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Contents

Diversity

United States | On track for 40% female and minority representation on Fortune 500 boards by 2026: Deloitte report finds that though diversity gains on US Fortune 500 boards have been 'negligible' in the period 2012-2016, the goal of 40% target by 2026 is achievable.

Alliance for Board Diversity (ABC) and Deloitte have released their latest report on progress towards greater representation and participation of women and minorities on US Fortune 500 boards. Overall, the report finds that progress has been 'negligible at best', and that diversity on US boards has not kept pace with 'the broad demographic changes' in the US over the same period. Despite this, the report finds that the 40% diversity (women and minority representation) target is achievable assuming that the percentage of Caucasian/White men on boards continues to decrease by 0.9% per year.

About the report: The report is based on data from 492 companies and 5,440 board seats for the period 2012-2016 across the Fortune 500. It also draws on data from previous reports going back to 2004.

Key Points

- **Overall, progress towards greater diversity at board level is minimal — 7% improvement since 2004:** In 2016, women and minorities held 35.9% of board seats compared to 30.1% in 2010, and 28.8% in 2004. The report also found that representation for minority men has been relatively flat with representation increasing only 1% over the period 2004-2016. This is also the case for minority women. The data shows that representation of minority women on boards increased 2% over the period 2004-2016.
- **Less than 20% of board seats are held by minority groups** (African Americans, Asians/Pacific Islanders, and Hispanics/Latino(a)s).
- **Larger companies tend to have more diverse boards**: According to the report 65% of Fortune 100 boards have greater than 30% board diversity as compared to the Fortune 500 where that percentage drops to just under 50% of boards.

Small signs of recent (if slow) progress?

- **Representation of Caucasian/White women has increased since 2012** by 21.2%, and the number of Caucasian/White men has decreased by 6.4%.
- **Representation of African Americans has increased since 2012**: Some progress has been made for African Americans in securing/holding Fortune 500 board seats. Representation of African American women board members was found to have increased by 18.4% since 2012. Overall, there was an increase of 1% in the number of African American male appointments across the Fortune 500 since 2012 with the majority of these appointments occurring within the Fortune 100. The report also found that African Americans appeared to have the highest rate of individuals serving on multiple boards. The writers suggest that this indicates that companies are going to the same individuals rather than expanding the pool of African American candidates for board membership.

[Source: Harvard Law School Forum on Corporate Governance and Financial Regulation 01/05/2018]

In Brief | Saudi Arabian Oil Co (Saudi Aramco) has reportedly appointed its first female director ahead of its public listing. Lynn Laverty Elsenhans, who previously served as the chairwoman, president, and CEP of US oil refiner Sunoco Inc, is now reportedly among the five members added to Saudi Aramco's board.

[Sources: The Guardian 30/04/2018; [registration required] The WSJ 29/04/2018; Fortune 30/04/2018]

In Brief | Canadian companies to become more transparent, inclusive and reflective of Canada's diversity? Bill C-25 received royal assent on 1 May 2018.

[Source: Parliament of Canada C-25: An Act to amend the Canada Business Corporations Act, the Canada Cooperatives Act, the Canada Not-for-profit Corporations Act, and the Competition Act]

Remuneration

First strike at QBE: Over 45% of votes against the remuneration report; the climate resolution was defeated but QBE committed to implementing TCFD reporting anyway.

Over 45% of shareholder votes cast at QBE's annual meeting were against the company's remuneration report.

The Australian attributes this to the company's $1.6bn loss last year and the decision to cut dividends and comments that the 25% cut to the CEO's bonus was insufficient to placate shareholders.

In addition, the article comments that the QBE Chair faced shareholder questions about director, Mike Wilkins' capacity to manage his QBE responsibilities in addition to stepping in as executive chair of AMP. The QBE Chair reportedly expressed support for Mr Wilkins.

Climate resolution defeated, but QBE committed to implementing anyway? The climate resolution at QBE was not carried receiving 9.12% support. However, despite recommending against the resolution, the QBE Chair explained the board's opposition was primarily because it was against amending the constitution (as required by part a of the shareholder resolution) rather than because the board was opposed to enhancing disclosure on climate risk. The Chair added that the company is committed to enhancing climate risk disclosure in accordance with the TCFD recommendations, and that the company has already commenced work to begin implementing the necessary changes for the 2018 year. This action, he emphasised, is 'exactly' in line with the shareholder resolution.

[Note: The climate resolutions and both Rio Tinto and Santos were also both defeated. The Rio Tinto resolution, and the possible implications, are discussed in a separate post in this issue of Governance News under the topic heading: Corporate Social Responsibility.]

[Sources: QBE ASX Announcements: 2018 AGM address 03/05/2018; 2018 AGM results of meeting 03/05/2018; [registration required] The Australian 05/04/2018; ASX Announcement Santos Ltd: 03/05/2018]

Time to impose pay penalties for poor conduct? Media reports suggest that under pressure from institutional investors and pressure from APRA, large financial institutions are likely to rethink remuneration practices.

The Australian suggests that the combined pressure from institutional investors for boards to be more active in their oversight of remuneration practices and the Australian Prudential Regulation Authority's (APRA's) requirement for the boards of the nation's biggest financial institutions to review and provide reports on how they measure up against the recommendations in APRA's recent prudential assessment of the CBA (including remuneration practices), may result in further cuts to executive pay at large financial institutions.

[Note: APRA's final report into the culture, accountability and governance at the CBA is discussed in a separate post in this issue of Governance News: 04/05/2018]

- According to The Australian, CBA which has a June balance date, and has already started the 2018 remuneration cycle is expected to announce further cuts to executive pay following CEO Matt Comyn's announcement that he would forfeit his own bonus this year and following news that fees for non-executive directors would be reduced by 25% for the current year. If this occurs, the article adds, it will be the second consecutive year that Mr Comyn's variable remuneration has been 'slashed to zero' after CBA Chair Catherine Livingstone enforced a no short-term bonus policy for the 2017 financial year.
- According to the article, The National Australia Bank board met ahead of releasing its interim result and is 'understood to have kick-started the bank's self-assessment process'. The article notes that NAB, ANZ and Westpac all have September balance dates, which allows them some time before

they need to consider executive remuneration and any action to impose pay penalties for poor conduct. The Australian adds that NAB chief customer officer consumer and wealth Andrew Hagger told the Financial Services Royal Commission last month that senior executive accountability for the beneficial nominations issue, where advisers failed to correctly witness beneficiary nomination forms, had ranged from a $60,000 cut in his own bonus to full removal for other executives.

An end to short term bonuses? Writing on a similar theme, The AFR also suggests that changes in pay practices are likely. The article quotes Professor Elizabeth Sheedy, as stating that 'banker pay needed a shake-up after the damning assessment of the CBA board' and suggesting that the government could introduce laws preventing banks from paying short-term bonuses.

[Sources: [registration required] The Australian 03/05/2018; [registration required] The AFR 02/05/2018]

United Kingdom: Excessive pay remains a key concern for shareholders? High protest votes against remuneration reports at large UK companies suggests shareholders are of the view that pay remains excessive.

The Times reports that voting patterns at a number of recent AGMs suggests that perceived excessive remuneration is an issue of increasing concern to shareholders.

- **Unilever**: Reportedly nearly 36% of the AGM votes at Unilever went against the company's remuneration policy after two shareholder groups recommended rejecting its pay proposals. Unilever had proposed amending the way its base salaries are paid to a new 'fixed pay' system that theoretically would enable it to hand senior staff larger incentives. After the annual meeting, Unilever reportedly said that it would take action to address investors' concerns, including capping some awards.
- **Inmarsat**: 58.5% of shareholders reportedly voted against the remuneration report. The Times attributes this to the lack of action by the company to address the concerns on the issue raised at the 2017 meeting at which there was also a high against vote. The Times adds that 'revolt' occurred despite the fact that the overall remuneration for the CEO fell from £2.35 million in 2016 to £1.88 million in 2017. The Times quotes Inmarsat as stating that it had 'consulted widely across its shareholder base to understand the concerns being raised'. The Times comments that the company is the first to suffer a defeat on pay this year.
- **Pendragon PLC**: 17% of shareholder reportedly voted against the remuneration report and over 25% of shareholders reportedly opposed the reelection of the Chair Colin Chambers in line with the Institutional Shareholder Services (ISS) recommendation. Mr Chambers was also chairman at last year's AGM and the strong protest vote is attributed by The Times, to the ISS recommendation which stated that his lack of action to address shareholder concerns on the issue since the last meeting.
- **Rio Tinto**: A smaller protest was registered at the annual meeting of Rio Tinto (UK), where a little over 10% of votes were cast against its pay report.

[Source: The Times 03/05/2018]

In Brief | According to Equilar, the US CEO to median worker pay ratio in Russell 3000 companies as at 27 April is 68:1. Equilar comments that the ratio looks set to continue to narrow as more proxy statements are analysed and that overall, the average pay ratio appears to be much lower than many had expected.

