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Diversity

Combined impact of Californian board diversity requirements and community pressure? Facebook has reportedly appointed former PayPal executive, Peggy Alford to its board, but will need to appoint at least one more female director by 2021 to meet Californian board diversity requirements

USA Today reports that Peggy Alford, a former member of PayPal's senior executive team and CFO/head of operations at the Chan Zuckerberg Initiative, will be the first African American woman and second black executive to join Facebook's nine member board. Ms Alford is also the third female director on the Facebook board.

The article adds that Facebook had until 2021 to appoint a third female director in order to comply with a Californian legal requirements.

[Note: California Senate Bill 826 requires any corporation (whether or not incorporated in California) with a principal executive office in California that has shares listed on a major US stock exchange, to have at least one female director on its board by December 31, 2019 and at least two female directors by 2021 (for boards with five directors) or three female directors by 2021 (for boards with six or more directors). See: SB – 826 Corporations: Board of directors]

Ms Alford is quoted as saying that she is excited by 'the company's drive and desire to face hard issues head-on while continuing to improve on the amazing connection experiences they have built over the years.'

Reportedly, Facebook has been under pressure for its lack of leadership and board diversity from the Congressional Black Caucus as well as Civil Rights Leaders for some time.

USA Today also points out that progress in representation for black women on corporate boards is especially slow in Silicon Valley, including at Facebook. USA Today comments, 'At Facebook, you can almost count on one hand the number of black women — six — who work as senior managers or executives in the US, accounting for less than 1% of those 769 jobs'.

[Source: USA Today 12/04/2019]

In Brief | The '30 per cent Club' is reportedly advocating that companies looking to join the ASX, have women on their boards before they list. Reportedly, almost 62% of the 63 companies that listed on the ASX over the past year had zero women on their boards and 32% had only one female director

[Source: Stockhead 15/04/2019]

Remuneration

Increased emphasis on non-financial targets is unlikely to secure investor support? The SMH reports that some senior bankers have expressed concern that APRA's expected restrictions on executive pay are unlikely to be supported by investors at upcoming AGMs

The SMH reports that senior bankers have expressed concern that placing greater emphasis on achievement of non-financial targets (as advocated by the Australian Prudential Regulation Authority (APRA)), is unlikely to receive investor support and consequently heightens the risk of second strikes (in some cases) at upcoming AGMs.

[Note: In his address to the AFR Wealth Summit: *Building resilience in three dimensions*, Australian Prudential Regulation Authority (APRA) Chair Wayne Byres said among other things, that APRA will commence consultation on revisions to current prudential standards relating to remuneration by the middle of the year. Mr Byres also said that the regulator wants to 'see remuneration based on a genuine and even balance of financial and non-financial considerations' suggesting that a 50:50 split may be an appropriate starting point. See: Governance News 05/04/2019]

Reportedly, senior bankers have expressed the view that key investors are likely to oppose the move on the basis that non-financial targets can more easily be 'gamed'.



The SMH quoted an unnamed senior banker as saying that satisfying both APRA and investors posed a significant challenge as 'you are never going to get everyone to agree'. The same source also reportedly expressed concern that in being more prescriptive on the issue, APRA is overstepping, 'APRA is entitled to their opinion but — unless there is regulation — it is a matter for the shareholders...It's going to take a lot of effort to find a solution that will meet APRA's requirements and avoid a second strike' they said.

However, the SMH reports that institutional investors and proxy advisers have said that they are opposed to non-financial targets provided that they are sufficiently transparent and justified. Head of investment stewardship at Vanguard, Glenn Booraem is quoted as stating that the fund will consider APRA's proposal but the more important debate is to support long-term remuneration structures over short-term targets.

Some investors have also reportedly said that they are more concerned about the exercise of board discretion in the context of paying bank bonuses ie with boards ensuring bonuses are not automatic, than with the use of non-financial targets per se.

[Source: The SMH 11/04/2019]

In Brief | Regressing? The UK Financial Reporting Council has released its gender pay gap report for 2017/2018: According to the report the FRC's own median gender pay and bonus gap have increased since the last report: the median pay gap increased to 27.8 (up from 21.8% 2017)

[Source: FRC Gender Pay Gap Report 2017/2018 March 2019]

In Brief | The WSJ reports that BlackRock CEO Larry Fink's compensation has been reduced by 14% in line with poorer than expected financial results over the past year. The WSJ opines that the reduction in Mr Fink's compensation signals that last year was a 'tougher year' not only for BlackRock but for asset managers more generally

[Source: [registration required] The WSJ 12/04/2019]

Shareholder Activism

Quietest opening quarter to a year since 2016 overall, but Australia ranks second 'busiest' country behind the US: Activist Insight has released a quarterly review of shareholder activism in Q1 2019

Activist Insight has released its activist trends report for Q1 2019.

Some Key Points

Global Overview Q1 2019

- **Overall, Q1 2019 was the quietest opening quarter to a year (in terms of the number of companies targeted by activists) since 2015.** In Q1 2019, 295 were publicly subjected to activist demands as compared with 368 in Q1 2018 and 309 in Q1 2017.
- **Though still ranked number 1 in terms of the number of companies targeted by activist campaigns, the US had a slow start to the year** with 189 companies targeted in Q1 2019 as compared with 227 (Q1 2018), 191 (Q1 2017) and 221 (Q1 2016).
- **The UK had its busiest Q1 in recent years** with 17 companies facing public activist campaigns in Q1 2019 as compared with 14 companies in Q1 2018 and 15 in 2017.

Overview of trends in Australia Q1 2019

- **Australia was ranked second 'busiest' country** behind the US in Q1 2019 with 25 companies facing activist demands. This was a slight decrease on Q1 2018 (26 companies) but is a significant increase on Q1 2017 (18 companies).
- **The majority of activist demands (69%) during Q1 were board related.** The next most common categories of demands were: balance sheet related demands (11%), governance related demands, M&A (5%) and business strategy related demands (5%). The report comments that Q1 2019 is the first quarter 'in recent years' that Australia-based companies have faced pro-M&A activist demands.



- **Board seats gained during the period:** There were a total of 9 board seats won in Q1 2019, 6 won through contested votes at meetings, and 3 secured by settlement which represents a recent Q1 low. In the same period in 2018, 18 seats had been won, in 2017, 12 seats had been won and in 2016 10 seats had been won.
- **(Australia-based) basic minerals companies were the most targeted during the period** (44% of activist demands). The next most targeted category were consumer goods companies (20% of demands) and services companies (12% of demands).
- **The majority of campaigns targeted nano cap companies** (88%) of campaigns.

[Source: [registration required] Activist Insight: Shareholder Activism in Q1 2019 April 2019]

Lazard's Quarterly Review of Shareholder Activism — Q1 2019 released: Starboard Value has surpassed Elliott as the most prolific activist fund for the first time

Lazard has released its latest quarterly review of trends in shareholder activism: Lazard's Review of Shareholder Activism — Q1 2019.

