Governance News

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In Brief | The FT reports that ING's CFO, a 22 year veteran of the company, will step down from his role (once a replacement is found) having reportedly been identified by ING in a statement as responsible for the compliance failings that led to the money laundering issues for which it has agreed to pay a record €775m in penalties to the Dutch public prosecutor. 25

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In Brief | The Crowd Sourced Funding Bill enabling proprietary companies with less than $25m in assets and turnover to raise up to $5m in any 12 month period through crowd-funding platforms has passed the senate: *Corporations Amendment (Crowd-sourced Funding for Proprietary Companies) Bill 2017* . SBS quotes assistant minister for treasury and finance Zed Seselja as commenting that the reforms will 'enable proprietary companies to obtain the capital they need to turn good ideas into commercial successes, while providing Australian investors with a larger pool of choice'. 25

Boards and Directors

In Brief | CBA board renewal update: CBA has announced that Paul O'Malley has been appointed as a non-executive independent director with effect from 1 January 2019. CBA adds that at the request of the board, and to 'allow for sufficient continuity in director succession' Brian Long will remain on the board until the end of the calendar year and will retire at 31 December 2018 and that Andrew Mohl will retire from the Board at the conclusion of the 2018 AGM.

[Source: CBA ASX Announcement 12/09/2018]

Diversity

Equilar Q2 2018 Gender Diversity Index results: Russell 3000 continues to progress towards boardroom (gender) diversity.

Equilar has released the findings of its latest quarterly update on gender diversity at board level in Russell 3000 companies. The findings are based on analysis of 8K filings to the Securities and Exchange Commission (SEC).

Key Points

- **Female board representation continues to improve:** For a third consecutive quarter, the percentage of women on Russell 3000 boards has increased. Between 31 March and 30 June 2018, the percentage of female directors increased from 16.9% to 17.7%. Equilar writes that this represents significant improvement in that the change 'moved the needle', pushing the Gender Diversity Index [GDI] to 0.35, where 1.0 represents parity among men and women on corporate boards.
- **39 boards have reached gender parity:** This is the highest proportion ever and an increase of 8 (the largest quarter on quarter increase since the Index began) on the previous quarter. The number of boards that have between 40% and 50% female representation is also increasing with 71 boards with 40% women, up from 62 in the previous quarter.
- **Number of boards with zero women is at the lowest point ever at 17.1% (a drop of 2.4%) on the previous quarter.** Equilar comments that Q1 2018 was the first time the number of boards with zero female representation fell below 20% and suggests that the continued trend is 'a promising sign that boards are making a concerted effort to promote diversity in the boardroom and that male-dominant boardrooms are becoming less prevalent'. Equilar adds that the number of boards with no women, 'is still a relatively sizable figure that indicates possible hurdles do indeed remain'.
- **The number of female appointments is consistently increasing:** In 2014, 17.9% of directorships went to women. This has increased year on year, since then. In Q2 2018, 34.9% of new directorships went to women. This is a 2.9% increase on the previous quarter, and a 5.5% increase on 2017.
- **Companies changing their approach to (gender) diversity?** One of the reasons behind the slow progress on this issue to date has been the lack of incentive to change, writes Equilar. However, pressure from regulators and large institutional investors eg BlackRock and State Street is having an impact, as is increased media coverage and scrutiny of the issue. Brigid Rosati, Director of Business Development at Georgeson is quoted as commenting 'Several large institutional investors updated their proxy voting policies in 2018, which we think could continue to drive change beyond the significant progress we saw in the first half of 2018.' Susan Angele, Senior Advisor of Board

Governance at KPMG's Board Leadership Center suggests that 'In addition to investor focus, I see a confluence of events that should play out over time…The changes in the business environment and expectations on boards—including technological disruption, competition coming from outside the industry, changing demographics, culture and risk—all of these forces are making it more important for the boardroom to include directors with a mix of backgrounds and experience.'

[Note: There appears to be some evidence of similar trends occurring in Australia. According to the second annual ASX200 Senior Executive Census the number of ASX 200 companies with zero female representation has decreased significantly (from 21% in 2017 to 12% in 2018) since last year. The Australian Institute of Company Directors June-August 2018 Quarterly Report has found women account for 28.5% of ASX 200 board positions, indicating that the 30% representation target for the end of the year is in sight. See: Governance News 10/09/2018]

[Source: Equilar blog 29/08/2018]

The latest Thomson Reuters diversity and inclusion index has ranked Accenture PLC, Novartis AG and Medronic PLC as the top performers (globally) in terms of promoting diverse and inclusive workplaces.

Thomson Reuters has released its third annual Diversity and Inclusion Index which ranks over 7000 publicly listed companies globally, to identify the top 100 with the most diverse and inclusive workplaces.

Top three companies: According to the latest data, the top three companies were: Accenture PLC, Novartis AG and Medronic PLC.

Accenture Chair and CEO commented: 'At Accenture, our commitment starts at the top with our board and extends across every dimension of the company. We embrace our rich diversity as a "culture of cultures" which is all about our 449,000 people around the world living our shared core values, while bringing our own unique skills and experiences to make the maximum contribution to our clients and our business'.

About the index

- The index ratings are informed by Thomson Reuters environmental, social, and governance (ESG) data.
- The index uses various datasets to assign companies a score across four 'pillars': diversity, inclusion, people development and news controversy. Only companies with scores across all four pillars are assigned an overall score. The top 100 ranked companies with the best overall scores are selected for the Index.

D&I data as a method of screening for risk? Thomson suggests that the index data and the metrics underpinning it, could be used to screen companies for risk/opportunities and notes that the Matterhorn Group at Morgan Stanley was the first advisory team to use the data in this way.

Thomson comments: 'The industry is beginning to recognise the societal and business benefits of investing in diverse and inclusive companies and we are working closely with various investment firms who are looking to develop investable products based on our D&I index'.

[Sources: Thomson Reuters media release 06/09/2018; Thomson Reuters IX global Diversity and Inclusion index; Methodology fact sheet]

In Brief | Spike in US CEO turnover? According to a report by consulting firm Challenger, Gray and Christmas there has been a 15% upswing in the rate of CEO turnover on 2017. So far, 879 US CEO changes have been recorded this year as compared with 765 changes last year. In addition, the report found that 22% of new CEOs are women (a 4% increase on August 2017). The high rate of turnover is attributed to strong competition for talent, increased disruption and uncertainty in the market requiring new skillsets and the impact of tax cuts/consumer spending in some cases.

[Sources: Fortune 12/09/2018; Challenger, Gray and Christmas Inc media release; August 2018 Report]

Shareholder Activism

Stronger case for board change at Myer, or wait and see? Update on Premier campaign to replace the Myer board following the release of company results.

Business Insider Media suggests that Premier Investments' (Solomon Lew) campaign to replace the Myer board may be gaining in momentum, following the announcement of the firm's poor results.

Mr Lew has reportedly issued a 'report card' that is highly critical of the approach taken by the Myer board to turning around profits and the result delivered. The report card also reportedly reiterated Mr Lew's view that the lack of retail experience at board level is a primary driver of the issues at the company. 'Premier has been able to predict these events because of its deep understanding of the retail market. This is why Myer needs directors with retail experience on its Board' Mr Lew is quoted as commenting by Business Insider.

The Australian suggests as Mr Lew has spent most of the past year campaigning against Myer and its board and has proposed installing his own directors, but has not actually called an extraordinary general meeting it now appears unlikely that he will do so. More likely, The Australian suggests, is that Mr Lew will wait until the company's Annual General Meeting (which is likely to be in November) where he may 'campaign for a second strike' on Myer's remuneration report (which if successful would trigger a vote on a motion to spill the board) or even, given the extent of the company's losses, divest and move on to the next project.

[Sources: Business Insider Australia 13/09/2018; The Australian 13/09/2018]

Meetings and Proxy Advisers

Update SEC roundtable discussion on the proxy process | SEC has withdrawn letters to ISS and Egan Jones Proxy Services ahead of the planned 'roundtable' discussions on the proxy process.

In light of the planned roundtable discussions on the proxy process (see: Governance News 06/08/2018), and developments since they were issued, the Securities and Exchange Commission (SEC) has announced that the staff of the Division of Investment Management has withdrawn the letters it issued 2004 to Egan-Jones Proxy Services (27 May 2004) and Institutional Shareholder Services Inc (15 September 2004). According to Pensions and Investments, the letters in question were aimed at assuring mutual fund managers of the reliability proxy recommendations.

SEC states that that the withdrawal is intended to facilitate discussion at the roundtable and adds that it looks forward to receiving feedback from stakeholders with 'multiple perspectives', including feedback on the staff guidance in Staff Legal Bulletin No 20 (issued 30 June 2014).

