments, and provide details of the work undertaken to ensure that the issues identified at the Australian Financial Services Royal Commission are not present in their own organisations/are being addressed.

The New Zealand Financial Markets Authority (FMA) and the Reserve Bank of New Zealand (RBNZ) have written to licenced NZ banks directing them to undertake their own assessments, and provide details of the work they have undertaken to ensure that the issues uncovered at the recent Australian Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Financial Services Royal Commission) hearings are not present in their own organisations and/or are being addressed. Banks have been given until Friday 18 May 2018 to provide the information.

The letter explains, 'we both believe that the nature and extent of the issues within financial services in Australia and the obvious cross-over in terms of entities, people and practices into New Zealand demands a strong response from the industry here and from the regulators'.

Detailed summary of actions undertaken to ensure culture/conduct issues are not present/being addressed: More particularly, the letter explains that the objective of the request is 'to understand what work you [banks] have undertaken to review…operations to promptly identify and address any conduct and culture issues. We expect you to show us what you have done in order to be comfortable that there are no material conduct issues within your business. We anticipate that you will have undertaken an exercise of that nature after our Conduct Guide (published in February 2017) and may be extending or enhancing that work in response to issues raised at the Royal Commission or more broadly as a result of that inquiry'.

The letter adds that 'the window' of opportunity to 'demonstrate to consumers, regulators and other stakeholders that they can have full confidence in the financial services industry in New Zealand is narrow, and we encourage proactive leadership from the retail Banking sector'.

Areas of focus for the regulators: The regulators state that they will continue to focus on areas previously signalled as priorities including: the FMA's thematic review on soft commission in life insurance; the Financial Adviser Act reforms; and the FMA's thematic work on incentives in vertically integrated institutions (among others). They emphasise that they anticipate 'deepening our priority focus this year on governance and culture within financial services firms'.

[Sources: Financial Markets Authority media release 04/05/2018; NZ adviser 07/05/2018]

In Brief | The Financial Services Royal Commission has released responses to requests for more information by official witnesses following the second round of hearings.

[Sources: AMP - Submission - General Questions; AMP - Case Study 1 - Fees for no service; AMP - Case Study 2 - Investment platform fees; AMP - Case Study 3 - Inappropriate Financial Advice; Andrew Smith – Submission; APRA; ASIC; Association of Financial Advisers (AFA); Australia and New Zealand Banking Group Limited (ANZ); Choice; Commonwealth Bank of Australia (CBA) - Part A Wealth Management; Commonwealth Bank of Australia (CBA) - Part B; Dover Financial Advisers; Finance Sector Union (FSU); Financial Planners Association of Australia (FPA) - Part A; Financial Planners Association of Australia (FPA) - Part B; Henderson Maxwell Entities; M3 and RI - Case Study Submissions; M3 and RI - Supplementary Case Study Submission; Mr John Doyle – Submission; National Australia Bank - General Questions; National Australia Bank - Case Study Submissions; National Australia Bank - Case Study Supplementary Submissions; Treasury; Westpac Banking Corporation - General Submission; Westpac Banking Corporation - Financial Advice Case Study]

Banking

Top Story | Phased implementation of Open Banking from July 2019: The government has agreed to the Farrell Review recommendations; the Federal Budget 2018-2019 includes a $44.6m commitment over four years to establish a national consumer data right (CDR)

In the 2017-18 Budget the Treasurer announced that Open Banking would be introduced in Australia and commissioned an Open Banking Review — chaired by Mr Scott Farrell (Farrell Review) — to make recommendations to the Government on the most appropriate model and the best approach to implement it. The final report was released for public comment on the review recommendations on 9 February (see: Governance News 12/02/2018).

On 9 May 2018, the Government agreed to the recommendations of the Farrell Review, both for the framework of the overarching Consumer Data Right (CDR) and for the application of the right to Open Banking, with a phased implementation from July 2019.

Key Points

Application: All entities holding banking licences (authorised deposit-taking institutions), other than foreign bank branches, will be subject to the CDR.