[Source: Equilar CEO Pay Ratio Tracker 30/04/2018]

In Brief | No progress on pay parity in accounting? Accountants Daily reports that the gap in salaries between male and female accountants remains at around 33%, and is largely unchanged from the preceding financial year, according to new data from the Australian Tax Office.

[Source: Accountants Daily 30/04/2018]

Other Shareholder News

Top Story | The ASX Corporate Governance Council is consulting on the proposed 4th edition of the Corporate Governance Principles and Recommendations

The ASX Corporate Governance Council is consulting on proposals to update and issue a fourth edition of its *Corporate Governance Principles and Recommendations*. The Council proposes to retain the same eight core principles as in the third edition (though with significant changes to principles 3) and to expand the number of recommendations from 29 to 38. The Council writes that the proposed changes both anticipate and respond to some of the governance issues identified in recent enquiries, such as the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry among other issues. The closing date for submissions is Friday 27 July 2018.

Timeframe: The Council intends to release a final version in early 2019 and that the new Principles and Recommendations will take effect for an entity's first full financial year commencing on or after 1 July 2019.

Key points

- **Accountability, governance, culture and social licence to operate:** The key change to the principles highlighted by the Council is the proposed substantial redrafting of Principle 3 and the accompanying commentary to address governance concerns related to an entity's values, culture and social licence to operate. The Council also proposes to introduce three new recommendations (3.1 (core values), 3.3 (whistleblowing policies) and 3.4 (anti-bribery and corruption policies) to support the revised principle.
- **Diversity:** To promote better diversity outcomes, the Council proposes to include, as part of recommendation 1.5 the following amendments (among others):
  - A requirement that entities in the S&P/ASX 300 set a measurable objective to have a minimum of 30% of directors of each gender on their boards by a specified date.
  - Amendments 'making it clear' that a 'listed entity's measurable gender diversity objectives should be targeted at achieving gender diversity in the composition of the entity's senior executive team and workforce generally, as well as in the composition of the board'.
  - Requiring a listed entity to disclose its diversity policy in full and removing its ability to disclose only a summary of the policy.
  - Including guidance in the commentary that a listed entity's diversity policy 'should express its commitment to embrace diversity at all levels and in all its facets, including gender, marital or family status, sexual orientation, gender identity, age, physical abilities, ethnicity, religious beliefs, cultural background, socio-economic background, perspective and experience'.

[Note: The most recent AICD report on progress towards achieving 30% female representation across ASX 200 boards by the end of 2018 released in March 2018 found women currently account for 26.7% of ASX 200 directorships and that across the ASX 200, a total of 74 companies have reached or exceeded the 30% target. See: Governance News 09/03/2018]

- **Increased guidance on carbon risk**: The Council proposes to amend recommendation 7.4 (sustainability disclosures) to refer to 'environmental and social risks' rather than 'economic, environmental and social sustainability risks' and to expand the commentary accompanying the recommendation. Among other things, it's proposed that in line with a recommendation from the Senate Economics References Committee for increased guidance around carbon risk, that the commentary be amended to suggest that listed entities with material exposure to climate change risk, implement the recommendations of the Financial Stability Board's Task Force on Climate-related Financial Disclosures (TCFD) among other things.

[Note: 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]

- **Shareholder engagement — Use of Polls not 'show of hands' to decide resolutions:** The inclusion of a new recommendation (6.4) that a listed entity should ensure that all resolutions at a meeting of security holders are decided by a poll rather than by a show of hands.

[Note: ASIC's report on 2017 AGM season expressed concern that a relatively high number of ASX 200 companies (25 companies in the ASX 200) continued to decide resolutions by a show of hands rather than by conducting a poll and encouraged companies to decide resolutions by poll. See: Governance News 05/02/2018.]

- **Cyber risk**: The Council proposes amendments to the commentary on recommendation 2.2 (board skills matrix) to provide more detailed guidance on what should be included in a board skills matrix. The proposed amendments include that that it should cover the skills needed to address existing and emerging governance and business issues eg cyber risk (among other risks). In addition, the Council proposes an amendment to recommendation 2.6 (director induction and professional development) and the accompanying commentary to reflect the importance of ensuring boards have the necessary skills to address new or emerging issues including cyber risk, that regular reviews of board skills be undertaken and that professional development programs address any skills gaps.
- **Whistleblower policies and anti-bribery and corruption policies**: The Council proposes that a new recommendation (3.3) be included that a listed entity should:
  - Have and disclose a whistleblower policy that encourages employees to come forward with concerns that the entity is not acting lawfully, ethically or in a socially responsible manner and provides suitable protections if they do; and ensures that the board is informed of any material concerns raised under that policy that call into question the culture of the organisation.
  - A new recommendation (3.4) that a listed entity should: have and disclose an anti-bribery and corruption policy; and ensure that the board is informed of any material breaches of that policy.

[Note: *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill* 2017 was introduced into the senate on 7/12/2017 and is yet to pass either house, though the senate economics legislation committee recommended it be passed. MinterEllison partner, Gordon Williams recently released an update on the Bill and its possible implications see: 24/04/2018.]

- **Remuneration**: The Council proposes the inclusion of a reference in principle 8 (remunerate fairly and responsibly) and the accompanying commentary to remuneration being aligned with 'the creation of value for security holders over the short, medium and longer term' and changes to the commentary to that principle.

Further detail

Proposed changes to principles

- The Council proposes to retain the same eight core principles as in the third edition (though with significant redrafting of principles 3).
- Changes to principle 3: The Council identifies the proposed redrafting of principle 3 as the primary change to the principles on which it is consulting.
- The Council proposes to change principle 3 from '[a] listed entity should act ethically and responsibly' to '[a] listed entity should instil and continually reinforce a culture across the organisation of acting lawfully, ethically and in a socially responsible manner'.
- The Council explains that the proposed revision is aimed at recognising the 'the fundamental importance of a listed entity's social licence to operate and the need for it to act lawfully, ethically

and in a socially responsible manner in order to preserve that licence. It also proposing to acknowledge that, in doing this, a listed entity must have regard to the views and interests of a broader range of stakeholders than just its security holders'.

- The Council adds that the 'proposed changes respond to various enquiries and reviews that have taken place since the publication of the third edition in 2014 that have highlighted governance issues arising from poor conduct or culture and a perceived lack of accountability. The Council considers it important to address these issues around corporate values and culture in the *Principles and Recommendations* as a way to help arrest the loss of trust in business'.
- The Council proposed that the redrafted principle 3 be supported by:
  - Three new recommendations: Recommendation 3.1 (core values); Recommendation 3.3 (whistleblowing policies); and Recommendation 3.4 (anti-bribery and corruption policies).
  - Expanded commentary to existing recommendation 1.1 (the role of the board and management).
  - Existing recommendation 3.1 (codes of conduct) which is proposed to become recommendation 3.2 in the fourth edition, to require the board to be informed of any material breaches of a listed entity's code of conduct by a director or senior manager and of any other material breaches of the code that call into question the culture of the organisation.
- The Council is also consulting on some minor changes: to principles 1 (lay solid foundations for management and oversight); 2 (structure the board to add value); 4 (safeguard integrity in corporate reporting); 6 (respect the rights of security holders) and 8 (remunerate fairly and responsibly). According to the Council. The Council writes that the proposed changes are primarily directed to refining the drafting of the principles and establishing a stronger linkage between the principles and their supporting recommendations.

Proposed new recommendations

The Council is consulting on proposals to add nine new recommendations which, if implemented, would expand the total number of recommendations in the fourth edition to 38.

Proposed new recommendations are:

- 'Recommendation 2.7: A listed entity with a director who is not fluent in the language in which board or security holder meetings are held or key documents are written should disclose the processes it has in place to ensure the director understands and can contribute to the discussions at those meetings and understands and can discharge their obligations in relation to those documents.
- Recommendation 3.1: A listed entity should articulate and disclose its core values.
- Recommendation 3.3: A listed entity should:
  - have and disclose a whistleblower policy that encourages employees to come forward with concerns that the entity is not acting lawfully, ethically or in a socially responsible manner and provides suitable protections if they do; and
  - ensure that the board is informed of any material concerns raised under that policy that call into question the culture of the organisation.
- Recommendation 3.4: A listed entity should:
  - have and disclose an anti-bribery and corruption policy; and
  - ensure that the board is informed of any material breaches of that policy.
- Recommendation 4.4: A listed entity should have and disclose its process to validate that its annual directors' report and any other corporate reports it releases to the market are accurate, balanced and understandable and provide investors with appropriate information to make informed investment decisions.