Roundtable agenda (possible topics): The timeline and agenda for planned discussions are yet to be finalised, but SEC writes that topics being considered include (among others) whether prior staff guidance about investment advisers' responsibilities in voting client proxies and retaining proxy advisory firms should be modified, rescinded or supplemented. The statement also notes that SEC Staff guidance is nonbinding and does not create enforceable legal rights or obligations.

SEC reiterates that it expects to utilise what it learns at the roundtable in any future recommendations to the commission with respect to proxy advisory firms.

Welcome action by SEC? In response to SEC's announcement, House Financial Services Committee Chair Jeb Hensarling issued a statement in which he said: 'The proxy advisory firm duopoly is in serious need of reform and SEC attention. The market power of proxy advisory firms demands greater accountability for these firms' actions and the information that they provide institutional investors. Time and again, we've seen their recommendations riddled with errors, misstatements of fact, and incomplete analysis. By exploiting the market for pricey advice, proxy advisory firms have shown way too often that they are more focused on pushing special interest agendas rather than serving investors. It is imperative that we improve the proxy process to uphold transparency, accountability, and integrity that both shareholders and companies deserve and expect'.

Mr Hensarling also 'commend[ed]' SEC Chair Jay Clayton for highlighting that staff guidance is legally non-binding. 'The Committee routinely hears that regulation through enforcement and staff guidance hinders innovation and confidence in accessing our capital markets' he said.

Not an indication that SEC will necessarily change its position? Pensions and Investments reports that Commissioner Robert Jackson Jr has said that SEC has long recognised that proxy advisers serve an important role and that 'empirical work' has shown that the claim that they wield too much power is overstated.

[Note: In Australia, the Australian Securities and Investments Commission (ASIC) has recently released a report: *Report 578 ASIC review of proxy adviser engagement practices* providing an overview of ASIC's review of proxy adviser engagement practices during the 2017 annual general meeting (AGM) season which includes recommendations for advisers and companies as to how engagement practices could be improved. see: Governance News 02/07/2018. ASIC's report on corporate finance regulation H1 2018 (*ASIC Report 589 ASIC regulation of corporate finance: January to June 2018)* reiterates ASIC's expectations of firms regarding engagement with proxy advisers. See Governance News 03/09/2018]

[Sources: SEC Public Statement 13/09/2018; Statement by House Financial Services Committee Chair Jeb Hensarling 13/09/2018; Pensions and Investments 13/09/2018]

Disclosure and Reporting

ASIC has commenced a civil penalty action against ANZ in relation to a 2015 Institutional Equity Placement. ANZ has said it will defend the allegations.

The Australian Securities and Investments Commission (ASIC) has announced that it has commenced proceedings against Australia and New Zealand Banking Group Limited (ANZ) for an alleged continuous disclosure breach in relation to a $2.5 billion institutional share placement undertaken by the ANZ in 2015.

ASIC alleges that:

- 'ANZ failed to comply with its continuous disclosure obligations under s674(2) of the Corporations Act 2001 (Cth) in relation to a $2.5 billion institutional share placement undertaken by ANZ on 6 August 2015 (Placement)'.
- 'ANZ contravened s674(2) by failing to notify the Australian Securities Exchange (the ASX) that approximately $791 million of the $2.5 billion of ANZ shares offered in the Placement were to be acquired by its underwriters rather than placed with investors (alternatively, by failing to notify the ASX that a significant proportion of the shares the subject of the Placement were to be acquired by the underwriters)'.

ASIC is seeking a declaration of contravention under s1317E of the Act and a pecuniary penalty order under s1317G(1A) of the Act.

ANZ response

ANZ has issued a statement in which it has said that it will 'defend' the allegations. ANZ adds that the 'shares in question represented less than 1% of the shares on issue at the time and were taken up by the joint lead managers in circumstances where the book indicated the placement was covered at 103%. ANZ is not aware of a precedent for a listed entity to disclose the take up of shares by underwriters in an equity placement'.

ANZ Chief Risk Officer Kevin Corbally is quoted as stating: 'ANZ's disclosure in relation to the placement was in accordance with its ASX disclosure obligations as well as market practice and we are defending the matter.

The statement also notes the placement is also the subject of separate proceedings by the Australian Competition and Consumer Commission (see: Governance News 12/06/2018).

[Sources: ASIC media release 14/09/2018; Concise statement; ANZ media release 14/09/2018]

In Brief | The UK Financial Reporting Council, Financial Reporting Lab has called for investors and companies to volunteer to participate in a new project on the disclosure of climate change and workforce information. The project will consider how the recommendations identified in the Lab's previous reports on business model reporting, risk and viability and performance metrics apply to companies' reporting on climate change and their workforce.

[Source: FRC media release 12/09/2018]

Markets and Exchanges

In Brief | ASX to tighten technology governance and operational risk controls: ASIC has released a review of technology governance and operational risk controls at ASX Group. Full implementation of the changes is expected to take up to three years. The regulator has indicated the recommendations in the report may have broader relevance for boards/senior managers of ASIC regulated organisations in the financial services sector.

[Sources: ASIC media release 12/09/2018; REP 592 Review of ASX Group's technology governance and operational risk management standards 12/09/2018]

In Brief | ASIC has updated the market integrity rules to facilitate the introduction of a new type of financial product that securities and derivatives exchange Chi-X Australia Limited (Chi-X) is introducing to its market, known as transferable custody receipts (TraCRs).

[Source: ASIC media release 14/09/2018]

Regulators

Australian Securities and Investments Commission

AFCA implementation update | ASIC has approved the Australian Financial Complaints Authority (AFCA) rules and terms of reference of the AFCA Independent Assessor.

Following a period of public consultation and feedback, the Australian Securities and Investments Commission (ASIC) has announced that it has approved the Australian Financial Complaints Authority (AFCA) Complaint Resolution Scheme Rules and the Terms of Reference of the AFCA Independent Assessor (IA). ASIC is required to approve material changes to the AFCA scheme under the Corporations Act 2001.

The scheme is due to commence on 1 November 2018.

ASIC deputy chair Peter Kell said that 'ASIC's approval marks another milestone towards the AFCA scheme's commencement'.

Transition to the new scheme:

- ASIC notes that it is a statutory requirement that financial firms including most credit representatives, that deal with retail clients must join the AFCA scheme by 21 September 2018.
- According to ASIC, 'almost all' Financial Ombudsman Scheme members have effectively transferred their membership to AFCA. About 80% of members of the Credit and Investments Ombudsman Scheme and about 64% of superannuation trustees and retirement savings accounts providers have also joined up.
- AFCA is providing regular membership updates to ASIC so that ASIC can monitor financial firm compliance with the statutory membership deadline.

[Source: ASIC media release 12/09/2018]

In Brief | First Australian Digital Council meeting: federal, state and territory governments have convened for the first bi-annual interjurisdictional meeting to improve collaboration on technology issues. ITNews reports that the Council is expected to agree to focus on fast-tracking the development of digital services and improving data sharing across borders. 'By committing to a strong agenda of collaboration and cooperation, we can learn from each other's experiences and pool our resources to develop systems that can be rolled-out across the country, avoiding costly duplication and accelerating the benefits for citizens and business' Michael Keenan, Council Chair and Federal Minister for Human Services and Digital Transformation commented.

[Source: ITNews 14/09/2018]

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[Source: ASIC media release 13/09/2018]

Financial Services

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

Top Story | Financial Services Royal Commission Round 6 Hearings: Overview of week 1 Life Insurance case studies.

Royal Commission Round 6: week 1, 10 September 2018 – 14 September 2018

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Financial Services Royal Commission) commenced its sixth round of public hearings on 10 September. The focus of this round of hearings, which will run until 21 September, is on the conduct of the life insurance industry and the general insurance industry. Week 1 of the hearings focussed on issues in relation to life insurance. A high level overview of the issues to be explored during the hearings as highlighted by Counsel Assisting Rowena Orr QC in her opening statement to the Commission and of some of the issues arising in relation to the direct sales of life insurance case studies (ClearView, Freedom) as well as an overview of Counsel Assisting's comments in relation to submissions concerning sale of accidental death policies is below.

Overview: Issues highlighted in Counsel Assisting's opening statement to the Commission

Focus of week one: Life Insurance

Counsel Assisting Rowena Orr QC said that the first week of hearings would focus on the following issues in relation to life insurance.

- How life insurance products are designed.
- How they are sold and promoted.
- How life insurance claims are handled.
- The dispute resolution mechanisms that are available in relation to life insurance claims.