Phased implementation:

- All major banks will make data available on credit and debit card, deposit and transaction accounts by 1 July 2019 and mortgages by 1 February 2020.
- Data on all products recommended by the Review will be available by 1 July 2020.
- All remaining banks will be required to implement Open Banking with a 12 month delay on timelines compared to the major banks.
- The Australian Competition and Consumer Commission (ACCC) will be empowered to adjust timeframes if necessary.

Draft legislation, rules and standards to be released for consultation:

- The Treasury will be consulting on draft legislation, the ACCC will be consulting on draft rules, and Data61 will be consulting on technical standards over the coming months.

Application to other sectors:

- The government has announced the first three sectors to which the right will apply – banking, energy and telecommunications. Further sectors will follow over time.
- The government notes that other sectors should not assume all of the recommendations for how the Consumer Data Right will apply to banking will necessarily be adopted for other sectors. For example, rules regarding how consumer identities are authenticated might differ between sectors.

Additional funding announced to establish the CDR

The Federal Budget 2018-2019 includes the announcement that the government intends to provide $44.6 million over four years from 2018-19 (including $1.4 million in capital funding in 2018-19) to help implement establish a national consumer data right (CDR).

This measure will include:

- $20.2 million over four years from 2018-19 for the Australian Competition and Consumer Commission (ACCC) to assist in determining the costs and benefits of designating sectors that will be subject to the CDR, and to develop and implement rules to govern the data right and the content of data standards.
- $12.9 million over four years from 2018-19 for the Office of the Australian Information Commissioner to assess the privacy impact of designating sectors subject to the CDR, and to ensure consistency of rule-making with the Privacy Act 1988
- $11.5 million over four years from 2018-19 to support the Commonwealth Scientific and Industrial Research Organisation (CSIRO) in its role as the data standards setter.

The ACCC has issued a statement welcoming the initiative: 'The introduction of a consumer data right in Australia is a fundamental competition and consumer reform. The ACCC is delighted to lead the data right and to work in the best interest of consumers' ACCC Chair Rod Sims said.

Industry has welcomed the announcement

- **The Australian Banking Association (ABA) has also welcomed the initiative**: 'The ABA welcomes the Government's announcement on Open Banking which charts the way forward for this important reform which will empower customers…The industry is pleased that the Government has outlined a phased introduction that enables it to design a good system the will both benefit customers and protect their data…Banks are committed to delivering this reform within the tight timeframe and are looking forward to seeing further details contained in the draft legislation as soon as possible' Australian Banking Association CEO Anna Bligh said.

[Note: The ABA released its response to the Farrell Report Recommendations on 26 March. The response included feedback that customers would benefit from a phased approach to the roll out of the changes (which appears to be reflected in the government's plan) and is acknowledged in Ms Bligh's statement above. See: Governance News 03/04/2018]

- **FinTech Australia** issued a statement welcoming the initiative stating that 'Australia's fintech industry has welcomed an Australian Government decision to put the customer first by pushing back against big bank delaying tactics and introducing open banking reforms from mid-next year'. The statement adds that the changes are 'expected to force downward pressure on lending costs, allow people to more easily manage their budget and be able to shop around for the best investments' as well as enable customers to more easily switch 'their bank accounts to new fintech challenger banks'. Commenting on the phased approach to providing access to some forms of data, FinTech Australia specifically welcomed the inclusion of specific timeframes for the roll out stating: 'We are pleased that the Australian Government has stood up to the big banks, which wanted to delay this reform into the never-never and significantly reduce the amount of data consumers could access'.

- **Westpac** CEO Brian Hartzer is quoted in The AFR as welcoming the initiative as an opportunity for his own organisation and of benefit to consumers, but cautioning that the design of privacy and security safeguards would be of paramount importance.
- **National Australia Bank (NAB)** Chief Operating Officer Antony Cahill is quoted in The FR as saying that the 'focus must be on ensuring this change is implemented in an appropriate manner and that speed isn't prioritised over safety; this is critical to ensuring the long term success of the regime and maintaining customer trust'.

