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Boards and Directors

Phase two of draft legislation to modernise Business registers (and introduce a legal framework for the implementation of director identification numbers) has been released for consultation.

The government has released the second part of draft legislation: *Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2018: Further amendments*, proposing to modernise Australian Business Registers and transfer the current 31 ASIC business registers onto a single platform. The platform will be administered by the Australian Business Registrar, within the ATO. The Australian Securities and Investments Commission (ASIC) will continue to administer all of its regulatory functions under the current ASIC laws.

The first part of the draft legislation was released on 1 October and included the core provisions that facilitate a modern government registry regime plus the bulk of the referrals of functions and consequential changes from other Acts (see: Governance News 08/10/2018).

The second part was released on 17 October and includes the remainder of the referrals of functions and consequential changes. The proposed amendments will allow ASIC's registry functions to be shifted to the ATO, via the Australian Business Registrar.

Commenting on the proposed changes, Assistant Treasurer Stuart Robert said: 'The current legislative framework that covers ASIC's business registers has not kept up with digital technology and restricts ASIC's ability to interact with clients in their preferred manner'. He added that the consultation is a step in supporting business in an evolving digital economy.

Timeline: Submissions are due by 26 October 2018.

[Sources: Treasury media release 17/10/2018; Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2018: Further amendments (updated 16 October 2018) ; Explanatory Memorandum (updated 16 October 2015)*; Assistant Treasurer Stuart Robert media release 16/10/2018]*

Executives, Secretaries and Officers

CEO turnover in the ASX 200 has hit 20% year on year according to new research published by recruiter Robert Half.

New research published by recruiter Robert Half, tracking the background and experience of ASX 200 CEOs and executive movement has found:

- **ASX 200 CEO turnover has hit 20% year on year** which is attributed to both the number of new CEOs being appointed (23 CEO since last year) and changes in the ASX200 (17 new companies listed on the ASX 200). Commenting on the rate of turnover, Senior Managing Director of Robert Half Asia Pacific David Jones said: 'While economic uncertainty and the need to deliver tangible results for customers and shareholders are causing some companies to make leadership changes, the level of turnover and organisational movement present within Australia's business landscape is not uncommon given the fast-paced nature of the ASX 200 companies and the CEO role itself'.
- **Tenure has decreased:** The majority (63%) of CEOs on the ASX 200 have been in their role for less than five years. One in four (25%) have been in their position for six to 10 years and 12% for more than 11 years.
- **Finance is still the dominant background of the current ASX 200 leadership,** with only a slightly lower number (47%) of CEOs coming from a financial background in comparison to 2017 (50%).
- **The profile and background of the ASX 200-listed CEOs was found to have 'not changed dramatically' over the past 12 months.** According to the report the typical CEO is:
  - most likely to be male (93% are men and 13 are women, up from 12 last year);

- based in Sydney;
- likely to have a postgraduate degree (56% of CEOs have a postgraduate qualification, and 82% hold an undergraduate degree),
- a background in finance (47% of ASX 200 CEOs have a background in finance) as well as international work experience (56% of CEOs have international experience). Despite the growing influence of technology in today's business landscape, only 8% of ASX 200 CEOs have a background in technology.

The report suggests that more attention could be focussed on both recruiting CEOs with cyber skills, and on improving board gender diversity.

Commenting on the report, The AFR suggests that the Financial Services sector appears 'hardest hit' by changes at board level in the wake of issues identified by the Financial Services Commission which raises questions about both the impact of the commission and 'short term business leadership'.

[Sources: [registration required] The AFR 15/10/2018; Robert Half media release 10/2018; Robert Half CEO tracker]

Former credit union CEO charged: ASIC has announced that a former CEO has been charged with breaching his s184(1) duty to act in good faith after (allegedly) failing to provide information to the board relevant to its investigation into voting irregularities following director elections.

The Australian Securities and Investments Commission (ASIC) has announced that the former CEO of WAW Credit Union Cooperative Limited (WAW) (an unlisted public company that operates as a credit union), has been charged with one count of contravening s184(1) of the Corporations Act 2001 (Cth) following an ASIC investigation. If convicted, he could face a maximum penalty of 5 years imprisonment or a substantial fine or both.

Allegations

- The allegations relate to director elections to fill two vacant board positions on the WAW board which were conducted electronically between 4 November 2015 and 18 November 2015.
- ASIC writes that following the election, the WAW board identified irregularities in the voting, including that a total of 627 ballots had been cast from the same Internet Protocol (IP) address (and according to ASIC, this altered the eventual election result). The board then initiated investigations to identify the owner of the IP address.
- ASIC alleges that the former WAW CEO knew the owner of the IP address but failed to inform the WAW board. ASIC alleges that he 'either dishonestly or recklessly failed to exercise his powers and discharge his duties as WAW CEO in good faith in the bests interests of the corporation or for a proper purpose'.
- ASIC notes that the owner of the IP address previously plead guilty and was convicted of one count of contravening section 247C of the *Crimes Act 1958 (Vic)* arising from his unauthorised voting in the WAW board election.

The matter has been listed for a committal mention on 27 November 2018.

[Source: ASIC media release 17/10/2018]

Diversity

Time to remove the financial disincentives for professional women to return to full time work? A KPMG report has found that the financial cost for some professional working mothers to return to full time work can sometimes outstrip the financial benefit.

KPMG has released a report, *The cost of coming back: Achieving a better deal for working mothers* which has found that the cost for some working mothers to return to work, outstrips the financial benefit.

- **Financial disincentives for professional women to return to full time work:** According to KPMG it can cost some professionally qualified working mothers almost $30 a day in tax, lost payments and out-of-pocket childcare expenses if they increase their working days from three to four per week. Other working mothers can lose almost $80 a day if they move from four to five days of work per week. This is attributed by KPMG primarily to the two 'cliffs' (or cut off points) built into current child care subsidy settings that apply once family income hits $186,958 and $351,248 respectively.
- **Time to rethink current settings?** KPMG argues that a 'national rethink' of 'the notion of equity' is warranted to address the disincentives for professional women to return to work, including social change. However, KPMG also advocates 'first stage' modifications to the current child care subsidy to counteract the negative impact of current settings by: a) eliminating the per‑child cap that comes into play at $186,958 per annum; and b) replacing the CCS's termination at $351,248, with a phase‑down rate of 1% point for every $3,000 of extra annual income earned. KPMG writes that 'The interplay of the tax and transfer systems is clearly aggravating the negative consequences of social biases against women. It is time to start rethinking equity with an increased focus on gender.'
- **The report argues that there is an economic case for addressing these issues.** For example, KPMG estimates that the national return on investment from reducing workforce disincentives facing professionally trained women is in the range of 100–210%. The report adds that by reducing workforce disincentives facing professional, university-educated women, up to 12 million working hours could be added to the economy annually which is the full-time equivalent of an additional 6,500 women to the Australian workforce.
- **Addressing these issues would promote gender equity:** The report also argues that implementing the proposed changes would be 'an important step towards promoting gender equity in the workforce, making Australia not only more prosperous in the long run, but fairer for working women'.
- **Partial solution to a broader equity issue:** KPMG acknowledges that addressing the issues identified for professional women is only a partial solution to a broader issue in that it will 'not affect the numerous disincentives for working women with young children further down the income scale' and that this would require a 'major' shift in the 'public policy philosophy underlying taxpayer-funded childcare support'.

[Source: KPMG media release 16/10/2018; The cost of coming back: Achieving a better deal for working mothers; [registration required] The AFR 15/10/2018; The ABC 16/10/2018]

BHP has reportedly confirmed it is on track to achieve 50% female workforce by 2025 due to implementing measures focused on both hiring and retaining female employees.

The FT reports that BHP has confirmed it is on track for women to make up 50% of its 26,000 strong workforce by 2025, following a 40% increase in the number of female staff over the past two years. BHP has reportedly attributed the increase to implementing initiatives to boost the hiring of women and in addition, implementing measures to increase retention of female employees (eg more flexible work conditions). 'We've got to have balanced hiring and balanced retention — so it's not a revolving door where we bring women in and they don't stay' BHP Chief People Officer Athalie Williams said.

Since setting the target in 2016, 75% of new hires (2000) have been female increasing the percentage of women from 17.6% to 22.4% at the company.

The FT comments this is a higher percentage of women than its peer organisations Rio Tinto (which has 18% female workforce) or Glencore (which has a 14% female workforce globally, rising to 40% in its trading and marketing divisions).

[Sources: [registration required] The FT 17/10/2018]

Shareholder Activism

Another resolution to split the CEO/Chair roles at Facebook: State treasurers in four US states will reportedly support Trillium Asset Management's shareholder resolution to split the Chair and CEO

roles at Facebook, which if successful, would effectively remove Mark Zuckerberg (current Chair and CEO) as Chair of the company.

The AFR reports that the state treasurers of Illinois, Rhode Island and Pennsylvania, and the city comptroller of New York, have signed on to a shareholder proposal filed by investor Trillium Asset Management seeking to replace Facebook Chair and CEO Mark Zuckerberg with an independent Chair. Their view is that separating the Chair and CEO roles is 'in the best interest of shareholders, employees, users and our democracy' as evidenced by recent scandals (eg the Cambridge Analytica data breach).