In addition, Ms Orr said that the commission would consider the statements provided by the 10 largest insurers (TAL, AIA, MLC, Westpac, MetLife, Zurich, CommInsure, OnePath, Suncorp and AMP) as to how they design life insurance products, sell and promote life insurance products, handle life insurance claims, and remunerate the personnel involved in selling life insurance products and handling life insurance claims.

Ms Orr said that the Commission would also consider issues that arise in relation to life insurance products provided through superannuation funds.

She added that the focus of the hearings would of the hearings would be confined to 'risk policies' ie 'policies that provide for a specified benefit to be paid on the death or disability of the insured or if the insured is found to have a specific disease or injury' as opposed to investment-linked policies.

Focus of week two: General Insurance

The second week of the hearings will focus on general insurance including case studies deferred from Round 4 concerning the experiences of people who had made claims under home insurance policies following natural disasters and also case studies in relation to add-on insurance sold through car dealerships and travel insurance.

Opening statement to the Commission

Key questions to be addressed over the course of this round of hearings

Ms Orr identified the following as 'key questions' to be addressed over the course of this round of hearings.

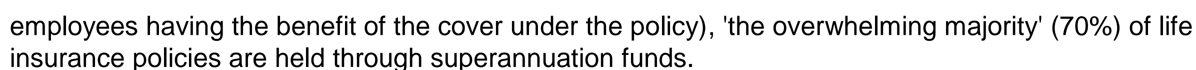
- 'Is there an appropriate balance between self-regulation and external regulation in the insurance industry. In particular, is it appropriate that the handling of insurance claims is currently largely outside of ASICs jurisdiction'.

  Ms Orr went on to comment in relation to this: 'Although most life and general insurance policies are financial products and the selling of those policies is a financial service, it is important to note that the handling and settling of insurance claims is specifically excluded from the definition of a financial service. This means that the obligations…including the obligation for an insurance company to do all things necessary to ensure that it provides financial services efficiently, honestly and fairly, do not apply to the process leading to making a decision about a claim, including the investigation of the claim and the interpretation of policy provisions, to negotiations of settlement amounts, to estimates of loss or damage, value or repair costs, or recommendations on mitigation of loss. This limits ASICs ability to take action against insurance companies where, for example, there are unnecessary or extensive delays in handling claims.'

- Should the 'unfair contract terms regime that applies to other consumer contracts be extended to insurance contracts'.
- Should the 'General Insurance Code of Practice and the Life Insurance Code of Practice be enforceable as contractual terms, like the Banking Code of Practice. Or should they be treated like industry codes under the Competition and Consumer Act, which makes a contravention of an applicable industry code a contravention of the Act'.
- 'Are the changes that have been made to section 29(3) of the Insurance Contracts Act, a provision that deals with the consequences of non-disclosure by an insured person, operating as intended'.
- 'What changes to the existing regulatory framework are necessary to improve the experiences of people with mental illness in dealing with life insurance companies'.

Context: sale of life insurance

- **Sale through financial advisers comprises the majority of sales:** The Commission heard that the majority (84%) of life insurance in Australia is sold through financial advisers (via the 'retail channel') and that these sales account for more than half the premiums paid. However, Ms Orr said that as issues relating to financial advice were considered in some detail in the second round of hearings, the sale of life insurance through financial advisers would not be the subject of a specific case study in this round. Ms Orr then made some observations about commissions noting that the issue of certain remuneration structures leading to poor financial advice had also been considered in the second round of hearings as had the impact of the Life Insurance Framework reforms (LIF reforms) and use of 'soft benefits'.
- **The majority of life insurance policies are held through superannuation:** Ms Orr observed that though less than 1% of life insurance policies are sold through the 'group channel' (policies are purchased by a trustee of a superannuation fund or an employer with the fund members or



employees having the benefit of the cover under the policy), 'the overwhelming majority' (70%) of life insurance policies are held through superannuation funds.

- **Direct sales** (where insurers sell products directly to the consumer) only account for 15% of sales.

Issues arising from public statements

Ms Orr said that as at 7 September, the Commission had received a total of 8769 public submissions of which 681 (8% of the total number of submissions received by the Commission) relate to life insurance. The issues raised most commonly in the public submissions concern were:

- **claims handling** and delays and difficulties experienced as part of this process
- **sales practices**, including sale of inappropriate products or issues experienced with premium costs

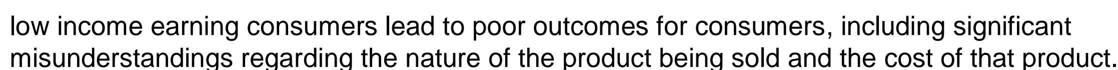
Mental Health and treatment of pre-existing medical conditions

- **Mental health was also an area of concern raised in a number of submissions.** Concerns were raised around: denial of coverage or benefit on the basis of mental health exclusions, excessive premiums where mental health issues are disclosed, alleged exacerbation of mental health conditions as a result of claims handling process and concerns over independent medical examinations as part of the claims process. Ms Orr also noted that concerns around the treatment of mental health featured in submissions from The Public Interest Advocacy Centre and beyondblue who each highlighted the difficulties that can be faced by individuals 'who have, or have previously had, or are imputed to have', a mental health condition in securing coverage in relation to both life and general insurance products. More particularly, the submissions raised issues with how insurers design, price, and offer policies and assess claims for people with mental health conditions, and the effect that this has on their access to the insurance market. These problems were raised in relation to travel, income protection, total and permanent disablement (TPD) cover, and life insurance products.
- **Treatment of pre-existing medical conditions also emerged as an issue in submissions**. A number of submissions related to claims being refused on the basis of an unrelated pre-existing injury or condition, consumers contesting the existence or extent of the pre-existing condition, inappropriate treatment of pre-existing conditions in the claims process leading to a denial of benefit, and consumers being 'locked into high premiums' as a result of an inability to change policies because of the existence of a pre-existing condition.

Concerns raised in submissions from consumer organisations

Among the issues raised by consumer organisations were the following.

- **Poor claims handling**: 'A significant theme to emerge from consumer and other submissions was the difficulties faced in engaging in claims processes, including appeals, without appropriate legal representation' Ms Orr said. For example, New South Wales Legal Aid told the Commission about barriers their clients face in obtaining claim forms in the first instance, or in proving their identity to the insurer or superannuation fund. This issue was particularly prevalent in relation to Indigenous consumers.
- **Non-compliance with dispute resolution timeframes:** Non-compliance with timeframes for resolution of complaints as set out in the Life Insurance Code, was also raised by many of the consumer organisations Ms Orr said. A number of organisations identified claim fatigue as a significant issue which leads to a high number of claims being withdrawn before they are determined.
- **Concerns regarding direct selling techniques** in relation to the advertising, marketing and sales techniques used to sell life insurance products direct to consumers were also raised in submissions. For example, the Consumer Action Law Centre identified misleading advertising and cold calling as contributing to inappropriate sales, on the basis that 'customers are subjected to pressure selling and can be misled about pre-existing medical condition exclusions'. The Financial Rights Legal Centre told the Commission that an over-emphasis on cooling-off periods as a time for a consumer to read a product disclosure statement, as well as the ease of obtaining direct debit payments from



low income earning consumers lead to poor outcomes for consumers, including significant misunderstandings regarding the nature of the product being sold and the cost of that product.

- **A number of consumer organisations also expressed concerns with the 'state of consumer law in relation to insurance policies.'** For example, the Consumer Action Law Centre identified that a lack of protection 'in relation to unfair policy terms can cause claim shock for policyholders at traumatic and vulnerable times in their lives'.
- **Lack of awareness of insurance held through superannuation was highlighted in submissions.**
- **Over-insurance eroding superannuation balances:** Legal Aid NSW and Financial Rights Legal Centre reported observing a 'significant amount of over-insurance through superannuation' leading to erosion of superannuation balances.
- **Policies not targeted to meet the needs of members:** CHOICE raised concerns in relation to poor policy design for group life insurance, including policies that may not be adequately targeted to meet the needs of the members of a particular superannuation fund.

Issues raised by the Financial Ombudsman Service (FOS): outdated definitions

The Financial Ombudsman Service (FOS) reported receiving 1307 disputes relating to life insurance products in 2016 to 2017 most of which related to decisions to deny claims, often as a result of the application and interpretation of policy decisions based on 'overly restrictive, ambiguous or outdated definitions' which in some cases, 'have not kept pace with current clinical, medical or diagnostic tools' Ms Orr said. Typically, according to FOS, these matters also 'involve instances where community expectations about what a policy covers differ from the highly technical definitions in policies and the narrow interpretation applied by the insurer in assessing the claim'.

Direct sales of life insurance case studies (ClearView and Freedom case studies)

The first two case studies concerned the direct sales of life insurance by two financial services licensees, ClearView and Freedom. Issues explored in these case studies included: the sales practices used, the methods used to incentivise sales staff (commissions/incentives), the approach taken to compliance and the effectiveness of oversight/quality assurance mechanisms among other issues.