Some Key Points

- Q1 2019's campaign activity (57 new campaigns against 53 companies) was lower relative to 2018's record levels of activity, but is overall 'in line with' multi-year average levels (55 companies is the average).
- Capital deployed in Q1 2019 (\$11.3bn) was in line with recent quarters, and the top 10 activists had a cumulative \$75.5bn deployed in public activist positions (new and existing) at the end of the quarter
- Campaigns outside the US continued to account for approximately 33% of global activity
- 46% of campaigns launched in Q1 2019 were M&A-driven, with pushing for a sale being the most common M&A objective (39% of campaigns), followed closely by pushing for break up/divestiture (38%)
- Starboard Value overtook Elliott Management as the most prolific activist in Q1 2019, with Starboard launching seven new campaigns as compared with Elliott's four campaigns. The FT reports that Starboard is increasingly considered a 'formidable opponent' and as a credible threat by firms because of its recent successful activity

Emerging trends

- More aggressive in pushing for board change? Q1 2019 was one of the busiest quarters ever for 'long slate nominations' — instances where an activist nominates directors to replace 50%-plus of the incumbent board — with 10 long slates nominated, accounting for 77 Board seats sought. Lazard comments that this is an indication that activists are increasingly emboldened when demanding board change.
- Increased engagement: Q1 2019 saw active managers, across geographies, increasing engagement with target companies, and more particularly employing a more 'vocal approach' in activist situations.
- In Q1, 2019 39 board seats have been won through settlements and none have been won through proxy campaigns.
- Increased focus on culture: Passage managers appear to be using their increasing influence to engage with companies on how corporate culture and purpose can impact long term performance for example, both State Street and BlackRock issued letters at the outset of the year calling on companies to focus on these issues.

[Sources: [registration required] Lazard: Quarterly Review of Shareholder Activism Q1 2019, [registration required] The FT 11/04/2019]



Activist shareholders are reportedly planning to make another bid to remove Mark Zuckerberg as Facebook Chair and abolish the firm's dual class structure

Business Insider reports that Facebook's activist shareholders at Facebook are making another attempt to: a) oust Mark Zuckerberg as chairman and replace him with an independent executive, and b) to abolish the existing dual class share structure.

Reportedly some investors are unhappy about the way in which recent scandals (eg Cambridge Analytica) have been dealt with by the firm, and also believe that Mr Zuckerberg holds too much power.

Trillium Asset Management reportedly filed one proposal (seeking to replace Mr Zuckerberg as Chair), but it is unknown which shareholders are behind the second proposal.

Facebook has called on shareholders to oppose both proposals on the basis that: a) an independent Chair is unnecessary and would not deliver more effective or efficient oversight and b) that the existing 'capital structure is in the best interests of our stockholders and that our current corporate governance structure is sound and effective'.

The two shareholder proposals will reportedly be voted on at the upcoming Facebook AGM on 30 May.

Business Insider comments that the chances of either proposal being successful is slim, Business Insider comments, given Mr Zuckerberg holds more than half of the voting power at the firm.

[Source: BusinessInsider 14/04/2019]

Gender pay disclosure resolution at BOA: The Bank of America is reportedly facing a shareholder resolution calling for BOA to disclose unadjusted metrics comparing average male vs average female pay

Glass Lewis reports that the Bank of America (BOA) is facing a shareholder resolution calling for the company to disclose its median (gender) pay ratio ie the average of what all women at BOA earn relative to the average of what all male employees earn.

Glass Lewis comments that this number, which is not adjusted to take into account factors such as job title or geography, is often very different to the pay metrics that are usually reported. According to Glass Lewis, BOA has been targeted for a number of years by investors requesting that it provide more information about how it ensures women are paid equally and that in response, BOA has substantially enhanced its disclosure on the issue.

Glass Lewis adds that the latest shareholder resolutions means that 'investors are now faced with a decision as to whether the potential reputational risks associated with publishing unadjusted data outweigh the benefits'.

[Source: Glass Lewis Blog 10/04/2019]


Regulators

Top Story | APRA's new enforcement approach: details released

The Australian Prudential Regulation Authority (APRA) will adopt a 'constructively tough' approach to deter misconduct in line with the recommendations of the APRA Strategic Enforcement Review Final Report.

Key Takeouts

1. **Existing approach 'retained but reinforced':** The strategic review of APRA's enforcement approach makes seven recommendations to strengthen APRA's current approach and shift it towards being 'constructively tough'. However, the recommended changes 'largely' align, with APRA's current approach which the Review recommends 'be retained but reinforced'.
2. **More willing to make use of the full range of its available powers:** APRA as a safety regulator will remain focused on 'preventing harm with the use of non-formal supervisory tools' which are often the



most appropriate/effective to achieve the desired outcome. As such, its envisaged that more 'coercive and intrusive' tools eg seeking civil or criminal penalties will be used less frequently than other tools. However, 'APRA will be more willing to use the full range of its formal powers – such as direction powers and licence conditions – to achieve prudential outcomes and deter unacceptable practices'.

3. **Impact of APRA's new 'constructively tough' approach to enforcement?** APRA has said that it will implement all review recommendations and that its new enforcement approach will mean the regulator: will be less patient with the time taken by uncooperative entities to remediate issues, more forceful in expressing specific expectations, and more prepared to set examples using public enforcement to achieve general deterrence (where appropriate).

Introduction

The Australian Prudential Regulation Authority (APRA) released both the results of the enforcement strategy review led by APRA Deputy Chair John Lonsdale and details of its new enforcement approach on 16 April. In a statement, APRA Chair Wayne Byres said APRA would implement all the recommendations of the enforcement review, including adopting a 'constructively tough' appetite to enforcement.

A high level overview of both the review findings and recommendations and APRA's new enforcement approach, which comes into immediate effect, is below.

APRA Enforcement Strategy Review Final Report

The Review examined the appropriateness of APRA's enforcement strategy and infrastructure, and assessed how enforcement should interact with APRA's core role of prudential supervision and was conducted between November 2018 to March 2019. The Review was led by APRA Deputy Chair John Lonsdale, who was supported by APRA staff and an independent advisory panel of experts. The panel comprised: Dr Robert Austin (Former Judge of Supreme Court of New South Wales); Commissioner Sarah Court (Australian Competition and Consumer Commission); and Professor Dimity Kingsford Smith (Minter Ellison Research Professor of Risk and Regulation and Deputy Director (Research) of the Centre for Law, Markets and Regulation at the University of New South Wales).

The Final Report of the Review was presented to APRA Members on 29 March 2019 and released publicly on 16 April.