[Sources: ACCC media release 09/05/2018; Budget 2018-2019 Budget Paper No. 2 2018-2019 08/05/2018; Consumer Data Right Handout; Consumer Data Right Booklet; Treasurer Scott Morrison media release 09/08/2018; Australian Banking Association media release 10/05/2018; FintTech Australia 10/05/2018; [registration required] The AFR 10/05/2018]

CBA and ASIC have agreed to an in-principle settlement over BBSW: CBA to pay $25m to settle allegations.

On 9 May, the Commonwealth Bank of Australia (CBA) announced it had reached an in-principle agreement with the Australian Securities and Investments Commission (ASIC) to settle the legal proceedings in relation to alleged manipulation of the bank bill swap rate.

According to CBA's statement, as part of the in-principle settlement, CBA will acknowledge that:

- On five occasions between February and June 2012, in the course of trading on the BBSW market in Australia, CBA 'attempted to engage in unconscionable conduct in breach of the ASIC Act'.
- CBA will also acknowledge it did not have adequate policies and systems in place to monitor the trading and communications of its staff in order to prevent that conduct from occurring.

CBA to pay $25m to settle the allegations: CBA has agreed to pay a $5 million penalty, a payment of $15 million to a financial consumer protection fund and a $5 million payment towards ASIC's costs of the litigation and its investigation. CBA states that the impact of this settlement will be reflected in CBA's 2018 Financial Year results.

The agreement is subject to Federal Court approval.

Commenting on the announcement, The AFR notes that the CBA's penalty is half of the $50m paid by NAB and ANZ which reflects the fact that the CBA settlement involved fewer allegations that either the NAB or ANZ settlements.

[Sources: CBA media release 09/05/2018; [registration required] The AFR 09/05/2018]

Additional compliance and other costs impacting financial performance? The SMH reports that CBA's shares fell sharply in response to both its third quarter trading update and the announcement of the BBSW settlement. According to the SMH CBA shares are now down about 14% since early January (or a $20bn loss in market capitalisation this year) in response, the article suggests, to the additional costs of addressing recent issues.

[Sources: CBA ASX Announcement 10/05/2018; The SMH 09/05/2018]

More competition in the banking sector? APRA has authorised the first restricted authorised deposit taking institution (ADI) licence.

The Australian Prudential Regulation Authority (APRA) announced it has authorised volt bank limited as a restricted authorised deposit-taking institution (Restricted ADI), and volt Corporation Limited as a non-operating holding company, under the Banking Act 1959 under the new framework announced last week to promote competition in the sector (see: Governance News 07/05/2018).

The AFR reports that volt, the first digital bank licenced under the new regime plans to offer saving accounts, transaction accounts, term deposits and foreign exchange initially and adds that the company is reportedly planning to apply for a full ADI licence this year (which the AFR observes is ahead of the two year timeframe required by the new framework).

[Sources: APRA media release 07/04/2018; [registration required] The AFR 07/05/2018]

In Brief | Building on the 2016-2017 budget measure, the government has committed $0.1m to promote Australia internationally as a fintech destination.

[Source: Budget 2018-2019 Budget Paper No. 2 2018-2019 08/05/2018]

In Brief | ANZ announced two executive committee appointments: the promotion of Alexis George to deputy CEO replacing Graham Hodges, and the appointment of Mark Hand as Group Executive, Australian Business and Private Banking. Both appointments are effective from 15 May 2018.

[Source: ANZ media release 09/05/2018]

Insurance

Top Story | 'Protecting your super package' announced in the Federal budget 2018-2019; exposure draft legislation released for consultation.

Among the measures announced in the 2018-2019 federal budget was the 'protecting your super package' which Treasury describes as 'a comprehensive package of regulatory reforms designed to protect Australians' superannuation savings from undue erosion by fees and insurance premiums'.