- Recommendation 5.2: A listed entity should ensure that its board receives copies of all announcements under Listing Rule 3.1 promptly after they have been made.
- Recommendation 5.3: A listed entity that gives a new investor or analyst presentation should release a copy of the presentation materials on the ASX Market Announcements Platform ahead of the presentation.
- Recommendation 6.4: A listed entity should ensure that all resolutions at a meeting of security holders are decided by a poll rather than by a show of hands.
- Recommendation 8.4: A listed entity should only enter into an agreement for the provision of consultancy or similar services by a director or senior executive or by a related party of a director or senior executive:
  - if it has independent advice that:
    - the services being provided are outside the ordinary scope of their duties as a director or senior executive (as applicable);
    - the agreement is on arm's length terms; and
    - the remuneration payable under it is reasonable; and
  - with full disclosure of the material terms to security holders'.

In addition, the Council proposes various amendments to existing recommendations and commentary.

[Sources: ASX media release 02/05/2018; ASX Consultation package 02/05/2018]

In Brief | One director elected improperly and another who should have been elected, not elected? ASIC has announced that the DPP has charged a financial planner with allegedly improperly casting 499 votes (without authorisation) in the electronic director elections of two board candidates at WAW Credit Union Cooperative Ltd. The planner has been charged with one count of causing unauthorised modification to data held in a computer contrary to section 247C of the Victorian Crimes Act which carries a maximum penalty of 10 years imprisonment writes ASIC.

[Source: 18-129MR Financial planner charged over fraudulent voting in credit union election]

In Brief | United Kingdom: The Quoted Companies Alliance has published a new Governance Code for small and mid-size quoted companies in the UK. The new code has been released ahead of the commencement of new requirement that all AIM companies apply a recognised governance code from 28 September 2018.

[Source: Quoted Companies Alliance media release 25/04/2018]

Markets and Exchanges

The ASX has released details of the blockchain based replacement for its post trade settlement system CHESS. Consultation closes on 22 June.

On 27 April, ASX released a consultation paper: *CHESS Replacement: New Scope and Implementation Plan* containing details of the new blockchain-based/distributed ledger technology (DLT) replacement for its post trade settlement system (the Clearing House Electronic Sub register System (CHESS).

The paper:

- describes the system architecture for the DLT-based model and the different connectivity options;
- outlines changes to be delivered in connection with the CHESS replacement system through new business features;
- outlines a draft plan for the implementation of the new features; and

- explains testing and transition arrangements.

Timeline: The 'indicative' go-live window for the new system is Q4 2020 to Q1 2021 with testing commencing prior to that date. ASX adds that depending on the extent of consultation feedback received, it expects to provide a final functional scope and implementation roadmap in late July 2018.

Consultation closes on 22 June 2018.

[Sources: ASX media release 27/04/2018; CHESS Replacement: New Scope and Implementation Plan; InnovationAus.com 30/04/2018]

In Brief | New Guidance on Market Integrity Rules: ASIC has released two regulatory guides: Regulatory Guide 265:Guidance on ASIC market integrity rules for participants of securities markets and Regulatory Guide 266 Guidance on ASIC market integrity rules for participants of futures markets that consolidate and replace guidance in seven regulatory guides for securities and futures markets participants. The seven regulatory guides that were consolidated into RG 265, RG 266 and RG 172 will be retired. ASIC has also updated and reissued Regulatory Guide 241 Electronic trading, to reflect the consolidated market integrity rule books.

[Sources: 18-130MR ASIC consolidates guidance on market integrity rules for market participants; Regulatory Guide 241]

Regulators

Australian Securities and Investments Commission (ASIC)

Australian laws may still apply to ICOs created and offered from overseas cautions ASIC Commissioner John Price.

In a recent speech at a fintech event providing an update on how ASIC is engaging with initial coin offerings (ICOs) and cryptocurrencies, ASIC Commissioner John Price has underlined the importance of protecting consumers from the risks associated and emphasised that the regulation cryptocurrencies and ICOs will be a focus for the regulator. Key points from his speech included the following.

- **ASIC's support for innovation cannot come at the expense of protecting consumers** Mr Price said. He went on to emphasise 'if there is one main thing I need you all to take away from ASIC tonight, it is we are dealing with real people's money and ASIC's support cannot come at the expense of basic consumer protection and the necessity to prevent investors and their funds being unfairly parted'.
- Mr Price said that ASIC is concerned that:
  - **ICOs are perceived as a low regulation/low cost option**: 'There is a certain level of opportunism – including businesses or people looking to undertake an ICO because it is seen as an easy, low regulation and low cost option which could lead to immature businesses coming to market'. This, he said has, and will continue to have a negative impact on investor confidence.
  - **There is an (incorrect) perception that Australian regulations can be avoided**: 'There exists a perception that Australian regulations don't apply or can be avoided by engaging in an activity from overseas. I cannot stress enough that if you are doing business here and selling something to Australians – including issuing securities or tokens to Australian consumers – our laws here can apply'.
  - **Poor governance and business practice risks**: Mr Price added that there are also risks relating to poor governance or business practices around the sale of tokens and manipulation of prices. And risks also exist if poor levels of information are given to investors before or after token sales.
- Mr Price recommended that people interested in undertaking ICOs consider ASIC's guidance on the subject and seek proper advice to avoid the risks.

- Mr Price said that ASIC planned to update its *Information Sheet 225: Initial coin offerings* in the coming weeks with additional scope including how 'Australian corporate and consumer law might apply — even if the ICO is created and offered from overseas' and answers to commonly-asked questions. Mr Price added that a strong focus on the application of misleading or deceptive conduct provisions could be expected.

ASIC has since released both a revised version of Information Sheet 225 and issued a media release outlining how the law (and more particularly) misleading or deceptive conduct provisions may apply.

[Sources: Speech by John Price, Commissioner Australian Securities and Investments Commission: 26/04/2018; Australian FinTech 30/04/2018; Information Sheet 225: Initial coin offerings and crypto-currency; 18-122MR ASIC takes action on misleading or deceptive conduct in ICOs]

ASIC has announced that it has expanded its legal proceedings against Rio Tinto and two former executives.

On 1 May, ASIC announced that it had expanded its legal proceedings against Rio Tinto Ltd (RTL), its former Chief Executive Officer, Mr Thomas Albanese, and its former Chief Financial Officer, Mr Guy Elliott.

[Note: ASIC filed proceedings in the federal court against Rio Tinto Ltd and the former executives on 2 March alleging RTL engaged in misleading or deceptive conduct by publishing statements in the 2011 annual report, signed by Mr Albanese and Mr Elliott, misrepresenting the reserves and resources of Rio Tinto Coal Mozambique (RTCM). ASIC said it was seeking declarations that RTL contravened s1041H of the Corporations Act 2001 and that Mr Albanese and Mr Elliott contravened s180 of the Corporations Act. ASIC also indicated that its investigations were continuing. See: Governance News 05/03/2018. In addition, the former executives and RTL were charged with alleged fraud by the US Securities and Exchange Commission. Separately, the UK Financial Conduct Authority (FCA) fined RTL £27,385,400 for breaching Disclosure and Transparency Rules. See: Governance News 20/10/2017.]

Expanded allegations: ASIC writes that in addition to the declarations, pecuniary penalties and disqualifications sought in the original proceedings it is seeking further declarations that:

- 'RTL contravened sections 304, 305 and 1041H of the Corporations Act 2001 (Cth) (the Act) with respect to its 2012 Interim Financial Statements;
- RTL contravened s674(2) of the Act in failing to comply with its continuous disclosure obligations by failing to disclose a substantial impairment in the carrying value of the operating assets of RTCM in its 2012 Interim Financial Statements. ASIC has sought from the Court a pecuniary penalty against RTL;
- Mr Albanese and Mr Elliott contravened s180 of the Act in relation to the above contraventions by RTL and their provision of information to the audit committee and auditors of RTL, and further that Mr Albanese and Mr Elliott contravened s344 of the Act'.

ASIC writes that it has sought from the pecuniary penalties against Mr Albanese and Mr Elliott and that they be disqualified from managing corporations for such periods as the court thinks fit. The matter has been listed for a further hearing on 24 July 2018.

The AFR reports that RTL continues to deny the charges against it and against the former executives. 'The charges are wholly unwarranted and Rio Tinto intends to vigorously defend itself and is confident that ASIC's allegations will be rejected once all the facts are considered in court' the article quotes RTL as stating.

[Sources: 18-119MR ASIC takes further action against Rio Tinto Limited and its former CEO and CFO; ABC 01/05/2018; [registration required] The AFR 01/05/2018]

Australian Prudential Regulation Authority (APRA)

BEAR should be regarded as a 'trigger for reform' if industry is to rebuild trust says APRA Chair Wayne Byers.

In a recent speech, entitled 'Beyond the BEAR Necessities', Australian Prudential Regulation Authority (APRA) Chair Wayne Byers has called on ADIs to do more than meet the minimum requirements of the

Banking Executive Accountability Regime (BEAR) and instead, to take the opportunity to improve systems of 'governance, responsibility and accountability' to restore trust in the sector.

