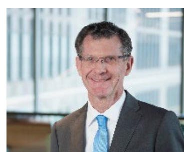
Governance News

5 November 2018



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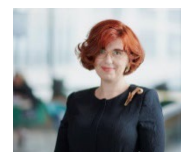

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United Kingdom | Time to regulate small business lending to avoid a repeat of the 'scandalous events at RBS' GRG'? The UK Treasury Committee has released its report on SME finance and has recommended (among other things) the extension of regulatory protections to SMEs. 23

CBA has announced the sale of CFSGAM and executive appointments 24

In Brief | The Australian Financial Complaints Authority (AFCA) 'opened for business' on 1 November ushering in a 'new era for financial dispute resolution, delivering free, fast and binding services for all financial complaints, whether they be related to banks, credit providers, insurance companies or superannuation funds' the government said. The ABA issued a statement echoing the government in welcoming the commencement of the AFCA scheme. 24

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'Landmark case'? The New York Attorney General has brought a lawsuit against ExxonMobil accusing the firm of defrauding investors by misleading them about the company's approach to managing climate risk. 27

In Brief | The AFR reports that low ESG scores (and more particularly exclusion from the MSCI ESG Leaders index) may be a predictor of the success of company. 'Below average ESG scores are not predictive of

specific disasters, but they are associated with a higher likelihood of something bad happening…In a good ESG company it's less likely that an oil platform blows up than in a bad [ESG] company' a MSCI representative is quoted as stating. 27

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In Brief | Standards Australia has announced that ISO 31000:2018, Risk Management - Guidelines has been published as an Australian adoption of the international standard. 28

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Diversity

Canada | Modest improvements since the introduction of mandatory reporting on gender representation: The Canadian Securities Administrators (CSA) has released its fourth review of mandatory disclosure of gender representation on Canadian boards and in executive officer positions.

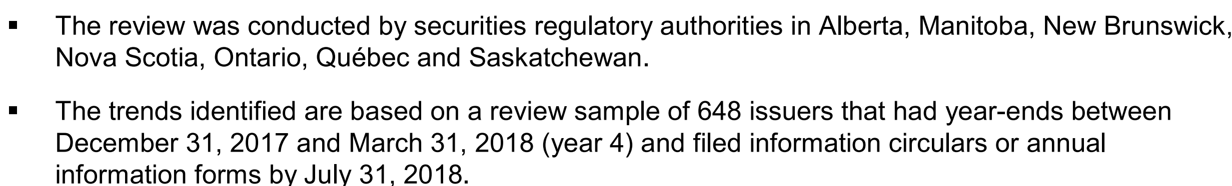
The Canadian Securities Administrators (CSA) has released its fourth review of required company disclosures (disclosure requirements under the National Instrument 58-101 Disclosure of Corporate Governance Practices) regarding women on boards and in executive officer positions.

Required Disclosure: Entities listed on the Toronto Stock Exchange (TSX) and certain other non-venture issuers are required to provide disclosure on an annual basis in five areas: a) the number of women on its board and in executive officer positions; b) whether it has gender targets; c) whether it has a written policy relating to the identification and nomination of women directors; d) whether it has director term limits or other mechanisms of board renewal; and e) whether it considers the representation of women in its director identification and selection process and in its executive officer appointments.

Trends identified in the report include the following.

- **Board representation:**
  - 66% of companies (427) had a least one women on their board (a 17% increase on 2014 which was the first year of the survey).
  - 34% (218 companies) had zero women. However, the number of companies with no women on their board has declined since the disclosure requirements were introduced.
  - Overall, 15% of board seats were held by women (a 4% increase on 2014). This number tends to increase commensurate with the size of the company and varies by industry. The manufacturing, retail and utilities industries had the highest rates of representation. The oil and gas, biotechnology and mining industries had the lowest percentage of issuers with one or more women on their boards.
  - 29% of vacated board seats were filled with women. This is a 3% increase on last year (and was not measured prior to this).
- **Executive officer positions:** 4% of companies (25 companies) had a female CEO, 14% (90 companies) have a female CFO. According to the survey 66% of companies have at least one women in an executive officer position, as compared with 60% in 2014.
- **Targets?** 16% of companies (103 companies) have targets for the representation of women on boards. 4% of companies (25 companies) have targets for the representation of women in executive officer positions. Issuers that had adopted board targets had an average of 24% of their board seats held by women, compared to issuers without targets that had an average of 13%.
- **Term limits/mechanisms for board renewal?**
  - 21% of companies have some form of director term limits in place.
  - 32% of companies had some other mechanism for board renewal (but had no term limits in place.)adopted other mechanisms of board renewal, but did not adopt.
  - 43% of issuers disclosed that they did not have director term limits nor had they adopted other mechanisms of board renewal.
  - 42% of companies have a policy relating to the representation of women at board level (as compared with 15% in 2014).

About the review:



- The review was conducted by securities regulatory authorities in Alberta, Manitoba, New Brunswick, Nova Scotia, Ontario, Québec and Saskatchewan.
- The trends identified are based on a review sample of 648 issuers that had year-ends between December 31, 2017 and March 31, 2018 (year 4) and filed information circulars or annual information forms by July 31, 2018.

[Note: LeanIn.org and McKinsey's fourth annual *Women in the Workplace survey* which tracks progress on gender diversity in US companies recently found that progress on the issue has effectively stalled in the US with rates of female representation at 1 in 5 (C Suite level for white women) and even less for women of colour. Among other things, McKinsey recommends setting targets and increased disclosure as specific actions to address the issue. See: Governance News 29/11/2018]

[Source: Report on Fourth Staff Review of Disclosure regarding Women on Boards and in Executive Officer Positions 27/09/2018]

Italy | The revised Italian Corporate Governance Code for listed companies aims to 'safeguard' the impact of a law (due to sunset) intended to ensure gender balance on listed company boards.

The Italian Corporate Governance Code (Code) was last reviewed in 2015. In August 2018, the Corporate Governance Committee released a revised version to include new diversity requirements. The purpose of the amendments is to 'safeguard' the impact of the Golfo-Mosca Law (No. 120/2011), due to sunset after 2020, which is aimed at ensuring a balanced gender composition of listed companies' corporate bodies.

The revised code includes the following revisions.

- A new principle recommends listed companies apply diversity criteria, including by gender, in the composition of both the board of directors (2.P.4) and the board of statutory auditors (8.P.2).
- One third gender target for board and the board of statutory auditors:
  - 2.C.3 requires that 'the board of directors shall have at least one third of directors of the less-represented gender'.
  - 8.C.3 requires that 'the Board of Statutory Auditors shall have at least one third of members of the less-represented gender'.
- The commentary accompanying the new recommendations suggests that one-third representation could be achieved through a wide range of tools (eg diversity policies, board's guidelines to shareholders, a slate submitted by the board itself).
- The revised Code also states that diversity considerations should be adopted 'taking into due consideration the primary goal of ensuring adequate competence and professional skills of its members'.

[Source: 2018 Corporate Governance Code [English translation] with amendments highlighted; previous versions of the Code]

In Brief | Delayed release of diversity information? The FT reports that the largest wealth fund in the world (Norway's sovereign wealth fund) which is estimated to own an average of 1.4% of every listed company globally has not published its views on the issue of gender representation on boards and diversity generally, despite releasing its views on other governance issues. Reportedly, this is due to lack of consensus, and possibly a level of concern about the appropriateness of exporting 'Nordic' values.

[Source: [registration required] The FT 29/10/2018; 26/10/2018]

United Kingdom | Revised guidance on meeting 'social licence to operate' requirements: GC100 guidance on compliance with s172 duty to promote the success of the company released.

At the invitation of the Department for Business, Enterprise and Industrial Strategy (BEIS), GC100 (an association of general counsel and company secretaries working in UK FTSE 100 companies) has released revised guidance for company directors on how to comply with section 172 of the *Companies Act 2006 UK*. Section 172 is the requirement for directors to 'act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole' and in doing so have regard to a range of factors including the impact of the company's operations on the community and the environment and the long-term interests of stakeholders.

Embedding s172 duty into all aspects of directors' roles

The focus of the guidance is on building s172 considerations into all aspects of directors' roles rather than purely in the context of decision making, which the guidance notes, is only a small part of the directors' role. 'Training, thoughtful information flows, sensible policies and processes combined with appropriate consideration of the factors in setting strategy, together with an engagement model for stakeholders, can together help embed directors' regard to the relevant factors. In that way, the factors are more likely to form a natural and automatic part of your reflections on the issues, which you consider in your role as a director. This is at the heart of how many directors address the section 172 duty and stakeholder interests' the guidance states.

s172 does not require that directors balance the interests of the company and other stakeholders

Commenting on the scope of the s172 duty, the guidance states: 'For all directors, your job is not to balance the interests of the company and those of other stakeholders. Instead, after weighing up all the relevant factors, ask yourself which course of action you consider best leads to the success of the company, having regard to the long term. This can sometimes mean that certain stakeholders are adversely affected, but this does not call into question decisions made'.

Suggested practical steps for directors

The guidance states that a 'checklist approach' to compliance with s172 obligations would be both 'unworkable and interfere with good judgment and effective prioritisation'. On this basis, the guidance identifies five areas of focus intended to build or 'embed' s172 considerations into every aspect of the director role.

- **Strategy setting:** Among other things, the guidance suggests that consideration of s172 factors in the context of strategy setting and consideration of risk should also include: consideration of the process for identifying relevant stakeholders; the appropriate level of engagement with stakeholders; whether sufficient time is being spent on longer-term important issues (eg organisational impact on communities/the environment) and consideration of whether corporate vision, goals and strategy reflect stakeholder interests/goals and the extent to which this is monitored/reflected across the organisation.
- **Training**: The guidance suggests that training inductions for new directors should include training on their duties including their s172 duties and that 'refresher' training should also be provided from time to time. In addition, the guidance suggests that directors should consider what training on s172 duties is appropriate for subsidiary directors and management and what training/career development is appropriate for the company's managers and others in this regard.
- **Information flows:** The guidance suggests that directors should consider and arrange to receive the information necessary to carry out their s172 duty and also consider what information is available to others in the company, whether this supports the achievement of the company's goals, and the board's responsibilities in relation to s172 factors. For example, the guidance suggests that directors might consider whether they are receiving too much information, whether it is too focused on particular metrics and whether 'the information you need to understand as a priority should be adapted, changed or simplified'.