Unlikely to succeed? Media reports have pointed out that a similar proposal was defeated last year (5.4bn votes against and 765m votes in favour) and suggest that this year's proposal is also unlikely to succeed given the unequal voting structure at Facebook (Mr Zuckerberg controls a majority (60%) of shareholder votes).

According to The AFR, Facebook has not commented on Trillium's proposal except to cite its response to the previous proposal in which it stated that it does not believe an independent chairman would 'provide appreciably better direction and performance, and instead could cause uncertainty, confusion, and inefficiency in board and management function and relations'.

[Sources: [registration required] The AFR 18/10/2018; Reuters 18/10/2018; firstpost.com 18/10/2018]

Premier Investments' campaign at Myer: There has been media speculation of a possible board spill and/or second strike, after Premier Investments (Solomon Lew) released another letter criticising the Myer board.

- **Activist Premier Investments (Solomon Lew) has issued a statement attacking the Myer board.** The statement alleges that CEO John King is unable to execute on his promise to close the 'clearance floors' permanently rather than for a limited trial period, due to (alleged) board opposition. Premier writes that this is 'proof that Mr King is battling against his own Board in making the necessary decisions to improve Myer's performance' and goes on to state that he 'needs a Board he can work with, not against. Mr King needs the advice and guidance of a group of experienced directors, not the failed individuals he has at present'.
- **More 'groundwork' for a possible board spill?** The Australian suggests that Premier's latest critique is another step in its strategy to overthrow the Myer board, possibly at the upcoming AGM, notice of which is expected to be released in the next two weeks though the report also notes that Myer could have up to three directors standing for re-election when Ian Cornell, Bob Thorn and Dave Whittle hit the three-year mark next year.
- **Possible second strike?** The Australian also speculates that following the almost 30% against vote last year, and given Premier's negative campaign against the board, a second strike is 'could be a formality this year'.

[Sources: Premier Investments media release 15/10/2018; [registration required] The Australian 16/10/2018; 16/10/2018]

Institutional Shareholders and Stewardship

Cbus has announced that is benchmarking its asset managers to determine how well they factor climate change into their investment decisions.

Following Cbus Super's earlier announcement that it has set a target for all its property holding to be net-zero emissions by 2030 (when that portfolio is tipped to be worth $10 billion) Cbus has announced that is benchmarking its asset managers to determine how well they factor climate change into their investment decisions.

'In our real assets, like property and infrastructure, there are potentially physical impacts on assets from climate change that need to be incorporated into analysis…This will involve engaging with our managers to help them set targets and deliver on this overarching target. The 2030 target is important from an investment lens, as it is being driven by the market' Cbus is quoted as stating.

[Source: Investment Magazine 12/10/2018]

In Brief | ACSI has announced that Cbus has signed on to the Stewardship Code.

[Note: The Australian Council of Superannuation Investors (ACSI) released The Australian Asset Owner Stewardship Code (the Code) on 17 May 2018. The voluntary Code is open to all asset owners (including super funds, endowments and sovereign wealth funds), not just ACSI members. See: Governance News 18/05/2018]

[Source: ACSI media release 15/10/2018]

Meetings and Proxy Advisers

ESG resolutions

Top Story | Origin shareholders have delivered a strong statement on anti-climate lobbying at the recent AGM: One of ACCR's four shareholder resolutions at Origin Energy Ltd received 46% proxy support ahead of the meeting.

- **One of the ACCR's four shareholder resolutions at Origin Energy Ltd (Origin) (seeking disclosure of membership of industry associations and lobbying interests) received 46% proxy support ahead of the meeting.**
- **Though ultimately unsuccessful, Origin has nevertheless committed to providing greater disclosure on the issue.**
- **The remaining proposals (constitutional amendment; setting emissions targets aligned with the Paris Climate Agreement; and ensuring prior and informed consent of Aboriginal traditional land owners has been established in relation to potential exploration sites in the Northern Territory) were unsuccessful with opposition ranging from 86% to 90%.**

Context

Despite the low levels of support for ESG resolutions in the 2017 AGM season, The Australasian Centre for Corporate Responsibility (ACCR) lodged four shareholder resolutions at the Origin Energy Ltd AGM.

The resolutions were as follows:

1. **Constitutional Amendment**: Special resolution to amend the company's constitution: a binding resolution to amend the constitution to allow for the submission of non-binding advisory shareholder resolutions. (Contingent on the constitutional amendment, three further advisory resolutions were also submitted).
2. **Informed consent of Traditional Owners**: Ordinary resolution on 'Free, Prior and Informed Consent' from the Aboriginal Traditional Owners and communities (who may be affected by Origin's intended operations in relation to petroleum exploration permits in the NT). Commenting on this proposal, ACCR stated that it is the first proposal of its kind ever voted on in Australia.
3. **Alignment of strategy with Paris 2C target**: Ordinary resolution on emissions targets (aligned with the goal of the Paris Climate Agreement to limit global warming to well below 2C).
4. **Review of lobbying activity/disclosure**: Ordinary resolution seeking a 'comprehensive review' of the 'company's positions, oversight and processes related to direct and indirect public policy advocacy' (a review of the alignment between the company's stated position on climate and lobbying positions held by various industry associations/other bodies, and disclosure of the financial contributions made to the company by associations/other bodies).

[Note: The full text of the resolutions is here]

Origin has committed to providing increased disclosure on lobbying/membership of industry organisations

The Origin AGM was held on 17 October 2018 and resolution 4 above (review of lobbying activity/disclosure) received 46.3% of proxy votes lodged ahead of the meeting in support, which ACCR comments is the largest vote for any shareholder proposal in Australian corporate history.

Origin's Chair Gordon Cairns acknowledged that the issue 'is of considerable interest to our shareholder base' and that on this basis the company would be 'very happy to improve the disclosure of our membership of industry associations, including describing our processes for engagement and our contribution to policy advocacy in our future annual sustainability reports'.

Remaining ESG proposals unsuccessful: The remaining proposals were unsuccessful with opposition ranging from 86% to 90%.

Commenting on the issue of consultation with traditional land owners in the NT, Origin's Chair defended the company's consultation process stating that the company is comfortable that it has respected the rights of the traditional owners and the requirements of the Northern Land Council in its engagement to secure community support for drilling next year in the Beetaloo Basin.

Remuneration report?

Origin's remuneration report received 92.63% support from proxies lodged ahead of the meeting.

Most successful AGM season yet?

Citing the results at Westpac and Origin (discussed in a separate post in the 23/10/2018 issue of Governance News), the ACCR comments that 'This AGM season is shaping up to be our most successful yet'.

[Sources: ASX Announcement: Origin Energy Annual General Meeting 2018 results 17/10/2018; Chairman's address 17/10/2018; Glass Lewis blog 10/10/2018; ACCR media release 17/10/2018; ACCR media release 15/10/2018]

Concessions on ESG resolutions: The ACCR has announced the results of its successful private engagement with Westpac and NAB

ACCR has withdrawn a shareholder resolution calling on Westpac to disclose more information about its membership of business lobby groups after the bank agreed to review its memberships and its positions on climate change ahead of the AGM.

The Australasian Centre for Corporate Responsibility (ACCR) withdrew a shareholder resolution calling on the bank to disclose more information about its membership of business lobby groups after Westpac agreed, ahead of the AGM, to review the Business Council of Australia's (BCA's) advocacy and membership.

The ACCR quotes Westpac as stating: 'As part of its annual reporting Westpac will set out principles for engagement with industry associations [including the BCA], and will commence a review of key industry association memberships in relation to our main areas of policy interest, including a focus on lobbying and advocacy related to climate change. Westpac expects to announce its full year results on 5 November 2018, with annual reporting to be released soon after.'

Brynn O'Brien, Executive Director of ACCR welcomed Westpac's decision, stating 'We commend Westpac making this commitment in the wake of the IPCC's special report on the impacts of 1.5°C of global warming. This report is a clear warning to companies that they must reconsider their relationships with industry associations that continue to block effective climate action against the interests of members'. He added that 'adverse climate lobbying also comes with profound risks to long-term shareholder value'.

[Sources: ACCR media release 15/10/2018; [registration required] The SMH 15/10/2018]

Successful private engagement at NAB

The ACCR also announced that it will not lodge a planned resolution with NAB on climate lobbying after NAB agreed to become the 'first ASX100 company to publicly acknowledge the need to take action on the scientific conclusions of the IPCC's special report on the impacts of 1.5°C of global warming'. Citing the results at Westpac and Origin (discussed in a separate post below), the ACCR comments that 'This AGM season is shaping up to be our most successful yet'.

[Sources: [registration required] The SMH 18/10/2018; ACCR newsletter 18/10/2018]

Market Forces has called for support of its climate resolutions at Whitehaven Coal and challenged the company's continued commitment to coal ahead of the 25 October AGM.