Consultation on draft legislation: The Government has released exposure draft legislation: *Treasury Laws Amendment (Protecting Superannuation) Bill 2018* and explanatory material to implement the package for consultation. The draft Bill proposes to amend the *Superannuation Industry (Supervision) Act 1993 (*SIS Act), *Superannuation (Unclaimed Money and Lost Members) Act* 1999 (SUMLM Act) and *Taxation Administration Act 1953 (*TAA 1953) to, among other things:

- **Cap administration/investment fees**: Schedule 1 of the draft Bill proposes to prevent trustees of superannuation funds from charging administration and investment fees exceeding 1.5% of the balance of accounts with balances below $6,000 for the six month period immediately following the date on which the balance is calculated. In addition, the Bill proposes to prevent trustees from charging exit fees on all superannuation products.
- **Implement 'opt in' (rather than opt-out) insurance for certain accounts**: Schedule 2 of the draft Bill proposes to impose a requirement on superannuation funds to only offer insurance on an opt in basis in relation to accounts of:
  - new members under 25 years old;
  - all accounts with balances below $6,000; and
  - all inactive accounts unless the member has directed the fund to provide that insurance.
- **Consolidate inactive, low balance accounts**: Schedule 3 of the draft Bill proposes to amend the SUMLM Act to require superannuation providers and retirement savings account (RSA) providers to pay the balances of accounts to the ATO where the account has been inactive for 13 months and the balance of the account is less than $6,000. The Bill also proposes to give the ATO greater powers to consolidate amounts held for a person who has an active account with a superannuation provider or RSA provider, without needing to be directed to do so by the person.

Timeframe: Consultation on the draft legislation will close on 29 May 2018.

Industry failed to act? The AFR comments that the release of the package underlines the inadequacy of the voluntary code of practice and more particularly its failure to address 'the plight' of young people 'forced' to take out life insurance, despite lower claims rates. The article quotes Minister for Revenue and Financial Services Kelly O'Dwyer as commenting: 'I am not going to wait for the industry to do this. I gave them a chance to fix it and they didn't. I wasn't going to hang around and wait for five years while they talked among themselves'. The article goes on to suggest that the release of the package will not be a surprise to industry as evidenced by the fact that AustralianSuper has already acted to remove compulsory insurance for those under 25, and other funds may be moving in a similar direction.

Possible implications of the proposed changes

- **Rise in premiums likely?** Reporting on the way that the measure has been received by industry, The Australian writes that the changes are likely to negatively impact the financial performance of the largest life insurers and that some insurers have said that the changes may result in a rise in insurance premiums.
- **Leave under 25s with inadequate cover?** Investment Magazine reports that the insurance industry is still working out the probable consequences of the government's move to make life cover inside superannuation an 'opt in' for members under 25 years old. The article quotes Association of Superannuation Funds of Australia (ASFA) CEO Dr Martin Fahy, as expressing the view that the measure could leave some young people with inadequate cover: 'Many young people have dependants and financial commitments, so in the instance of a tragic event occurring, particularly disablement early in life, having insurance in place is extremely valuable'.

[Sources: Exposure Draft Legislation; Draft explanatory material; Draft Summary of Regulation; Minister for Revenue and Financial Services Kelly O'Dwyer media release 08/05/2018; Budget 2018-2019 Budget Paper No. 2 2018-2019 08/05/2018*; [registration required] The AFR 08/05/2018; [registration required] The Australian 10/05/2018; Investment Magazine 10/05/2018]*

In Brief | APRA has released annual general insurance institution-level statistics for December 2017

[Sources: The publication is available on the website at: http://www.apra.gov.au/GI/Publications/Pages/General-Insurance-Institution-Level-Statistics.aspx]

Other developments

In Brief | The Super Guarantee integrity Bill (*Treasury Laws Amendment (2018 Measures No 4) Bill* 2018) has been referred to the senate committee for report by 13 June 2018. The Bill includes the Government's Superannuation Guarantee (SG) integrity package and other measures.

[Source: Treasury Laws Amendment (2018 Measures No. 4) Bill 2018]

Accounting and Audit

IOSCO consultation paper released: Good Practices for Audit Committees in Supporting Audit Quality. Consultation closes 24 July.

The International Organisation of Securities Commissions (IOSCO) released a consultation report titled *Good Practices for Audit Committees in Supporting Audit Quality* on 24 April for consultation.

The report was released in response to reviews by audit regulators that indicated a need to improve both audit quality and the consistency of audit execution and proposes various features that an audit committee should have in order to promote and support audit quality. These include the qualities, qualifications and experience of audit committee members. Consultation closes on 24 July.