- **Policies and processes:** The guidance is broken into guidance for boards; management; directors of UK subsidiary companies, directors of UK joint venture companies and engagement with shareholders. In relation to guidance for boards on this issue, the guidance suggests (among other things) that: directors' terms of appointment and role descriptions should reference s172 duties as should the terms of reference for the board and each committee; remuneration policies and incentives should reflect s172 factors where relevant; that there should be a consistent approach to minute taking 'whether brief or detailed and as to when section 172 factors are minuted'; and that shareholder factors are considered in the process for developing board papers (where judged relevant).
- **Shareholder Engagement:** The guidance notes that publicly listed companies already have access to a lot of guidance on this issue and that consequently the guidance included focuses on a smaller number of 'themes' that may be relevant in the context of the s172 duty. These include: that directors should give consideration to the fact that taking into account shareholder interests is likely to be less effective (perceived to be less effective) if not combined with appropriate engagement; that stakeholder engagement should be considered in the context of the way in which every level of the organisation interacts with stakeholders of the whole of the organisation (rather than limited to consideration of the way in which the board interacts with stakeholder) and that directors might also consider the extent to which engagement feedback from stakeholders to the company and vice versa is or needs to be fed back to business.

The role of culture: The guidance also acknowledges culture as the 'overarching theme' underpinning compliance with s172, noting that the 'processes, rules and decisions' made by companies ultimately will 'create a culture or cultures within the company or within its different business segments.' As such, the guidance suggests that boards should be conscious of their role and influence in setting the tone from the top and should give consideration to the different, lived cultures within the organisation at every level (and consider whether these are appropriate).

Disclosure and reporting? The guidance does not specifically address how companies should report against compliance with the s172 duty.

[Sources: GC100 media release 23/10/2018; GC100 Guidance on Directors' Duties Section 172 and stakeholder considerations October 2018; BEIS Green Paper: Corporate Governance Reform]

[Note: The Financial Rights Legal Centre (FRLC) submission in response to the Financial Services Royal Commission's Interim Report includes, among other things, the suggestion that *The Corporations Act 2001 (Cth)* should be amended to explicitly introduce corporate social responsibility duties for all directors (as per s172). This is discussed in a separate post in this issue of Governance News below.]

Remuneration

European Union | New European Commission figures show that the gender pay gap in the EU persists despite increased focus on the issue. The Commission has called for the urgent passage of proposed changes to flexible working arrangements (including paid paternity leave) to help drive progress.

Ahead of equal payday on 3 November, the European Commission released new figures showing that women in the EU still earn 16.2% less than men on average. In a statement, First Vice-President Frans Timmermans, Commissioner Marianne Thyssen and Commissioner Věra Jourová said: 'Women and men are equal. This is one of the EU's founding values. But women still effectively work for two months unpaid each year, compared to their male colleagues. We cannot accept this situation any longer'.

Ms Jourová added that the data, 'underlines' the importance of adopting the work-life balance legislation the aim of which is to 'modernise' family related leave and flexible working arrangements in the EU. More particularly, the proposal for a *Directive on Work-Life Balance for Parents and Carers* includes the following measures: the introduction of paternity leave; the strengthening of parental leave by making the 4 months period compensated at least at sick pay level and non-transferable from a parent to another; the introduction of carers' leave for workers caring for seriously ill or dependent relatives and the extension of the right to request flexible working arrangements (reduced working hours, flexible working hours and flexibility in place of work) to all working parents of children up to 12 and carers with dependent relatives.

[Source: European Commission media release 26/10/2018; Work Life Balance legislative measures; The Guardian 26/10/2018]

United States | Executive remuneration less of a concern for shareholders than previously? A review of trends in US executive compensation practices 2018 suggests that the drop in the number of shareholder-sponsored proposals on executive compensation may indicate shareholders are more satisfied with company practices and the increased engagement with directors.

A review of US executive pay trends: *CEO and Executive Compensation Practices: 2018 Edition*, has identified trends in pay practices in Russell 3000 companies. These include the following.

- **CEO pay at larger companies is stable or in some cases declining** in larger firms. By contrast, CEO pay is increasing rapidly at smaller firms. Companies with revenues less than $100 million saw increases for their CEOs at more than 20.5%, while CEOs in the next bracket up, $100 million to $999 million, had increases of 14.4%. However, CEOs in the largest companies ($25-49.9 billion and $50 billion plus) received, respectively, a decrease in pay (-7%) and a relatively modest raise (1.4%).
- **The pay growth rate for named executive officers (NEOs) outpaced CEOs by almost 4%**.
- **The number of shareholder-sponsored proposals on executive compensation put to a vote at 2017 AGMs declined sharply from prior years**, suggesting that shareholders are more satisfied with company practices and the increased engagement with directors.
- **Use of long term incentive plans continues to increase:** The use of appreciation awards, time-based awards, and performance-based awards all increased in prevalence from 2016 to 2017 with the use of time based awards rising to 74% (as compared with 64% in 2016) and the use of performance shares rising to 80% (from 77% in 2016). The report comments that this 'continues the impetus of companies to demonstrate to their investors that longer term incentives are more focused on strict performance measurement'.
- **CEO pay ratio information:** For the first time, in 2018, most US public companies included in the compensation section of their proxy statements the disclosure of the ratio between CEO pay and median employee pay.
  - **The review found that there were wide variations**, with a median for the Russell 3000 of 70:1 (compared to a median of 158:1 in the S&P 500) and a range from 0:1 to 5908:1.
  - **Pay disparities appear to be directly correlated to company size**: companies with revenue below $100 million, disclosed a median ratio of 15:1, compared to the 249:1 ratio among firms with an annual turnover of $50 billion and over.
  - **Financial sector had the lowest median ratio at 40.5:1?** In the industry analysis of Russell 3000 companies, the lowest median ratio (40.5:1) was found in the financial sectors. This is attributed to the 'generous rewards' offered to bankers 'which skews the median-employee compensation used as a denominator in the calculation'.
  - **Non-standard methodology in the calculations makes direct comparisons more difficult:** Due to flexibility in the reporting requirements in the choice of methodology for the calculation of pay ratios, there was wide variation in the way issuers chose to report making direct comparisons more difficult.

[Source: Harvard Law School Forum on Corporate Governance and Financial Regulation 27/10/2018]

Shareholder Activism

On the back of the recent SEC settlement, activist investors at Tesla are pushing for governance reforms at the company including the permanent separation of the CEO and Chair roles and 'board refreshment'.

Activist investors at Tesla, including a union-affiliated investor group and five major pension funds (California, Connecticut, Oregon, New York state and city pension funds, CtW Investment Group), are reportedly pushing to 'refresh' the company's board, for permanent separation of the CEO and chair positions, and

other measures to hold Tesla CEO more accountable in the wake of the recent Securities and Exchange Commission (SEC) settlement (in response to Tesla founder Elon Musk's tweets regarding plans to take to take the company private see: Governance News 13/08/2018). The settlement requires the separation of the Chair and CEO roles, and the appointment of two independent directors (see: Governance News 08/10/2018; 23/10/2018) but only applies for three years, which in the activist's view is insufficient.

More particularly the group is reportedly seeking: the creation and release of a plan to refresh the board and for timelines to be set for directors to leave; for the board to adopt proxy access rights to give long term shareholders the ability to nominate their own slate of directors and for increased board diversity/recruitment of new directors with appropriate skills who are independent of founder Elon Musk.

Reportedly, Tesla has not yet responded to the group's demands.

[Source: Bloomberg 01/11/2018]

Proxy campaign at Campbell Soup Co: Activist Third Point has filed a lawsuit against Campbell Soup Co alleging the company misled investors and seeking injunctive and declaratory relief.

Activist Third Point LLC is engaged in a proxy contest at Campbell Soup Co the object of which is to replace the Campbell Soup Co board (so it can install its own nominees, and change the strategic direction of the company). Initial calls for board change commenced in September.

Recently, Third Point has increased pressure on the company by filing a lawsuit alleging (among other things) that 'the members of the Board, aided and abetted by the Company, have breached their fiduciary duties to Campbell’s shareholders by withholding material information critical to shareholders assessing how to vote at the Company’s Annual Meeting'. More particularly, the complaint alleges that the Campbell's board misled investors about the competence of its directors, provided insufficient information to enable investors to assess the merit of the company's strategic plans and the way it carried out a recently completed strategic review and has not provided information about the departure of the former CEO or succession plans. Third Point has requested that the court: direct the board to correct their 'material misstatements and omissions; enjoin the Board and Company from holding the Annual Meeting [to be held on 29 November] until they have corrected the misstatements and omissions; enjoin the Board from exercising any voting rights as Campbell shareholders; and enjoin the Board and Company from making any further material misstatements or omissions'.

The Campbell's Chair has written to investors claiming that Third Point, 'is attempting to seize control of Campbell’s entire Board with a slate of handpicked and underqualified candidates. Third Point has failed to articulate a cogent plan to run the Company. In fact, it has not provided any new ideas to enhance shareholder value'.

In response, Third Point issued a detailed plan, including a proposal to evaluate Campbell's recently completed strategic review and Campbell's plans to divest certain business units, which the Campbell's board subsequently publicly critiqued.

According to media reports, Third Point is considered unlikely to be wholly successful in its campaign given that descendants of the original founder (who are represented on the current board) control 41% of the company while Third Point has a 7% holding, but suggest that Third Point may be successful in negotiating for and securing some board seats.

[Sources: Third Point media release 25/10/2018; Campbell Soup Company media release 25/10/2018; Philadelphia business journal 26/10/2018; Financial Buzz 26/10/2018; [registration required] The FT 26/10/2018; Reuters 26/10/2018; CNN Business 28/10/2018; Justfood.com 31/10/2018]

In Brief | Only (an estimated) one third of proxy fights ever become public? A new report into trends in activism in Canada flags that there has been a substantial uptick in private engagement as a preferred method of engagement.