ClearView case study

In her opening statement to the Commission, Ms Orr said that the ClearView case study would centre on the conduct the subject of an ASIC enforcement action in February which found that ClearView had engaged in unfair and high pressure sales tactics in selling life insurance products directly to customers.

Issues explored included (among others): the direct sale of low-value, 'non-competitive' life insurance products to lower socio-economic groups, concerns around sales practices (eg the use of high pressure sales techniques based on an 'emotional pitch' to these customers); and admitted breaches of 'anti-hawking provisions' (s992A(3) under the Corporations Act 2001 (Cth)) an estimated 300 and 303 thousand times over a three year period. The adequacy of oversight of compliance within the organisation, the approach taken by ClearView to reporting issues to ASIC and the effectiveness of the way in which ClearView addressed issues internally was also questioned.

In the course of his evidence, Mr Gregory Martin agreed that in the 'pressure sales that it made between 2013 and 2016, its [ClearView's] representatives breached the prohibition on unconscionable conduct on occasion'; that they 'breached the prohibition on misleading or deceptive conduct'; 'breached ClearView's duty of utmost good faith to its policyholders'; and that 'its processes for pressuring customers to sign up to policies immediately, and its processes for aggressive objection handling, were unfair to its customers and led to customer detriment and that as a result of those contraventions and those unfair processes…[ClearView] contravened its obligation to do all things necessary to ensure that the financial services covered by its AFSL were provided efficiently, honestly and fairly'.

Mr Martin also agreed that ClearView 'failed 'to ensure that…[sales] representatives were adequately trained'; failed to 'take reasonable steps to ensure that…representatives complied with the financial services laws'; and that 'remuneration and incentive structures that it had in place encouraged sales agents to make as

many sales as possible, sometimes at the expense of the customers' best interests'. In addition he agreed that ClearView did not have in place 'adequate arrangements for the management of the conflict that ClearView created between the interests of its employees and the interests of its customers'.

Asked whether in his view it 'is possible to sell life insurance in outbound sales calls in a way that is both financially viable and legally compliant?' Mr Martin said 'I find it difficult to understand how you can reconcile those things'.

Causes of the issues

Ms Orr put to Martin that that there were three causes of the 'systemic compliance issues' at the organisation: the remuneration structure for sales agents, 'a culture that tolerated aggressive sales tactics at the cost of compliance' and deficiencies in ClearView's compliance program.

- **'A culture that tolerated aggressive sales tactics at the cost of compliance' and deficiencies in ClearView's compliance program:** Among other examples, Counsel Assisting questioned the use of unauthorised scripts, the 'objection handling processes' used by the sales teams and the attempt by a sales manager to circumvent Future of Financial Advice restrictions on conflicted remuneration by attempting to pass off trip offered as an incentive to high performing sales staff as a training trip. In relation to the use of unauthorised scripts, the Commission heard that on two occasions, ClearView identified that unauthorised scripts were in use by sales teams which advocated use of 'classic cornering techniques' to achieve sales. Though the scripts were identified as inappropriate, the Commission heard that the manager responsible for circulating them, and for subsequently defending the '[sales] process' used by his team, received only a warning. Counsel Assisting questioned whether this was an appropriate response and went on to suggest it was indicative of a 'genuine tension between what ClearView's sales team – direct sales team regarded as appropriate and compliant behaviour and what the compliance team regarded as compliant and appropriate behaviour'.
- **'Deficiencies in ClearView's compliance program'.** The Commission heard that the quality assurance methodology at ClearView was flawed because it was not picking up the 'sorts of conduct' outlined above due to: insufficient separation between sales staff and compliance staff ie compliance staff were not sufficiently independent from sales staff; because the quality assurance team 'lacked qualifications…lacked experience…lacked supervision, and they lacked resources' and; because they lacked direct business experience to identify some issues. In addition, the Commission heard that there were issues with the escalation of reporting quality assurance issues. The Commission heard that following ASIC's review of 42 sales calls by ClearView, ClearView determined that the issues identified by the regulator were 'endemic beyond those 42 calls'.
- **Remuneration:** In relation to remuneration, the Commission heard that payment of volume based commissions (30% of sales representative remuneration) was regarded by ClearView as driving a 'high performing sales culture' and acted to 'incentivis[e] aggressive sales tactics'.

Resolution of the breaches with the regulator (the Australian Securities and Investments Commission (ASIC))

The Commission heard that after ClearView ceased its direct sales business, ASIC and ClearView negotiated terms to resolve ASIC's allegations arising from its investigation, including 'contraventions of the anti-hawking provisions, contraventions of the general obligations of financial services licensees imposed by the Corporations Act and contraventions of the consumer protection provisions of the ASIC Act.'

ClearView agreed to resolve the breaches by agreeing to eight conditions imposed by ASIC including that it engage 'Ernst & Young to do a piece of work and to implement recommendations that came from that piece of work, to implement and finalise a consumer remediation program' to prioritise, resource and report on that program and to implement it in a timely manner.

Asked what action ASIC would be taking in relation to the breaches of anti-hawking provisions, Mr Martin said that though it would be open for the regulator to take action, there has been no further discussion or indication from ASIC that intends to do so. Ms Orr then questioned whether ASIC had indicated whether it intends to take action in relation to other breaches referenced above, and in each case, Mr Martin answered that no indication had been given that it intends to do so.

Suncorp Life and Superannuation Limited

Counsel Assisting tendered a witness statement concerning the sale of direct life insurance from Suncorp Life and Superannuation Limited (Suncorp Life) about the processes and controls in place to ensure that the sale of its life insurance policies by phone complied with regulatory requirements.

Suncorp Life told the Commission that in December 2017, the Financial Ombudsman Service (FOS) identified a possible 'systemic issue' relating to the distribution of life insurance policies over the phone. FOS identified that: 'representatives of Suncorp Financial Services were providing personal advice, or opinions to consumers' and 'were not making all relevant health and lifestyle questions. And they were not capturing all relevant answers accurately'.

In addition, in the period from 2014 to June 2017, the quality assurance system used to monitor the sale of those policies by phone did not mark calls as non-compliant in circumstances 'where a medium or high risk operational requirement' (eg noncompliance with the Suncorp Code of Conduct) was not met. Ms Orr said that the statement accepted that 'there was misconduct and conduct that fell below community standards and expectations where representatives of Suncorp Financial Services who distributed Suncorp Life policies by phone under a general advice model provided personal financial product advice to customers' and that the 'failure by a representative to ask or record responses to relevant health and lifestyle questions, or to observe medium or high risk operational requirements could also give rise to misconduct or conduct that fell below community standards and expectations'.

Freedom Case Study

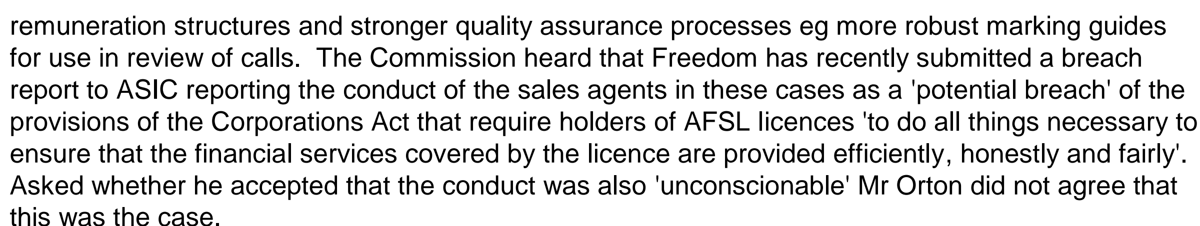
The focus of this case study was also issues arising from the sale of direct sale of life insurance.

The Commission heard that Freedom Insurance Proprietary Limited (which holds an Australian Financial Services Licence AFSL) markets and distributes six types of life insurance products (funeral insurance; life insurance; trauma cover; loan protection cover; accidental death cover; and accidental injury cover) solely through telephone sales.

Issues explored in this case study included issues in relation to sales practices (eg the sale of products to vulnerable customers and the practice of 'downgrading' customers ineligible for life insurance products to accidental death and/or injury products) and sales culture, retention policies/cancellation handling; the role of remuneration structures and more particularly incentives and commissions in driving customer outcomes; and the adequacy of compliance oversight/compliance processes. The value of accidental death insurance and the company's continued sale of the product was also the subject of questions. Some of these issues are outlined in more detail below.