Some key findings

- APRA has performed well overall in its primary role of protecting the soundness and stability of institutions. However, it could achieve better outcomes in the future by taking stronger action earlier where entities were are cooperative or open, and by being more willing to set public examples.
- APRA's appetite to use enforcement 'as a last resort and mainly where financial promises or stability are at risk has been too low' and in some cases has resulted in 'risks not being addressed in a timely manner'.
- APRA's 'last resort enforcement appetite' is reflected in the current size of its support function and enforcement infrastructure which represents about 3% of total staff.
- Though in most circumstances APRA's non-formal supervision approaches are 'highly effective' — that is to say, timely and resource efficient as compared with court based action — they also carry the risk that intended prudential outcome may not be achieved. In addition, the approach could lead to less than optimal prudential outcomes eg protracted exposure to known risks, lack of deterrence.
- The report also observes that 'use of formal powers are an important part of the supervisory toolkit and using them appropriately can bring benefits. It can make non-formal supervision approaches more effective by reinforcing the credible threat that APRA will take stronger action where entities and individuals do not cooperate'. Once consequence of APRA's low appetite has been to 'diminish the credible threat of consequences for failing to meet APRA's requirements'.
- APRA's enforcement appetite is also 'out of step' with international peer organisations.



- APRA's approach to enforcing behavioural risk is still maturing (as is the case for prudential regulators globally) and the regulator has been 'hesitant to use enforcement to compel remediation of behavioural risks, or to hold entities and individuals to account and achieve deterrence in respect of these issues'.
- APRA and the Australian Securities and Investments Commission (ASIC) need to coordinate more closely on enforcement matters to fulfil their respective mandates (as was emphasised by the Financial Services Royal Commission's final report recommendations).

Review recommendations — some key points

The review makes seven recommendations to strengthen, but not to fundamentally alter, ASIC's enforcement approach — the proposed changes 'largely' align, the report states, with 'APRA's current approach which the review recommends 'be retained but reinforced'. 'APRA is expected to continue to achieve its mandate largely through non-formal supervisory approaches, with enforcement action used to prevent and address serious prudential risks' the report states.

In broad terms, the review recommends that going forward APRA should:

- take stronger actions earlier where entities and individuals are not open and cooperative
- be more forceful in holding entities and individuals to account for actions that could have an adverse impact on financial soundness and stability, or lead to other inappropriate prudential outcomes
- more actively consider the deterrence benefits of enforcement action
- be more innovative in the use of its powers or combinations of its powers
- coordinate more effectively with the Australian Securities and Investments Commission (ASIC) where the two agencies have enforcement matters of common interest

In addition, it's recommended that APRA should:

- build 'a more forceful supervisory culture and approach'
- establish an APRA-member led committee to drive enforcement decision making and strengthen oversight
- establish an independent Banking Executive Accountability Regime (BEAR) Disqualifications Panel to make disqualification decisions under the BEAR
- seek legislative reforms (for example amendments to enhance APRA's enforcement powers and penalties) to help ensure the legislative framework can facilitate the regulator's increased enforcement appetite

In a statement Mr Lonsdale said the review found APRA had, on the whole, performed well in its primary role of protecting the soundness and stability of institutions, but that the regulator could achieve better outcomes in the future by taking stronger action earlier where entities were not cooperative or open, and by being more willing to set public examples. He went on to say that 'The recommendations of the review will still mean that APRA as a safety regulator remains focused on preventing harm with the use of non-formal supervisory tools. However, APRA will be more willing to use the full range of its formal powers – such as direction powers and licence conditions – to achieve prudential outcomes and deter unacceptable practices'.

APRA Chair Wayne Byres said that the review acknowledges that as a supervision-led prudential regulator, APRA's primary focus will always be on resolving issues before they cause problems for depositors, insurance policyholders and superannuation members, rather than relying on backward-looking actions after harm has occurred and that in most cases that this will continue to be achieved through 'non-formal tools'. Mr Byres added that 'in future, APRA will be less patient with the time taken by uncooperative entities to remediate issues, more forceful in expressing specific expectations, and prepared to set examples using public enforcement to achieve general deterrence'.

Specifics: Seven Recommendations

- **Recommendation 1:** Strengthening APRA-ASIC coordination on enforcement by developing clear principles for sharing information and taking coordinated action on matters of mutual interest.




- **Recommendation 2:** Increasing APRA's enforcement appetite from a 'last resort' to a 'constructively tough' approach and setting this out in a Board-endorsed, publicly available enforcement strategy.

This means APRA should take enforcement action to hold entities and individuals to account to prevent and address serious prudential risks: a) earlier than it currently does, well before an imminent threat to financial viability; b) in broader circumstances than it currently does, including in relation to behavioural risks; and c) to achieve deterrence, including by making enforcement actions public where appropriate, to send strong messages that entities and individuals must comply with their prudential obligations.

- **Recommendation 3:** Assign clear responsibility to the supervisory divisions for applying the enforcement appetite. This means supervisors and their management should understand enforcement options, maintain supervisory watch lists of potential enforcement cases, escalate matters that meet the criteria set out in the enforcement appetite, and make recommendations to the new Enforcement Committee.
- **Recommendation 4:**
 - Build a more confident and forceful supervisory culture, emboldened by tone from the top of the organisation and management support, and refresh the supervisory approach, including the underlying infrastructure, to: a) better empower and support supervisors to undertake forceful supervision, including by holding entities and individuals to account through the use of enforcement; and b) appropriately tailor the approach to industry-specific factors, to take account of issues of relevance to each sector and actively facilitate the use of enforcement.
 - Direct a relevant portion of the increase in APRA's resources, as recently announced by the government, to its supervisory divisions as appropriate to reflect the additional work required to implement an increased enforcement appetite.

[Note: In his (planned) opening remarks to the senate economics legislation committee, APRA Chair Wayne Byres said that additional funding would be deployed in this way. Mr Byres' remarks are covered in a separate post in this issue of Governance News]

- **Recommendation 5:**
 - APRA should establish an APRA Member-led Enforcement Committee for enforcement decision-making to give APRA executives greater visibility of potential enforcement matters and ensure the constructively tough enforcement appetite is applied appropriately. The Enforcement Committee would have responsibility for: a) overseeing watch lists of prospective cases; b) reviewing and challenging the supervisory strategy on escalated matters; c) deciding whether or not to take enforcement action on escalated matters; d) referring relevant cases to the APRA Banking Executive Accountability Regime (BEAR) Disqualifications Panel for decision; and e) reviewing APRA's enforcement strategy on an ongoing basis to assess its suitability.
 - APRA should also establish an APRA banking executive accountability regime (BEAR) Disqualifications Panel comprised of independent persons to make disqualification decisions under the BEAR.
 - Ensure appropriate oversight and challenge in relation to enforcement matters, including through the Member-led Enforcement Committee and through APRA's Quality Assurance (QA) function.
- **Recommendation 6:** Build an enforcement support infrastructure shaped around the new appetite, with the ability to take on an increased number of investigations and enforcement actions. Seek the Government's consideration to establish a new hypothecated enforcement fund for APRA.
- **Recommendation 7:** Seek the government's consideration of legislative amendments that enhance APRA's enforcement powers and penalties by: a) addressing impediments that could hinder the new enforcement appetite, including remedying the adequacy of penalties, closing gaps in APRA's enforcement powers in superannuation and private health insurance, and removing barriers to conducting joint investigations with ASIC; and b) extending the BEAR across all APRA-regulated industries and, in so doing, considering the introduction of a civil penalty for a breach of accountability obligations by an accountable person. In a statement, Mr Byres indicated support for this



recommendation and said that the proposed legislative changes would be referred to the government for its consideration.