[Source: Harvard Law School Forum on Corporate Governance and Financial Regulation 28/10/2018]

Institutional Shareholders and Stewardship

In Brief | Focus on renewables: BlackRock has appointed a Sydney-based managing director to lead its renewable energy investments in Asia Pacific. Charlie Reid is relocating from London for the role and will be responsible for sourcing, executing and managing renewable infrastructure assets in APAC. BlackRock currently has $5 billion of equity assets under management spread across 250 solar and wind farm projects globally. Of this, 40 projects are based in APAC countries of Australia, Japan and Taiwan.

[Source: Financial Standard 29/10/2018]

Meetings and Proxy Advisers

Recent AGM results: 'First strike' at Healthscope, defeat of shareholder climate resolution at Wagners Holding Co Ltd.

- **First strike (26.29% 'against' vote) at Healthscope Limited**: Healthscope has received a 'first strike' against its remuneration report and a 27.33% 'against' vote against granting short term performance rights to the managing director and CEO. Media reports suggest that the protest vote was an opportunity for investors to pressure Chair Paula Dwyer to engage with the latest offer from two of its largest shareholders: Private equity group, BGH and AustralianSuper to buy the company. In her opening address to the meeting, Ms Dywer commented that the company was not yet in a position to make a decision in relation to the proposal but would update shareholders when the board had completed its assessment. Ms Dwyer was reelected as Chair (despite Glass Lewis reportedly recommending against her reelection citing concerns over her role as Chair of Tabcorp).

[Sources: Healthscope ASX announcements: results of AGM 31/10/2018; Chair's address 31/10/2018; [registration required] The AFR 31/10/2018; The Age 31/10/2018]

- **Climate resolution at Wagner Holding Company Ltd unsuccessful:** Like a number of Australian companies this year (eg Origin Energy Ltd, Westpac, NAB (see: Governance News 23/10/2018)) Wagner faced a climate-focused shareholder resolution — for the company to amend the constitution to require that directors ensure the business of the company is managed in a manner consistent with the Paris Agreement target. The shareholder resolution was not supported by the board. Glass Lewis suggests that while Wagner does operate in a carbon-intensive industry (construction) the resolution was primarily fueled by the company's plans to help build an airport that would provide transportation service to workers at the Carmichael Coal Mine project in Central Queensland. The resolution was unsuccessful (4.36% support). Glass Lewis notes that a similar proposal was brought in 2017 at Downer Edi which ultimately abandoned its plans to build the mine.

[Source: Wagners Holding Company Ltd ASX announcements: notice of AGM 28/09/2018; 2018 AGM address 01/11/2018; Results of AGM 01/11/2018; Glass Lewis Blog 25/10/2018]

Engagement with proxy advisers on the rise?

The AFR reports that the trend towards private engagement with proxy advisers and external consultants on topics such as remuneration and director accountability appears to be increasing with companies actively checking views/voting intentions ahead of AGMs.

Separately, incoming AICD Chair John Atkin has reportedly questioned whether the trend towards increased engagement with proxy firms is helpful, especially in the context of remuneration 'The proxy advisers and some of the remuneration consultants have done us a disservice in a way…Rem should be about aligning the interests of management and shareholders around implementing the long-term strategy of the company and that is not going to be the same for each company, there is too much "oh, but that is deviating from the norm"'.

[Sources: [registration required] The AFR 28/10/2018; 29/10/2018; AICD media release 29/10/2018]

Disclosure and Reporting

United Kingdom | Rethinking corporate reporting? The Financial Reporting Council has launched a project to 'challenge existing thinking about corporate reporting' and has called for participants to join an advisory group to support the project.

The Financial Reporting Council (FRC) has announced a major project intended to 'challenge existing thinking about corporate reporting and consider how companies should better meet the information needs of shareholders and other stakeholders'. The FRC states that the purpose of the review is to 'seek a balance between the needs of users and the costs and practicalities' of providing the necessary information. More particularly, the FRC writes that the project is being launched in response to: the growing pressure from users of the annual report to streamline it; increasing reporting requirements; developments in the 'responsible business agenda and the need for businesses to be accountable to a wider group of stakeholders' and their needs. The potential role technology could play, in reporting will also be considered in the review.

Commenting on the review, Paul George, Executive Director of Corporate Governance and Reporting at the FRC added that 'new models for corporate reporting will inevitably lead to considerations of how audit and assurance models will need to evolve to respond to the changes. This project complements our work on the future of audit'.

Call for participants to join an advisory group: The project will be supported by an advisory group and the FRC is calling for up to 15 participants to join it. The deadline for nominations for membership of the group is 15 November 2018.

Timeline: The FRC expects that this project will result in a series of calls for action for changes to regulation and practice and will publish a paper consolidating the outcomes of the project during H2 2019.

[Source: FRC media release 30/10/2018]

Regulators

Australian Securities and Investments Commission (ASIC)

ASIC has released its Annual Report 2017-2018 setting out its key achievements over the past financial year.

The Australian Securities and Investments Commission (ASIC) has released its annual report for 2017-18 outlining its activities and performance for the previous financial year.

Commenting on ASIC's achievements over this period, ASIC Chair James Shipton said that many instances of misconduct before the Financial Services Royal Commission had been the subject of ASIC investigations and resulted in regulatory actions, adding that 'during the year, we undertook over 1200 surveillances and completed 124 formal investigations'.

'Key regulatory outcomes' highlighted by Mr Shipton include: securing admissions from three of Australia's big four banks over unconscionable conduct in respect of the bank bill swap rate (BBSW) and significant changes to practices in the add-on insurance sector, including the payment of over $122 million in compensation to consumers. Mr Shipton also said that the regulator is working to achieve better regulatory outcomes for investors and consumers through adopting new supervisory approaches, accelerating enforcement outcomes, and being more strategic in its approach.

Mr Shipton noted that the ASIC's four-year corporate plan, explains in more detail how the regulator proposes to respond to future challenges.

[Note: The initiatives identified in ASIC's four year corporate plan, and ASIC's areas of focus were discussed by Commissioner John Price in his speech at the Risk Management Association Annual Chief Risk Officer Conference 2018. See: Governance News 10/09/2018; **Error! Hyperlink reference not valid.**].

[Sources: ASIC media release 31/10/2018; ASIC Annual Report 2017-18]

Ban on flex commissions in car finance has commenced: ASIC issued a statement reminding lenders that the ban on flex commissions in the car finance market commenced on 1 November. ASIC has cautioned lenders it will be monitoring compliance and reminded them that penalties apply.

The Australian Securities and Investments Commission (ASIC) has issued a statement confirming that the ban on flex commissions — commissions paid by lenders to car dealers and finance brokers to encourage them to arrange car loans at the highest possible interest rate — in the car finance market became effective on 1 November.

ASIC implemented the ban by making a legislative instrument in September 2017 by using its powers under the *National Consumer Credit Protection Act 2009*. The ban makes it the responsibility of the lender, rather than the car dealer, to set the interest rate for a particular loan.

The ban is expected to deliver significant savings to consumers by preventing them from being charged 'uncompetitive interest rates'.

Penalties for non-compliance: ASIC cautions that lenders who do not comply face penalties of up to $420,000 per contravention. ASIC will be monitoring lenders, to ensure they are complying and the prohibition is operating as intended.

[Sources: ASIC media release 31/10/2018]

ASIC Commissioner Cathie Armour has called on the investment management industry to raise standards of professionalism

In her keynote address at the Chartered Institute of Management Accountants (CIMA) Society of Australia Annual Conference, entitled: *Ethics and professionalism post Royal Commission—A regulator's view* Australian Securities and Investments Commissioner (ASIC) Commissioner Cathie Armour, spoke on the theme of ethics and professionalism in the investment management industry and the need for analysts to 'raise the bar' not only in terms of skills/knowledge but in terms of 'conscientiousness – that is caring about other people and acting ethically'. 'A truly professional approach requires considerations of a broader range of considerations. For example, do you consider the fund manager's own approach to ethics and professionalism? What do their governance practices tell you? What about their remuneration practices? Does their remuneration consider long and short-term risks as well as financial and non-financial risks?' she said.

Among other things, she highlighted remuneration structures and practices as an area for improvement, commenting that issues identified by the APRA Chair in relation to executive remuneration in financial institutions applied equally in to the investment management industry (see: Governance News 06/04/2018).

In addition she suggested that, 'while strictly speaking the broad MIFID II obligations are not part of Australian law already we are seeing some global fund managers change their practices in response to aspects of MIFID II like research unbundling. Whether you'd like to see more of this in Australia is something CIMA members might want to consider'.

Ms Armour also provided an update on ASIC's work in relation to the sector.

- Ms Armour flagged that ASIC will be reviewing industry compliance with RG 264 Sell Side Research which provides 'specific and reasonably detailed guidelines on how AFS licensees should appropriately manage conflicts of interest during each stage' of a capital raising transaction.
- Ms Armour also said that ASIC will release a report outlining the results of its review of allocation practices in capital raising transactions (including the factors considered when allocation decisions are made, how messages are provided, who makes them and how potential conflicts of interest are managed') before the end of the year and identified some initial findings.

[Source: Keynote address by Cathie Armour, Commissioner, Australian Securities and Investments Commission at the CIMA Society of Australia Annual Conference (Melbourne, Australia), 30 October 2018 and John Price, Commissioner, Australian Securities and Investments Commission (Sydney, Australia) 01/11/2018]

Australian Prudential Regulation Authority (APRA)

In Brief | The AFR reports that the APRA will receive $58.7 million in additional funding over four years to be used to enable greater focus on the identification of new and emerging risk areas (eg cyber and fintech), to fund APRA's review of its enforcement strategy and to enable it to make better use of its enforcement powers.

[Source: [registration required] The AFR 05/11/2018]

In Brief | APRA has released its monthly banking statistics (MBS) for September 2018. Separately, the regulator has written to ADIs regarding changes to the MBS publication that will flow from changes to its underlying data source from mid-2019 and also proposed extending coverage of the monthly banking statistics to credit unions and building societies (but not registered financial corporations).