[Sources: IOSCO media release 24/04/2018; Consultation Report on Good Practices for Audit Committees in Supporting Audit Quality]

In Brief | The Hong Kong Securities and Futures Commission (SFC) announced that its Chief Executive Officer, Mr Ashley Alder, has been reappointed as Chair of the new Board of the International Organisation of Securities Commissions (IOSCO) at IOSCO's annual conference in Budapest.

[Source: SFC media release 11/05/2018]

In Brief | The UK Financial Reporting Council has released its first report on audit culture and has flagged plans to review the culture at the largest firms as part of its recently announced expanded monitoring and supervision of those firms

[Sources: FRC media release 10/05/2018; Audit Culture Thematic Review: Firms' activities to establish, promote and embed a culture that is committed to delivering consistently with high quality audits 10/05/2018]

Restructuring and Insolvency

Top Story | Treasurer Scott Morrison has announced 'tough new anti-phoenixing measures' in the Federal Budget 2018-2019.

In the Federal Budget 2018-2019 the government announced that it proposes to reform the corporations and tax laws to provide regulators with additional tools to assist them to deter and disrupt illegal phoenix activity. 'In this budget, we are making sure small businesses don't get ripped off by other businesses who deliberately go bust to avoid paying their bills, with tough new anti-phoenixing measures' Treasurer Scott Morrison said.

More particularly, the government said it plans to:

- 'introduce new phoenix offences to target those who conduct or facilitate illegal phoenixing;
- prevent directors improperly backdating resignations to avoid liability or prosecution;
- limit the ability of directors to resign when this would leave the company with no directors;
- restrict the ability of related creditors to vote on the appointment, removal or replacement of an external administrator;
- extend the Director Penalty Regime to GST, luxury car tax and wine equalisation tax, making directors personally liable for the company's debts; and
- expand the ATO's power to retain refunds where there are outstanding tax lodgements. From a tax perspective, the Government proposes to extend the Director Penalty Regime to GST, luxury car tax and wine equalisation tax, and make directors personally liable for the company's debts'.

The government notes that the proposed measures build on the reforms to 'combat illegal phoenixing complement and build on the work of the Government's Phoenix, Serious Financial Crime and Black Economy taskforces, and other announced reforms such as a Director Identification Number, a combined black economy and illegal phoenixing hotline, and reforms to address corporate misuse of the Fair Entitlements Guarantee and to tackle non-payment of the Superannuation Guarantee Charge'.

The Australian Institute of Company Directors (AICD) released a statement reiterating its support for the budget reforms aimed at combatting illegal phoenixing activity adding that it looks forward to seeing the details of the proposals to ensure they are appropriately targeted.

[Sources: Treasurer Scott Morrison budget speech 2018-2019 08/05/2018; *Budget 2018-2019 Budget Paper No. 2 2018-2019* 08/05/2018; [registration required] The Australian 09/05/2018; Australian Institute of Company Directors media release 10/05/2018]

Risk Management

Top Story | What to expect from AUSTRAC if you're in their sights: MinterEllison Partner Tony Dhar and Senior Associate Jacki Wang caution that the mere existence of compliance processes is insufficient to mitigate regulatory risk.

Amid intense focus on financial institutions and the apparent regularity in which poor governance practices are being disclosed, an article in The Australian last week revealed interesting insights into the Australian Transaction Reports and Analysis Centre's (AUSTRAC) investigative approach.

The article refers to their Freedom of Information (FOI) request of AUSTRAC relating to the documents it sought from the Commonwealth Bank of Australia (CBA) well before the regulator filed proceedings in the Federal Court alleging anti-money laundering (AML) breaches by CBA.

We are not commenting on the merits of that case, although it has attracted significant publicity. The case is continuing and the parties are due to report to the court on mediation efforts before the end of this month.

Of interest, as reported on the FOI responses, AUSTRAC sought a suite of documents including the banks' recent internal and external audit reports on AML compliance, minutes of meetings of the board, audit committee and risk committee at which AML compliance were considered, iterations of the bank's AML program, documentation of money laundering and terrorism financing risk assessment and risk management controls and internal correspondences regarding regulatory reporting.