[Note: The Review includes a table (Table 4: Assessment of effectiveness of certain APRA enforcement powers at p49) summarising the gaps in APRA's current enforcement powers. The proposed changes are outlined in the report at p48-53. See: [APRA Enforcement Strategy Enforcement Review: Final Report](#)]

Review in three years? The report suggests that a 'comprehensive review of the implementation of the recommendations' should be conducted in three years.

Impact for industry?

The report states that if the recommendations are implemented 'it can be expected APRA will continue to be a supervisory-led organisation that undertakes the majority of its work through non-formal approaches. Enforcement should not become its first option but will be used, where appropriate'.

More particularly, the report suggests industry should expect that APRA will:

- act more quickly – by being less patient about the time taken to remediate issues;
- be more forceful – by being firmer in clearly setting and following up on expectations, and more ready to hold to account; and
- be willing to set public examples – by being more transparent and sending strong public messages through enforcement action.

APRA's new approach to enforcement

APRA will implement all the review recommendations including adopting a 'constructively tough' approach to enforcement

APRA's new approach is outlined in a board endorsed enforcement strategy document which the regulator also released on 16 April (in line with recommendation 2 of the enforcement strategy review). The purpose publicly releasing the document 'is to provide guidance on how APRA will approach its decisions to use enforcement action in relation to prudential risks'. The new enforcement approach comes into effect immediately.

An overview of APRA's stated enforcement objective, the criteria that APRA will use to determine whether enforcement action is appropriate, and the guiding principles that will inform the regulator's enforcement decisions is below.

APRA's enforcement objective

APRA's objective is to 'prevent and address serious prudential risks and hold entities and individuals to account'.

- APRA focus, as a 'safety based regulator' is on 'preventing and mitigating harm, and its enforcement actions will be aimed at the proactive remediation of prudential risks, as well as holding institutions and individuals to account for their actions'.
- APRA states that 'enforcement action can also have a positive deterrent effect beyond the immediate target of the action', On this basis, 'APRA may use enforcement to achieve the strategic benefits of general deterrence, including through public enforcement action to deliver wider prudential outcomes where appropriate'
- Though in most circumstances, 'non-formal tools are effective in achieving APRA's prudential outcomes in a resource-efficient and timely manner' particularly where regulated entities are 'open and cooperative' the effectiveness of prudential supervision depends on regulated parties 'knowing that APRA will take firm action where prudential risks are not being properly addressed'. As such, APRA may select a combination of tools from its supervisory toolkit (which range from information gathering powers to more 'coercive and intrusive tools') to suit the particular circumstances.



Enforcement criteria — issues that will lead APRA to consider enforcement action

APRA will use the following enforcement criteria to identify matters for potential enforcement action (though APRA specifies that the criteria are 'not exhaustive').

Where an entity or individual has not:

- adequately prevented or addressed prudential risks; or
- conducted business with honesty and integrity, or with due skill, care and diligence; or
- dealt with APRA in an open, cooperative and constructive way

and this has resulted in:

- an adverse impact on financial soundness, stability or, in the case of superannuation, the interests of members; or
- the risk or behaviour could have, or could have had, an adverse impact on financial soundness, stability or, in the case of superannuation, the interests of members. For example, actions that do not promote prudent risk management; or
- APRA's ability to make an accurate and timely assessment of an entity's prudential risk profile has been, could be or could have been impeded.

The four principles underpinning APRA's enforcement approach

Guiding APRA's strategic decisions on when and how to take enforcement action are the following four principles.

- **Risk based:** APRA's appetite for enforcement should prioritise the issues and entities that pose the most serious prudential risks
- **Forward looking:** APRA should use enforcement to prevent serious prudential risks from having a realised impact. 'The principle of deterrence will be an important forward-looking component of APRA's decision making.'
- **Outcomes based:** 'APRA's appetite for enforcement action will be driven by the prudential outcomes that it is trying to achieve' and as such there will be cases where non-formal supervisory approaches are more appropriate than the alternative.
- **Deterrence:** APRA should actively consider the need to deter similar practices from occurring in future including by making enforcement actions public where appropriate. 'However, as a prudential regulator APRA must always balance the benefits of public action against any immediate risks to financial stability'.

Other factors APRA will take into account: APRA states that it will also take into account other factors when considering the use of enforcement powers. These include:

- **Proportionality:** Whether the action taken is proportionate and properly reflects the nature and seriousness of the matter under consideration and its potential impact on APRA's prudential objectives
- **History and behaviour:** APRA decision makers will have regard to the past conduct of the entity or individual before during and after the matter or event under consideration
- **Other Agencies:** APRA decision makers will have regard to any relevant action proposed or being taken by other domestic and/or international regulatory or law enforcement agencies -including whether, if such agencies are taking action, it is necessary or desirable for APRA also to take its own action

[Sources: APRA Enforcement Strategy Review 16/04/2019; APRA's Enforcement Approach 16/04/2019; APRA media releases 16/01/2019; 16/01/2019; The SMH 16/04/2019; [registration required] The AFR 16/04/2019; Investor Daily 16/04/2019; Financial Standard 16/04/2019]

ASIC's appearance at senate estimates: The extension of BEAR is an 'important next step' but ASIC is in a 'very confident position moving forward for the task ahead' the Committee heard

In his opening statement at the budget estimates hearing, Australian Securities and Investments (ASIC) Chair James Shipton said that ASIC is focused on 'maintaining' the momentum for reform and improvement of the financial services sector. He also provided an update on ASIC's recent work in this regard and tabled ASIC's most recent enforcement outcomes report (see: Governance News 10/04/2019).

Some Key Points

- **Enforcement highlights:** Mr Shipton said that from February 2018 to March 2019 there has been a 15% increase in the number of ASIC enforcement investigations; a 65% increase in enforcement investigations involving the big six (or their officers or subsidiary companies); and a 129% increase in wealth management investigations.
- **New powers:** Mr Shipton also welcomed the passage of *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill* commenting that the new powers would enable ASIC to take more proactive action to improve standards and achieve fairer consumer outcomes in the financial services sector.
- **Comments on the tightening of credit:** Mr Shipton also responded to 'commentary to the effect that consumers are finding it harder to obtain credit' commenting that suggestions that responsible lending obligations are contributing to it, are 'not true'. 'We [ASIC] have been administering the credit laws that have been in place for nearly a decade' Mr Shipton said.
- **Mr Shipton also welcomed the \$400m in additional funding** which he said would enable ASIC to give effect to its goals, as well as the additional funding for the Federal Court to extend its jurisdiction to corporate crime. Mr Shipton said that the additional funding would enable ASIC to: a) significantly increase the number of cases it pursues and to accelerate the speed of court based enforcement outcomes; b) use the full extent of its new powers and penalties; c) embed and expand its supervisory approaches; and d) to 'play our part in implementing the Government's package of reforms and our new obligations and responsibilities following the Royal Commission' including becoming the primary conduct regulator in superannuation.