[Sources: APRA media release 31/10/2018; APRA letter to ADIs 01/11/2018]

Other Developments

In Brief | The AFR reports that Assistant Treasurer Stuart Robert has indicated it is unlikely the government will support the establishment of a new financial regulator, stating that he is of the view that the current 'twin peaks' model is effective, provided the regulators exercise their powers appropriately.

[Source: The SMH 30/10/2018]

Financial Services

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

Top Story | APRA's response to the Financial Services Royal Commission's Interim Report

Introduction

The Australian Prudential Regulation Authority (APRA) has released its response to the Financial Services Royal Commission's Interim Report (see: Governance News 08/10/2018). The submission outlines the regulator's views on issues including the regulatory framework and practices, conduct, culture and governance and specific issues covered in the report including lending practices and codes of conduct. A high level overview of some of the issues raised in the submission is below.

[Note: The Commission has not yet released submissions in response to the Interim Report. However, some entities including APRA, the Governance Institute of Australia (GIA) and the Financial Rights Legal Centre (FRLC) have elected to release their own submissions. These are covered in separate posts in the 5 November issue of Governance News, which you can find on the MinterEllison website here.]

Three broad policy questions

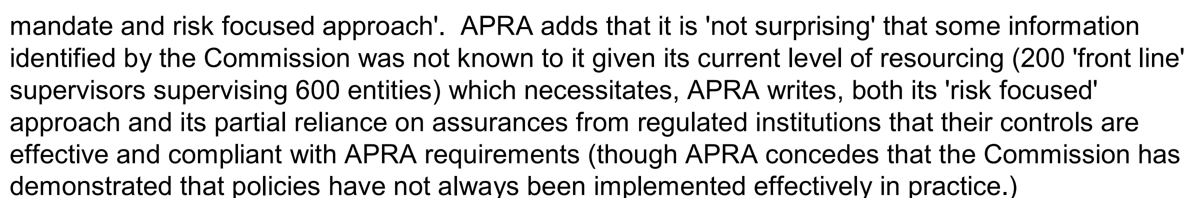
The submission identifies three 'overarching questions' raised by the Commission with respect to regulators, namely:

1. whether the regulators' response to misconduct has been appropriate
2. how regulators should respond to misconduct and compliance risk
3. whether the regulatory architecture or the law should be simplified.

These questions are the focus of much of APRA's submission.

APRA's response to misconduct

- **APRA's response to misconduct has been 'broadly appropriate':** APRA considers that its 'response to misconduct and misconduct risk has been broadly appropriate given its core prudential



mandate and risk focused approach'. APRA adds that it is 'not surprising' that some information identified by the Commission was not known to it given its current level of resourcing (200 'front line' supervisors supervising 600 entities) which necessitates, APRA writes, both its 'risk focused' approach and its partial reliance on assurances from regulated institutions that their controls are effective and compliant with APRA requirements (though APRA concedes that the Commission has demonstrated that policies have not always been implemented effectively in practice.)

- **APRA is reviewing its current approach:** APRA writes that it is reviewing prudential standards on governance and risk to ensure that they focus not only on policies and frameworks but also on implementation in practice and outcomes achieved. In addition, APRA is reviewing its regulatory approach more generally to look at how it can 'deepen' its supervision, and increase the deterrent effects of enforcement action including in relation to its use of public enforcement action where appropriate. In particular APRA states that the review will consider:
  - whether APRA should increase the breadth of issues it seeks to address through public enforcement action;
  - whether APRA should take more enforcement action to hold individuals to account (including under the Banking Executive Accountability Regime (BEAR)); and
  - whether APRA should take more public enforcement action including litigation to achieve general deterrence effects in appropriate cases and publicly disclose enforcement priority areas.
  - APRA adds that it is also rethinking its approach to overseeing culture in light of the issues identified by the Commission. 'The Commission has demonstrated how poor culture together with weak governance within organisation can allow incentives for misconduct to persist undetected within an organisation's business operations. APRA agrees that culture is a key driver of an institution's operations but notes that regulatory oversight of culture is a relatively new and developing field. Clearly this is an area where more work is required APRA's current focus in this area is on accountability and remuneration' the submission states.
- **A more 'active' approach to responding to conduct and compliance risk (but not a wholesale rethink):** Though both APRA and the Australian Securities and Investments Commission (ASIC) have a role to play in guarding against/enforcing standards of governance, APRA writes, ultimately behavioural change is a matter for boards and industry must take 'more responsibility, not less, for maintaining appropriate standards of conduct and guarding against misconduct'. APRA also notes that regulatory responses to compliance need to be tailored to the circumstances of the particular breach, as taking formal legal action on every occasion could result in financial institutions becoming 'wary of all but the most simple and low risk transactions with a much reduced incentive to innovate' which would in turn limit access to/increase costs of financial services.

The role of industry codes of conduct

- **Supportive in principle:** Commenting on the roles of industry codes of conduct, APRA writes that it 'remains supportive in principle of comprehensively adopted and robust industry codes' which in its view deliver 'flexibility within the regulatory architecture to respond to emerging risks and evolving community expectations' and avoid the need for additional legislation/regulation. Having said this, APRA notes that in practice not all entities subscribe or adhere to relevant codes. APRA goes on to say that though it does not have any direct responsibility with respect to industry codes, it does engage on the design of Codes to ensure alignment with prudential requirements. APRA comments that in its view, this approach strikes 'a reasonable balance between engagement about the robustness of industry codes, and ensuring that industry bodies and institutions that are code signatories remain accountable for effective adherence to relevant codes'.
- **Scope for improved enforcement?** APRA goes on to say that a number of case studies considered by the Commission identified instances where a financial institution has not fulfilled its duties under the relevant industry code and that in these cases it is of the view that the industry bodies and the code signatories 'should be accountable for effectively adhering to the code in practice'.

[Note: Contrary to APRA, The Financial Rights Legal Centre (FRLC) submission to the Commission calls for an end to 'self-regulation' by the industry and the introduction of a co-regulation model.]

The current regulatory architecture should not be changed

The submission argues that the current 'broad structure of prudential and conduct regulation and responsible regulators should be maintained' as the existing model has 'served Australia well in terms of economic outcomes' and as an alternative approach risks introducing more complexity and is unlikely to 'drive materially better practices'. Having said this, APRA does support some specific changes. For example in relation to the banking executive accountability regime (BEAR).

Potential expansion of the Banking Executive Accountability Regime (BEAR)

- **BEAR is currently limited in scope:** APRA writes that in its current form, the BEAR may play a limited role in addressing the issues identified by the Commission — by helping to prevent incentives from leading to poor conduct — but that in its current form, it is 'not an answer to all types of misconduct identified by the Commission' due to its limited scope and the way in which it is intended to operate.
- **Follow the UK example?** APRA writes that there would be 'benefits' to following the UK example (UK Senior Managers' Regime), and extend the existing BEAR to other financial sectors and all types of misconduct including conduct affecting individual consumers (rather than being limited to conduct that is systemic and prudential in nature). APRA suggests that this could be accomplished either through legislation or, for insurers and superannuation funds, in a 'simplified form' through APRA's prudential standards. Were this expansion of BEAR to happen, APRA suggests, it should be jointly administered by ASIC and APRA.

[Note: This view appears to be shared by the Financial Rights Legal Centre (FRLC) which also argues in its submission to the Commission that BEAR should be extended, in line with the UK regime, to include accountability measures tied to poor consumer outcomes rather than just prudential matters. 'BEAR in its current form is unlikely to compel any executive to face consequences for the string of scandals that the Royal Commission and other inquiries have identified' the submission argues. 'We believe BEAR should be expanded in similar ways, that is: BEAR should link accountability to poor consumer outcomes; and BEAR should apply to all Australian Financial Service (AFS) licensees – not simply ADIs'.]

Incentives and remuneration — total prohibition on payment of incentives is 'premature'

- **Review of prudential standards:** One of the questions identified by the Commission was whether APRA's prudential standards on governance (particularly Prudential Standard *CPS 510 Governance*, which contains the remuneration requirements) need to be reconsidered. APRA writes that it 'agrees that a sharper focus on incentive structures is needed, both by regulators and financial institutions' and went on to flag that 'APRA intends to strengthen and modernise its governance standards on remuneration to reflect experience to date and current expectations of good practice'.

[Note: CPS 510 was one of a package of six revised cross-industry standards and guidance released by APRA following consultation, in September as part of a project to extend to all APRA regulated institutions stronger standards on board governance and renewal. See: Governance News 17/09/2018]

- **Payment of incentives:** On the issue of incentives, APRA writes that though they can lead to 'perverse' outcomes, 'it would seem premature to call for abolition of any incentives throughout an organisation' given the 'longstanding role' they have played across many industries. APRA goes on to caution that the wholesale removal of incentives 'could have unintended consequences, such as the conversion of variable costs into fixed costs' among others.
- **Industry should 'take the lead':** APRA writes that industry 'should also be expected to take the lead on improving remuneration structures to prevent misconduct from recurring. Institutions looking to enhance conduct-related performance measures should ensure these are implemented in practice'.

Increased oversight/accountability measures?

Commenting on the issue of increased oversight of APRA, APRA states that it has no 'in principle concerns' with proposals that require regulators to demonstrate their performance and accountability but notes that it is already subject to a number of oversight mechanisms and that any new requirement should ideally assess the effectiveness of existing requirements in a 'holistic manner' to streamline/harmonise, rather than add to them. 'There has been a tendency over the years to add new layers of reporting and additional accountability mechanisms on regulators, rather than assess whether/how existing mechanisms night be deficient and, if so propose how they might be improved' APRA writes. APRA states that it 'would be open' to having more frequent reviews, adding that annual reviews are unlikely to provide sufficiently new information to justify the cost.

[Sources: Submission: APRA response to Royal Commission interim report October 2018; FRCL media release 29/10/2018; Submission to the Royal Commission into Misconduct in the Banking, Super and Financial Services Industry Interim Report 26/10/2018]

Time to amend the Corporations Act to include a UK style s172 duty? This is among the suggestions put forward in the Financial Rights Legal Centre (FRLC) submission to the RC interim report.