Ahead of the upcoming AGM at Whitehaven Coal on 25 October, environmental action group Market Forces has written an article in the SMH calling on shareholders to support shareholder resolutions (coordinated by Market Forces) requesting that Whitehaven align its strategy with the Paris Agreement on climate change, and challenging Whitehaven's continued commitment to coal in light of the recent UN commissioned Intergovernmental Panel on Climate Change (IPCC) report (see: Governance News 15/10/2018). 'The future Whitehaven is working towards and meeting the outcomes of the Paris Agreement differ by barely one degree in terms of global warming. But that difference means we can either keep Whitehaven's current growth plans or keep the Great Barrier Reef. Investors, which do you think is in our best interests?' MarketForces writes.

MarketForces' resolutions are not supported by the Whitehaven board.

The resolutions

As at Origin (among others) Whitehaven received a binding resolution to amend the constitution to allow for the submission of non-binding advisory shareholder resolutions. Contingent on the constitutional amendment, two further advisory resolutions ask for increased disclosure on climate risk in line with the TCFD recommendations from 2019; and call for the company's strategy and capital expenditure decisions are consistent with the climate goals of the Paris agreement.

[Note: The full text of the resolutions can be accessed here.]

Whitehaven shareholder update: Whitehaven to consider adopting TCFD recommendations, but will continue to promote 'high quality, low emissions' coal

Whitehaven recently released a shareholder update on climate change reporting on 5 October. The update states that:

- **Whitehaven is committed to playing a role in reducing carbon emissions through promotion of the use of 'high quality, low emissions coal':** Whitehaven writes that climate change is an issue requiring 'coordinated international action' and commits to 'playing a role in reducing carbon emissions by promoting increased 'use of Whitehaven's high quality low emissions coal' use of which, it views as essential in enabling a number of countries (Japan, Korea and Taiwan) to meet their Paris Agreement Targets. Continued use of coal is consistent with the International Energy Agency's base case for New Policies Scenario which predicts that coal demand globally will continue to increase until 2040, and more than double in South East Asia Whitehaven adds.
- **Consideration of the TCFD recommendations?** Whitehaven writes that its disclosures on climate change related matters 'continue to evolve in line with industry trends and shareholder expectations' and goes on to say that it is reviewing the Task Force on Related Financial Disclosures (TCFD) recommendations with a view to incorporating these into the company's reporting for 2019. .

[Sources: The SMH 19/10/2018; MarketForces ASX Announcements: Climate update 13/08/2018; Notice of Annual General Meeting 2018]

In Brief | ACCR proposal at Qantas: The Australasian Centre for Corporate Responsibility (ACCR) and the Refugee Advice and Casework Service (RACS) have co-filed a shareholder resolution calling on Qantas to 'stop deportations and removals to danger' and to commission a human rights review to align Qantas' deportation practices with the UN Guiding Principles on Business and Human Rights. Qantas currently undertakes deportations of refugees and asylum seekers as a service provider to the Australian Department of Home Affairs. The Qantas AGM will be held on 26 October.

[Source: ASX notice of AGM 31/08/2018; ACCR media release; Glass Lewis blog 10/10/2018]

Executive remuneration

Top Story | A sign of shifting shareholder expectations on executive remuneration? Telstra and Tabcorp shareholders have delivered first 'strikes' at recent AGMs sparking media speculation that this is the start of an AGM season of shareholder revolts.

Telstra and Tabcorp investors have each delivered first 'strikes' against the firms' remuneration reports at recent AGMs with almost 62% of investors voting against the remuneration report at Telstra, and 40% voting against the remuneration report at Tabcorp as well as delivering a strong protest vote against the reelection of Tabcorp board member Steven Gregg (over 40% against his reelection).

A brief overview of the comments made by the Telstra and Tabcorp Chairs in relation to the remuneration is below.

Telstra Chair's comments on remuneration

As previously reported in Governance News on 15 October there was considerable disagreement among Telstra investors ahead of the AGM with proxy advisers Glass Lewis, ISS and Ownership Matters each issuing recommendations against it, on the basis that they believed the board had not reduced executive bonuses sufficiently in light of the company's performance.

- **Executive remuneration is too high:** Mr Mullen said 'I personally believe that executive salaries are too high across the board' adding that any change would require a wholesale change across all companies and would take considerable time. He went on to say that Telstra had already made inroads in this regard citing the fact Telstra CEO Andy Penn's remuneration had decreased 50% over the past two years in line with company performance and that CEO remuneration at the company had progressively decreased over time with the current CEO's predecessors receiving higher salaries than the incumbent and his successor likely to receive a lower salary than the current CEO.
- **The first 'strike' a disappointment to the board:** Mr Mullen acknowledged the level of dissatisfaction with the remuneration report, adding that the 'first strike' is 'deeply disappointing' to the board. He said that the board and remuneration committee had spent considerable time and effort trying to get remuneration 'right' and went on to stand behind the company strategy, to defend management's performance and the time and effort, and the approach taken by the Telstra board and remuneration committee in relation to executive remuneration. 'I am very willing to apologise if, despite our best efforts, we have not been adequately transparent in our remuneration disclosures, or we have missed enhancements that could make our structures better. If anyone has a better solution, we would welcome it. However I cannot apologise for continuing to do what we believe is the right thing for the company and the right thing for shareholders in the long term' he said.
- **Shareholder dissatisfaction does not reflect poor management performance, but rather declining share price?** 'If we call a spade a spade here, the bottom line is that it would seem that for many shareholders, if they see the value of their shares diminish, then they consider that management has performed badly and should not receive any of their variable compensation, irrespective of whether management have done a good job that year or not' Mr Mullen said. Mr Mullen went on to say that if correct, it means 'that we can make all the changes we like to the [remuneration] scheme and we will never please everyone. This I believe is over simplistic and simply wrong. The share price cannot be the only metric by which we evaluate management performance.'
- **Incentivising executives to perform strongly in bad times:** Mr Mullen also expressed the view that incentivising executives to perform strongly in bad times assumes greater significance.
- **Going back to fixed salaries?** Mr Mullen said that if we are 'moving to a world where variable compensation is seen principally as a bonus for positive share price development' then 'why do we need complicated remuneration structures at all. Maybe there is a case for doing away entirely with all these complex schemes and just go back to a fixed salary commensurate with the difficulty of the role with maybe one half in cash and one half in shares locked up for five years. No metrics, no adjustments, no exclusions, or adjustments and no complicated tables'.

- **No change at Telstra for now:** Having said this, Mr Mullen said that immediate change was not possible. 'Next year is also going to be a difficult year for Telstra as everyone knows, but we cannot change direction every time a proxy advisor or shareholder finds a new fault with our approach and we cannot say to management that there will be zero available remuneration this year even if you do a great job. We will listen we will consult yet again, and we will do everything we can to amend and enhance our remuneration policies where it is demonstrated that we can do better, but we cannot compromised on doing what we think is right for the long term health of the company and for you and our shareholders' Mr Mullen said.

Tabcorp Chair's comments on remuneration

Over 40% of shareholders voted against the remuneration report at Tabcorp and in addition, over 40% voted against the reelection of director, Steven Gregg.

Changes to the structure of merger completion awards in response to shareholder feedback: In her address, Tabcorp Chair Paula Dwyer acknowledged the concerns expressed by some shareholders concerning remuneration adding that 'It is clear these concerns relate principally to the Merger Completion Awards granted to management' with some shareholders expressing a preference for the awards to be conditional on the achievement of the 'combination' of Tabcorp and Tatts becoming effective. She commented that:

- The one-off awards were in 'recognition of management's extraordinary efforts over a prolonged period to successfully negotiate' a strategically complex transaction in addition to their existing duties.
- Ms Dwyer also said that in response to shareholder feedback, the board would change the structure of the payments. A 'synergy based performance measure' (the achievement of 'synergies and benefits from the combination of Tatts and Tabcorp at the end of FY21) would be applied and the vesting period for the restricted shares granted to key management personnel under the merger completion award would be extended from two to three and a half years.

Response to concerns around director accountability

Ms Dwyer went on to say that proxy advisers and investors had raised concerns in relation the role of boards and director accountability in relation to both the AUSTRAC matter and the unsuccessful startup Sun Bets joint venture and that these issues were 'coming to the fore' in the voting on the remuneration report and the reelection of director Steven Gregg.

- **In relation to AUSTRAC concerns** she said: 'Given the acknowledgement of the regulator and the facts around Tabcorp Board accountability as approved by the Federal Court it is unfair and incorrect for directors of Tabcorp to continue to be targeted of failed accountability'.
- **In relation to unsuccessful Sun Bets startup** she commented that 'it is disappointing that a well-considered initiative although unsuccessful is used selectively or in isolation to discredit Tabcorp director performance' and further that 'It is critical for the success of Australian Businesses, the economy overall and in the interests of shareholders, that boards and management teams make considered investments to drive long term growth and shareholder value. In fact this is a key aspect of the board's role. Not all these bets will pay off. However, it does not serve the interests of shareholders for boards and management to do nothing for fear of retribution.'

New Diversity Targets announced: Separately, the Chair also announced that Tabcorp has put in place new diversity targets: at least 40% female NEDs by the end of FY23 and at least 40% of senior leadership roles filled by women by the end of FY21.

Media reports

The two 'strikes' have received wide media coverage.