Questions to ASIC witnesses

A number of questions to ASIC witnesses concerned the way in which the regulator plans to deploy additional funding and the impact of recently passed legislation on ASIC's enforcement/supervision activity.

- **Additional funding and additional powers will enable ASIC to better execute its role.** Asked to explain how two recently passed Bills — *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill* and *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2019* — would better enable ASIC to fulfil its role, Mr Shipton said that 'taken together, these new powers and penalties, combined with the budget [ie additional funding], are very powerful and will enable us to be more effective and efficient in our regulatory output.' Mr Shipton went on to emphasise that the penalty now attaching to s912A of the *Corporations Act 2001 (Cth)* is of particular significance. 'We now have meaningful deterrents; we now have meaningful penalties, and part of our enforcement priority moving forward will be to pursue cases of this nature' he said.
- **'Fairness' as a concept, is not 'difficult to understand':** Commenting on the concept of 'fairness', ASIC Deputy Chair Mr Daniel Crennan commented that 'There seems to be an indication from the regulated community via the media that fairness [ie in the context of s912A] is difficult to understand. I won't make any rude remarks about that narrative. However, Justice Beach certainly says that this is a very simple human concept and should be very easy to understand. The notion that that legal obligation, which has been in the legislation for well over a decade, wasn't important to those it was designed to regulate or designed to be observed by, because there was no consequence, is quite revealing. That is why the penalties bill was so important to us—because now there are consequences, and quite significant civil penalty consequences'.
- **Role as a conduct regulator in superannuation:**



- Commenting on the impact of the recent passage of the Members Outcome Bill (*Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No 1) Bill 2019*) from ASIC's perspective, Mr Crennan said that, it would become 'important to us if recommendation 6.4 by the royal commission is implemented, thereby making us a conduct regulator of the SIS Act [*Superannuation Industry (Supervision) Act 1993 (Cth)*]. Mr Crennan highlighted the introduction of, civil penalties attaching to trustee obligations (sections 52 and 52A) as of particular importance.
- When asked for his view on ASIC's role in taking action on underperforming superannuation funds, Mr Shipton said that he supported the comments made by Deputy Chair Karen Chester at the recent AFR Wealth Summit — that is, comments to the effect that ASIC will apply its 'why not litigate?' approach to underperforming funds, and that ASIC would look to take action (including seeking civil or criminal penalties) as appropriate.
- **What more does ASIC require to execute its role?** The Committee Chair observed that in light of the comments, ASIC appeared to have the 'resourcing, the enforcement powers and every tool that is now required in order to do the job'. Mr Shipton agreed that ASIC is on a 'very confident position moving forward for the task ahead' but added that the extension of BEAR is an 'important next step'.

Update on Financial Services Royal Commission related referrals

ASIC witnesses were also asked to provide an update on referrals made by the Financial Services Royal Commission.

- Senator Ketter said that the last report from ASIC at the end of February was that ASIC was prioritising 13 referrals from the commission and ASIC's enforcement team was investigating a further 12 matters that featured as case studies.
- Asked to provide an update specifically on the referrals from the Financial Services Royal Commission, Executive Director Tim Mullaly said ASIC is working on '13 matters that we got from the final royal commission report, and then there were, as mentioned, 14 or so case studies that we identified' in addition to 90 related investigations. The Committee heard that investigations are at various stages and that ASIC has not set target timeframes for finalising the referrals or for decisions as to whether or to proceed with criminal prosecution or civil action.
- Mr Mullaly added that ASIC had increased the number of people working on the project (Financial Services Royal Commission related matters) from 45 people working full time on the project at the time of the last committee hearing in February to 70 people.
- Mr Shipton was also asked to comment on commentary in the media ascribed to senior bankers that ASIC is 'on a frolic'. Mr Shipton said that the comments are 'very disheartening' adding that they are 'ultimately unhelpful and destructive because they do not represent the constructive engagement that we want to have. It also reflects...a mindset in some, not all segments of the financial services industry that they do not realise that there is a trust deficit and a need for them to prioritise fair outcomes for consumers and also to make our financial system just better and stronger'. Mr Shipton went on to say that there is a risk, with the end of the Financial Services Royal Commission that 'pockets of resistance' would go back to 'business as usual'.

[Sources: Budget Estimates, Opening Statement by ASIC Chair James Shipton 10/04/2019; Transcript: Economics Legislation Committee hearing 10/04/2019; [registration required] The AFR 15/04/2019]

APRA has released Chair Wayne Byres' planned opening remarks to the Senate Economics Legislation Committee

The Australian Prudential Regulation Authority (APRA) has released APRA Chairman, Wayne Byres' planned opening statement to the senate economics legislation commission (estimates hearing) despite the fact that the hearing did not proceed due to the Federal Election being called.

Some Key Points

Funding



- **Upgrade supervisory capabilities:** The announcement of \$150 million in funding over four years, will enable APRA to substantially upgrade its supervisory capabilities in three ways: a) building internal technical expertise and accessing technical specialists outside of APRA; b) implementing the recommended extension of the Banking Executive Accountability Regime (BEAR) to all APRA-regulated entities; and c) boosting APRA's broader supervision capacity across all regulated entities, and ensuring this can be sustained in future years.
- **Improve data collection:** The \$60 million in funding over four years announced in November last year is being used to: a) improve APRA's data collection, storage and analysis systems to improve supervisory assessment and decision-making; b) increase the number of frontline supervisors for the largest and most complex financial institutions; and c) enhance APRA's ability to address new and emerging risk areas by strengthening internal technical expertise and increasing access to specialists outside APRA.
- **Overall the funding will enable APRA to employ an additional 100 permanent staff** which Mr Byres described as a 'meaningful increase relative to our long-run operating level of around 600'.
- **The additional resources will also fund APRA's new enforcement approach.** 'The new funding for APRA that has been approved will allow us to take on new responsibilities and adopt a broader and wider focus in our activities, particularly in areas of non-financial risk, without needing to lessen the attention we give to the critical issues of financial safety and soundness' Mr Byres writes.

[Note: Details of APRA's new enforcement approach were released on 16 April. This is covered in a separate post in this issue of Governance News.]

- The capability review (currently underway) will also help ensure, Mr Byres writes, that APRA's resources are deployed effectively.

Superannuation

- **Mr Byres said the APRA is 'commencing a major drive towards increased industry transparency as part of its ongoing push to lift standards and ensure trustees put their members' interests first'.** APRA has also announced plans to enhance the consistency and granularity of the superannuation data it collects, especially for choice products. More of this data will be made publicly available, and easier to interpret, to help members make informed decisions about who to entrust with their retirement savings, Mr Byres writes. APRA has also flagged its broader agenda for superannuation, focussed on 'lifting trustee board capability, developing a stronger fiduciary culture and tackling conflicts of interest'.
- **Mr Byres also welcomes APRA's new directions power** following the passage of *Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No 1) Bill 2019* describing APRA's new powers as a 'game changer' for the regulator. He said APRA is preparing to use them to put pressure on underperforming superannuation funds to improve performance or exit the industry.