In addition, he identified and commented on each of the five elements of the regime and on APRA's role and interest in overseeing it. In particular, Mr Byers emphasised the accountability (and to a lesser extent) the remuneration requirements within the BEAR as key opportunities for reform.

His speech included the following points.

Trust is a prudential issue

- **Trust in financial institutions?** Mr Byers said that though the financial system is 'widely acknowledged as financially sound' and there is no sign that the community 'lacks trust in the underlying financial strength' of financial institutions, there is less trust in those institutions to 'do the right thing'. He added that 'at the moment that form of trust is taking a severe hit'. Mr Byers commented that while this is not 'as fatal' as it would be if an institution's financial soundness was called into question, it does have commercial implications and would 'likely make the financial system less efficient and competitive over the longer run than it might otherwise be'.
- **Accountability is key to maintaining trust**: Emphasising the important role that financial institutions play in the community and the heightened expectations of behaviour attaching to institutions that provide necessary services, Mr Byers commented that the community 'will be far more likely to maintain its trust that the sector will do the right thing if it is evident there is accountability when it does not'.
- **APRA's interest in 'trust' issues**: Mr Byers said that though 'trust' in the financial soundness of institutions is APRA's primary focus, it is 'also interested in the issues of governance, culture and accountability that are central to the current community debate' on the basis that they 'have potential to tell us something about how financial institutions respond to and deal with risk. Traditional prudential requirements for adequate financial resources may not be sufficient when an institution suffers from poor governance, weak culture, or ineffective risk management. These deficiencies can, if severe and persistent enough, threaten the financial soundness that is at the heart of prudential safety'.
- **No change to APRA's role?** Addressing a concern that the BEAR 'somehow changes APRA's role' Mr Byers said that this is not the case. Rather than an extension of APRA's mandate, he said, the BEAR is a 'strengthening of APRA's prudential framework'. He added that the BEAR is not dissimilar to a number of other management responsibility/fitness and propriety regimes that are administered by APRA's prudential peers in other jurisdictions eg the UK. Mr Byers went on to acknowledge that the BEAR 'provides for a strengthening of after-the-event sanctions that could apply if things go seriously wrong in an ADI. But its real value, I hope, will be to support APRA's preventative role by promoting strong and clear accountability, and ensuring directors and executives who have the primary responsibility for the safe and sound operation of an ADI stay focussed on that task'. This, he added had been the experience in the UK despite the SMR's extensive penalty regime.
- **Blurring of responsibilities between APRA and ASIC?** Mr Byers commented that as APRA's interest in issues of risk culture within financial institutions has increased, there have been questions as to whether it has led to a blurring of responsibilities between the Australian Securities and Investments Commission (ASIC) and APRA. Commenting on this he said that the two regulators approach the issue from different perspectives in line with their respective mandates. 'ASIC will take an interest in shortcomings that lead to damaging outcomes for consumers and markets. APRA, on the other hand, has an interest in failings in governance, culture and accountability that indicate a lax attitude to risk-taking, which might ultimately impact the soundness of the financial institution itself (and thereby jeopardise the interests of depositors, policyholders and superannuation fund members)' he said.

ROAR — APRA Chair's comments on the five main elements of the BEAR

Mr Byers went on to briefly outline each of the five main elements of the BEAR and to comment briefly on the requirements of each.

- **Registration**: Commenting on the registration requirement, Mr Byers noted that unlike the UK regime, there is no scope in the BEAR for regulatory approval of appointments, or any process of interviews and that this was a deliberate choice in order to maintain 'accountability for senior appointments where it rightly belongs – with the Boards and senior executive teams that are making the appointments'. Commenting on the requirement for an executive to be registered with APRA prior to taking up duties, he said that though 'APRA will not be vetting all appointments, the pre-appointment registration does provide an opportunity, should we be aware of information that might make an appointee unsuitable, to discuss any concerns with the individual or the employing ADI'.

- **Obligations**: Commenting on the obligations for accountable persons to act with honesty and integrity, due skill, care and diligence, and to deal with APRA in an open, constructive and cooperative way as well the requirement that they take reasonable steps to prevent matters arising which would undermine the ADI's prudential standing and prudential reputation, Mr Byers said that he did not regard the obligations as 'more onerous than the existing requirements' in APRA's prudential standards.

- **Accountabilities (Accountability maps and statements)**: Mr Byers commented that this requirement 'is probably the most important element of the BEAR' and could be powerful in addressing the lack of accountability that can arise from 'collective responsibility' for various aspects of businesses. 'Often, process failures or poor decision-making have been the result of a lack of clear accountability for ensuring a product works as it should, a risk is fully understood, or that a system delivers what was intended. To the extent that BEAR provides a catalyst to untangle that complexity and provide clear accountability for putting things right, it can only be a good thing' he said. He added that clearer accountability could also improve remuneration outcomes by enabling scorecards to be more targeted allowing greater alignment between individual performance and individual reward.

- **Remuneration**: Mr Byers emphasised that 'the BEAR does not grant APRA any power to determine what amount of remuneration an individual should receive'. Rather, it 'introduces the prescribed minimum deferral amounts and terms, and creates a stronger link to the statutory obligations' which will mean, he said a greater emphasis on explaining how adverse prudential outcomes have been factored into remuneration outcomes. He added that 'the BEAR will require many ADIs to restructure their remuneration frameworks' and encouraged ADIs to use the opportunity to 'fundamentally rethink remuneration frameworks and achieve a stronger alignment with long-term financial safety and a strong risk culture. It will be a lost opportunity if everyone just defaults to the minimum'.

- **Sanctions**: Commenting on the penalty regime, Mr Byers reiterated that APRA cannot impose the fines on ADIs unilaterally but would be required to make a successful case before the courts. Commenting on the penalty regime as it applies to individuals Mr Byers said that the power to disqualify (ie remove an accountable person from their role, and in 'the most extreme cases' prevent them from taking on a similar role' in future would be not be used lightly but is 'appropriate and useful where necessary to eliminate known poor behaviour endangering prudential safety'.

Industry needs to more than meet the minimum BEAR requirements if it is to rebuild trust

- Mr Byers concluded his speech by calling on ADIs to use BEAR as a 'trigger' for reform. He encouraged ADIs to use the BEAR as 'an opportunity to demonstrate to the community that accountability is actively practiced within the industry. To that end, it is important that the BEAR is not seen as a compliance exercise, but rather a trigger to genuinely improve systems of governance, responsibility and accountability'.

- He added that in order to be successful in rebuilding trust, industry would have to go beyond the minimum requirements: 'Regulators will play their role, but the industry needs to wholeheartedly embrace that opportunity and think beyond the BEAR necessities'.

[Source: Speech by APRA Chair Wayne Byers, 'Beyond the BEAR Necessities' UNSW Centre for Law Markets and Regulation Seminar, Sydney 02/05/2018]

Other Developments

United States | Securities and Exchange Commission (SEC) Chair, Jay Clayton has highlighted investment in, and focus on, cybersecurity and technology among the key priorities for SEC in his budget request for FY 2019.

In his FY 2019 budget request speech, Securities and Exchange Commission (SEC) Chair Jay Clayton has requested a 'modest' increase the SEC budget to bring it to $1.652bn. Among other things, he said that the additional funds would be used to:

- Lift the hiring freeze in place at SEC since 2016, enhance expertise within the organisation and enable greater focus on key priority areas.
- Enable greater focus on cybersecurity and investment in technology through investment in tools, technologies and services to protect the security of the agency's network, systems and sensitive data. Specific examples highlighted by Mr Clayton included: investment in hardening existing systems eg EDGAR electronic filing system, against cyber-attack and the modernisation of the EDGAR system, retiring 'legacy' IT systems and expanding data analytics tools to facilitate earlier detection of potential fraud or suspicious behaviour.
- Enable greater focus on markets that are 'fertile ground for fraud and market integrity efforts' and the protection of 'Main Street investors' (including the most vulnerable). Particular areas of focus highlighted by Mr Clayton included: combating insider trading, market manipulation and accounting fraud.
- Maintain and enable continued SEC's focus on facilitating capital formation in public and private markets particularly for small and emerging companies. More particularly, Mr Clayton said that the additional funds would be used to 'further enable the staff to develop and present to the Commission rulemaking initiatives aimed at promoting firms' access to capital markets to generate economic growth while continuing to foster important investor protections'. He added that the resources will also be used to enable Corporation Finance to further assist companies that seek to raise capital through IPOs, follow-on or exempt offerings and to implement other important capital formation initiatives.

[Source: Harvard Law School Forum on Corporate Governance and Financial Regulation 26/04/2018]

Corporate Social Responsibility and Sustainability

More evidence that climate is of increasing concern to investors? Climate resolution at Rio Tinto was defeated, but is nevertheless indicative of a shift in investor culture and of an increased willingness to engage proactively and publicly on ESG issues say University of Melbourne academics.