- **Sale of insurance to vulnerable customers (Stewart case study):** The Commission heard from witness Mr Grant Stewart concerning the sale of insurance (a funeral policy, an accidental death policy and an accidental injury policy) over the phone to his 26 year old son who he said has Down Syndrome and a moderate intellectual disability. The Commission heard that Mr Stewart's son was unable to understand the purpose of the sales call, what he was committing to, or why he was providing payment details. Mr Stewart also said that from his son's minimal responses during the calls, that this would have been apparent (on Mr Stewart's subsequent review of the calls) to sales representatives. Mr Stewart then described the difficulties he encountered in trying to cancel the policy (staff attempted to persuade him to keep the policy despite his son not understanding and not needing the policy) and the approach taken by Freedom to handling his complaint (which Mr Stewart also referred to ASIC). Asked for his view of Freedom's cancellation process, Mr Stewart said 'I thought it was a difficult process to go through, and I especially felt for our son having to – to add distress to his situation'. Asked for his view on the way in which Freedom resolved his compliant Mr Stewart said that he 'felt disturbed at the – some of the communication that was involved and that you referenced before, some of the internal communication. I thought that it was a long time coming, an apology for what had happened, and I – I guess I was more disturbed at the potential for this kind of experience to happen to – to other people in similar circumstances to our son'.

  Subsequently Freedom Chief Operating Officer Mr Orton was asked a number of questions in relation to this case study and other similar incidents involving vulnerable customers. He attributed the poor conduct in the incidents to insufficiently strong quality assurance processes that did not pick up the issues, and outlined the changes that have since been made including changes to


remuneration structures and stronger quality assurance processes eg more robust marking guides for use in review of calls. The Commission heard that Freedom has recently submitted a breach report to ASIC reporting the conduct of the sales agents in these cases as a 'potential breach' of the provisions of the Corporations Act that require holders of AFSL licences 'to do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly'. Asked whether he accepted that the conduct was also 'unconscionable' Mr Orton did not agree that this was the case.

- **Commissions/Incentives**: The Commission heard that ASIC is currently 'looking' at Freedom's retention practices and sales practices. In relation to the sales practices at Freedom, the Commission heard that the commission structure in place in recent years at Freedom had 'created a situation where your [ClearView's] sales agents have been incentivised to aggressively pursue sales' eg the commissions Freedom sales agents can earn is uncapped and that this is emphasised during Freedom's recruitment processes (though this has recently ceased to be the case). The Commission also heard that incentives eg trips to Bali were offered to incentivise staff and that those offered during the period 1 January to April 2018 were recently reported by Freedom to ASIC as a potential breach of the Life Insurance Framework (LIF) reforms (conflicted remuneration) in force from 1 January this year. It was suggested by Counsel Assisting that these remuneration structures have led to poor customer outcomes. Mr Orton disagreed that this was so in every case, though he acknowledged that there are 'some examples here today which I can only apologise for'. The Commission also heard that incentives were also employed to incentivise staff to persuade customers not to cancel their policies. Commissions were paid to retention staff on the basis of the number of policies 'saved' and incentive campaigns were implemented to retain as many policies as possible. Counsel Assisting suggested that the processes and incentives in place at Freedom were designed 'to make it as difficult as possible for people to cancel their policies' which Mr Orton agreed had been the outcome. Mr Orton also outlined changes to retention practices including (among others) stopping commissions to retention staff.
- **Sales culture**: The Commission heard evidence of internal communications from sales managers to staff focussing on encouraging volume of sales, and it was suggested, insufficiently focussing on managing conduct issues, even in the face of complaints. In one example, Counsel Assisting questioned the approach to managing the conduct of one sales agent with multiple complaints against him and the (alleged) delay in taking action to address it. 'He was given compliance warnings, but at the same time he was strongly encouraged to continue trying to hit sales targets and maximise his commission?' Counsel Assisting said, to which Mr Orton agreed. Ms Orr went on to suggest that the community could expect Freedom to have taken more decisive action in relation to the repeated misconduct, to which Mr Orton responded that it would do so today.
- **Accidental Death Insurance:** Counsel Assisting questioned the value of accidental death insurance and the practice of 'downgrading' clients ineligible for life insurance to the product. The Commission heard that as at 3pm the day prior to appearing before the Commission, Freedom ceased selling four of six products it offers through outbound sales calls, with the exception of funeral insurance and loan protection insurance. The Commission also heard that there are no current plans for Freedom to cease selling funeral insurance (which comprises 85% of its sales) though Freedom is engaging with ASIC in light of concerns raised in ASIC's recent report into sales of direct life insurance.

[See: The reference to ASIC's report into direct life insurance appears to be a reference to: *ASIC report 587: The sale of direct life insurance* and *ASIC Report 588 Consumers' experiences with the sale of direct life insurance* see: Governance News 03/09/2018]

Statement from Freedom

In a statement issued following Mr Orton's appearance before the commission Freedom said that it 'acknowledges the instances of unacceptable behaviour highlighted by the Commission. For this the board, management and staff of Freedom are deeply sorry'. The statement goes on to say that the examples of conduct highlighted during the hearings are 'not in line with community expectations, our code of conduct or our company values' and to reiterate its apology to Reverend Stewart and his son. The statement adds that Freedom has made a number of changes to policies and procedures including 'improved training of staff, increased internal monitoring of customer calls, reviewing and enhancing compliance procedures, and

improving our sales targeting to better protect vulnerable customers' and that Freedom will 'carefully review the findings and recommendations of the Royal Commission when they are released'.

A separate statement Freedom confirmed that it outbound sales of accidental death and accidental injury insurance had ceased from 6 August, and that the company will cease outbound sales of Term life (death and terminal illness) and trauma insurance as well as the marketing of loan protection cover later in the month.

The value of accidental death policies to customers: 'accidental death products have substantial limitations and limited benefits for consumers'

Referencing a recent report from the Australian Securities and Investments Commission (ASIC) released ahead of the hearings (*ASIC report 587: The sale of direct life insurance and ASIC Report 588 Consumers' experiences with the sale of direct life insurance see: Governance News 03/09/2018)* which raised a number of concerns regarding the value of accidental death policies to customers, Ms Orr highlighted in particular ASIC's concerns that: accidental death insurance was 'unlikely to perform in the way that the consumer or their family or dependents expected at claim time due to the product and its exclusions being poorly described on sales calls'; and concerns in relation to the value of the product.

Ms Orr then outlined the information provided by 10 entities (Auto & General, CommInsure, Greenstone, MLC, OnePath, Suncorp, Westpac and Zurich, as well as Freedom and ClearView) to the Commission in relation to accidental death policies and identified common themes across the statements. These themes included:

- 'extremely high claim denial rates' across all entities;
- the most common reason for denial of a claim was that cause of death was not solely due to accident (excluding claims where a person dies of multiple factors, even where the death was partly or predominantly due to accident)
- a number of entities had 'received few or no claims under their policies'

On this basis Ms Orr said that 'Taken as a whole, the information provided to the Commission by the 10 entities is consistent with the view recently expressed by ASIC that accidental death products have substantial limitations and limited benefits for consumers.'

[Sources: Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry 10 September 2018 – Draft Transcript for Day 50; 11 September 2018 – Draft Transcript for Day 51; 12 September 2018 – Draft Transcript for Day 52; Freedom Insurance Group media release 12/09/2018; 13/09/2018]

Insurance

Top Story | APRA has released final prudential standards to strengthen governance, fitness and propriety and audit requirements for private health insurers (PHI).

Following consultation (see: Governance News: 09/02/2018), the Australian Prudential Regulation Authority (APRA) has released six prudential standards and practice guides 'to strengthen governance, fitness and propriety and audit requirements for private health insurers'.

APRA writes that the package aims to introduce stronger prudential standards that have successfully lifted capabilities across other APRA regulated industries.

- **Prudential Standard CPS 520 Fit and Proper and Prudential Practice Guide HPG 520 Fit and Proper (HPG 520):** The changes extend the cross industry prudential standard to apply to 'all APRA-regulated institutions' including PHIs. The standard sets out minimum requirements for APRA regulated institutions in determining the fitness and propriety of to hold positions of responsibility. In particular, APRA highlights that it requires boards to establish and apply a written policy to ensure the competence and integrity of anyone exercising material influence over the company.
- **Prudential Standard CPS 510 Governance and Prudential Practice Guide HPG 510 Governance:** APRA writes that this is 'a stronger cross-industry standard [ie extends to all APRA regulated institutions] on board governance and renewal, which replaces the equivalent PHI-specific standard, HPS 510'.

- **Prudential Standard HPS 310 Audit and Related Matters:** This standard sets out the requirements for PHIs to appoint an auditor, and the roles and responsibilities that PHIs must require of that auditor as well as PHI obligations to enable the auditor to undertake their role. APRA states that the new requirement 'will harmonise the auditing requirements on PHIs with the balance of the insurance industry'.
- **Prudential Standard HPS 001 Definitions** has been updated to include terminology referenced in CPS 510, CPS 520 and HPS 310.