Update APRA's work on the Financial Services Royal Commission recommendations and referrals

Mr Byres said that this work remains a 'high priority' for APRA and that the regulator is continuing to gather evidence on each of the possible enforcement matters referred. APRA expects to be able to make an assessment 'on the merits of further action in the coming months'. Mr Byres noted that 'none of the potential breaches of the law or prudential standards that have been referred to APRA carry civil or criminal penalty provisions directly, although other avenues to impose sanctions may be available depending on the specific circumstances'.

[Sources: APRA Chair Wayne Byres' opening statement to the Senate Economics Legislation Committee, 11/04/2019; [registration required] *The AFR* 11/04/2019]



Superannuation funds to review fees: ASIC and APRA have jointly called on superannuation trustees to review governance and assurance arrangements for fees charged to members' accounts

The Australian Securities and Investments Commission (ASIC) and the Australian Prudential Regulation Authority (APRA) have jointly written to all registrable superannuation entity (RSE) licensees to reinforce the importance of ensuring fees charged to members are in line with the members' best interests and calling on them to review their oversight of fees and other charges being deducted from their members' accounts for payment to third parties such as financial advisers.

Fee Review

The regulators called on RSE licensees to review their governance, risk management and oversight processes to ensure that only authorised and appropriate fees and other charges are deducted from members' superannuation accounts, and to promptly address any identified weaknesses or concerns.

Matters to be considered in reviews: The letter states that the regulators expect that reviews will consider the following.

1. Whether deductions have been explicitly authorised by members and whether the deductions are consistent with the authorisations and disclosures made to members.
2. Whether services have been provided.
3. Whether deductions are consistent with the 'sole purpose test'.
4. Whether the deductions are in the best interests of members?

Has a reportable breach occurred? The regulators emphasise that they have a 'strong expectation' that should reviews uncover any 'significant issues or deficiencies in the risk management systems and processes of trustees' that RSEs give 'urgent consideration' to whether a 'reportable breach has occurred, whether it has been escalated in a manner that will ensure appropriate remediation takes place'.

The letter states that the regulators are aware of circumstances in which trustees have determined it appropriate not to pursue financial advisers for compensation for their members or have indicated to financial advisers that they cannot accept such payments. The letter states that regulators consider that this practice 'may represent a breach of the SIS legislation, in particular payment standard requirements. Trustees should expect the regulators to take enforcement action in the event breaches are uncovered. In such cases, the trustee should look to recover fees paid to financial advisers and make whole members' accounts within the superannuation system using agreed remediation methodologies'.

Expectation of periodic reviews of the appropriateness/accuracy of third party payments: APRA and ASIC expect that the accuracy and appropriateness of fees and other charges being deducted from members' accounts for payment to third parties are periodically reviewed by an independent party 'who could provide such assurance'.

'Further regulatory action' may follow: 'APRA and ASIC will continue to engage with trustees in relation to the robustness of their policies and practices for management and oversight of such fees charged to members' superannuation accounts and reserve the right to exercise our powers in relation to any subsequent enforcement action required.'

Timeline for reviews: The regulators expect the reviews to be 'substantially completed by 30 June 2019'.

[Sources: Joint letter to all RSE Licensees: Oversight of fees charges to members' superannuation accounts 10/04/2019; Investor Daily 10/04/2019]

Bills update: A number of Bills have lapsed with the calling of federal election

With the calling of the federal election by the prime minister on 11 April, and the prorogation of parliament, all unpassed legislation before parliament has now lapsed including the following Bills (among others).



- Treasury Laws Amendment (Putting Members' Interests First) Bill 2019: This Bill proposed to prevent trustees from providing insurance on an opt out basis to members under 25 years old and to members with low balance accounts (balances below \$6000)
- Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019: This Bill was part of a package of reforms to modernise Commonwealth registers and to introduce a 'director identification number' (DIN) requirement
- Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019: This Bill included a range of measures targeting illegal phoenix activity including penalties for directors.
- Treasury Laws Amendment (2018 Superannuation Measures No 1) Bill 2018: Bill proposed a one-off 12 month superannuation guarantee amnesty to encourage employers included the 12-month superannuation guarantee amnesty for non-compliant employers, as well as other amendments to the superannuation guarantee contribution rules, the non-arm's length income rules and the total superannuation balance test.

On a related point: Deputy Commissioner, Superannuation at the Australian Taxation Office (ATO), James O'Halloran said (at a recent senate estimates hearing) that approximately 19,000 non-compliant employers had come forward since 28 February — which represents a 10-15% increase (approximately) on previous quarters — and that approximately \$100m has 'actually gone to employees as a consequence of people coming forward' despite the fact that the Bill has not yet passed.

[Sources: Commonwealth Government Gazette - C2019G00344 (Proclamation by Governor-General) 11/04/2019; Economics Legislation Committee, Estimates hearing transcript 10/11/2019; MyBusiness 12/04/2019]

ASIC has cautioned AFSL holders on overseas derivatives laws: 'AFS licensees offering OTC derivatives to overseas retail clients should, as a matter of priority, seek advice on the legality of their offerings to these clients' ASIC Commissioner Cathie Armour said

ASIC has issued a statement cautioning Australian Financial Services Licensees (AFS licensees) that offer over-the-counter (OTC) derivatives to retail investors located overseas, that they could be at risk of breaking laws abroad. According to ASIC, Chinese authorities have informed ASIC that: 'some online platforms are illegally engaged in forex margin trading activities'.

ASIC states regulators in many jurisdictions (such as Europe, Japan, North America and China) have restricted or prohibited the provision to retail investors of certain OTC derivatives, such as binary options, margin foreign exchange and other contracts for difference (CFDs) to mitigate harm to retail investors and that AFS licensees are on notice that, 'in addition to overseas consequences of potential breaches of overseas law, ASIC will consider whether breaching overseas law is consistent with obligations under Australian law to provide services "efficiently, honestly and fairly". ASIC will also consider whether AFS licensees are making misleading or deceptive statements about the scope or application or effect of an AFS licence'.

ASIC Commissioner Cathie Armour said 'AFS licensees offering OTC derivatives to overseas retail clients should, as a matter of priority, seek advice on the legality of their offerings to these clients. Any non-compliant activities should cease immediately and be notified to ASIC and the relevant overseas authorities.'

[Sources: ASIC media release 11/04/2019; InvestorDaily 15/04/2019]

'Kicking the can down the road another four years is unacceptable': The AIST has issued a statement cautioning that the ongoing delays to disclosure reforms for Choice superannuation products will negatively impact member outcomes

The Australian Institute of Superannuation Trustees (AIST) has issued a statement warning that the deferral of consumer disclosure requirements for non-default (Choice) superannuation products for up to four years, (as recently announced by the Australian Securities and Investments Commission see: Governance News 10/04/2019) will negatively impact retirement outcomes for 'millions' of 'unsuspecting Australians'.

The requirements would have made it mandatory for superannuation funds to provide a standardised disclosure of fees and performance, called product dashboards, for all their super products. Currently, funds



only must provide this disclosure for their default (MySuper) products. The AIST writes that the 'ongoing delays' makes comparison between fund performance difficult for members.