As previously reported in Governance News on 30/04/2018, advocacy group the Australasian Centre for Corporate Responsibility (ACCR) supported by the Australian Local Government Super, the Church of England Pensions Board and the Seventh Swedish National Pension Fund (AP7) co-filed a shareholder resolution on climate change at Rio Tinto calling on the company to review and report on its membership of industry associations such as the Mineral Council of Australia.

Vote on the climate resolution defeated: The Rio Tinto AGM was held on 2 May. Rio's board advised shareholders against voting on the resolution and it was ultimately defeated (81.97% voting against it,18.3% shareholders voted in support). The ACCR is quoted in The AFR as saying that support levels among Rio shareholders were the highest in Australian corporate history for shareholder resolutions on climate change issues that were not endorsed by a company's board.

A second, related resolution to amend the company's constitution, brought by the same group of shareholders was voted on by slightly fewer shareholders, with 10.66% of votes case in favour.

Evidence of a shift in investor culture and consequent changes in company behaviour? Commenting on the result, and more particularly the fact that institutional investors chose to support the resolution, University of Melbourne academics Anita Foerster and Jacqueline Peel suggest that it marks a significant 'shift in investor culture in Australia, signalling an increased willingness to engage proactively and publicly on environmental, social and governance issues'.

They go on to argue that though a relatively recent phenomenon in Australia, there is evidence that shareholder resolutions on climate change are a factor in changing company behaviour on climate issues. They cite a number of recent examples in support of their argument. These include:

- the release by Santos Ltd of its first Climate Change Report;
- the development of a long-term energy transition strategy at AGL; and
- the withdrawal from the World Coal Association, and review of other industry association memberships by BHP Billiton (which faced a similar resolution to Rio Tinto on its membership of industry associations in 2017).

They conclude that 'This week's resolution at Rio Tinto signals a coming of age for investor engagement on climate change in Australia. Shareholder resolutions have clearly become an important part of the toolbox for civil society in Australia seeking to influence corporate decision making on climate change'.

[Note: Glass Lewis has also highlighted climate as an issue of increasing concern for Australian investors, and suggested, citing similar examples, that climate change activism in Australia appears to be 'gaining momentum'. See: Governance News 30/04/2018. The shareholder vote on the climate resolution at QBE (which was defeated, but the substance of which will be implemented in any case), is discussed in a separate post in this issue of Governance News under the topic heading: Remuneration].

[Sources: [registration required] The AFR 30/04/2018; 02/05/2018; ASX Announcement: Results of Rio Tinto annual general meetings 02/05/2018]

Financial Services

Top Story | Final APRA report into CBA culture released: CBA to implement all recommendations; APRA Chair has called on all regulated financial institutions to conduct a self-assessment and for large financial institutions to provide board endorsed reports on the outcomes of their own assessments.

The Australian Prudential Regulation Authority (APRA) released the Final Report of the Prudential Inquiry into the Commonwealth Bank of Australia (CBA) on 1 May 2018 following a six month inquiry into the governance, culture and accountability at the organisation.

Overall, the report found that 'CBA's continued financial success' had 'dulled the senses of the institution' with respect to the way in which it has managed its non-financial risks [ie operational, compliance and conduct risks]' and that consequently, 'These risks were neither clearly understood nor owned, the frameworks for managing them were cumbersome and incomplete, and senior leadership was slow to recognise, and address, emerging threats to CBA's reputation'.

APRA writes that the 35 report recommendations 'provide a roadmap for the CBA Board and executive team to deliver organisational and cultural change across the CBA group' as well as 'important insight for all institutions particularly about the need to maintain a broad focus on all aspects of risk and stakeholder interest'. A high level overview of the key findings and recommendations in the report is below.

Five key areas to be addressed: APRA states five key areas need to be improved to address the report recommendations. These are as follows:

1. 'more rigorous Board and Executive Committee level governance of non-financial risks;
2. exacting accountability standards reinforced by remuneration practices;

3. a substantial upgrading of the authority and capability of the operational risk management and compliance functions;

4. injection into CBA's DNA of the "should we" question in relation to all dealings with and decisions on customers; and

5. cultural change that moves the dial from reactive and complacent to empowered, challenging and striving for best practice in risk identification and remediation'.

Enforceable Undertaking

- CBA has acknowledged APRA's concerns and has offered an Enforceable Undertaking (EU) under which CBA's remedial action in response to the report will be monitored.
- In recognition of the prudential risks arising from the report findings, APRA has also applied a $1 billion add-on to CBA's minimum capital requirement 'until such times as these recommendations are addressed to APRA's satisfaction'.
- The EU also requires CBA to report to APRA by 30 June on how the findings have been reflected in the remuneration outcomes for current and (where appropriate) past executives and to tie accountability for completing items in the remediation plan to the performance scorecards of the senior executive team (and other staff) as relevant.

Overview of key concerns and recommendations

A high level overview of the key concerns identified in the report, and the accompanying recommendations is below.

- **Overall the Panel found that there was insufficient focus on non-financial risk** at CBA due to the continuing financial success of the organisation which 'dulled' it's 'senses to signals that might have otherwise alerted the board and senior executives to a deterioration in CBA's risk profile' particularly with respect to the management of non-financial (operational, compliance and conduct risks) risks.

- **Insufficient oversight of non-financial risk by the Board and Executive Committee**: The Panel found a level of over-confidence in the operations of Board Committees over much of the period under review. The report adds that a lack of benchmarking added to the issue as 'rigorous benchmarking would have indicated that aspects of CBA's governance practices were, in fact below mature practice.' The Report comments that the CBA has recently identified a number of areas where the governance practices of CBA can be enhanced and has plans in place to address the issues identified, many of which are in line with 'the Panel's assessment of where the Board needs to focus its attention'.

  Recommendations 1-5 of the report relate specifically to the role of the board and more particularly to strengthening board oversight of risk management practices, aligning them with 'global better practice' for risk management and increasing engagement between the board and business unit and support function owners of significant issues.

  Recommendation 6-8 relate to strengthened leadership oversight.

- **Shortcomings in how issues, incidents and risks were identified and escalated through the institution and a lack of urgency in their subsequent management and resolution.**

  - The Report found that 'the customer voice (in particular, customer complaints) did not always ring loudly in decision making forums and product design' and were too focused on 'short term' customer satisfaction metrics rather than on resolving complaints or identifying systemic issues.

  - The Report states that 'CBA has difficulty identifying broad, systemic issues in its businesses, including by linking sources of risk data across the institution and through analysis of customer complaints.'

  - The report identifies shortcomings in CBA's handing of issues escalated from staff, customers and regulators and that 'CBA has had difficulty resolving identified issues as a result of organisational complacency, low senior-level oversight, and weak project execution capabilities'.

- Recommendations 16 to 19 of the report call for the Board and Board committees to prioritise investment in the identification of systemic issues arising from customer complaints, to improve board and committee processes for monitoring and addressing issues identified, for improvements in reporting on risks in line with better practice peer organisations and for improved engagement with regulators.

- **An operational risk management framework that emphasised process rather than outcomes and 'worked better on paper than in practice supported by an immature and under-resourced compliance function'**. Recommendations 9-15 relate to strengthening risk frameworks and capabilities within the organisation. In particular, recommendation 10 requires that business unit 'Chief Risk Officers have the necessary independence to provide effective challenge to the business'. Recommendation 12 requires CBA strengthen its management of operational and compliance risk by implementing a number of specific measures.

- **Lack of clear accountability:** The report found that there was a lack of clear accountability and a consequent lack of ownership of risk, including at board committee level in the organisation. The Panel made a number of recommendations that touch on the issue. Recommendation 22 specifically recommends that the CBA, build on the foundation established by the Banking Executive Accountability Regime (BEAR) and incorporate the Accountability Principles set out in the report.

- **A remuneration framework that 'had little sting' for senior managers and executives** for poor risk or customer outcomes (at least until the AUSTRAC action)'. Recommendations 23 to 26 relate to measures to strengthen remuneration practices, policies and oversight. Recommendation 23 recommends that the board exercise stronger governance to ensure the effective application of the remuneration framework, that there are pay consequences for poor conduct and that group executives 'cascade accountability throughout the group on a consistent basis'.

Broader Implications

- **Expectation that all regulated institutions undertake a self-assessment**: APRA Chair, Wayne Byres called on all regulated institutions to conduct a self-assessment 'to gauge whether similar issues might exist in their institutions' and said APRA supervisors will expect institutions to demonstrate how they have considered the issues raised in the report.

- **Requirement that large financial institutions provide a board endorsed report:** Mr Byers also said that 'For the largest financial institutions, APRA will be seeking written assessments that have been reviewed and endorsed by their Boards.

- **'Required reading' for every board:** Commenting on the report, Treasurer Scott Morrison said: 'The report, I think, is required reading not only for every financial institution in this country, but, frankly, it should be the next item on the agenda of every single board meeting in this country, regardless of whether you're a bank or not. It goes to the heart of what responsibilities of board directors are'.