The Financial Rights Legal Centre (FRLC) has released its submission to the Financial Services Royal Commission's Interim Report (see: Governance News 08/10/2018). A high level overview of some of the points raised in the submission is below.

Some Key Points

- **Law Reform: The *Corporations Act 2001 (Cth)* should be amended to explicitly introduce corporate social responsibility duties for all directors (as has been done in the UK).** The submission argues that 'wholesale reform to regulation of the financial services sector is required to address the poor conduct and system failing identified'. One example (among others) of where this change is needed, according to the submission, is in relation to directors' duties. Despite numerous reviews into possible reform of the Corporations Act, which have determined that the current law is sufficiently flexible to enable directors to take into account the wider interests of the community/stakeholders in their decision making, the misconduct identified at the Commission is evidence that stronger measures are required. 'Short-term profits for shareholders have in practice consistently outweighed the interests of other relevant stakeholders in the deliberations of relevant boards, even where this is clearly to the detriment of the long term interests of the organisation. Directors must be explicitly directed to take all stakeholder interests into account so as to adequately manage these risks' the submission argues. The submission continues, 'The Corporations Act 2001 is therefore, in our view, out of step with community expectations with respect to the expected behaviour of directors and corporations, and as such, sections 180-184 of the Act should be updated to explicitly ensure directors take into account stakeholder interests other than shareholders, particularly their customers'.
- **Hold industry to account by introducing a regular sector wide review or re-run of the Royal Commission.**
- **Enhance and extend the Banking Executive Accountability Regime (BEAR):** In line with APRA (APRA's submission is discussed separately above) the submission argues that BEAR should be extended, in line with the UK regime, to include accountability measures tied to poor consumer outcomes rather than just prudential matters. 'BEAR in its current form is unlikely to compel any executive to face consequences for the string of scandals that the Royal Commission and other inquiries have identified' the submission argues. 'We believe BEAR should be expanded in similar ways, that is: BEAR should link accountability to poor consumer outcomes; and BEAR should apply to all Australian Financial Service (AFS) licensees – not simply ADIs'.
- **Implement a comprehensive prohibition on 'all forms of conflicted remuneration and misaligned incentives' (commissions):** The submission argues that 'All commissions, be they upfront, trailing, bonus, volume based or flex commissions, must be prohibited'.
- **'Self-regulation via voluntary codes of practice has failed and co-regulation must be implemented'** the submission argues. More particularly, the FRLC writes argues that Codes of Practice:
  - should be mandatory for all financial services providers.

- should require the mandatory approval and oversight of the Australian Securities and Investments Commission (ASIC).
- should bind the subscriber to agreements with the code body and with customers (as is the case with the Banking Code)
- should be enforceable and violations should attract effective sanctions. 'A failure on the part of a financial institution to comply with a code of practice should lead to serious consequences, including enforceable sanctions, civil penalties and ASIC administrative action under the Corporations Act 2001 s.915C, and Part IVB of the Competition and Consumer Act 2010'.

Commenting specifically in relation to the Australian Banking Association Code of Practice, The Australian Small Business and Family Enterprise Ombudsman's (ASBFEO's) submission to the Commission appears to raise a number of similar concerns regarding the effectiveness of the current self-regulation model, including that the Australian Banking Association's Code of Banking Practice does not apply to every institution, and that it lacks sufficient force to sufficiently, in ASBFEO's view, protect consumer interests.

[Note: The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) media release and submission in response to the Financial Services Royal Commission's Interim report are here (media release) and here (submission).]

Other suggested measures

Other suggested measures to address the misconduct identified in the Interim Report include the following.

- **Intermediaries should be legally required to act in the best interests of their clients**: 'In all cases where the consumer deals with an entity other than the lender, they must be clearly an agent of the lender (as employee or credit representative) or a licensed intermediary with a best interests duty' the submission argues.
- **Professionalise the financial services industry through strengthened licensing appropriate conduct and qualifications standards and ethics training**.
- **Require loans to be suitable as opposed to 'not unsuitable':** This is preferable, the submission argues as 'requiring a loan to be suitable requires more action on the part of the credit provider to know the objectives and financial situation to match them to a suitable product'.
- **Bring debt management firms into the financial services regulatory framework** and ensure buy now pay later providers are captured by the credit law.
- **Prohibit 'worthless products'** such as consumer credit insurance, add on funeral insurance, accidental death and accidental injury products.
- **Improve protections for vulnerable customers** through strengthened guarantor rules, increased access to basic bank accounts and improved direct debit processes.
- **Prohibit pressure sales tactics and strengthen anti-hawking measures.**
- **Bring small business lending into the regulatory framework** by requiring licensing external dispute resolution and a code of practice coverage for non-bank lenders.

In addition, the submission advocates 'tougher' powers for ASIC, increased penalties for corporate misconduct (in line with the ASIC Enforcement Review Recommendations), compensation measures to help ensure access to swift remediation for consumers (including the establishment of a last report compensation scheme).

[Sources: FRCL media release 29/10/2018; Submission to the Royal Commission into Misconduct in the Banking, Super and Financial Services Industry Interim Report 26/10/2018; [registration required] The AFR 28/10/2018]

Governance Institute submission in response to the Financial Services Royal Commission's Interim Report: Need to revisit 'ethical frameworks' underpinning culture to ensure alignment between theory and practice.

The Governance Institute (GIA) has released its submission in response to the Financial Services Royal Commission's Interim Report.

Some Key Points

- **Need for financial service providers to re-visit the 'ethical frameworks' underpinning decision making, conduct and culture within the institution, to ensure alignment between theory and practice:** The GIA suggests that gap between the way in which companies talked about their services and how they actually behaved, their failure to ask whether they 'should' rather than whether they 'could' is attributable to the gap between the 'declared ethical framework' underpinning the culture, decision making and conduct within the organisation and the reality. As such, the GIA writes, boards should consider a reassessment of their ethical frameworks to ensure alignment between theory and practice as this will assist in addressing poor conduct at all levels of the organisation.
- **Increased disclosure around remuneration is unlikely to address misconduct**. Rather, the GIA writes that there is a 'pressing need for an approach to legislative reporting requirements that simplifies reporting, rather than adding further layers of complexity'. In relation to incentives, the GIA writes that 'eliminating incentive based payments for front-line staff will not necessarily affect the ways in which they are managed' unless there are also changes in the way their managers are rewarded. This is complicated, in practice, the GIA notes by the focus on achieving financial targets by proxy advisers and institutional investors.
- **Need for 'better' enforcement, not necessarily law reform:** GIA writes that existing laws should be better enforced, and the impact of reforms currently in progress assessed, before new legislation is proposed. 'Any new individual element of the regulatory landscape needs to be evaluated for its impact on the regulatory 'whole' or 'sum of the parts'. The greatly increased amount of corporate law and governance legislation introduced in recent years has led to significant complexity as well as unintended consequences' the GIA writes.
- **Supportive of a greater role for ASIC**: The GIA writes that GIA members are of the view that the Australian Securities and Investments Commission (ASIC) could play a key role in restoring and maintaining trust and confidence in the market. The GIA adds that if ASIC is to better enforce existing laws it must be 'well-funded and appropriately resourced' and ASIC itself must be accountable in relation to funding it receives and enforcement action it takes.
- **Reconsideration of how boards and management work together: '**Our members consider that now is the time for a wide-ranging conversation on the clarity of the role of the board versus management. Addressing the matters raised by the Report will require boards and management to work together differently in the future. Our members are already actively considering the implications of these matters' the GIA writes.

[Source: Governance Institute media release 02/10/2018; Governance Institute submission 26/10/2018]

APRA has released its submission in response to policy questions arising in relation to Round 6 hearings into general and life insurance

The Australian Prudential Regulation Authority (APRA) has released its submission in response to policy questions arising in relation to the Financial Services Royal Commission Round 6 hearings. The submission covers life and general insurance, including underwriting and policyholder disclosure, insurance in superannuation, product design and claims management. A high level overview of some of the points raised in the submission is below.accoun

- **Value in continuing to allow 'diverse structures':** APRA states that it 'does not agree that RSE Licensees should be prohibited from engaging an associated entity as the fund's group life insurer, and is of the view that there is general benefit to the Australian financial system in the law continuing to allow diverse structures to compete in the market'. The submission goes on to say that the 'key

issue' raised in these circumstances is the management of conflicts of interest. APRA states that in its view, 'with care and diligence on the part of RSE Licensees, these potential conflicts of interest can be appropriately mitigated'. APRA adds that it 'acknowledges the need to strengthen the requirements placed on RSE Licensee boards in relation to arrangements with potential conflicts, including governance arrangements and assessing performance; adequacy of resources to support the RSE Licensee in fulfilling its obligations; and the authority and independence of the RSE Licensee within corporate structures' as well as the need to 'deepen its supervision of related party arrangements'.

- **Existing disclosure requirements for policy holders should not be lessened:** APRA writes that the duty of disclosure in section 21 of the *Insurance Contracts Act 1984 (Cth)* allows insurers to obtain reliable information from policyholders, so that they can make informed decisions around pricing, underwriting and reserving and on this basis that it 'continues to serve an important purpose'. APRA goes on to state that 'If the onus on consumers to make full disclosures to insurers was lessened, insurers would likely respond by including an additional risk margin in their pricing or may, in extreme cases, be unable to insure the risk and so withdraw from the market'.
- **APRA opposes a 'blanket ban' on use of surveillance by insurers:** APRA writes that it is opposed to a 'blanket prohibition' on insurers engaging in surveillance of insureds who make claims that are 'challenging to assess' on the basis that to do so 'would not strike the right balance'. 'If it becomes known that the insurer is unable or unwilling to reject claims that involve fraud or otherwise do not meet the terms of the policy, an inappropriate incentive is created to attempt to take advantage of those circumstances' APRA writes.
- **APRA opposes banning the sale of products outright (but is supportive of proposed stronger product intervention powers for ASIC to intervene):** APRA writes that certain types of insurance products (eg accidental death and accidental injury products) should not be banned on the basis that 'if a risk is insurable and is capable of causing a loss, then insurers should be able to offer cover to policyholders for whom that cover is suitable'. APRA goes on to say that products 'need to be designed and sold in a way that is fair to consumers' and that though it is opposed in principle to banning products, in light of the outcomes identified by the Financial Services Royal Commission, there is justification for the granting of 'strong product intervention powers for ASIC, to allow for targeted actions in relation to specific products that are causing consumer harm'. APRA states that it is supportive of these powers being granted to ASIC.