AIST CEO Eva Scheerlinck commented 'This delay is disgraceful. In a post-Royal Commission environment, we should be prioritising action to help consumers get out of underperforming funds. Kicking the can down the road another four years is unacceptable'.

[Sources: AIST media release 10/04/2019; Investor Daily 11/04/2019]

General vs personal advice: Citigroup to refund over \$3m to clients

The Australian Securities and Investments Commission (ASIC) has announced that Citigroup will refund over \$3 million to 114 retail customers for losses arising out of structured product investments offered by Citigroup between 2013 and 2017. ASIC states that though 'Citigroup considers' that its financial advisers provided the customers in question with 'general advice', ASIC considers some customers may have believed they were receiving 'personal advice'.

Citigroup will also write to over 1000 customers remaining in the products to provide them an opportunity to exit early without cost.

Timeframe: ASIC states that the remediation will be completed by 10 September 2019, will be independently assured and Citigroup will report to ASIC once the process is complete.

Further detail:

- ASIC investigated Citigroup's sale and provision of general advice to customers for fixed coupon structured products, which ASIC characterises as 'complex'. ASIC states that it was concerned that while Citigroup 'considered its financial advisers to be providing general advice, elements of its practice may have led some customers to believe that Citigroup was providing personal advice'.
- These practices included its advisers asking customers about their personal circumstances, such as their tolerance for risk, and providing financial education about benefits and risks to customers who had no previous experience of investing in structured products.
- ASIC notes that as a result of its investigation Citigroup ceased structured products to retail clients under a general advice model from 1 January 2018.

[Note: ASIC Report 614 Financial Advice — Mind the Gap flagged, among other things, the regulator's intention to conduct research into a 'more appropriate' label for 'general advice' following findings, that the term is not well understood by customers. See: Governance News 05/04/2019. ASIC's latest enforcement report — ASIC Report 615 ASIC Enforcement update July to December 2018 — identified (among other things) the sale of inappropriate products to consumers as an enforcement priority for the regulator over the next six months see: Governance News 10/04/2019]

[Source: ASIC media release 15/04/2019]

CBA Financial Planning compensation final report released

The Australian Securities and Investments Commission (ASIC) has released its final report (the final of five reports) on CBA's financial advice compensation program under its additional licence conditions.

The final report — Report 613 Compliance Report (part 4) Commonwealth Financial Planning Ltd and Financial Wisdom Ltd — prepared by KordaMentha Forensic, provides KordaMentha Forensic's assessment of compliance by Commonwealth Financial Planning Ltd and Financial Wisdom Ltd with processes they were required to follow under the licence conditions.

According to the report:

- Commonwealth Bank has offered a further \$2.3m to 232 clients of five advisers under its additional licence conditions. This is in addition to: \$4.9m offered to customers of different advisers under the licence conditions and \$1.9 million offered to additional customers as a result of CBA's review outside the licence conditions. In total CBA has offered a total of approximately \$9.3m to customers whose advice has been reviewed as a result of the licence conditions imposed by ASIC in August 2014.



- The final report also provided KordaMentha's Forensic's assessment of compliance with additional licence conditions. ASIC said the compliance breaches identified were failures to meet strict deadlines for providing information to clients (which were subsequently rectified).

ASIC states that as a final step before it makes a decision on the removal of the additional licence conditions, the boards of Commonwealth Financial Planning and Financial Wisdom need to confirm in writing to ASIC that the licensees have complied with the additional conditions.

[Sources: ASIC media release 10/04/2019; [registration required] The Australian 11/04/2019; Independent Financial Adviser 11/04/2019]

The ACCC has granted mortgage broking disciplinary rules interim authorisation

The Australian Competition and Consumer Commission (ACCC) has granted interim authorisation to allow the Mortgage and Finance Association of Australia (MFAA) to continue to administer disciplinary rules enforcing its Code of Practice. The extension of time will allow the MFAA to review its Code of Practice in line with recommendations of the Financial Services Royal Commission.

The ACCC states that the review process is likely to take three to six months, and that once complete, the ACCC will assess the new rules and determine whether to authorise them.

[Source: ACCC media release 11/04/2019]

In Brief | ASIC surveys highlight continued growth in innovative funding platforms: The Australian Securities and Investments Commission (ASIC) announced that recent surveys of market sectors supported through ASIC's Innovation Hub show that fintech businesses are continuing to see growth in demand for alternative funding sources

[Source: ASIC media release 12/04/2019]

Accounting and Audit

United Kingdom | The Brydon review has called for views regarding audit quality and effectiveness

The Independent Review into Quality and Effectiveness of Audit announced at the end of 2018 (the Brydon Review see: Governance News 16/01/2019) has released a paper calling for views 'on the extent of assurance that audit currently provides to the users of financial statements, and how it might develop to meet better those users' needs and to serve the interests of other stakeholders and the wider public interest'.

The focus of the review is on 'what product would be of value irrespective of the delivery and regulatory mechanism' – that is, on the audit process and the audit product. Views are particularly invited on how the statutory audit of public interest entities could be improved to provide greater assurance to shareholders and other stakeholders.

Though 'cognisant' of recent reviews into the sector, Sir Donald Brydon (who is heading the review) makes clear that the review will be broad based. The review, he states must 'demonstrate an open minded approach to questions about the purpose of audit, its social usefulness and the extent to which it fulfils users' legitimate demands'.

[Note: Recent reviews into the sector include: the recently completed Kingman Review — a 'root and branch' review the regulatory framework around audits — and the current review into completion in the audit sector being completed by the Competition and Markets Authority (CMA) which is due to report soon as well as the recently released UK Parliamentary report (The Future of Audit) See: Governance News 16/01/2019, 05/04/2019; 10/04/2019]

The review poses 60 questions on which it seeks feedback including in questions concerning the following issues: the 'expectation gap' (what the law says and audit should deliver and what the public thinks it does/ought to do), the scope and purpose of audit (eg whether the scope of audit should be extended), audit product and quality, legal responsibilities, the scope of auditor responsibility and auditor liability among other areas.

Timeline: Submissions close 7 June 2019.



Risk Management

Climate Risk

Shell is reportedly facing a Dutch lawsuit which, if successful, may mean the company is directed by the court to reduce emissions

Reportedly seven environmental and human rights organisations in the Netherlands — including Friends of the Earth Netherlands/Milieudefensie, Greenpeace Netherlands, five other organizations and more than 17,000 Dutch citizens — have filed suit against Royal Dutch Shell (Shell) in The Hague, for failing to align its business model with the goals of the Paris Climate Agreement.

The environmental groups are reportedly not seeking financial compensation. Rather, they are seeking to compel Shell to adjust its business model in order to keep global temperature rise below 1.5 degrees Celsius, as recommended by the United Nations Intergovernmental Panel on Climate Change (IPCC).

Reportedly, the groups allege that by failing to align its business model with these goals, Shell is violating a Dutch law prohibiting 'unlawful endangerment' and is violating human rights by taking insufficient action against climate change.