CBA Response: In a statement, CBA CEO Matt Comyn said: 'We have embraced the Report as a critical but fair assessment of the issues facing us and we will act on its recommendations, and the requirements of the Enforceable Undertaking, in an open, transparent and timely way.' Mr Comyn also apologised to the bank's customers and staff, regulators, shareholders and the Australian community.
He added that change priorities already on foot within the organisation are consistent with the report recommendations: 'Our current change priorities are consistent with the Report's recommendations. We now have a detailed roadmap for ongoing change and we will work with APRA to ensure we implement all of the Report's 35 recommendations.'
In support of this, the CBA statement included a table demonstrating the similarities between the five 'levers of change' identified in APRA's enforceable undertaking (the five areas that need to be improved to address the 35 recommendations in APRA's report) and CBA change priorities.

CBA Chairman Catherine Livingstone confirmed that addressing the report findings would be a key priority, 'Addressing the findings of the Report is a key focus for the Board and management to ensure that our governance, culture and accountability frameworks and practices are significantly improved and meet the high standards expected of us.'

The statement adds that:

- CBA will release its third quarter trading update on 9 May and in early July, subject to finalisation with APRA, CBA will provide a public update on its agreed remediation plan.
- An estimate of the expected financial cost of the program for the 2019 financial year will be included in the CBA's annual results announcement on 8 August.
- CBA 'remains in a strong financial position'.

CEO to forgo short term bonus for 2018: Separately, CBA released the transcript of a video interview with Mr Comyn in which he said that he had asked the board to cancel his short term bonus for 2018. Mr Comyn explained that 'There has to be clear consequences for failure to exercise and fulfil those accountabilities. And one small example of that is since coming into the role, actually a few days after my appointment, I did form a view that it would be inappropriate to accept a short term incentive this year, it is a conversation I had with the Chair in February and then with the full Board in March. And for me this is only one small step in demonstrating that accountability and the steps that are going to be required are going to be different this time round'.

[Sources: APRA media release 01/05/2018; Prudential Inquiry into the Commonwealth Bank of Australia (CBA) - Final Report; Enforceable Undertaking given by the Commonwealth Bank of Australia (CBA) and accepted by Australian Prudential Regulation Authority; Prudential Inquiry into the Commonwealth Bank of Australia (CBA) - Terms of Reference; CBA ASX Announcements: 01/05/2018; Transcript of video Interview with Matt Comyn 01/05/2018; Treasurer Scott Morrison transcript 01/05/2018; [registration required] The AFR 01/05/2018; 01/05/2018; 01/05/2018; Bloomberg 01/05/2018; The Guardian 01/05/2018]

AMP has released its submission to the Financial Services Royal Commission; David Murray appointed independent non-executive Chair.

AMP lodged its submission addressing evidence received by the Financial Services Royal Commission in relation to the fee-for-no-service case study on 4 May. AMP released both the submission in full and a 'fact sheet' outlining its response.

AMP states that it 'acknowledges its failings consistent with the evidence which is before the Commission but does not accept all of the open findings which Counsel Assisting submits should be made'.

Fee for no service issue

- AMP acknowledges that fees were charged by advisers without the provision of services, and fees were charged by licensees without the provision of services (including due to 'an administrative error and the practice of retaining fees during buy back arrangements known as 'ring fencing' and 'the 90-day exception').
- AMP also confirms that the 90 day exception was terminated in 2016 and that AMP has since 'apologised to and refunded the fees to all customers impacted by the 90-day exception'. AMP also acknowledges that the 'process has been too slow' and goes on to say that it is 'committing additional resources and exploring new ways to accelerate this process'.
- Responding to counsel assisting's open findings, AMP states that the issues raised at the commission are the subject of an ongoing ASIC investigation and submits that in line with the terms of reference for the commission (which provide that the commissioner is not required to inquire into a particular matter to the extent that he is satisfied that the matter has been, is being, or will be, sufficiently and appropriately dealt with by another inquiry or investigation) and given 'there is no reason for the commissioner to believe that ASIC will not deal with the matter appropriately', the commissioner should not make findings with respect to alleged breaches.

The Clayton Utz investigation and report

- Responding to 'criticism' levelled at the way in which the Clayton Utz report was produced, AMP asserts that:
  - 'there is no evidence to suggest that the Board, including the former Chairman and former CEO, acted inappropriately in relation to the preparation of the report;

- the Board were not aware of the nature and extent of the interaction during the preparation of the report;
- there is also no evidence that Clayton Utz made any changes to the report that they did not agree with or that they do not stand behind the report; and
- the extent of interaction between AMP and Clayton Utz has been overstated'.

- On this basis, 'AMP strenuously denies the allegation by Counsel Assisting that it is open to find that AMP has committed a criminal offence in providing the Clayton Utz report to ASIC'.

Communications with ASIC

- AMP acknowledges that statements made to ASIC regarding the circumstances in which the fees for no service were charged were misleading and that 'any misrepresentation, even if inadvertent' to ASIC is unacceptable and must be corrected'.
- However, AMP adds that the number of separate misrepresentations referred to in the Royal Commission were overstated — there were 7 not 20 separate misrepresentations.

Accountability and steps to strengthen governance: The fact sheet outlines the steps taken by the board to accept accountability namely: the departure of the CEO and the chair and the reduction of directors' fees by 25% for the remainder of the 2018 calendar year. In addition the fact sheet says that the workplace investigation commissioned by the board is ongoing and 'will be used to determine any disciplinary consequences for individuals involved'. AMP also states that the selection of a chair and the appointment of a new non-executive director to 'help accelerate cultural change' will be fast-tracked and that the board accepts that 'further board renewal is necessary'. In addition, the fact sheet sets out the steps AMP has taken and is taking to strengthen governance.

[Note: The AMP AGM is scheduled to occur on 10 May. There are three directors seeking reelection. Voting recommendations were discussed in a previous issue of Governance News. See: Governance News 30/04/2018.]

[Sources: ASX announcement: AMP Submission to the Royal Commission Fact Sheet 04/05/2018; Fee for no service submission 04/05/2018]

David Murray AO announced as independent non-executive chair

Separately, AMP announced on 4 May that:

- David Murray would take on the role of independent non-executive Chair following the 2018 AGM on or before 1 July 2018. The announcement also said that current executive chair Mike Wilkins would return to the position of acting CEO on that date.
- The announcement adds that Mr Murray will lead redevelopment of governance processes at AMP, including 'a process of considered board renewal and the appointment of an additional non-executive director in the near term.
- Mr Murray will also work with Mr Wilkins in leading the search process for a new CEO.

[Source: ASX Announcement: AMP media release 04/05/2018]

An easier path for new entrants to the banking industry? APRA has announced that a new pathway for financial entities to become registered as an ADI is now in place.

The Australian Prudential Regulation Authority (APRA) has formally established a new pathway for financial entities to become registered as an authorised deposit-taking institution (ADI) in Australia.

Key Points

An information paper: *ADI Licensing: Restricted ADI Framework* describes the new framework. The framework, which comes into effect immediately:

- Enables eligible entities to seek a Restricted ADI licence, which allows them to conduct a limited range of business activities for two years while they build their capabilities and resources.

- Establishes the eligibility criteria, minimum initial and ongoing requirements and application of the prudential and reporting standards during the restricted phase of operation.
- Provides guidance to assist Restricted ADI applicants during the licensing process.

APRA adds that it has sought to ensure the new approach does not create material competitive advantages for new entrants compared with incumbents, or compromise financial stability.

APRA's response to consultation on the new framework also released: APRA notes that the new framework was implemented following consultation and the release of a discussion paper *Licensing: A phased approach to authorising new entrants to the banking industry* in August 2017. APRA released its response to submissions on this consultation. APRA Chair Wayne Byers said that the feedback on the consultation indicates that the final framework 'strikes the right balance between facilitating new entrants, while continuing to safeguard depositors'.

[Sources: APRA media release 4/05/2018; Information Paper: ADI Licensing: Restricted ADI Framework 04/04/2018; Response to submissions: Licensing: A phased approach to authorising new entrants to the banking industry 04/05/2018]

Australian Financial Complaints Authority (AFCA) progress update | Authorisation of Australian Financial Complaints Ltd and four new board appointments announced.

Minister for Revenue and Financial Resources Kelly O'Dwyer has announced the authorisation of Australian Financial Complaints Limited to operate the Australian Financial Complaints Authority (AFCA), the new financial dispute resolution scheme. The Australian Securities and Investments Commission (ASIC) issued a media release welcoming the authorisation.