The nature of these requests and scope of documents, especially board minutes and records of when regulatory action was considered or taken, show the level of detail and focus of the regulator in establishing whether or not and how an obligation has been performed, and consequently whether a breach may have occurred.

This is a timely reminder to all industry participants that good governance does not start and end with putting procedures in place.

It requires the active involvement of senior management to ensure those procedures are appropriate, and most importantly, that they are followed. A lack of adequate procedures, as well as a failure to follow procedures, could form the basis for a prosecution. The regulator's immense information gathering powers enable it to gauge the extent to which compliance or non-compliance has occurred.

Regular review and assessment of what is being done, and importantly what is not being done, are essential to ensuring a business demonstrates proper governance and mitigates regulatory risk.

[Source: MinterEllison Partner Tony Dhar and Senior Associate Jacki Want, What to expect from AUSTRAC if you're in their sights 04/05/2018]

Recent developments at AMP | A first strike, board renewal and confirmation that the company will defend shareholder class actions.

AGM outcomes: The AMP AGM was held on the 10 May. The interim acting chair's address reiterated the unreserved apology for issues at the company, outlined the steps already in place and the investment being made to addressing these issues and addressed a number of points of shareholder feedback received in the lead up to the meeting. The address also reinforced that the strong financials give the company 'a good platform for change'.

The board reportedly spent significant time responding to shareholder questions on topics including board accountability and renewal, the search for the new CEO and the remuneration report among other issues.

- **Remuneration**: More than 60% of AMP shareholders voted against the company's 2017 remuneration report, giving the company its first strike. Prior to the result, the acting interim Chair acknowledged in his address that based on the proxy position, he anticipated that a first strike was likely. He commented: 'We recognise that many of our shareholders have voted against the remuneration report in response to the wider business issues but we acknowledge that other have concerns about the new remuneration framework…Our remuneration approach must appropriately balance the needs of our shareholders and executives for a common and successful future. We're committed to moving forward, and will consider specific feedback on the remuneration report, as well as wider concerns, when deliberating how to progress.'

- **Re-election of director, Mr Andrew Harmos**: Mr Harmos was re-elected to the board, though there was a strong protest vote against him (over 37% of shareholders voted against his reelection).

- **AMP has committed to further board renewal** with changes expected within the next 12-18 months. Reportedly, the board faced a number of questions on this issue, and on why change was not more immediate, including from the Australian Shareholders' Association who reportedly called for change by Christmas.

[Sources: AMP ASX Announcement 10/05/2018; 10/05/2018; [registration required] The AFR 10/05/2018]

AMP to defend shareholder class actions: On 10 May (in advance of the AGM scheduled for the same day) AMP issued a statement confirming that it has been served with two class action proceedings (both relating to mattered referred to during the hearings of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry). AMP stated that it 'intends to vigorously defend the proceedings'.

[Source: AMP ASX Announcement 10/05/2018]

Board Changes at AMP announced: On 8 May (prior to the AGM) AMP announced that three non-executive directors had resigned from the AMP board. Vanessa Wallace and Holly Kramer (both of whom were up for reelection) stepped down ahead of the AGM (10 May). Ms Wallace also resigned as Chair of AMP Capital Holdings Ltd.

It was also announced that Patty Akopiantz who is the longest serving AMP director, would step down at the end of 2018.

AMP interim executive chair Mike Wilkins is quoted as stating: 'Our shareholders are demanding board accountability and need to know that meaningful change is underway. I'd like to thank Patty, Vanessa and Holly for their service to AMP'.

The AFR suggests that as Ms Kramer and Ms Wallace are among the longest-serving AMP board members, they were perceived to be the most at risk of a protest vote at the 10 May AGM in the wake of issues highlighted in recent Financial Services Royal Commission hearings, the resignation of the AMP CEO and Chair and the departure of AMP legal counsel.