- **Not about management performance, but rather about 'money'?** In an article that appears to agree with the view of Telstra Chair John Mullen, the SMH suggests that the recent results are not principally motivated by community distrust in corporations, but 'mainly about money' in that shareholders seeing negative impacts on their investments as a result of corporate misbehaviour, expect that 'culpable executives will have their hip pockets hit'. The article goes on to suggest that shareholders are unconcerned with complex remuneration schemes 'But they do understand the notion of — we lose, you lose'.

- **The start of things to come?** The SMH suggests that the more than 30 ASX 200 companies hosting AGMs in the coming week are likely to also face pressure from smaller investors over executive remuneration in the wake of the strikes against Tabcorp and Telstra. The report also suggests that Qantas and Brambles are 'heading for showdowns with smaller investors' over the issue (though the article notes that proxy advisers have not recommended votes against the remuneration reports of either company).
- **A possible trigger for change on remuneration?** Australian Council of Superannuation (ASCI) CEO Louise Davidson has reportedly commented that the results are an indication of the level of shareholder dissatisfaction with bonuses paid regardless of performance and suggested that though the 'message' on executive pay had been slow to get through it is gaining traction due to poor company performance, stagnant wages, and the issues identified by the Financial Services Royal Commission. Ms Davidson reportedly also said that the results may signal that 'we are entering a period where there will be changes'. Separately, the Australian also reports that Morgan Stanley has suggested that the result at Telstra 'has the potential to prompt changes in practice'.

[Note: ACSI's latest report on CEO pay: *CEO Pay in ASX 200 companies: ACSI Annual Survey of S&P/ASX200 Chief Executive Remuneration* found (among other things) that average executive pay in 2016-17 was at its highest level in 17 years and that bonus payments 'resemble variable fixed pay' with CEOs appearing more likely to lose their jobs than their bonuses. See: Governance News 23/07/2018]

- **Negative impact of proxy advisers/shareholders 'caucusing to undermine out leaders':** The AFR reports that Tabcorp Chair Ms Dwyer has expressed concern over what she reportedly views as investors and advisers working together to undermine the company's leadership in a way that damaged the interests of shareholders. 'The maligning of people's reputation under the cloak of investors' rights to have a view is completely unreasonable…The secret is, what does a board do when something goes wrong? I think the Tabcorp board particularly has, unfortunately, a lot of experience in these things, and has acquitted itself very well' she is quoted as stating.
- **Are boards out of step with shifting shareholder expectations?** The AFR suggests that the fact that the board's decision to alter the structure of remuneration in response to shareholder concerns at Tabcorp was insufficient to address shareholder concerns as evidence of shifting shareholder expectations. More particularly the article suggests that the result at Tabcorp raises questions, about whether investor concerns are being raised in a reasonable way and whether boards are listening. In a 'world demanding greater accountability, faster than ever before, boards are likely to find they don't like the answers' the SMH writes. Citing the opening address by Tabcorp Chair Paula Dwyer as an example, The AFR suggests that 'there is a sense that chairmen are ready to stare critics down and effectively ask: What do you really expect from us?'.

[Sources: Tabcorp ASX announcement: Chairman's address 17/10/2018; Tabcorp results of AGM 17/10/2018; [registration required] The AFR 17/10/2018; 18/10/2018; 18/10/2018; Australian 17/10/2018; 18/10/2018; 18/10/2018; [registration required] The SMH 18/10/2018; 22/10/2018]

Other Developments

In Brief | In the lead up to the planned SEC roundtable discussion on possible changes to proxy regulation, Glass Lewis/Value Edge Advisers have raised concerns about (alleged) 'anti-shareholder propaganda' from conservative business groups calling for change of current shareholder rules based on what Value Edge Advisers/Glass Lewis regard as spurious arguments.

[Note: The Securities and Exchange Commission's (SEC's) announced plans to hold a 'roundtable' on the proxy system (to facilitate discussion on the proxy process, shareholder engagement and to hear investor, issuer and other market participant views on the need (or not) for existing proxy rules to be 'refined') earlier in the year (see: Governance News 06/08/2018; 17/09/2018) and the meeting will be held next month.]

[Source: ValueEdge Advisers blog 09/10/2018; Glass Lewis blog 11/10/2018]

Disclosure and Reporting

United Kingdom | FRC Financial Reporting Lab review of risk reporting practices has found limited improvement over the past year.

The UK Financial Reporting Council (FRC) Financial Reporting Lab has released a report: *Business model reporting; Risk and viability reporting – Where are we now?* which considers how reporting practice has changed since the Financial Reporting Council's Financial Reporting Lab published its original reports in 2016 and 2017. It also includes practical examples from companies that have implemented the recommendations in those reports.

Overall, the report found limited improvement in disclosures over the past year with changes in business model reporting found to add 'neither broad understanding nor company specific detail' and to lack connection to wider information within the annual report; and lack of detail in risk reporting (eg lack of detail on mitigating actions and links to business model/KPIs especially in relation to Brexit preparedness).

[Source: FRC media release 18/10/2018; Business model reporting; Risk and viability reporting – Where are we now?]

In Brief | A US court has approved the SEC settlement with Tesla and Tesla CEO Elon Musk: The AFR reports that a US judge has approved Tesla and Tesla CEO Elon Musk's $US40 million settlement with the US Securities and Exchange Commission, resolving allegations that Mr Musk misled the public over his Twitter announcements of plans to take the company private. According to The AFR the result was expected, even in the face of Mr Musk's recent 'insulting' tweets about the 'Short seller Enrichment Commission' a few days after reaching the deal with SEC.

[Source: [registration required] The AFR 17/10/2018]

Regulators

The Australian Securities and Investments Commission (ASIC)

ASIC Chair James Shipton has reiterated to the Joint Parliamentary Committee on Corporations and Financial Services that the regulator is committed to enhancing its approach to enforcement but has questioned whether it is 'right sized' to meet expectations.

In his opening statement to the Parliamentary Joint Committee on Corporations and Financial Services, Australian Securities and Investments Commission (ASIC) Chair James Shipton has acknowledged the Financial Services Royal Commission's criticisms of ASIC's approach and reiterated ASIC's commitment to enhancing its supervision and enforcement. However, he has also questioned whether ASIC (and its peers) are in a position to meet expectations given their size/resourcing.

Further detail

- **Acknowledged the criticisms made by the Financial Services Royal Commission's interim report** and said that the regulator 'fully accept that we need to continue to make changes to our approach to enforcement to deliver more effective deterrence'.
- **Commitment to use every tool available to address misconduct:** Mr Shipton said that the regulator will use every available enforcement tool available stating that 'If institutions lie, or are otherwise dishonest with us, we will use every power available to us to punish that behaviour. I am a firm believer in the importance and effectiveness of court-based enforcement tools. They are the foundation of any regulator'. He then reiterated the changes being implemented to 'enhance' decision making structures and processes in relation to enforcement including steps to 'accelerate' enforcement outcomes, the introduction of new supervisory approach (see: Governance News 04/06/2018; 30/07/2018; 13/08/2018; 10/09/2018) and the internal review of ASIC enforcement processes led by new ASIC Deputy Chair Daniel Crennan QC. Mr Shipton added that any analysis of 'court based' enforcement will also need to consider 'court processes as well as timeliness, cost and likely success, especially in relation to remediation' noting that this would be addressed in ASIC's formal response to the Financial Services Royal Commission.

- **Despite commitments to change, ASIC continues to experience delays from industry:** Mr Shipton observed that 'unfortunately, whilst we are hearing important acknowledgements from leaders of financial institutions about change, such change is not happening as quickly as it should. ASIC is still experiencing slow and delayed responses from financial institutions and, in some cases, overly technical responses aimed at delay. Due process is important, but it must not be manipulated to disrupt the achievement of fair, appropriate and honest outcomes'.
- **Is ASIC 'right sized' to be in a position to utilise enforcement tools more often in line with expectations?** Referencing the Financial Services Royal Commission's Interim Report, Mr Shipton noted that the Interim Report states that because market deterrents to poor behaviour are 'missing' in the Australian financial sector, 'only the regulator can mark and enforce' boundaries. He added that given this, it is clear 'that ASIC is expected to utilise enforcement tools more often, particularly against larger financial institutions because, as the Interim Report highlights'. Mr Shipton went on to question whether ASIC is in a position to meet these expectations, observing that 'expectations need to be balanced against reality. The reality of how ASIC is empowered and resourced as well as the legal and regulatory settings within which ASIC operates'. Alongside discussion of ASIC's approach to enforcement, a conversation needs to be had, Mr Shipton said, about 'ASIC's regulatory positioning as regards its size and resourcing'. Mr Shipton went on to suggest that a 'conversation' should be had about whether ASIC (and its peer organisations) are 'right sized' to meet expectations noting that on an 'adjusted basis' in terms of financial services GDP and financial services population, Hong Kong's financial regulators are three times the size of Australia's.

[Source: Opening statement by ASIC Chair James Shipton to the Parliamentary Joint Committee on Corporations and Financial Services 19/10/2018]

ASIC has announced a review of 'school banking' programs in primary schools

The Australian Securities and Investments Commission (ASIC) has announced that it will conduct a review of school banking programs — programs where a bank has a relationship with a school to offer deposit products to their students and where students are encouraged to establish bank accounts and make ongoing deposits into those accounts — in primary schools to better understand how the programs are operating.