Minister O'Dwyer added that:

- **AFCA will commence accepting complaints from 1 November 2018**. She said that this would allow AFCA sufficient time to put in place the necessary infrastructure and staff to be ready to receive complaints.
- **Financial firms will be required to become members of AFCA by 21 September 2018**: Ms O'Dwyer announced that financial firms (Australian Financial Services Licensees, Australian Credit Licensees, superannuation trustees and other financial firms required to become members of AFCA by law) would be required to become members of AFCA by 21 September 2018. AFCA will, in the coming months, outline the process for applying for membership.
- **Consultation on the terms of reference and funding**: One of the first priorities of the AFCA Board will be to commence public consultation on the AFCA terms of reference (known as the AFCA Rules) and the scheme's interim funding model.
- **Existing ombudsman schemes continue to operate until AFCA commences**: Consumers will be able to lodge complaints with the existing industry ombudsman schemes – the Financial Ombudsman Service (FOS) and the Credit and Investments Ombudsman (CIO) – and the Superannuation Complaints Tribunal (SCT) until AFCA commences.
- **Superannuation Complaints Tribunal (SCT) complaints**: Ms O'Dwyer said that the SCT will continue to operate beyond AFCA's commencement to resolve the existing complaints it has on hand and that complaints lodged with the SCT will not be transferred to AFCA. She added that Treasury have released a fact sheet providing further detail.
- **Further detail on transitional arrangements will be released shortly on the AFCA website**: Ms O'Dwyer said that the AFCA Board will continue to engage with the existing dispute resolution bodies to bring about a smooth transition to AFCA for consumers and financial firms and that further information on the transition would be published on the AFCA website shortly. ASIC subsequently announced that AFCA has launched a website that includes information and forms for prospective members.
- **Board appointments**: In addition, Ms O'Dywer announced the appointment of four directors to the AFCA board. They are: Claire Mackay (financial planner, appointed as an industry director); Andrew Fairley (equity lawyer, appointed as an industry director); Erin Turner (consumer advocate,

appointed as a consumer director) and Alan Wein (lawyer and mediator appointed as a consumer director). The appointments will take effect from 4 May 2018. The directors will join Board Chair, the Hon Helen Coonan.

[Sources: Minister for Revenue and Financial Services Kelly O'Dwyer media release 01/05/2018; 01/05/2018; 18-123MR ASIC welcomes AFCA authorisation]

In Brief | The New Zealand Reserve Bank and Financial Markets Authority have reportedly called on NZ banks to provide 'assurances, including in writing, as to the processes they've followed to check themselves against what's coming out of the [Australian Financial Services] Royal Commission'.

[Source: Scoopnz 02/05/2018]

In Brief | Spanish bank BBVA has reportedly become the first global bank to offer blockchain. Reportedly using blockchain for a €75m corporate loan cut the process from 'days to hours'.

[Source: [registration required] The FT 26/04/2018]

Accounting and Audit

An ASIC Review has found no systemic concerns regarding accountants providing SMSF advice

ASIC has announced it has found 'no systemic concerns' in relation to accountants providing unlicensed advice recommending their clients set up self-managed superannuation funds (SMSFs) following the completion of a review into the issue. However, ASIC did identify significant levels of inaccurate and out of date information on websites and in promotional material. ASIC said it has since followed up with accountants who need to update their websites.

It also reminded other accountants to update their service or AFS licence details on their websites.

ASIC said it is continuing to make enquiries of five accountants whose services it had concerns about, and will take appropriate regulatory action where necessary.

[Source: 18-127MR ASIC reviews accountant compliance with changes to SMSF advice licensing]

In Brief | ASIC has cancelled the registrations of 117 SMSF auditors after they failed to lodge their outstanding annual statements. ASIC notes that an unregistered auditor is not permitted to audit a SMSF and cautions that doing so may have further serious consequences for both the fund and the auditor.

[Source: 18-120MR ASIC cancels the registration of 117 SMSF auditors]

Risk Management

Cybersecurity

Financial protection from acts of Cyberterrorism? Treasury has released the terms of reference for the 2018 Review of the Terrorism Insurance Act. Feedback is requested on whether the exclusion for cybercrime and over-riding policy exclusions for cyber terrorism should be reconsidered.

Treasury has released the Terms of Reference, for the review of the Terrorism Insurance Scheme (which occurs every three years).

The consultation seeks stakeholder views on issues outlined in the Terms of Reference including:

- 'Whether the risk of cyber terrorism causing physical property damage should be included in the scheme by removing the scheme regulations for computer crime and over-riding policy exclusions for cyber terrorism; and

- The extent of coverage available for terrorism incidents causing harm to people including armed assault'.

The insurance of losses arising from computer crimes is currently excluded by the terms of the Act.

Timeline: Submissions will close on 30 June 2018. Minister for Revenue, Kelly O'Dwyer has indicated that the review will be will be delivered to the Government by the end of the year.

Context: Treasury writes that the Scheme, established by the *Terrorism Insurance Act* 2003, was intended to operate in the absence of commercially available terrorism insurance on reasonable terms and that as such, a review of the scheme is required every three years to determine whether the scheme should continue to operate.

[Sources: Minister for Revenue and Financial Services Kelly O'Dwyer media release 30/04/2018; Treasury media release 30/04/2018; Terms of Reference]

United States | Should companies be able to legally retaliate against hackers? New Bill calls for significant revisions to the relevant law to enable companies and private citizens who are the victims of cybercrimes to 'hack back'.

The New Yorker writes that in the wake of a number of recent large-scale cyberattacks eg Uber and Equifax some members of US Congress have proposed amending the *Computer Fraud and Abuse Act* 1986 (CFAA) to enable companies and private citizens who are the victims of cybercrimes to legally 'hack back' (ie to take steps to actively pursue and identify the 'hacker').

The CFAA currently prohibits anyone from 'knowingly' accessing a computer 'without authorization'. The *Active Cyber Defense Certainty Act* HR 4036 (Hack Back Bill), introduced by Republican Tom Graves on 10 December, proposes 'to provide a defense to prosecution for fraud and related activity in connection with computers for persons defending against unauthorized intrusions into their computers'.

Reportedly, advocates of the Bill are of the view that regulators lack the capacity to protect the US against the magnitude of the cyber threat facing the country as evidenced by recent cyberattacks and that consequently, companies should be enabled to better protect themselves by adopting an 'active cyber defense' approach.

The Hill suggests though the Bill has potential to improve cyber defences, discussion about 'active defence' against cyber threats also raises a range of issues that are yet to be addressed by policy makers, including the possible risks of collateral damage to third parties and the inadvertent escalation of tension with other countries among others.

[Sources: HR 4036 Active Cyber Defense Certainty Act; The New Yorker 07/05/2018; The Hill 18/05/2018]

In Brief | Reputational damage too great? Cambridge Analytica, a data firm that worked for President Donald Trump's 2016 campaign, will reportedly shut down following allegations about its misuse of Facebook Inc data and the campaign tactics it pitched to clients writes The WSJ.

[Source: [registration required] The WSJ 02/05/2018]

Other Developments

Cultural issues at Nike? A 'covert' whistleblower survey of female Nike employees indicating a culture of sexual harassment and gender discrimination at Nike has reportedly led to the departure of six male executives. The company has reportedly moved to replace two male executives with women.

The New York Times (NYT) reports that a 'covert' survey conducted by and for female employees at Nike, has identified a culture of sexual harassment and gender discrimination at the company. Despite a number of complaints of gender discrimination and harassment reportedly made to the company, nothing was done until the survey responses were delivered to the CEO Mark Parker on 5 March.

Subsequently, the NYT writes, six senior male executives either left, or announced plans to leave the company. They reportedly include: the head of diversity and inclusion, a vice president in footwear, a senior director of Nike's basketball division, the president of the Nike Brand and the head of Nike's global business.

Following the survey, The NYT interviewed 50 current and former female Nike employees and found numerous examples of situations in which women were allegedly passed over for promotion, subject to flawed/ineffective complaints processes and subject to harassment by their male bosses.

The report adds that in response to questions, Nike said the problems were confined to 'an insular group of high-level managers' who reportedly 'protected each other and looked the other way' but that it was something 'we are not going to tolerate'.

Reportedly the company has appointed two women (so far) to replace departing executives, including Amy Montagne to replace vice president and general manager of global categories, and Kellie Leonard as chief diversity and inclusion officer.

Some media reports suggest that the culture at the company has had financial implications for the company, which is reportedly struggling to win market share in the 'women's category'.

[Sources: The New York Times 28/04/2018; Portland Business Journal 27/04/2018; Fast Company 30/04/2018; [registration required] The AFR 30/04/2018; SBS 01/05/2018]

United States | Panasonic and Panasonic Avionics will pay a combined total of $280,602,830.93 to SEC and the DOJ respectively to settle alleged FCPA and other breaches.

The US Department of Justice (DOJ) and Securities and Exchange Commission (SEC) announced that they had reached resolutions with Panasonic Corporation and its wholly owned subsidiary, Panasonic Avionics Corporation (PAC) to settle separate allegations of Foreign Corrupt Practices Act (FCPA) and accounting fraud.