In addition, Prudential Standard HPS 350 Disclosure to APRA (HPS 350) has been revoked.

APRA writes that its expectation is that 'when fully implemented, these prudential standards and guidance will drive sound governance practices, increase focus on the competence and propriety of responsible persons and strengthen the external audit function'.

APRA Executive Board Member Geoff Summerhayes said that the 'new measures are designed to encourage timely and effective decision-making, helping insurers remain sustainable, and minimising the risk of failures that could threaten policyholders' cover'.

Timing and implementation

The revised prudential standards come into effect on 1 July 2019. APRA states that it will consider 'further transitional arrangements' on a case by case basis and that these requests should be submitted no later than 28 February 2018. APRA states that it's expectation is that the need for these arrangements will be limited given the 'extensive consultation undertaken'.

Context: APRA states that the announcement 'is the culmination of Phase Two of APRA's roadmap for reviewing the PHI prudential framework' and flags that phase three (capital) will commence later in the year.

Response to key issues to emerge from consultation

According to APRA's letter to industry announcing the changes, APRA has not amended the drafting of the standards or guidance in response to feedback received during consultation. The letter identifies the concerns raised by industry and APRA's response to them. The key concerns raised were:

1. concerns around guidance on director independence (and more particularly concerns around 'perceived' mandatory maximum director tenure limits of 12 years);
2. the frequency of the appointed auditor's report on the review of systems, processes and internal controls (it was suggested that annual review was onerous on the basis that it was too frequent);
3. the experience for the appointed auditor (5 years specific experience); and
4. pending changes to the auditor rotation requirements arising from APES 110 Code of Ethics for Professional Accountants. APRA outlines its reasons for not changing the standards.

Guidance is not a 'mandatory prudential requirement' but APRA will consider the composition and membership of boards as part of ongoing supervision: Responding to concerns around guidance on maximum tenure limits in HPG 510, APRA states that it has 'carefully considered the submissions on this issue and confirms the guidance on director tenure is APRA's strong expectation of sound governance practices and not a mandatory prudential requirement. Private health insurers can adopt an alternative approach in appropriate circumstances, but APRA expects the entity to be able to demonstrate that board renewal and succession planning is given sufficiently high priority'.

APRA goes on to note that APRA data on the length of director tenure — 16% of non-executive directors have more than 12 years tenure, 27% exceed 10 years tenure and 6 have tenure between 20 and 31 years — 'raises the question as to whether current board renewal policies have been paid sufficient attention'. APRA will consider the composition of membership of boards as part of its ongoing supervision and engage with firms where concerns are identified.

[Sources: APRA media release 14/09/2018; APRA letter 14/09/2018; Prudential standards (effective from 1 July 2019); Prudential practice guides (effective from 1 July 2019); non confidential submissions on consultation]

Superannuation

In Brief | 'Get your super back' class actions planned? Reportedly Slater and Gordon is planning to launch a series class actions against retail super funds (possibly commencing with CFS or AMP) following the Financial Services Royal Commission superannuation hearings alleging the funds failed to obtain competitive cash interest rates on cash option funds and charged high fees. Both the Commonwealth Bank and AMP have said they are yet to be served with legal proceedings. In a statement, AMP also said it is 'committed to acting in the best interests of our superannuation members' and encouraged any customers who have concerns to contact AMP directly.

[Sources: AMP media release 11/09/2018; CBA media release 11/09/2018; The New Daily 11/09/2018; The ABC 11/09/2018; Business Insider 11/09/2018; [registration required] The Australian 11/09/2018; [registration required] The AFR 12/09/2018]

Banking

Open Banking Update | The ACCC is consulting on a proposed rules framework to implement the Consumer Data Right (CDR) which is proposed to come into operation from 1 July 2019 for the big four banks.

Consultation on proposed rules framework to implement the consumer data right

On 12 September the ACCC released a proposed rules framework to implement the Consumer Data Right (CDR) for consultation. The regulator is seeking stakeholder comment on the content of the proposed rules, including whether rules are required relating to issues not canvassed in the proposed rules framework. Submissions are due by 5pm on 12 October 2018. In addition, the ACCC will be holding a number of stakeholder forums seeking input on the rules.

Context: The Consumer Data Right

The Consumer Data Right (CDR) is a competition and consumer reform announced by the government in the 2017-2018 Federal Budget. The CDR is intended to allow consumers to require their bank to share their data with accredited service providers such as a comparison site or another bank in order to be able to access 'more tailored, competitive services'. The Australian Competition and Consumer Commission (ACCC) has been delegated the lead role in rule-making, consumer education and enforcement (see: The Consumer Data Right – opening data access to drive competition 28/05/2018).

Consultation before enactment of the legislation? Context of the consultation in the implementation of Open Banking

The ACCC will not have legal authority to make the rules until the passage of the draft legislation: *Treasury Laws Amendment (Consumer Data Right) Bill 2018*. Consultation on the draft legislation closed on 7 September.

[Note: For an overview of the draft legislation, see: *Empowering consumer choice – ACCC to regulate the Consumer Data Right* 17/08/2018]

However, due to the proposed timeline for implementation of Open Banking — the government has said that its expectation is that the regime will operate in relation to the first tranche of banking products from 1 July 2019 — the ACCC states that a number of processes need to be run in parallel. This includes the development of the rules, the development of technical standards by the Data Standards Body, the building, testing and implementation of systems by industry stakeholders and the drafting of the legislation.

The ACCC states that its understanding is that the draft legislation will be introduced into Parliament before the end of 2018, to commence in early 2019. The ACCC expects draft rules to be published in December 2018. The rules will be finalised following commencement of the legislation.

Snapshot: Scope of the rules framework

The eventual rules (and data standards) will jointly set out:

- which consumers can take advantage of the CDR
- the data sets that are within scope

- the criteria an entity must satisfy to be an 'accredited data recipient'
- requirements for consumer consent
- requirements for authorisation and authentication
- the limits a consumer can place around the use of their data

Rules Framework

ACCC approach

- **Approach to rulemaking:** In developing the rules that will apply from 1 July 2019, the ACCC states that its approach is to focus on the objectives of the regime and what is 'achievable by 1 July 2019 to provide benefits to consumers without compromising security of data or confidence in the CDR'. The rules will then be developed from this point on a progressive basis.
- **Relationship between the standards and the rules:** The ACCC writes that it is proposing that the rules will create 'high level obligations such that certain activities required by the rules will need to be carried out in accordance with the relevant standard'. A breach of a standard would therefore constitute a breach of the rules and be actionable by the ACCC.
- **Data Standards:** The ACCC also proposes to make rules that set out the matters to which the Data Standards Chair must have regard in the making of the standards, including a requirement that the Chair have regard to particular principles. The proposed principles, the ACCC notes, reflect the principles that applied to the development of the UK's Open Banking API technical standards, with the addition of a principle relating to security. The principles have been adopted by the interim Advisory Committee.
- **Limits on scope of the rules:** The draft legislation imposes limitations on the scope of consumer data rules. The rules cannot require a data holder to disclose data before 1 July 2019 or impose a requirement that has retrospective application.

Rules Framework: key points

- **Sharing data with third parties:** It proposed that rules will be made to the effect that:
  - An accredited data recipient may only collect and use a consumer's data where it has obtained their consent, and only in accordance with that consent.
  - A data holder must share a consumer's data with an accredited data recipient where the consumer directs and authorises the data holder to do so.
  - Data sharing must only occur where the consumer has given relevant informed consent to the accredited data recipient and authorisation to the data holder.
  - Data sharing must occur via an API.
- **Data within scope:**
  - **Customer data:** The ACCC proposes to make rules to specify minimum inclusions for 'customer data'. It's proposed that the obligation to share customer data will only apply to customer data kept in digital form. It's also proposed that identify verification assessments and data relating to authorisations to share data given under the CDR will not be included in the first version of the rules.
  - **Transactions Data:** The ACCC proposes to make rules to specify minimum inclusions for 'transaction data' and states that it welcomes submissions from stakeholders on what transaction metadata could be within scope; what benefits to consumers it could deliver; and what risks would arise.
  - **Product Data:** The ACCC proposes the make rules to specify minimum inclusions for 'product data'. It's proposed that 'generic' product data be made publicly available.