[Note: *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018* was referred to the Senate Economics Legislation Committee for report by 9 November and is yet to pass either house. The Bill is discussed in a separate post in this issue of Governance News (05/11/2018) below.]

- **APRA supports the extension of UCT provisions to insurance contracts:** APRA states that 'the terms of insurance contracts should be fair to consumers' and that it 'supports the extension of an appropriately designed unfair contract terms regime to insurance contracts'. APRA goes on to note that 'in designing the detail of the regime, it will be important to minimise the amount of uncertainty created, particularly around the key terms and conditions that underpin the pricing of the policy'.
- **APRA is supportive of ASIC having jurisdiction over the handling and settlement of insurance claims**: APRA writes that it 'supports ASIC having jurisdiction over handling and settlement of claims, and supports obligations on insurers to undertake these functions efficiently, honestly and fairly'.
- **The Existing Superannuation Voluntary Code of Practice should be 'progressively' strengthened over time**: Commenting on the adequacy of the Code, APRA states that the Code should be 'strengthened' over time and identifies a number of 'deficiencies in the current Code including the need to address: the 'lack of enforceability, lack of standard definitions for disability insurance, the issue of multiple accounts and unnecessary multiple insurance covers, and the need to fully reconsider the role and level of default insurance through MySuper versus insurance provided by choice products'. APRA adds that a 'key deficiency' in the current code is lack of enforceability, writing that in its view 'each of the codes applicable in the insurance industries should have appropriate mechanisms to provide for enforceability by the relevant industry body and the code signatories and should be robustly enforced in practice'.

- **Universal minimum coverage requirements:** In response to the question of whether universal minimum coverage requirements, key definitions and/or key exclusions should be prescribed for group life policies offered to MySuper members APRA writes that 'in principle, RSE Licensees should be best placed to know the needs of the members of their fund, and so should be best placed to determine the level and type of cover to be provided'. Having said this, APRA concedes that 'the ability of RSE Licensees to balance the insurance needs of their members with the requirement to not inappropriately erode members' retirement incomes has been challenging for them in practice, and some members have experienced undue erosion of retirement benefits'. On this basis, APRA states that it supports the government's proposed Protecting Your Super package and also 'supports a move towards more cost effective and simpler insurance benefits being provided in MySuper products, which may involve increased standardisation of particular aspects of the benefits provided'.

[Note: The legislation to implement the government's 'Protecting Your Super package': *Treasury Laws Amendment (Protecting Your Superannuation Package) Bill 2018* has not yet passed. The Senate Economics Legislation Committee recommended it be passed on 13 August.]

- **Use of standard definitions/updating of definitions:**
  - **Outdated definitions in Life Insurance products:** APRA writes that it 'is clearly appropriate that life insurers update medical definitions regularly, so that products are not sold with definitions that are out of date'. APRA adds that issues in relation to outdated definitions often occur in the context of 'legacy products' and writes that there are 'legal constraints that create complexity for life insurers in updating the terms and conditions' for these products. APRA states that it has 'long advocated a legislative mechanism to allow for rationalisation of life insurance legacy products by allowing modification of out of date contractual terms in appropriate cases to bring them up to date'.
  - **'Total and Permanent Disability' definition life insurance policies offered to MySuper members:** The submission states that there are 'clear benefits' for members in having a 'single, aligned definition' of 'total and permanent disability' in this context adding that the definition should be 'no narrower than the legislative definition [contained in regulation *1.03C of the Superannuation Industry (Supervision) Regulations 1994 (Cth)*] of permanent incapacity'.
  - **Use of standardised definition of key terms in insurance products?** APRA comments that the question of insurers making greater use of standardised definitions of key terms, raises issues around the design of insurance products and the setting of terms and conditions, which is 'one lever available to an insurer to manage its business'. APRA writes that 'constraints on that ability can involve prudential trade-offs, and can also be expected to increase reliance by insurers on other levers, such as pricing'.

[Source: APRA submission in response to the Royal Commission Round 6 hearings]

In Brief | Final Round of Financial Services Royal Commission Hearings: The next and final round (Round 7) of Financial Services Commission public hearings will take place in Sydney, from 19-23 November, and in Melbourne, from 26-30 November. The seventh round of public hearings will focus on policy questions arising from the first six rounds.

[Source: Financial Services Royal Commission Public Hearings]

In Brief | Trust in banks on the decline in the aftermath of the Financial Services Royal Commission according to Deloitte study which found that only 21% of people believe banks in general have their customers' best interests at heart (rising to 36% in relation to their own bank).

[Sources: Deloitte media release 29/10/2018; [registration required] Deloitte Trust Index — Banking 2018; [registration required] The AFR 28/10/2018; 28/10/2018; Business Insider 29/10/2018]

Other Developments

The Australian Banking Association has raised concerns about the draft legislation on Design and Distribution Obligations and Product Intervention Powers

The Australian Banking Association (ABA) has raised a number of concerns regarding the Bill proposing to introduce new design and distribution obligations and product intervention powers: *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018*.

The Bill was referred to the Senate Economics Legislation Committee on 20 September for Report by 9 November. Appearing before the Committee, the ABA provided the following feedback on the proposed legislation:

- The proposed designed and distribution obligations should not apply to 'basic banking products'.
- The proposed legislation raises 'implementation challenges' for determining appropriate target markets.
- The proposed design and distribution obligations regime should support innovation (given customers are increasingly using digital channels to access financial products).

Recap: Proposed reforms and status update

The *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018* proposes to implement certain recommendations made by the Financial System Inquiry (FSI) by introducing:

1. design and distribution obligations for financial products to ensure that products are targeted at the right people (FSI recommendation 21); and
2. a product intervention power for the Australian Securities and Investments Commission (ASIC) when there is a risk of significant consumer detriment (FSI recommendation 22).

As stated above, the Bill was referred to the Senate Economics Committee for report by 9 November, and is yet to pass either house. Despite this, the government is currently consulting on draft regulations to implement the reforms in the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018*. Consultation will close on 13 November. (See: Governance News 29/10/2018).

[Sources: Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018; ABA November newsletter 02/11/2018]

Open Banking update | Consultation on proposed rules to implement the Consumer Data Right concluded on 12 October and the ACCC has now released submissions. The ACCC has also announced consultation on issues expected to arise when the CDR is rolled out to the energy sector is expected to be scheduled for early 2019.

- On 12 September the ACCC released a proposed rules framework to implement the Consumer Data Right (CDR) for consultation. Consultation closed on 12 October (see: Governance News 17/09/2018).
- The ACCC has now released submissions received in response to the Consultation on the proposed rules framework to implement the Consumer Data Right (CDR). 55 submissions were received in total.
- The ACCC notes that through the current focus in on the banking sector, a number of the submissions were from energy sector participants. Consultation on issues expected to arise when the CDR is rolled out to the energy sector is expected to be scheduled for early 2019.

[Note: The ACCC will not have legal authority to make the rules until the passage of the draft legislation: *Treasury Laws Amendment (Consumer Data Right) Bill 2018*. Consultation on the draft legislation closed on 7 September. However, due to the proposed timeline for implementation of Open Banking — the government has said that its expectation is that the regime will operate in relation to the first tranche of

banking products from 1 July 2019 — the ACCC states that a number of processes need to be run in parallel including development of the rules, technical standards etc. See: Governance News 17/09/2018. For an overview of the draft legislation, see: Empowering consumer choice – ACCC to regulate the Consumer Data Right 17/08/2018]

[Sources: ACCC media release 02/11/2018; Consumer Data Right submissions]

United Kingdom | Time to regulate small business lending to avoid a repeat of the 'scandalous events at RBS' GRG'? The UK Treasury Committee has released its report on SME finance and has recommended (among other things) the extension of regulatory protections to SMEs.

The UK Treasury Select Committee has completed its inquiry into small business lending. The inquiry considered the extent of competition in the market, the various sources of funding available to small businesses and whether the current regulatory framework provides adequate protection to small and medium-sized enterprises (SMEs) when they borrow money.

Some Key Points

- **Current dispute resolution mechanisms are inadequate**: The report found that the only option for many SMEs to settle disputes that cannot be resolved directly with their lender is to go to court which was viewed by the Committee as inadequate on the basis of the potential cost and time involved.
- **The expansion of the Financial Ombudsman Service (FOS) to allow greater access for SMEs (as proposed) is unlikely to address the issue:** Commenting on the 'near final rules' recently published by the Financial Conduct Authority (FCA) which would allow greater access for SMEs to the Financial Ombudsman Service (FOS), the Committee states that it is 'doubtful of the FOS' readiness for an increase in its remit'. More particularly, the Committee raised concerns that under the current proposal the FOS would lack the capability to address more complex disputes. The Committee therefore cautioned against 'rushing through' the FCA's 'ambitious and risky proposals' on the basis that if the Ombudsman is 'under-prepared and under-resourced, it will yield little benefit'.
- **Establishment of a Financial Services Tribunal (to operate alongside the expanded FOS scheme):** Given the Committee's concerns about the capability of the FOS, it recommends that a new Financial Services Tribunal (FST) be established to handle more complex disputes. This would 'complement the expansion to the FOS' remit, and seek to level the playing field where there exists an imbalance of power between disputing parties'.
- **SME lending should be brought within the Financial Conduct Authority's (FCA's) 'regulatory perimeter':** The report found that commercial lending to SMEs is 'mostly unregulated' and that this had led to 'numerous high-profile cases of poor treatment of SME customers, including the scandalous treatment of SME customers at RBS' Global Restructuring Group (GRG)'. More particularly the report cites the lack of enforcement action by the FCA in relation to this as a 'damning indictment' of the current regulatory settings. The report adds that the justification for not regulating lending to SMEs 'is feeble' given the fact that small business owners are 'no more financially sophisticated than everyday consumers' and the fact that 'the personal and business finances of many SME owners are often closely intertwined, increasing the potential for personal catastrophe due to SME banking misconduct'. On this basis the report recommends that the Treasury and the FCA 'should introduce a regulatory regime that protects SMEs'. Commenting on this, Committee Chair Nicky Morgan said: 'A regulatory black hole for commercial lending to SMEs has led to numerous cases of poor treatment of many small businesses, including the scandalous events at RBS' GRG. The Treasury should bring commercial lending inside the regulatory perimeter, allowing the introduction of a regulatory regime that adequately protects SMEs'.
- **Treasury should develop a strategy to overcome SME's unwillingness to apply for finance:** The Committee comments that demand for external financing among SMEs is 'subdued' due to a lack of awareness of the various sources of finance available, mistrust in the banking sector, and the perception that an application for external finance will be unsuccessful. The Report calls on the Treasury to identify develop a strategy to overcome this.