Timeline: The review is expected to be completed by mid-2019.

Focus of the Review

ASIC states that the review will focus on the following.

- How school banking programs are implemented and marketed to school communities.
- Student engagement with banking programs and 'the accounts established through these programs while they are at school and after they leave school'.
- The 'benefits as well as the risks of school banking programs'.

In addition, the review will identify 'principles for appropriate conduct and good practice in this area'.

Consultation: ASIC states that it will consult with various stakeholders including from the education sector, consumer organisations, other regulatory agencies, as well as the banks offering the programs.

Commenting on the review, Deputy Chair, Peter Kell said, 'Transparency around school banking programs is important. ASIC wants to understand the motivations and behaviours around school banking programs to ensure they ultimately serve the interests of young Australians, and to enable school communities to have an understanding of the potential impact of these programs.'

Media reports have commented that the review follows controversy over the CBA's Youthsaver bank accounts and calls from consumer group CHOICE for an end to 'marketing' of banks in schools and payments of commissions.

[Sources: ASIC media release 18/10/2018; CHOICE media release 04/10/2018; 05/10/2017; News.com.au 12/10/2018; The ABC 13/10/2018; The SMH 11/10/2018; [registration required] The AFR 18/10/2018]

In Brief | The Australian Securities and Investments Commission (ASIC) has released two updated regulatory guides (*Regulatory Guide 261 Crowd-sourced funding: Guide for companies*, and *Regulatory Guide 262 Crowd-sourced funding: Guide for intermediaries*) to coincide with the extension of the crowd-sourced funding framework to eligible proprietary companies (which started on 19 October). ASIC writes that the guides include guidance for proprietary companies and updated requirements for public companies and follows previous consultation.

[Sources: ASIC media release 18/10/2018; Regulatory Guide 261 Crowd-sourced funding: Guide for companies; Regulatory Guide 262 Crowd-sourced funding: Guide for intermediaries]

Australian Prudential Regulation Authority (APRA)

BEAR update | The Australian Prudential Regulation Authority (APRA) has released an information paper outlining its approach to implementing BEAR to assist medium and other small ADIs with their preparations for commencement on 1 July 2019.

The Australian Prudential Regulation Authority (APRA) has released an information paper outlining its approach to implementing the banking executive accountability regime (BEAR) to assist medium and small ADIs with their preparations for commencement on 1 July 2019, and to assist large authorised deposit institutions (ADIs) 'with their ongoing refinement and embedding of the accountability regime'.

The paper focuses on implementation of the regime and is based on APRA's experience to date. APRA states that it 'expects that, over time, it may refine or enhance certain aspects of the guidance contained in this paper and may periodically release updated information'.

More particularly the paper outlines APRA's expectation of how an ADI can effectively implement the accountability regime, including in relation to: identifying and registering accountable persons; creating and submitting an accountability statement for each accountable person, and an accountability map for the ADI; establishing a remuneration policy requiring that a portion of accountable persons' variable remuneration be deferred for a minimum of four years, and reduced commensurate with any failure to meet their obligations; and notifying APRA of any accountability-related changes or breaches of accountability obligations.

The paper does not include APRA's enforcement of breaches of the regime. The regulator writes that it will release additional information on particular elements of enforcement 'in due course'.

[Source: APRA media release 17/10/2018; Implementing the BEAR]

Australian Competition and Consumer Commission (ACCC)

The House Economics Committee has released its review of the Australian Competition and Consumer Commission Annual Report 2017. Among other things, the report welcomes the more 'proactive' approach ACCC has taken to monitoring competition in the financial sector and states that the ACCC appears 'well placed' for its 'enhanced competition role'.

The House Economics Committee has released its review of the 2017 Australian Competition and Consumer Commission (ACCC) Annual Report. Among other things, the report:

- **Welcomes the more 'proactive' approach being adopted in relation to issues in the financial sector** and goes on to note the role the ACCC is expected to play, going forward, in 'monitoring the banks on competition matters, enabling the regulator to play a competition champion role'.
- **The report observes that the ACCC 'appears well placed' for its 'enhanced competition role' but that there is 'still much work to be done**…to clearly demonstrate to companies that for serious competition breaches there will be serious consequences'.
- **The Committee commented that the Australian Competition Law penalties have been too low to be an effective deterrent to breaches of consumer law** and noted that the passage of *Treasury Laws Amendment (2018 Measures No 3) Bill 2018* would address this.

[Sources: House Economics Committee media release 15/10/2018; Review of the Australian Competition and Consumer Commission Annual Report 2017]

Related news: The ACCC has released its 2017-2018 annual report. Among other things, the regulator highlights the fact that it 'secured nearly $170 million in penalties for breaches of competition and consumer law in the 2017-18 financial year' including the $46m penalty against Yazaki (see: Governance News 21/05/2018). ACCC Rod Sims writes that the regulator intends to continue to seek higher penalties: 'We have been advocating hard for increased penalties for breaches of the Competition and Consumer Act to make boards and shareholders sit up and take notice…We will continue to seek higher penalties where we see consumer detriment or deliberate breaches of competition laws. This past year we've also welcomed the legislated increase to serious financial penalties available for breaching consumer law, bringing them in line to competition law penalties.'

[Note: The legislation that Mr Sims appears to be referring to is: *Treasury Laws Amendment (Australian Consumer Law Review) Bill 2018* which passed both houses on the 18 October. The new legislation (among other things) imposes stronger consumer protections relating to consumer guarantees, unsolicited consumer agreements, product safety, false billing, unconscionable conduct, pricing and unfair contract terms. For an overview of the scope and implications of the changes see MinterEllison's update here: Heavy new penalties arrive for the Australian Consumer Law]

[Note: The ACCC announced on 19 October that the High Court has refused Yazaki's special leave application to appeal the Full Federal Court's decision ordering the company to pay $46m in penalties for cartel conduct. Mr Sims is quoted as stating: 'Only substantial penalties for breaches of competition laws, such as these penalties imposed on Yazaki, send the message to large corporations that this kind of behaviour is unacceptable and against the law…Penalties imposed by the Courts should be sufficiently large to act as a strong deterrent against anti-competitive conduct, particularly when this conduct is engaged in by large national and multinational corporations.' See: ACCC media release 19/10/2018]

[Source: ACCC media release 18/10/2018; ACCC annual report 2017-2018; *Treasury Laws Amendment (Australian Consumer Law Review) Bill 2018]*

Overseas Developments

United Kingdom | The Financial Reporting Council (FRC) has released its annual report.

The UK Financial Reporting Council (FRC) has released its Annual Report for 2017/18. The report identifies priority projects delivered and actions undertaken by the regulator in its first full year as Competent Authority for statutory audit in the UK.

Among the projects the FRC highlights: the review of the UK Corporate Governance Code, the introduction of enhanced monitoring and supervision of the six largest audit firms and imposition of what the FRC describes as the 'largest enforcement fines at the time in cases of serious misconduct by audit firms' as significant.

The FRC also highlights the change in its mission — which is now to 'promote transparency and integrity in business — as a significant change which guides decision making, impacts the way in which the organisation communicates. Going forward, the FRC writes that its 2018/21 Strategy will deliver against this mission.

The FRC also acknowledged the review being undertaken by Sir John Kingman (see: Governance News 20/04/2018) and the calls for it 'to operate in different ways including criticism of our effectiveness in holding auditors, in particular, to account'. Commenting on this FRC Chair Sir Win Bischoff writes that the 'Kingman Review aims to make the regulatory system as effective and credible as needed, a beacon for the best in governance, transparency and independence'. He added that 'rebuilding public trust in business and responding to changing expectations of all stakeholders are at the heart of what we do. We will continue to take robust action to meet our objectives and ensure the UK remains a magnet for global capital and a centre of excellence for the professions.'

[Source: FRC media release 15/10/2018; FRC annual report 2017/2018]

In Brief | Update on implementing the extension of the SM&CR to insurers: The PRA has published Policy Statement 26/18: 'Strengthening accountability: Implementing the extension of the SM&CR to insurers' which provides a rules instrument with amendments to the final rules for the implementation

of the extension of the Senior Managers Certification Regime to insurers. The final rules will apply with effect from Monday 10 December 2018.

[Sources: PRA media release 18/10/2018; Policy Statement 26/18]

Financial Services

Inquiry into 'payday' lending: The Senate has voted to establish an inquiry, to be undertaken by the Senate Economics References Committee, into debt management firms and the impact of payday loans, rent to buy leases and 'buy now, pay later' credit.

The senate has voted to establish a senate inquiry, to be conducted by the Economics References Committee, into debt management firms and the impact of payday loans, rent-to-buy leases and 'buy now, pay later' credit.

The motion, put by Labor senator Jenny McAllister proposes that the Committee undertake an inquiry and report into:

> 'Credit and financial services targeted at Australians at risk of financial hardship, with particular reference to:
>
> (a) the impact on individuals, communities, and the broader financial system of the operations of:
>
>> (i) payday lenders and consumer lease providers,
>>
>> (ii) unlicensed financial service providers including ‘buy now, pay later’ providers and short term credit providers, and
>>
>> (iii) debt management firms, debt negotiators, credit repair agencies and personal budgeting services;
>
> (b) whether current regulation of these service providers meets community standards and expectations and whether reform is needed to address harm being caused to consumers;
>
> (c) the present capacity and capability of the financial counselling sector to provide financial counselling services to financially stressed and distressed members of the community; and
>
> (d) any other matters'.