- **No fees:** The ACCC proposes that in the first version of the rules, data sharing will not be subject to fees.
- **Limited to 'big four' banks initially**: The ACCC proposes to make rules to give effect to the phased implementation of Open Banking as outlined by the government (see: Governance News 11/05/2018). The 'four major banks' will be within scope of the rules for the initial phase. The ACCC proposes to exempt the related brands of these banks from the first version of the rules. Other ADIs, with the exception of foreign bank branches, will be brought within scope 12 months later, including related brands of the four major banks. In addition, the ACCC proposes to make a rule to acknowledge that exemptions for certain entities from some or all obligations may be granted in certain cases, should the need arise.
- **Access to the CDR limited to bank customers initially:** The ACCC proposes that the first version of the rules will enable a consumer to direct a bank to share their data only if:
  - they are currently a customer of that bank,
  - they access to and use online banking (ie not to offline consumers).
- **Feedback sought on extending to other customers:** The ACCC adds that it seeks stakeholder views on the timeframe for extending the CDR to former customers and offline consumers.
- **Accreditation:** The draft legislation provides a general power for the ACCC to makes rules in relation to accreditation of data recipients and also the ability to make rules governing the Data Recipient Accreditor. Among other things, the ACCC proposes to:
  - **Provide for a 'single general tier of accreditation in the first version of the rules'**. However, feedback is sought on the development of lower tiers of accreditation and the basis for any reduced accreditation requirements.
  - **The ACCC proposes that accreditation will be granted to applicants if the Data Recipient Accreditor is satisfied that the applicant meets certain criteria** including (among others) that the applicant is a 'fit and proper person' to receive CDR data and has 'appropriate and proportionate systems, resources and procedures in place to comply with the legislation, the rules and the standards including in relation to information security'.
- **Penalty provisions not specified:** The ACCC notes that the rules framework does not identify which of the proposed rules will be specified as civil penalty provisions, since the penalties applying to contravention of the draft legislation and the rules may change in the final legislation. The ACCC goes on to say that its current position is that 'rules imposing obligations on data holders or accredited data recipients will be specified to be civil penalty provisions'.
- **Data sharing must occur via an API.** The API will be implemented in accordance with the standards developed by the Data Standards Body, and data sharing must occur in accordance with those standards'.

Timeframe: Submissions on the proposed framework are due by 5pm on 12 October 2018. In addition, the ACCC will be holding a number of stakeholder forums seeking input on the Rules Framework. The ACCC writes that draft rules will be prepared after submissions have been received and are expected to be published in December 2018. The rules will be finalised following commencement of the legislation.

[Sources: ACCC Consumer Data Right Rules Framework September 2018; [registration required] The AFR 12/09/2018]

In Brief | APRA has released quarterly ADI performance statistics (excluding restricted ADIs) for the June 2018 quarter: The net profit after tax for all ADIs was $36.4 billion for the year ending 30 June 2018. This is an increase of $2.2 billion (6.3%) on the year ending 30 June 2017. The return on equity for all ADIs was 12.1% for the year ending 30 June 2018, compared to 12.0% for the year ending 30 June 2017. In terms of ADI numbers, there were 4 fewer ADIs operating in Australia as at 30 June 2018 (143) as compared to 147 as at 31 March 2018.

[Source: APRA Quarterly ADI performance Statistics June 2018]

Climate Risk

Changing attitudes to climate risk? 70% of Australians support an orderly transition away from coal power but there is less consensus on when that transition should occur, according to a new report from The Australian Institute.

New report from The Australia Institute: *Climate of the Nation 2018 Tracking Australia's attitudes towards climate change and energy* has found that concern about the impacts of climate change is increasing with most Australians supportive of clean, renewable energy and the orderly phasing out of coal-fired power.

Key Points

- **More Australians accept the reality of climate change:** Three quarters (76%, up from 71% 2017) of Australians accept that climate change is occurring, 11% do not think that climate change is occurring and 13% are unsure. In addition, fewer respondents were of the view that climate change impacts are exaggerated (agreement that 'the seriousness of climate change is exaggerated' declined by 5 points from 33% in 2017 to 28% in 2018).
- **Concern about climate has increased:** 73% of Australian are concerned about climate change (an increase from 66% in 2017). Only 6% said that they are 'not at all' concerned. In particular, survey participants said that they were most concerned about the impact of droughts/flooding on food production and supply (78%); the destruction of the great barrier reef (77%); and more bushfires (76%).
- **Support for setting domestic targets for emissions reduction:** Less than a quarter of those surveyed (20%) think Australia should pull out of the Paris Agreement, compared to 55% who say Australian should remain. 68% of Australians support setting domestic targets to reduce emissions in line with the Paris Agreement.
- **Majority of public support transition to renewables:** 70% of Australians agree that the government needs to implement a plan to ensure the orderly closure of old coal plants and their replacement with clean energy. 68% support state governments putting place incentives for renewable energy.
- **Support for ending coal-fired power?** Though supportive of a transition to renewable energy the survey found that there are a diversity of views as to when the transition away from coal should occur. 67% of respondent said the transition should occur within the next 20 years, and 16% said that coal power should not be phased out. The remainder said that it should be phased out between 20 and 50 years.
- **Moratorium on new coal mines and the expansion of existing ones?** 49% were in support and 20% are opposed.
- **Cause of high prices?** 52% of Australians blame the privatisation of electricity generation and supply for increasing electricity prices. 29% blame renewable energy being expensive for increasing electricity prices.
- **Support for government action to address climate change?** 53% think governments are not doing enough about climate change. And less than a quarter of Australians (20%) of Australians believe Australia should pull out of the Paris Agreement.

[Sources: The Australia Institute: Climate of the Nation 2018 Tracking Australia's attitudes towards climate change and energy September 2018; [registration required] The SMH 12/09/2018]

Shareholder demands aren't Paris compliant? The latest report from As You Sow has found shareholder engagement is not on track to achieve the changes required for gas and oil companies to meet Paris climate goals and has called on shareholders to demand targeted changes, and ultimately to divest, if their demands are not met.

As You Sow's latest report: *2020 Paris Compliant Paris Engagement*, analyses the effectiveness of shareholder engagement in changing oil and gas companies' business strategy in line with the Paris climate agreement. According to the report, current shareholder engagement practices with this industry are not on track currently to achieve the changes necessary to meet Paris goals, and the report calls on shareholders to adopt a firmer line.

According to the report:

- **Oil and gas industry needs to be an area of particular focus:** Emissions of the oil and gas industry collectively accounts for approximately half of global carbon dioxide (CO_2). If fossil fuels continue to be extracted at the same rate over the next 28 years as they were between 1988 and 2017, global average temperatures would be on course to rise 4°C by the end of the century ie above the 2°C Paris target.
- **Shareholder advocacy is not 'on pace with Paris climate goals':** Though shareholder pressure has increased on oil and gas companies with 160+ shareholder resolutions filed at 24 oil and gas companies between 2012 and 2018, they achieved no 'material change'. For example, oil and gas companies' demand projects and capital expenditures on exploration and production of new reserves are not in line with Paris compliant goals.
- **The risk of inaction on climate is growing:** The report cites a 'broad range of reports and media stories' outlining the increasing risk associated with fossil fuel investments in a 'globally decarbonizing energy economy' and the associated risks for investors and for companies as evidence of the growing risks of inaction. Among other things, the report suggests that fiduciaries who continue to hold stocks that are 'not performing or that are creating substantial portfolio risk' despite engagement, may face the risk of 'fiduciary breach'. In addition, insufficient financial transparency and the increasing competitiveness of renewables are highlighted as risks.
- **Shareholders need to change their approach to engagement:** The report calls for institutional and retail investors to focus on 'core issues' to effect change in the oil and gas industry over the next two years: 'we can no longer act incrementally or apply diffused approaches and methods. The world needs one powerful last round of effective engagement with a proposal that is fit for purpose' the report writes.
- **Specific shareholder resolutions:** More particularly, the report calls on shareholders to 'unify and demand that oil and gas companies immediately undertake scenario analysis compatible with a 2°C demand level, with transparent methods of assessment and disclosure' and, by 2020 to 'adopt Paris compliant business plans with clear timelines for implementation'. The report goes on to specify that these plans need to:
  - 'Apply a reasonable, transparent approach to assessing fossil fuel projections and rationalize capital expenditures for developing reserves tied to an analysis of each company's share of the remaining global carbon budget.
  - Identify which type of assets are likely to become stranded under scenario planning, and how the company will move away from such assets.
  - Provide capital expenditure plans that are demonstrably in line with maintaining global temperatures well below 2°C and commit to immediately ceasing capital expenditures for exploration of new sources of fossil fuels that would bring company emissions outside of such parameters, especially high cost, high carbon, long term reserves'.
- **Divest if engagement fails:** If Paris Engagement fails, the report states, investors must divest, as if shareholders continue to support companies who fail to change their approach, then the shareholders 'become complicit in both the risk and the outcome'. The report concludes that 'We no longer have the luxury of time. Shareholder engagement must focus on one last, fit for purpose

demand, seeking 2°C assessments from companies in year one and 2°C action plans by 2020. If Paris Compliant Engagement fails, then investors must divest. It is the only way investors themselves can be Paris compliant'.