Diversity to be a key consideration in board renewal: Nest Egg quotes AMP as stating that the directors' gender had nothing to do with their departure from the AMP board and that AMP is 'absolutely committed to gender diversity and diversity more generally on the board of AMP. This will be a key consideration as we renew the board.' The AFR quotes Mr Wilkins as stating at the AGM that it is regrettable that all the board members who resigned were women and that 'Achieving the right balance of gender diversity and financial services experience will be critical. It is highly regrettable and unintentional that we will have lost all our female directors through this process'.

[Sources: AMP ASX Announcement 08/05/2018; [registration required] The AFR 08/05/2018; 08/05/2018; Governance Institute of Australia media release 08/05/2018; The SMH 08/05/2018; Nest Egg 08/05/2018; [registration required] The AFR 10/05/2018]

Further resignations at Nike; Nike CEO has reportedly apologised to staff for allowing a corporate culture that was not inclusive which failed to take complaints seriously.

The WSJ writes that Nike Inc CEO Mark Parker convened a meeting to apologise to employees for allowing a corporate culture that excluded some staff and failed to take complaints about workplace issues seriously following reports of alleged sexual harassment and discrimination against women at the company (see: Governance News 7 May).

Separately, The New York Times reports that a further five executives have departed the company in the wake of the allegations bringing the total number of executives who have done so to 11.

[Sources: [registration required] The WSJ 03/05/2018; The New York Times 08/05/2018]

Other News

Funding to address financial elder abuse announced in Federal Budget 2018-2019.

In the 2018-2019 Federal Budget the government announced that it will provide $22.0 million over five years from 2017-18 to protect the rights of older Australians and protect them from abuse. Among the measures outlined, was a commitment that the government would work with the states and territories to develop a nationally consistent legal framework and establish a National Register of Enduring Powers of Attorney. Though provision has been made in the budget for the measure, specifics were not published pending the outcomes of negotiation with the states/territories.

The Australian Banking Association issued a statement welcoming the measure welcomed the measure saying 'The announcement in this year's budget of a move to standardise power of attorney orders and create a national online register will help empower bank staff as they play their part in tackling the growing problem of financial abuse against the elderly across the country'.

[Sources: Australian Banking Association media release 09/05/2018; Budget 2018-2019 Budget Paper No. 2 2018-2019 08/05/2018]

Measures to address illegal 'black economy activity' announced in the Federal Budget 2018-2019.

In the Federal Budget 2018-2019, and following recommendations made by the Black Economy Taskforce in their final report to the government which was released at the same time as the budget, the government announced a number of measures to address illegal 'black economy activity'. These include (among others):

- The establishment of an illicit tobacco package targeting criminal gangs.
- The introduction of an economy-wide cash payment limit of $10,000 from 1 July 2019 (which is intended to reduce the ease with which large anonymous cash payments can be used to avoid tax and reporting obligations). The government has said it will consult on the implementation of this measure.
- Changes to government procurement requirements to incentivise tax compliance in supply chains. From 1 July 2019, businesses tendering for Commonwealth contracts over $4 million (inclusive of GST) will be required to provide evidence of a satisfactory tax record.
- The government will establish a multi-agency Black Economy Standing Taskforce to undertake a cross agency approach to combatting the black economy, with more effective exchange of information to develop increased intelligence, and be equipped to identify and prosecute the most egregious cases
- Increasing the ability of enforcement agencies to detect and disrupt black economy participants.

Minister for Revenue and Financial services Kelly O'Dwyer said: 'Today's reforms follow recommendations made by the Black Economy Taskforce in their final report to Government and will be complemented by a comprehensive suite of supporting measures which build on our significant tax integrity measures'.

Ms O'Dwyer added that the government would shortly release consultation papers on a number of work steams being progressed on these issues.

[Sources: Minister for Revenue and Financial Services Kelly O'Dwyer media release 08/05/2018; Black Economy Taskforce final report; Government response ; Budget 2018-2019 Budget Paper No. 2 2018-2019 08/05/2018]

In Brief | Tax implications of the Federal Budget 2018-2019: The MinterEllison tax team have provided an overview of key budget measures and the possible implications from a tax perspective.

[Source: Tax Reform: Highlights from the Federal Budget 2018-2019 here]