The proposed timeframe for delivery of the report is 22 February 2019.

In a joint media release, Labor shadow ministers Clare O'Neil, Madeleine King and Jenny McAllister said that the inquiry would 'help to restore community confidence in key financial services that have not been examined by the Royal Commission'.

Initial response to the inquiry

The news of the inquiry has been welcomed by the Consumer Action Law Centre (CALC) and Financial Counselling Australia (FCA).

- CALC CEO Gerard Brody said: 'Debt vultures [debt management firms] advertise incessantly online and on TV promising a "life free from debt". If you thought from watching the Royal Commission that the banks, insurers and superannuation companies have been ripping us of, they’ve got nothing on the unregulated debt management sector. This Senate Inquiry is an important initiative and will expose those financial services providers that have been left free to prey on financially struggling Australians for too long.'
- In a statement welcoming the announcement, FCA said that financial counselling agencies and financial counsellors 'look forward to telling our clients’ stories to the Inquiry and putting the case for adequate regulation. If the current Royal Commission had been extended to this part of the financial services industry, we have no doubt that the issues uncovered would have been profoundly shocking'.

The announcement was also welcomed by Afterpay which issued a statement welcoming the review, welcoming 'appropriate regulatory oversight' by the Australian Securities and Investments Commission (ASIC) and differentiating the service it provides from other companies.

[Sources: Consumer Action Law Centre media release 17/10/2018; Financial Counselling Australia media release 18/10/2018; Afterpay ASX Announcement 18/10/2018; [registration required] The AFR 17/10/2018; Journals of the Senate No 123 16/10/2018]

In Brief | Treasurer Josh Frydenberg has announced that he intends to introduce new legislation to strengthen penalties for white collar crime. Based on recommendations from the ASIC Enforcement Review Taskforce, the Bill 'significantly increases maximum penalties for both criminal and civil wrongdoing, while also expanding the range of contraventions subject to civil penalties'. The Treasurer adds that as the changes include amendments to the Corporations Act, its introduction requires the agreement of at least three states or two states and one territory and that the government is seeking the necessary agreement.

[Note: The legislation referenced by the Treasurer appears to be: *Treasury Laws Amendment (ASIC Enforcement) Bill 2018* a draft of which was released for public consultation on 26 September. Consultation closed on 23 October 2018. See: Governance News 08/10/2018]

[Source: Treasurer Josh Frydenberg media release 21/10/2018]

In Brief | According to a new study, superfund fees have risen 10% on last year to $32bn with the average superannuation fund member paying 1.23% of their account balance in fees, (up from 1.17% in 2017). According to the study, almost two-thirds of the fees charged by superannuation funds go to investment management with the remaining one third going to fund administration.

[Sources: Rainmaker media release: 2018 Rainmaker Fee Study 17/10/2018; Business Insider 18/10/2018]

In Brief | The Australian and New Zealand governments are consulting on proposed new e-invoicing governance arrangements to help 'establish an independent, fair and equitable governance structure for the day to day operation of e-invoicing' in both countries including the development of the Trans-Tasman e-invoicing interoperability framework. This consultation is the latest step in the Australian and New Zealand Governments' commitment to progress e-Invoicing as part of the Single Economic Market agenda, which aims to create a seamless Trans-Tasman business environment. Consultation closes 16 November 2018.

[Source: Treasury media release 17/10/2018; Discussion Paper; Assistant Treasurer Stuart Robert media release 17/10/2018]

In Brief | Setting ourselves up to fail on Open Banking? Failing to follow best practice (the UK's example) in the implementation of open banking may incur risk for the project from the beginning given its complexity The AFR argues.

[Source: [registration required] The AFR 15/10/2018]

Risk Management

Climate Risk

A MSCI report has found that approximately 40% of Australia's largest listed companies fall short of carbon reduction requirements under the current target set by the Australian Government under its Nationally Determined Contribution (NDC).

MSCI has released the results of its analysis of MSCI AU200 (ASX 200) companies' alignment with three climate emission reduction scenarios as a means of providing investors with 'a concise framework for viewing how companies are positioned' in terms of transitioning to a carbon constrained market. MSCI found that across all three scenarios, between 40% and 52% companies 'showed misalignment with emission reduction requirements, highlighting that a large portion of the Australian listed equities are currently unable to meet these requirements and could face increased carbon related penalties'.

The three scenarios against which companies were assessed were:

1. **The current Nationally Determined Contribution (NDC) Target for all sectors**. This scenario requires that carbon emissions be cut by 26-28% below 2005 levels by 2030, and is applied equally across all sectors.
2. **The current NDC, but with the power sector given regulatory relief** and additional penalties on all remaining sectors.
3. **Paris agreement aligned scenario** which assumes emissions are cut by 52-56% on 2005 in alignment with the Paris Agreement 2C target.

Some Key Findings

- **Approximately 40% of MSCI AU200 Index companies fell short of the carbon reduction requirements** under the current target set by the Australian Government under its Nationally Determined Contribution (NDC) according to MSCI. This increases to 52% if the Australian Government strengthens its carbon reduction requirement to align with a 2C warming target (ie in alignment with the Paris Agreement). On this basis, MSCI concludes that 'a large portion of the MSCI AU200 Index is at risk of facing regulatory penalties under policies aligned with Australia's NDC'.
- **Under all three regulatory scenarios, the sectors that faced the greatest exposure to carbon related regulatory penalties were Utilities, Energy, Health Care and Consumer Staples.** The sectors with the least burden across all regulatory scenarios were the Consumer Discretionary, Telecommunication Services, Information Technology and Financials sectors.
- **Companies most 'at risk'?** MSCI assessed each company for its level of Scenario Emission Alignment, as well as its Carbon Management practices, to identify those most at risk and least at risk of 'incurring potential carbon related regulatory penalties, such as the required purchasing of carbon credits or regulatory fines'. Based on this, the report identifies the following companies as 'most at risk across all three scenarios': Regis Resources, Smartgroup Corporation, Greencross, IPH, Charter Hall Group, Webject, South32, Asaleo Care, Downer EDI, and ALS. MSCI suggests that investors aiming to align their portfolios with the carbon reduction requirements of each regulatory scenario could consider excluding (certain of) the lowest performing companies.

[Sources: [registration required] Alignment to climate regulatory scenarios: A case study of Australian Companies September 2018]

Further indications that regulatory focus on climate risk management and reporting is building? UK regulators the PRA and FCA have called on the financial firms they regulate to improve their management of climate risk.

The Bank of England's (BOE's) Prudential Regulation Authority (PRA) and, separately the Financial Reporting Council (FCA), have each signalled that companies are expected to improve their planning, management and reporting on climate risk.

PRA consultation on plans to require banks and insurers to strengthen their existing climate risk planning, management and accountability practices.

The PRA has released a draft supervisory statement (SS) for consultation which provides a high level outline of its expectations in relation to the way in which UK insurers, banks, building societies and PRA designated investment firms (firms) approach the issue of managing the financial risks of climate change.

The purpose of the proposals, the PRA writes, is to articulate and consult on 'how effective governance, risk management, scenario analysis, and disclosures may be applied by firms to address the financial risks from climate change'.

High level guidance only

The PRA states that the proposed expectations in the draft SS are 'intentionally kept high level', and as such has indicated that it expects to issue further guidance on best practice once the SS has been finalised.

Some Key Points

- **Financial risk posed by climate change is relevant to the PRA's objectives of safety and soundness:** The PRA states that 'Climate change and society's response to it presents financial risks that are relevant to the PRA's objectives of safety and soundness. Whilst these risks may crystallise in full over longer-time horizons, they are becoming apparent now. Firms are enhancing their approaches to managing these risks, but more need to take a forward-looking, strategic approach if financial risks are to be minimised'.
- **Use of scenario analysis:** Where 'proportionate', the PRA proposes that firms use scenario analysis to assess the impact of the financial risks from climate change on their current business strategy, and to inform the risk identification process'. The PRA adds that the scenarios should 'address a range of outcomes on the transition to a lower-carbon economy and a range of climate change scenarios leading to increased physical risks. Where appropriate, scenarios should also include a short and a longer term assessment'.
- **Disclosure — consider adopting the TCFD recommendations:** The PRA writes that its expectation is that firms will 'develop and maintain an appropriate approach to disclosure of climate-related financial risks' which takes into account interaction with existing categories of risk, including financial risk. The PRA adds that it expects that firms engage with wider initiatives on climate-related financial disclosures and 'to take into account the benefits of disclosures which are comparable across firms, for example *the Recommendations of the Taskforce on Climate-related Financial Disclosure*'.
- **A 'strategic approach' to, and board oversight of, climate risk:** The PRA writes that its 'desired outcome is that firms take a strategic approach to managing the financial risks from climate change, taking into account current risks, those that can plausibly arise in the future, and identifying the actions required today to mitigate current and future financial risks'. More particularly, The PRA proposes that climate risk should be managed through firms' existing risk management frameworks; that firms should be able 'identify, measure, monitor, manage, and report on their exposure to these risks'; and that this should be reflected in the written risk management policy, management information and board risk reports.
- **Accountability for climate risk management:** The PRA expects 'firms to have clear roles and responsibilities for the board and its relevant sub-committees in managing the financial risks from climate change'. More particularly, the PRA writes that its expectations are as follows.
  - **There is allocation of responsibility to a designated senior manager:** Responsibility for identifying and managing the financial risks from climate change is allocated to the relevant existing senior manager most appropriate within the firm's organisational structure and risk profile, and also ensure that these responsibilities are included in that person's statement of responsibilities.
  - **Board and subcommittee oversight:** In addition, the PRA writes that it expects to see 'evidence that the board and its relevant subcommittees exercise effective oversight of risk management and controls' and ensures that 'adequate resources and sufficient skills and expertise are devoted to managing the financial risks from climate change.'