[Source: As You Sow: 2020 Paris Compliant Paris Engagement]

#MeToo Risk

The latest Australian Human Rights Commission (AHRC) survey has found sexual harassment in Australian workplaces is more prevalent than 6 years ago. The AHRC states that the findings will inform the national inquiry into workplace sexual harassment consultation which will commence later this month.

Between April and June 2018, the Australian Human Rights Commission (AHRC) conducted a national survey to investigate the prevalence, nature and reporting of sexual harassment in Australian workplaces and the community more broadly. Commenting on the findings, Commissioner Kate Jenkins said: 'The findings are more timely and relevant today than ever before, with the huge surge in public concern about sexual harassment generated by the #Me-too movement and the willingness of people to say that, they too, have been affected'.

Key findings

- **The majority of Australians have experienced sexual harassment:** 71% of Australians have been sexually harassed at some point in their lifetimes.
- **The results of the 2018 National Survey indicate that there is a high rate of sexual harassment in Australian workplaces,** with one in three people (33%) having experienced sexual harassment at work in the last five years.
- **Highest incidence?** Women were more likely to be sexually harassed in the workplace than men. In the last 12 months, 23% of women in the Australian workforce have experienced some form of workplace sexual harassment compared with 16% of men in the workforce.
  - Women and those who identified as non-binary or as a gender other than male or female were the groups with the highest incidence of sexual harassment (85% and 89% respectively).
  - People aged 18 to 29 were more likely than those in other age groups to have experienced workplace sexual harassment in the past five years (45%).
  - People who identify as gay, lesbian, bisexual, pansexual, queer, asexual, aromatic, undecided, not sure, questioning or other were more likely than people who identify as straight or heterosexual to have experienced workplace sexual harassment in the past five years (52% and 31% respectively).
  - Aboriginal and Torres Strait Islander people were more likely to have experienced workplace sexual harassment than people who are not Aboriginal or Torres Strait Islander (53% and 32% respectively).
  - People with disability were also more likely than those without disability to have been sexually harassed in the workplace (44% and 32% respectively).
- **The prevalence of sexual harassment across industry sectors was broadly aligned with the proportions of Australian workers employed in those industries.**
  - Rates of workplace sexual harassment are notably higher in some industries, including: information, media and telecommunications (81% of employees in this industry in the last five years), arts and recreation services (49%), electricity, gas, water and waste services (42%) and retail trade (42%).
  - A substantial proportion (just over two in five) of workplaces where the sexual harassment occurred had an equal mix of female and male employees.

- One in five people who were sexually harassed at work said the behaviour was common (20%) in their workplace.
- Two in five people (41%) said they were aware of someone else in their workplace who had also been sexually harassed in the same way as them.

- **The majority of workplace sexual harassment was perpetrated by men.** In almost four out of five cases (79%) of workplace sexual harassment in the past five years, one or more of the perpetrators were male. Harassers were most often a co-worker employed at the same level as the victim and in the majority of cases, had sexually harassed others in the same workplace in a similar manner.
- **Harassment is ongoing over an extended period in many cases.** In addition, a substantial proportion of people who were sexually harassed experienced negative consequences as a result, such as impacts on mental health or stress.
- **Low incidence of reporting?** Fewer than one in five people (17%) made a formal report or complaint in relation to workplace sexual harassment. The most common reasons for not reporting workplace sexual harassment were that people would think it was an over-reaction (49%) and it was easier to keep quiet (45%).
- **Witnessing sexual harassment?**
  - More than one-third of people (37%) have witnessed or heard about the sexual harassment of another person at their workplace in the past five years.
  - Only one in three people (35%) who witnessed or heard about the sexual harassment of someone else in the workplace took action to prevent or reduce the harm of this harassment.
  - Most commonly (in 71% of cases), the action taken by the bystander was to talk with or listen to the victim about the incident. In less than half of cases (47%) the bystander reported the harassment to the employer.
  - The most common reason for bystanders not taking action was knowing that other people were supporting and assisting the victim (41%). In one-quarter (25%) of cases, the bystander did not take action because they did not want to make things worse for the victim.
- **Consequences of reporting?**
  - Almost one in five people who made a formal report or complaint were labelled as a troublemaker (19%), were ostracised, victimised or ignored by colleagues (18%) or resigned (17%).
  - In one in five cases (19%) the formal report or complaint brought no consequences for the perpetrator. The most common outcome of reports or complaints was a formal warning to the perpetrator (30% of cases).
  - Almost half (45%) of people who made a formal report said that no changes occurred at their organisation as a result of the complaint. This was more likely to be the case for complaints lodged by women (55%) than for complaints lodged by men (31%).

The findings will inform the national inquiry into sexual harassment in Australian workplaces: The survey results will inform the AHRC National Inquiry into sexual harassment in Australian workplaces, which will begin public consultations later this month. Commissioner Jenkins commented in relation to this: 'Our world first inquiry is already accepting submissions and we're hoping to hear from individuals and organisations across the country about their experiences and ideas for change. The inquiry will report in the second half of 2019. We encourage all workplaces to examine the results for their industry, and review the effectiveness of their current sexual harassment prevention initiatives. I genuinely believe there is a desire for change and an unprecedented appetite for solutions. Our goal must be to ensure all Australians work in an environment that is safe, productive and free from sexual harassment'.

About the survey: The 2018 National Survey was conducted both online and by telephone with a sample of over 10,000 Australians. The survey measured people's experiences of sexual harassment over the course of their lifetimes and within the last five years. The Commission has conducted and reported on similar sexual harassment surveys in 2003, 2008 and 2012.

[Sources: AHRC media release 12/09/2018; Everyone's business: Fourth national survey on sexual harassment in Australian workplaces]

Other Developments

United States | The Securities and Exchange Commission (SEC) has announced that United Technologies Corporation (UTC) will pay $13.9 million to resolve SEC allegations that it violated the Foreign Corrupt Practices Act 1934 (FCPA) by making illicit payments in its elevator and aircraft engine businesses.

The Securities and Exchange Commission (SEC) announced that United Technologies Corporation (UTC) will pay $13.9 million to resolve SEC allegations that it (and some subsidiaries) violated the *Foreign Corrupt Practices Act* (FCPA) by making illicit payments in its elevator and aircraft engine businesses.

SEC alleged that:

- UTC made unlawful payments to Azerbaijani officials to 'facilitate the sales of elevator equipment for public housing in Baku and as part of a kickback scheme to sell elevators in China'.
- UTC (though a joint venture) also made payments to a Chinese sales agent in an attempt to obtain confidential information from a Chinese official to assist in securing sales to a Chinese state-owned airline.
- UTC also improperly provided trips and gifts to various foreign officials in China, Kuwait, South Korea, Pakistan, Thailand, and Indonesia in order to obtain business.

SEC states that UTC consented to SEC's order without admitting or denying the findings that it violated the anti-bribery, books and records, and internal accounting controls provisions of the *Securities Exchange Act of 1934*.

Deputy Chief of the SEC Enforcement Division's FCPA Unit Tracy L Price said: 'US companies with global operations must implement policies and procedures that prevent bribery and motivate employees to perform ethically…Issuers with weak internal accounting controls open the door to corruption and other financial misconduct.'

Settlement: UTC agreed to pay $13.9 million to resolve SEC allegations. This included disgorgement of $9,067,142 plus interest of $919,392 and a penalty of $4 million.

[Sources: SEC media release 12/09/2018; Stanford Foreign Corrupt Practices Act Clearinghouse 12/09/2018]

In Brief | The FT reports that ING's CFO, a 22 year veteran of the company, will step down from his role (once a replacement is found) having reportedly been identified by ING in a statement as responsible for the compliance failings that led to the money laundering issues for which it has agreed to pay a record €775m in penalties to the Dutch public prosecutor.

[Source: [registration required] The FT 11/09/2018]

Other News

In Brief | The Crowd Sourced Funding Bill enabling proprietary companies with less than $25m in assets and turnover to raise up to $5m in any 12 month period through crowd-funding platforms has passed the senate: *Corporations Amendment (Crowd-sourced Funding for Proprietary Companies) Bill 2017*. SBS quotes assistant minister for treasury and finance Zed Seselja as commenting that the reforms will 'enable proprietary companies to obtain the capital they need to turn good ideas into commercial successes, while providing Australian investors with a larger pool of choice'.

[Sources: Corporations Amendment (Crowd-sourced Funding for Proprietary Companies) Bill 2017; SBS 12/09/2018]