If successful, the lawsuit will reportedly be the first in which a company is ordered to reduce emissions by a court.

[Source: Climate Liability News 05/04/2019]

Climate Change (not financial returns) the centrepiece of Rio Tinto's London AGM presentations? Rio Tinto has reportedly positioned itself as a supporter of the renewable sector in presentations to shareholders

The Australian reports that presentations from both the Rio Tinto Chair and CEO in London at the recent AGM primarily focused on Rio Tinto's environmental credentials and more particularly, on Rio's commitment to decarbonising its operations and increasing its use of renewable energy at its mines and processing facilities. The presentations also reportedly highlighted Rio's commitment as a supplier of materials necessary to the renewable energy sector and a supporter of the renewable sector. In addition, the presentations reportedly noted that Rio is 'unique' among its peers in having no fossil fuel production within its portfolio.

The Australian comments that this is a contrast to last years presentations which focused on the company's strong financials, and ability to deliver strong shareholder returns.

The Australian suggests that the change is a result of the increasing pressure from major shareholders, activists (eg Climate Action 100+) and governments, and from the broader community, over the sector's contribution to climate change.

[Source: [registration required] The Australian 11/04/2019]

Other Developments

Uber Technologies Inc has reportedly disclosed a DOJ investigation into allegations of improper payments made in Indonesia and potentially three other countries in documents announcing the company's intention to go public

Reportedly, Uber Technologies Inc has disclosed that the US Department of Justice (DOJ) is investigating the company in connection with (alleged) bribes paid to police in countries including Indonesia, Malaysia, China and India.

If found to be in violation of Foreign Corrupt Practices Act (FCPA) or similar laws, Uber has said it may be subject to criminal sanctions and other liabilities. Reportedly, Uber added that it is cooperating with the ongoing investigation.



The details of the investigation were reportedly detailed in documents announcing the company's intention to go public.

The WSJ comments that the investigation highlights the challenges facing Uber given it operates in 63 countries including some known to have high levels of corruption.

[Sources: FCPA blog 11/04/2019; registration required] The WSJ 11/04/2019; 10/04/2019]

Corporate Misconduct and Liability

Top Story | ALRC Review into Australia's corporate criminal responsibility regime: Terms of reference announced

Key Takeouts

1. The ALRC will review Part 2.5 of the Commonwealth Criminal Code, and consider options for reforming this regime or other relevant legislation to strengthen and simplify it. This is in line with the recommendations of the final report of the Financial Services Royal Commission.
2. The inquiry will be led by ALRC president Justice SC Derrington. Justice Robert Bromwich has been appointed as a part-time member of the ALRC to assist with the review.
3. The ALRC has opened the Terms of Reference for the inquiry for public comment until 10 May 2019. The final report is due to be delivered to the Attorney General by 30 April 2020.

The government has commissioned the Australian Law Reform Commission (ALRC) to undertake a 'comprehensive review of the corporate criminal responsibility regime' with a view to examining how it can be strengthened. More particularly, the ALRC will review Part 2.5 of the Commonwealth Criminal Code, and consider options for reforming this regime or other relevant legislation to strengthen and simplify it. The Review will consider, the findings of the 2019 Report of the Financial Services Royal Commission and the ASIC Enforcement Review Taskforce.

Announcing the Review, Attorney General Christian Porter said that the Review it would 'consider reforms to the Criminal Code and other relevant legislation to provide a simpler, stronger and more cohesive regime for corporate criminal responsibility' including consideration of any practical challenges to investigating and prosecuting these crimes.

The inquiry will be led by ALRC president Justice SC Derrington. Justice Robert Bromwich has been appointed as a part-time member of the ALRC to assist with the review.

Terms of Reference

Terms of Reference — Review of corporate criminal liability

The review will have regard to:

- the corporate criminal responsibility regime in Part 2.5 of the Commonwealth Criminal Code contained in Schedule 1 of the Corporate Criminal Code Act 1995 (Cth) ('the Code'); and
- the complexity of this regime and its challenges as a mechanism for attributing corporate criminal liability.

The Review will consider whether, and if so what, reforms are necessary or desirable to improve Australia's corporate criminal liability regime. In particular, the ALRC has been tasked with reviewing the following.

- The appropriateness and effectiveness of criminal procedure laws and rules as they apply to corporations.
- The effectiveness of present Commonwealth criminal procedural laws with a focus on their interaction with state and territory criminal procedural law, particularly in relation to committal hearings.
- Possible reform of Part 2.5 of the Criminal Code: The review will consider options for reforming Part 2.5 of the Code or other relevant legislation to strengthen and simplify the Commonwealth corporate criminal responsibility regime. More particularly, the review will consider:



- the policy rationale for Part 2.5 of the Code;
 - the efficacy of Part 2.5 of the Code as a mechanism for attributing corporate criminal liability;
 - whether Part 2.5 of the Code needs to incorporate provisions enabling senior corporate officers to be held liable for misconduct by corporations;
 - the availability of other mechanisms for attributing corporate criminal responsibility and their relative effectiveness, including mechanisms which could be used to hold individuals (eg senior corporate office holders) liable for corporate misconduct
 - options for reforming Part 2.5 of the Code (or other corporate liability regimes) to facilitate implementation of the recommendations made by, or to address issues highlighted by, the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry and by the ASIC Enforcement Review Taskforce.
- The terms of reference state that the ALRC should have regard to existing reports relevant to Australia's corporate accountability system, including reports on: corporate misconduct; corporate criminal law; corporate governance; court procedure which applies in corporate enforcement actions; and law enforcement arrangements relating to corporate misconduct/crime, including the Financial Services Royal Commission Recommendations and the Recommendations of the ASIC Enforcement Review Taskforce.

Process and Timeframe

- **Process:** In accordance with the ALRC's usual process, a Discussion Paper will be released at an interim stage and interested stakeholders will be invited to make formal submissions in response to the Discussion Paper.
- **Call for comment on the terms of reference:** The ALRC has opened the Terms of Reference for the inquiry for public comment until 10 May 2019.
- **Timeframe for reporting:** The ALRC has been tasked with reporting to the Attorney-General by 30 April 2020.

[Source: Attorney General for Australia media release 10/04/2019; ALRC media release 11/04/2019]

The Australian Institute of Company Directors (AICD)

In a statement acknowledging the release of the terms of reference for the review, AICD Managing Director and CEO Angus Armour cautioned that any reforms to the 'corporate criminal responsibility regime should be consistent with established principles of good corporate governance and criminal justice'. The statement suggests that the review should 'leverage off' the principles and guidelines, developed by COAG and already in place, to which the Commonwealth, States and Territories are already committed. These principles found that 'directors should not be liable for corporate fault as a matter of course or by blanket imposition of liability across an entire Act'. Mr Armour said that 'these are important safeguards to prevent individuals being unjustly held liable for criminal offences that can carry with them lengthy terms of imprisonment. As much as the community needs confidence that directors will bear the consequences, I believe that the community equally needs confidence that our system is fair and balanced in its application'.

[Source: AICD media release 10/04/2019]