Timeline: Consultation closes on Tuesday 15 January 2019.

FCA consultation on areas in which it considers 'greater regulatory focus is warranted'

Separately, the Financial Conduct Authority has released a discussion paper on managing climate change risks. The discussion paper outlines the FCA's proposed approach and how the impacts of climate change are relevant to its statutory objectives of protecting consumers, protecting market integrity and promoting competition. The discussion paper also seeks feedback areas in which the FCA considers 'greater regulatory focus is warranted'. These include the following.

1. **Climate change and pensions**: The FCA has sought feedback on whether investment managers should be required to take risks from climate change into account.

2. **The introduction of a public reporting requirement and the scope of that requirement:** The FCA has sought feedback on the scope of a proposed new requirement for financial services firms to report publicly on how they manage climate risks.

3. **Enabling competition and market growth for green finance:** The FCA writes that in the interests of ensuring competition and growth in green investments, it will also consider how climate disclosures in capital markets can be improved to ensure that they provide 'adequate information to investors of the financial impacts of climate change'.

Andrew Bailey, Chief Executive at the FCA said: 'The FCA can play a key role in providing more structure and protection to consumers for green finance products and ensuring that the market develops in an orderly and fairway which meets users' needs.'. He added that the FCA welcomes the PRA's consultation on proposed enhancement to banks'/insurers' climate risk management practices and noted that the FCA and PRA have been 'working closely together to develop a joined-up approach to enhance the resilience of the UK financial system to climate change'.

Timeline: The consultation period closes on 31 January 2019.

Establishment of the Climate Financial Risk Forum

The FCA also announced that to 'build our joint knowledge and share best practice' the PRA and FCA will be establishing a Climate Financial Risk Forum. The Forum will 'seek to encourage financial sector approaches to managing the financial risks from climate change, as well as supporting innovation in green finance' through (for example) the development of analytical tools and techniques, such as climate-related scenarios for risk assessments, to help bring future financial risks into current financial decision making.

Timeline: The Forum will include representatives from industry, technical experts and other stakeholders. The PRA and FCA expect to finalise membership of the forum by the end of November with a view to having a first meeting in early 2019.

[Sources: FCA media release 15/10/2018; DP18/8: Climate change and green finance; PRA media release 15/10/2018; Consultation paper 23/18: Enhancing banks' and insurers' approaches to managing the financial risks from climate change October 2018; InvestmentWeek 15/10/2018]

First G7 country to move on setting a net-zero emissions target? In the wake of the IPCC report, the UK government has sought guidance from the Committee on Climate Change (CCC) asking for advice on a roadmap to a net zero economy, including how emissions might be reduced and the expected costs and benefits of doing so.

Following the release of the Intergovernmental Panel on Climate Change's (IPCC's) report (see: Governance News 15/10/2018), UK Energy and Clean Growth Minister Claire Perry has announced the government has written to the independent Committee on Climate Change (CCC) to seek advice on a 'roadmap' to a 'net zero economy', potentially becoming the first G7 country to take this step.

According to a statement, the government has sought CCC guidance on the following issues:

- setting a date for achieving net zero greenhouse gas emissions from across the economy, including from transport, industry and agriculture;
- whether review the UK's 2050 target of cutting emissions by at least 80% relative to 1990 levels to meet international climate targets set out in Paris Agreement is required;
- how emissions reductions might be achieved in industry, homes, transport and agriculture; and
- the expected costs and benefits in comparison to current targets.

In addition, she announced a number of measures to 'help transform energy infrastructure to make it cleaner and greener': 'Our world-leading Clean Growth Strategy sets out how we're investing more than £2.5 billion in low carbon innovation as part of the largest increase in public spending on science, research and innovation on over three decades'.

Prime Minister Theresa May said: 'On the global stage, the UK is driving forward action on climate change through our work at the UN and with our Commonwealth partners. To ensure that we continue to lead from the front, we are asking the experts to advise on targets for net zero emissions'.

[Sources: Open Access Government 16/10/2018; BBC News 15/10/2018]

Dow Jones Sustainability Indices accused of 'greenwashing'? Friends of the Earth has criticised the DJSI for including a company linked to a 'problematic' palm oil group for a second year.

The FT reports that environmental charity, Friends of the Earth, has criticised the Dow Jones Sustainability Indices (DJSI) for including a company linked to a 'problematic' palm oil group (Golden Agri-Resources) in its Asia Pacific index for a second year. Golden Agri-Resources was censured for serious shortcomings in how it handled community relations by the Roundtable on Sustainable Palm Oil earlier in the year.

Friends of the Earth is quoted as stating that the DJSI should 'recognise the inherent risks of rampant deforestation, human rights violations and land grabbing — otherwise the DJSI is betraying its mission of sustainable investing'.

The FT quotes a spokesperson for Golden Agri-Resources as stating that it is confident that its action plan will address shortcomings in its sustainability efforts to date.

[Source: [registration required] The FT 14/10/2018]

A watershed moment for the entire fossil fuel industry? The Norwegian parliament will determine whether Norway's $1tn sovereign wealth fund should be allowed to proceed with a controversial plan to divest $40bn in oil and gas stocks this spring.

Norway's $1 trillion sovereign wealth fund has reportedly been accused by some economists of misleading the Norwegian parliament finance committee in an (alleged) effort to persuade sceptics that it should be allowed to exit oil and gas stocks (including about $40 billion in shares of companies including ExxonMobil Corp and Royal Dutch Shell Plc). The Committee has reportedly defended the fund's presentation of the plan stating that they will make their decision as to whether the plan will go ahead in the spring. Reportedly, a majority in Norway's parliament is believed to be leaning toward supporting the fund's proposal, but an expert commission's recommendation against the plan has made the final outcome less clear.

[Sources: [registration required] The AFR 15/10/2018; Reuters 14/10/2018]

#MeToo Risk

In Brief | Acting to address the risk of sexual misconduct in NGOs: The Australian Council for International Development (ACFID) has announced that there will be a vote on the inclusion of a 'clear cut, high level commitment for NGOs to advance the safeguarding of people vulnerable to sexual exploitation and abuse' in the ACFID Code of Conduct at the upcoming AGM. If adopted at the AGM, 'the commitment will lead to strong and clearer accountability to stakeholders – the public, partners and local communities – as well as a clear process for addressing the prevention of sexual exploitation and abuse and an articulation of expected standards of behaviour of ACFID members' staff' and will be binding on the ACFID's 122 members.

[Source: ACFID media release 17/10/2018]

Cybersecurity

A global report from Gemalto has found that 4.5 billion records were stolen, lost or compromised worldwide in the first half of 2018, a 133% increase over H1 2017.

According to Gemalto's *2018 Breach Level Index,* in the first half of 2018, data breaches globally declined by 18.7% from the previous year to 945 security incidents. However, despite the decrease in the number of incidents, the impact was greater in that the numbers of records 'compromised every day, hour, minute and second' more than doubled over the previous year's figures.

Some Key Findings

- **Overall, the total number of disclosed breach incidents globally decreased**, from 1,162 in 2017 to 945 in 2018.
- **Despite the drop in the number of disclosed breaches, the number of records potentially exposed increased**. According to the report, 42.7 billion records were potentially exposed to a breach in the first half of 2018 (up from 17.0 billion over the first half of 2017). This was largely due to a few large breaches exposing more than 100 million people, including those at Facebook, Exactis, Under Armour, and the Indian government's Aadhaar service.
- **Malicious outsiders were the main source of breaches**, comprising 56% of all breach incidents and 80% of all breached records. This was attributed to six social media breaches including the Cambridge Analytica Facebook breach.
- **20% of all breaches (or 189 of 945 breaches) had an unknown or unaccounted number of compromised data records**. Accidental loss, which was the leading source of breach incidents during the first half of 2017, fell to 34% of all breach incidents during the first half of 2018 (but was still the next most common source of breaches after malicious outsiders).
- **The most common form of intrusion/breach was identity theft** which accounted for 65% of all breach incidents and 87% of all breach records. Account access and financial access, at 17% and 13% were the next most common forms of breach respectively.
- **The health industry had the highest rate of breaches** at 27% followed by 'other' at 17%. Financial accounted for 14% of breaches.
- **Geographical distribution of data breaches:** North America had the highest number of breaches and the highest incidence of compromised records (59% and 72% respectively). With the implementation of the Notifiable Data Breaches law, the number of incidents in Australia increased significantly from 18 to 308 'as could be expected'. Asia/Pacific had the next highest rate of breaches (accounting for 36%) overall.
- **More data breaches reported going forward?** Gemalto indicates that it expects to see an increase in the number of reported breaches by European Union countries bound by the new General Data Protection Regulation and in Australia with the new Notifiable Data Breaches law going forward but cautions that 'We should be careful not to misconstrue this as an increase in overall incidents in these areas but rather as a more accurate reflection of what is actually going on'.