SEC allegations

SEC alleges that:

- During the period 2007 to 2017, PAC made a series of payments in the Middle East, Asia, and China that violated the various provisions of the FCPA. More particularly, between 2008 and 2014, SEC alleges that a senior executive at PAC was allegedly involved in a scheme to bribe a Middle Eastern government official (by paying him $875,000 over several years for purported 'consulting services) to assist PAC in negotiating amendments to two existing contracts it had with a Middle Eastern state owned airline. According to SEC, these contract amendments were collectively worth approximately $713 million in additional revenues for PAC.
- During the same period, the same senior executive at PAC allegedly authorised payments of an additional $885,000 to two other 'consultants' who provided little or no legitimate services to the company. These payments were made out of the Office of the President budget, which the executive controlled, in order to conceal their true purpose.
- During the same period, PAC allegedly had a practice of using third party sales agents in some, but not all, regions in which the company did business. In 2007, PAC allegedly put into place certain due diligence requirements for screening new and existing sales agents. According to SEC, some sales agents were unable to meet the new requirements, so PAC allegedly engaged a Malaysia based sales agent to act as an stand-in between PAC and the sales agents. The sales agents who could not meet the new requirements became subagents of the Malaysia agent in order to circumvent PAC's internal controls. Allegedly, PAC employees hid more than $7 million in payments to the subagents through this process.

SEC Cease and Desist order: Panasonic is required to cease and desist alleged violations of the anti-bribery, books and records, and internal controls provisions of the FCPA as well as other securities laws and to pay disgorgement of $126.9 million plus prejudgment interest of $16,299,018.93.

DOJ Deferred Prosecution Agreement (DPA): Under the terms of the DPA with the DOJ, PAC agreed to pay a criminal monetary penalty of $137,403,812, continue to enhance its anti-corruption compliance policies and procedures, and to hire an independent compliance monitor for a term of two years.

The monetary penalty represented a 20% departure below the minimum guidelines range, which the DOJ deemed appropriate given the company's cooperation and remediation.

Panasonic response: Panasonic issued a statement which says that 'Panasonic takes these issues very seriously and is committed to increasing compliance awareness throughout the organization and strengthening its oversight of its subsidiaries globally'. The statement adds that the 'payments are not expected to have a material impact on Panasonic's consolidated results forecasts for the fiscal year that ended March 31, 2018, as provisioning was completed by the third quarter of the year'.

[Sources: US Securities and Exchange Commission media release 30/04/2018; US Department of Justice media release 30/04/2018; Panasonic media release 01/05/2018]

United Kingdom | BEIS is consulting on reforms to limit the misuse of Scottish Limited Partnerships after the National Crime Agency identified that they were linked to a 'disproportionately high' volume of criminal activity.

The UK Department for Business, Enterprise and Industrial Strategy (BEIS) has released a consultation paper seeking views on proposed reforms aimed at deterring the misuse of limited partnerships (including Scottish limited partnerships) in criminal activity eg operating as a money-laundering vehicle and improving the regulatory regime.

Reasons for the proposed reforms: Among the reasons for proposing the reforms is the fact that the National Crime Agency identified a 'disproportionately high volume of suspected criminal activity involving Scottish limited partnerships' (SLPs). The Consultation paper goes on to comment that there have been prominent examples of SLPs featuring in international money laundering schemes that have made international headlines and which have damaged the wider reputation of the UK 'as a clean and trusted place to do business'. The reforms are therefore being proposed to address the issue of the misuse of SLPs.

Key Points: The proposals would make it clearer who runs limited partnerships by:

- requiring a real connection to the UK, including ensuring SLPs do business or maintain a service address in Scotland;
- registering new SLPs through a company formation agent, meaning frontmen will be subjected to anti-money laundering checks
- new powers for Companies House to remove limited partnerships from the company register if they are dissolved or are no longer operating
- The reforms being proposed will apply to all limited partnerships in the UK and will also include new annual reporting requirements for limited partnerships in England and Wales and Northern Ireland.

Consultation closes on 23 July 2018.

[Sources: UK Department for Business, Energy and Industrial Strategy media release 29/04/2018; Partnerships: Reform of Limited Partnership Law consultation media release 30/04/2018; Consultation paper 30/04/2018]

Not cyber related: CBA has confirmed that the loss of 19.8 million customer records in 2016 is not linked to a cyber breach, that there has been no compromise of CBA's technology platforms, systems, services, apps or websites.

Following media reports concerning an alleged data breach at CBA in 2016, which was not disclosed to the public at the time, Commonwealth Bank of Australia (CBA) issued a statement clarifying the facts and the circumstances of the breach. The CBA states:

- Reports of a data breach (loss of 19.8 million customer files) in May 2016 was not cyber related but related to the loss (and probable destruction according to an independent KPMG report into the incident) of two magnetic tapes which contained historical customer statements.

- The tapes contained customer names, addresses, account numbers and transaction details from 2000 to early 2016 but did not contain 'passwords, PINs or other data which could be used to enable account fraud'.
- No evidence was found by the KPMG report of any customer information being compromised, and over the past two years there has been no evidence of customer harm or suspicious account activity. Ongoing monitoring of the 19.8 million customer accounts involved remains in place as a precaution.
- Report recommendations were acted upon to ensure a similar incident would not happen again.
- The Office of the Australian Information Commissioner and the Australian Prudential Regulation Authority (APRA) were both notified of the incident at the time and a briefing was provided on the results of the KPMG investigation. The decision not to notify customers was made in light of the findings and the account monitoring in place.

The Office of the Australian Information Commissioner also issued a statement confirming it was notified of an incident. The statement adds that 'Having regard to the findings in the report by the Australian Prudential Regulation Authority into the CBA released on Tuesday, the OAIC has made further inquiries in relation to this matter and has sought information from the CBA to satisfy the OAIC that the CBA has taken on board lessons learned from this incident, to ensure the privacy of customer's personal information is adequately protected'.

[Sources: CBA ASX announcement 03/05/2018; OAIC media release 03/05/2018]

Corporate Misconduct and Liability

The Government has released its response to the senate committee report into penalties for white collar crime: supports recommendations to increase the availability of infringement notices, increase to civil penalties and to allow for disgorgement of profits in civil proceedings in line with ASIC Taskforce recommendations.

On 25 November 2015, the Senate referred the matter of inconsistencies and inadequacies of current criminal, civil and administrative penalties for corporate and financial misconduct or white-collar crime to the Economics References Committee for inquiry and report. The Senate Committee provided its report on 23 March 2017. The government notes that as the recommendations of the ASIC Enforcement Review Taskforce overlapped with the senate recommendations, it was appropriate to provide its response to the Senate Committee's report 'alongside' its response to the ASIC Enforcement Review Taskforce Report in April 2018.

[Note: On 19 October 2016, the government announced a taskforce to review the Australian Securities and Investments Commission's (ASIC's) enforcement regime. The Taskforce report, which included 50 recommendations, was provided to the Government in December 2017 and released publicly in conjunction with the government response on 20 April. See: Governance News 23/04/2018]

Recommendations: The committee made 6 recommendations of which the government accepted four. In essence, the Government agreed, in line with the Taskforce recommendations, to increase the civil penalties in the Corporations Act 2001 for both individuals and bodies corporate, that civil penalties for white-collar offences should be set as a multiple of the benefit gained (or loss avoided) and allow for disgorgement of profits. More specifically, the government agreed with the following recommendations.

- **Increase the availability of infringement notices**: The recommendation reads: 'The committee recommends that the government consider making infringement notices available to the Australian Securities and Investments Commission to respond to breaches of the financial services and managed investments provisions of the Corporations Act'.
- **Increase civil penalties: '**The committee recommends that the government amend the Corporations Act 2001 to increase the current level of civil penalties, both for individuals and bodies corporate, and that in doing so it should have regard to non-criminal penalty settings for similar offences in other jurisdictions'.

- **Allow the maximum civil penalty to be set by a multiple of benefit gained or loss avoided**: 'The committee recommends that the government provide for civil penalties in respect of white-collar offences to be set as a multiple of the benefit gained or loss avoided'.
- **To allow for disgorgement of profits in civil proceedings**: 'The committee recommends that the government introduce disgorgement powers for the Australian Securities and Investments Commission in relation to non-criminal matters'.

Response to remaining recommendations

- **No change to evidentiary standards and rules**: The Government rejected the recommendation calling for reforms that would reduce the evidentiary standards and rules for civil penalty proceedings involving white-collar offences, but indicated that it would keep the matter under review.
- **Improved accessibility and usability of ASIC banned and disqualified register**: The government noted the committee's recommendation that the Australian Securities and Investments Commission consider ways in which the accessibility and usability of the banned and disqualified register might be enhanced. The government noted that the information is currently accessible and added that it is currently considering the modernisation of Business Registers, which could potentially include upgrades to the ASIC registries (which could improve accessibility).

[Sources: Australian Government response to the Senate Economics References Committee Report: White Collar Crime 04/05/2018; Minister for Revenue and Financial Resources Kelly O'Dwyer media release 04/05/2018]