- **Lack of competition in SME banking — Brexit is an opportunity to address it?** The report comments that the lack of competition in SME lending could offer an opportunity to consider how the current regime can better support competition without compromising safety and soundness and adds that the 'government should provide its assessment of how this could be achieved'. In addition, the report suggests that the set of initiatives that the Royal Bank of Scotland (RBS) was required to undertake following the government's bailout of the bank could provide an opportunity to address competition in the banking market and should be implemented in 'as timely a manner as possible.'

[Note: The Australian government has recently announced that Treasury will review of the operation of the existing regulatory regime in place to protect small businesses from unfair contract terms. The review will commence in November 2018 and report to the Government by 1 February 2018. See: Governance News 29/10/2018. Note also that the adequacy (or not) of the existing regulatory framework governing lending to small to medium enterprises (SMEs) was among the issues considered during the Financial Services Royal Commission round 3 hearings (see: Governance News 08/06/2018) and among the policy questions identified in the Commission's Interim Report. More particularly, the Interim Report included the questions of whether there should any change to the current legal framework governing SME lending and more particularly, whether the *National Consumer Protection Act 2009 (Cth)* protections should be extended to SMEs. See: Governance News 08/10/2018].

[Source: SME Finance Inquiry media release 26/10/2018; Report Conclusions and Recommendations; Peer2Peer Finance News 26/10/2018; [registration required] The FT 26/10/2018]

CBA has announced the sale of CFSGAM and executive appointments

The Commonwealth Bank of Australia has announced that Jason Yetton will be appointed CEO and Andrew Morgan will be appointed CFO of CBA's wealth management and mortgage broking businesses effective 1 December 2018.

The appointments follow CBA's commitment in June 2018 to the demerger of NewCo, which includes Colonial First State, Count Financial, Financial Wisdom, Aussie Home Loans and CBA's minority shareholdings in ASX-listed companies CountPlus and Mortgage Choice.

The demerger of NewCo is subject to shareholder and regulatory approvals under a scheme of arrangement. If approved, the demerger is expected to complete in late calendar year 2019.

Mr Yetton's appointment is also subject to regulatory approvals, including any applicable APRA registration requirements.

CBA Chief Executive Officer Matt Comyn said: 'The appointments bring an important mix of external and internal experience, as well as a deep understanding of wealth management and financial services, to lead the new entity. Jason is an accomplished leader, with deep wealth management and broad financial services experience. He is well positioned to lead NewCo and will be strongly supported by Andrew," Mr Comyn said.

Sale of global asset management business: CBA also announced that Colonial First State Global Asset Management will no longer form part of NewCo, instead CFSGAM will be sold to Mitsubishi UFJ Trust and Banking Corporation for total cash consideration of $4.13 billion.

[Sources: CBA media releases 31/10/2018; 31/10/2018]

In Brief | The Australian Financial Complaints Authority (AFCA) 'opened for business' on 1 November ushering in a 'new era for financial dispute resolution, delivering free, fast and binding services for all financial complaints, whether they be related to banks, credit providers, insurance companies or superannuation funds' the government said. The ABA issued a statement echoing the government in welcoming the commencement of the AFCA scheme.

[Sources: Assistant Treasurer Stuart Robert media release 31/10/2018; AFCA media release 01/11/2018; ABA media release 31/10/2018]

Accounting and Audit

Should shareholders expect that auditors will identify and clearly communicate 'systemic' issues? An opinion piece in The AFR suggests that Financial Services Royal Commission should 'next turn' its attention to the role of auditors in identifying and signalling systemic risks to investors.

Writing in The AFR, Professor Stuart Kells (La Trobe Business School) and Scott Hamilton (consultant and director) suggest that the Financial Services Royal Commission should 'next turn' its attention to the role of auditors in identifying and signalling systemic risks to investors. 'All of the financial companies being examined by the royal commission have had independent audits carried out. Occasionally those audits touched upon the matters that are now the focus of the royal commission' they argue, however, issues were not raised in every case, and if they were, were not raised clearly enough to provide 'adequate warning about the storm on the horizon'. They add that while it is not reasonable for auditors to detect every instance of misconduct, it is reasonable to expect that they would identify 'large, longstanding, deep-seated or systematic failings' and in their view 'the community deserves a frank reckoning' of which firms identified which misconduct identified and investigated at the Commission.

[Source: [registration required] The AFR 29/10/2018]

In Brief | New accounting investigation at GE: The WSJ reports that General Electric has cut its dividend to 1c a share (down from 12c), and disclosed that the US Department of Justice has opened an investigation into the company's recent accounting practices (in addition to the Securities and Exchange Commission's investigation). Reportedly, ratings agency Standard & Poor's has cut the company's credit rating and Moody's have placed the company under review.

[Sources: [registration required] The WSJ 30/10/2018; [registration required] The AFR 03/10/2018]

Risk Management

Cybersecurity

Human error remains a key cause of privacy breaches according to OAIC: OAIC has released quarterly statistics for July-September 2018

The Office of the Australian Information Commissioner (OAIC) has released its latest quarterly statistics report on the Notifiable Data Breaches (NDB) scheme for the period July–September 2018.

According to OAIC:

- **Slight uptick in the number of reported breaches on last quarter:** 245 data breaches were notified to affected individuals and the Office of the Australian Information Commissioner, compared to 242 the previous quarter
- **Slight increase in the number of breaches caused by human error:** Malicious or criminal attacks remained the most commonly reported cause of breaches, accounting for 57% (as compared with 59% last quarter). The next most common cause was human error (37%), which is a 1% increase on the last quarter. Commenting on this, Ms Falk said that 20% of data breaches over the quarter occurred when personal information was sent to the wrong recipient, by email, mail, fax or other means and underlined the need for organisations to ensure that identifying and preventing privacy breaches is treated as 'business as usual'. 'Everyone who handles personal information in their work needs to understand how data breaches can occur so we can work together to prevent them' she said.
- **63% involved the personal information of 100 or fewer individuals**, compared to 61% the previous quarter.
- **The top five industry sectors to report breaches** were: Private health service providers: 45; Finance: 35; Legal, accounting and management services: 34; Private education providers; and Personal services: 13

[Source: OAIC media release 30/10/2018]

Data breach settlements at Facebook and Yahoo announced.

Facebook has reportedly been fined £500,000 by the UK Information Commissioner's Office (the maximum allowed under the pre-GDPR law) for its role in the Cambridge Analytica data scandal. Facebook has reportedly said that it is reviewing the ICO's decision. Reportedly, the value of the average data breach fine in the UK has doubled over the course of the last year.

Separately, Yahoo Inc has reportedly agreed to pay $85 million to settle consumer class actions brought in relation to its 2013/2014 data breaches. The settlement, includes a $50 million fund from which consumers can file claims to be reimbursed. In addition, Yahoo has agreed to provide credit monitoring and to pay up to $35 million in legal fees. The settlement is subject to court approval.

[Sources: BBC news 25/10/2018; CNBC news 24/10/2018; City AM 29/10/2018; The Recorder 23/10/2018; In Re: Yahoo! Inc Customer Data Security Breach Litigation]

Climate Risk

Direct accountability for executives to deliver against climate plan at IAG

IAG has announced that under an expanded Climate Action Plan, incorporating a new climate action plan 'scorecard,' senior executives will be held directly accountable for actions on climate change. The scorecard lists key objectives, targets and deadlines, names the Group Leadership Team members responsible, and identifies key milestones for the next three financial years. Incentives are linked to achievement of the targets.

Speaking at the AGM IAG Managing Director and CEO Peter Harmer at which the expanded climate action plan and scorecard were launched, Mr Harmer acknowledged climate risk is of increasing concern to shareholders. He added that adherence to the targets set by the Paris Agreement is the object of the measures adopted, 'Underpinning our efforts is the primary objective identified in the Paris Agreement to limit global climate change to well below two degrees of global warming above pre-industrial levels.'

[Sources: [registration required] The Australian 27/10/2018; IAG media release 26/10/2018; IAG ASX Announcement: Chair's address 26/10/2018; IAG executives directly accountable for Climate Action Plan announcement; Climate Action Plan]

Pressure on companies to address their 'hypocritical' stances on climate lobbying: The FT writes that a coalition of investors has challenged 55 companies to review the positions adopted by trade associations and organisations of which they are members.

The FT reports that a $2tn group of investors, including the Church of England Pension Board, Swedish pension fund AP7, UK asset manager Legal & General Investment Management and Dutch asset manager Robeco have written to 55 European corporations expressing concern about their 'possibly hypocritical approach to climate lobbying' (expressing concern that they are engaging in 'behind the scenes' lobbying to undermine climate change action, while publicly backing carbon reduction).

The FT reports that director of ethics and engagement at the Church of England Pension Board Adam Matthews said 'We are keen to ensure that companies that are making a clear commitment to the Paris agreement are also taking that position across their lobbying'. He added that misleading corporate lobbying practices 'undermined the ability of governments to act on climate change'.