Some of the themes identified in the report include the following:

- human error remains and issue; and
- the risk that increased spend on cybersecurity measures may not lead to improved outcomes unless there is also a 'change of mindset' at firms. More particularly the report suggests that companies should take care that the funds are being spent 'wisely' as spending on technologies that simply monitor and protect an organisation's perimeter will likely not have the effectiveness that they once had. 'Since the traditional perimeter of the enterprise has been blown up by the cloud, the new perimeter is the data itself and the users accessing that data…Mindsets need to change to adapt to this reality, and IT professionals need to accept that breaches will occur and attach security directly to the data itself and the users.'

About the survey: The Breach Level Index is a global database that tracks public data breaches and measures their severity

[Sources: Gemalto blog 09/10/2018; [registration required] Gemalto 2018 breach level index; Legaltechnews 10/10/2018]

SEC has released a report reminding public companies of the need to consider cyber threats when implementing internal accounting controls after an investigation of nine public companies revealed that lack of internal controls led to the loss of nearly $100m (most of which was unrecoverable).

The US Securities and Exchange Commission (SEC) has released a report into cyber fraud against public companies. The report is based on the SEC Enforcement Division's investigations of nine public companies from a range of sectors — including technology, machinery, real estate, energy, financial, and consumer goods — that fell victim to cyber fraud, losing millions of dollars in the process. The report cautions companies to consider cyber threats when implementing internal accounting controls.

Further detail: According to SEC, the nine companies investigated transferred nearly $100m as a result of cyber fraud due to lack of sufficient internal controls.

- The SEC's investigations focused on 'business email compromises' (BECs) where perpetrators posed as company executives or vendors and used emails to dupe company personnel into sending large sums to bank accounts controlled by the perpetrators.
- The frauds in some instances lasted months and often were detected only after intervention by law enforcement or other third parties.
- Each of the companies lost at least $1 million, two lost more than $30 million, and one lost more than $45 million. In total, the nine companies transferred nearly $100 million as a result of the frauds, most of which was unrecoverable. No charges were brought against the companies or their personnel.
- According to SEC, the FBI estimates fraud involving BECs has cost companies more than $5 billion since 2013.

The report cautions companies to consider cyber threats when implementing internal accounting controls.

SEC notes that public issuers subject to the internal accounting controls requirements of s13(b)(2)(B) of the *Securities Exchange Act of 1934* 'must calibrate their internal accounting controls to the current risk environment and assess and adjust policies and procedures accordingly'.

Stephanie Avakian, Co-Director of the SEC Enforcement Division commented 'In light of the facts and circumstances, we did not charge the nine companies we investigated, but our report emphasizes that all public companies have obligations to maintain sufficient internal accounting controls and should consider cyber threats when fulfilling those obligations.'

SEC Chairman Jay Clayton commented: 'Cyber frauds are a pervasive, significant, and growing threat to all companies, including our public companies…Investors rely on our public issuers to put in place, monitor, and update internal accounting controls that appropriately address these threats.'

[Source: SEC media release 16/10/2018; Investigative report: Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 Regarding Certain Cyber-Related Frauds Perpetrated Against Public Companies and Related Internal Accounting Controls Requirements 16/10/2018]

Update on Facebook security breach: fewer accounts impacted than originally reported, but additional personal data may have been exposed.

Fortune reports that Facebook has provided an update on the security breach it first disclosed in September (see: Governance News 08/10/2018).

- The breach reportedly impacted fewer accounts than was originally disclosed — only 30 million accounts were exposed down from the 50 million originally reported.

- However, stolen personal information included names, phone numbers, and email addresses. In addition, for 14 million accounts, additional stolen data may also have included other information including: gender, relationship status, religion, birthdates, the last 10 places they checked into, and their 15 most recent searches.

- Facebook reportedly does not believe that hackers obtained any information from the other one million people compromised by the attack, which started on 14 September and which Facebook said it was able to stop on 27 September.

- Facebook reportedly said that it has no reason to believe that the attack was related to the upcoming US elections. However, it has reportedly said it removed 559 pages and 251 accounts that it believed were intentionally misleading and spamming people with 'sensational political content' as part of its efforts to safeguard its service facilitating the spread of misinformation in the lead up to US elections.

- The BBC reports that Facebook has also acted to strengthen 'transparency' around political advertising in the UK, implementing new requirements (already in place in the US and Brazil) to require those wishing to advertise a political cause to prove their identify and location. Each advertisement will also state who paid for the advertisement. There will also be an online publicly available archive (ie open to non-Facebook users) to access all previous advertisements by the same advertiser, listing how much was paid, and who the advertisements reached. Reportedly, the system also allows users to report a political ad as fake news. Subject to Facebook determining that the content contains incorrect information, it can be taken down. Advertisements that have been taken down remain in the archive to enable users to access data on who the advertisement may have reached while it was visible.
- Facebook has reportedly confirmed that it is cooperating with the Irish Data Protection Commission, (which is currently investigating the breach to determine if there was any breach of the General Data Protection Regulation laws) as well as with other authorities over the breach.

[Sources: Fortune 12/10/2018; BBC 16/10/2018]

In Brief | More concerned with producing reports than on acting on them? The Australian has questioned the effectiveness of the Office of the Australian Information Commission (OAIC) in holding corporations and government to account for data breaches and for safeguarding privacy information given the volume of breaches being reported and the lack of fines/prosecutions. Whether OAIC lacks resources to fully investigate reported breaches or is reluctant to prosecute offending firms, The Australian argues, its effectiveness is questionable given its record.

[Sources: [registration required] The Australian 16/10/2018]

Other Developments

Distancing themselves from possible reputational risk associated with attending the Saudi Investment Forum? According to media reports, several high profile speakers, sponsors and media partners have withdrawn from the 'Davos in the Desert' event, following the disappearance of journalist Jamal Khashoggi.

The FT reports that several high-profile speakers and sponsors as well as many of the events' media partners (The FT, Bloomberg and the New York Times) have pulled out of the Future Investment Initiative (dubbed in some reports as 'Davos in the Desert') conference in Riyadh, following the disappearance of Saudi Arabian journalist Jamal Khashoggi from the Saudi Arabian consulate in Instanbul on 2 October.

Some of those who will reportedly not attend include: JP Morgan Chase CEO Jamie Dimon; Chair of the Ford Motor Company Bill Ford; Founder of Thrive Global Arianna Huffington; CEO of Blackstone Stephen Schwarzman; and Chair and CEO of BlackRock Larry Fink (among others).

Bloomberg reports that US Treasury Secretary Steven Mnuchin and International Monetary Fund Director Christine Lagarde have indicated that they still plan to attend as does Moelis & Co’s Ken Moelis.

Bloomberg quotes former US ambassador to Kuwait Richard LeBaron as suggesting that the CEOs must now strike a balance between 'the reputational risk they run by being associated with what seems to be very disturbing developments' and 'their long term business interest' in Saudi Arabia. The AFR also suggests that the 'spirited pursuit of trophy deals' in Saudi Arabia has turned into an 'exercise in crisis management for some of the world's most influential financiers' and that a number of deals now appear to be on hold as a result.

More broadly, The Conversation suggests that the disappearance of Mr Khashoggi is putting pressure on Saudi Arabia's relationships with the UK, US and France and more particularly, that the way in which the UK (in particular) responds, will be a test of the UK's credibility on the international stage.

[Sources: [registration required] The FT 16/10/2018; Bloomberg 12/10/2018; [registration required] The AFR 16/10/2018; The Conversation 17/10/2018]

Restructuring and Insolvency

In Brief | The Australian Securities and Investments Commission (ASIC) has issued a statement confirming that it has exercised its powers to wind up 17 abandoned companies and appoint liquidators (thereby assisting 32 employees gain access to the Fair Entitlements Guarantee scheme (FEG)) in the 12-month period ending 30 September 2018. The appointment of liquidators also facilitates a full and proper investigation into why the companies failed, and allows recovery of any voidable or unreasonable director-related transactions that can potentially be returned to creditors. ASIC first exercised its powers in 2013 and to date, has wound up 110 companies.

[Note: The *Corporations Amendment (Strengthening Protections for Employee Entitlements) Bill 2018* proposes to amend the *Corporations Act 2001* (Cth) to strengthen enforcement and recovery options to deter and penalise company directors and other persons who engage in, or facilitate, transactions that are aimed at preventing, avoiding or significantly reducing employer liability for employee entitlements in insolvency. In addition, the Bill implements reforms intended to address misuse of the FEG scheme.]

[Source: ASIC media release 18/10/2018]