Reportedly, the investors have called on the companies, which include seven automakers and 10 oil groups (including BMW, BP and ArcelorMittal), to review the positions adopted by trade associations and organisations of which they are members.

The FT notes that the Church of England Pension Board, AP7 and other investors previously filed a shareholder resolution at Rio Tinto about disclosure of lobbying practices and adds that the group has signalled that further resolutions could be filed at other companies going forward in the absence of action on the issue.

[Note: In Australia, a shareholder resolution filed by the Australasian Centre for Corporate Responsibility (ACCR) seeking Origin Energy Ltd conduct a review of lobbying memberships and report on whether lobbying groups (including industry associations) are obstructing action on climate change, recently secured the 'largest vote for any shareholder proposal in Australian corporate history' receiving 46% proxy support

ahead of the meeting despite the fact that it was not supported by the board. Though ultimately unsuccessful, Origin has nevertheless committed to providing greater disclosure of its membership of industry associations, including describing processes for engagement and the company's contribution to policy advocacy, in future annual sustainability reports. See: Governance News 22/10/2018]

[Source: [registration required] The FT 28/10/2018]

'Landmark case'? The New York Attorney General has brought a lawsuit against ExxonMobil accusing the firm of defrauding investors by misleading them about the company's approach to managing climate risk.

New York Attorney General Barbara D Underwood has announced a lawsuit against Exxon Mobil Corporation (Exxon) alleging that the company misled investors regarding the risk that climate change regulations posed to its business.

More particularly its alleged that Exxon:

- Falsely represented to investors that it was accounting for the likelihood of more stringent regulation of greenhouse gas (GHG) emissions by factoring in an escalating cost 'proxy cost' of those emissions to its business planning, investment decisions, calculations of the amount and value of company reserves and resources, impairment assessments, and projections of future demand for oil and gas when it was not doing so. Allegedly, Exxon marketed itself to long-term investors on this basis.
- The lawsuit also alleges that Exxon CEO Rex Tillerson knew that Exxon was using different cost figures internally than the ones publicly disclosed to make investment decisions and allegedly allowed the practice to continue 'for years'.

In a statement announcing the action, Attorney General Underwood commented: 'Exxon built a facade to deceive investors into believing that the company was managing the risks of climate change regulation to its business when, in fact, it was intentionally and systematically underestimating or ignoring them, contrary to its public representations.'

The statement adds that the impact of Exxon’s alleged fraud on the company’s value is 'significant in scale and scope' and gives a number of examples of this including that Exxon’s failure to apply its publicly represented proxy costs in 14 of Exxon’s oil sands projects in Alberta, Canada, resulted in undercounting of projected greenhouse-gas related expenses by more than $25 billion over the projected lifetime of the projects.

The suit seeks an order prohibiting Exxon from continuing to misrepresent its practices in this area, and requiring it to correct its past misrepresentations and for damages, a disgorgement of all monies obtained in connection with the alleged fraud, and restitution. Additionally, the complaint requests the court to direct a comprehensive review of Exxon’s failure to apply a proxy cost consistent with its representations, and the economic and financial consequences of that failure.

Reportedly Exxon shares fell following the announcement of the lawsuit.

New York City Comptroller Scott Stringer released a statement welcoming the news of the lawsuit, stating that 'The fraud alleged in the Attorney General’s suit is systematic, intentional, and originates from the highest levels of Exxon management – including the Chairman of the board of directors. It’s daunting and means that this lawsuit is ultimately a failure of the board…I commend Attorney General Barbara Underwood for her efforts to seek accountability and disclosure, and protect investors with this lawsuit.'

In an opinion piece, The AFR (republishing a WSJ article) questions the basis for the NY attorney general's case, suggesting that it lacks merit.

[Sources: New York Attorney General press release 24/10/2018; [registration required] The FT 29/10/2018; New York City Comptroller Scott M Stringer media release 24/10/2018; [registration required] The AFR 31/10/2018]

In Brief | The AFR reports that low ESG scores (and more particularly exclusion from the MSCI ESG Leaders index) may be a predictor of the success of company. 'Below average ESG scores are not predictive of specific disasters, but they are associated with a higher likelihood of something bad

happening…In a good ESG company it's less likely that an oil platform blows up than in a bad [ESG] company' a MSCI representative is quoted as stating.

[Source: [registration required] The AFR 31/10/2018]

Other Developments

Mismatch between stated commitments and actions? Google employees have reportedly staged a walk out in protest over the company's handling of sexual harassment/misconduct cases. The group have called for an end to 'reassuring PR' and 'transparency, accountability, and structural change' at the company.

According to media reports, Google employees from more than 20 different offices (including Tokyo, Singapore, London, Dublin, Zurich, Berlin, Chicago and New York) have staged a walk out in protest against Google's past handling/ongoing approach to dealing with sexual misconduct/harassment claims. The group has reportedly called for greater transparency from the company and an end to gender pay and opportunity inequality. A statement from the group says: 'While Google has championed the language of diversity and inclusion, substantive actions to address systemic racism, increase equity, and stop sexual harassment have been few and far between…ENOUGH. Reassuring PR won't cut it: we need transparency, accountability, and structural change' a circulated employee statement read.

The walk out follows recent media reports into Google's past handling of sexual misconduct/harassment complaints, which allege (among other things) that a $90m exit payment was made to a former top executive, (despite allegations of sexual harassment and misconduct which were not disclosed) and separately the exit of another executive following the disclosure of a sexual harassment claim against him. In response to this, Google's leadership reportedly wrote to employees to reassure them that media reports regarding exit payments are inaccurate and that the company does take sexual harassment/misconduct seriously. CEO Sundar Pichai and HR head Eileen Naughton also confirmed 48 people (including 13 executives) have been terminated for sexual harassment in the last two years (none of whom received exit packages). Mr Pichai reportedly wrote to staff: 'I understand the anger and disappointment that many of you feel. I feel it as well, and I am fully committed to making progress on an issue that has persisted for far too long in our society… and, yes, here at Google, too.'

Media reports have commented that the walkout could signal that a significant number of the 94,000 employees working for Google and its corporate parent Alphabet appear unconvinced the company is doing enough to live up to its stated commitments on the issue.

[Sources: The New York Times 25/10/2018; The New York Times 01/11/2018; Bloomberg 26/10/2018; [registration required] The FT 26/10/2018; 31/10/2018; The New Daily 02/11/2018]

In Brief | Standards Australia has announced that ISO 31000:2018, Risk Management - Guidelines has been published as an Australian adoption of the international standard.

[Source: Standards Australia 30/10/2018]

DIN Regime | The Governance Institute submission on the proposed legislation has reiterated its calls for the extension of the proposed Director Identification Number (DIN) regime to company secretaries

In its submission on the draft *Commonwealth Registers Bill 2018* and the *Treasury Laws Amendment (Registries Modernisation and other Measures) Bill 2018* the Governance Institute has reiterated its calls for:

- the extension of the proposed Director Identification Number (DIN) regime to company secretaries;
- the time period in which a new director or company secretary has to apply for a DIN to be extended from the proposed of 28 days to a period of 60 days;
- the exclusion of personal information (the home address, place and date of birth of directors and company secretaries) from the public part of the register; and
- for the DIN regime to be implemented at the same time as the modernisation of business registers project.

'Failure to include company secretaries in the DIN regime will mean that there is a missing piece of the puzzle when it comes to company registers' said Meegan George, Acting Chief Executive at Governance Institute.

Master Builders Australia submission on the DIN regime: In its submission to Treasury responding to a draft of the proposed laws, Master Builders expressed support for the proposed DIN regime in principle but also suggests a number of 'improvements'. Among other things Master Builders calls for:

- **A change in the proposed approach to the application process to for DINs** (Master Builders suggests that the government should assign DINs and notify directors)
- **A 'moratorium' on the imposition of non-registration penalties** proposing that penalties should not apply for a minimum of 12 months after the commencement of the scheme to allow directors appropriate time to seek advice 'respect to their obligations and rights and take appropriate actions – including establishing a DIN'.
- **passage of DIN legislation should trigger a review** of 'all existing measures in place implemented or proposed to achieve the same or similar policy outcome as stated to be achieved by the DIN'.

'As the DIN is intended to help regulators be more effective, there should be less need for more red tape and regulation. There is no better time than now to take stock of existing regulation and red tape to make sure it is necessary and still effective' Denita Wawn said.

Recap of the (proposed) DIN regime

As has previously been reported in Governance News (see: Governance News 16/07/2018; 8/10/2018; 23/10/2018):

- On 1 October 2018, the government released draft legislation: *Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill* 2018 for public consultation (and subsequently released further changes to the draft Bill on 16/08). The draft Bill proposes to introduces a Director Identification Number (DIN) regime under which directors will be assigned an identification number to enable better 'tracking' over the course of their careers. The measure is part of a package of measures to address the practice of illegal phoenixing.
- The draft Bill proposes that 'eligible officers' (appointed directors and acting alternate directors, but not de facto or shadow directors) of a 'registered body' (a company registered under the *Corporations Act 2001 (Cth)* or *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)*) will be required to have a DIN.
- It's proposed that newly appointed directors must apply for a DIN within 28 days of being appointed a director (unless they are given an exemption from the registrar). Directors who are already in office will have 15 months to apply.

- There are civil and criminal penalties for breaching various DIN requirements.

'Modernisation' and consolidation of business registries: At the same time, the government is also consulting on a second draft Bill *Commonwealth Registers Bill 2018* which proposes to create a new Commonwealth business registry regime. The draft legislation proposes to move certain existing legal registers administered by ASIC onto a single platform to be administered by the Australian Business Registrar (ABR) within the ATO. This includes the registers for companies, business names, ABNs and others. While ASIC's registry functions will be shifted to the ABR, ASIC will continue to administer all of its regulatory functions under the current ASIC laws.

Current status: Consultation on the draft legislation closed on 26 October and the Bills are yet to be introduced.

[Sources: Governance Institute media release 0/11/2018; Governance Institute submission; Masters Builders Australia media release 01/11/2018; Master Builders submission]