Governance News

21 August 2019

Mark Standen
Partner
Email Mark

T +61 2 9921 4902 | M +61 412 104 902

Siobhan Doherty
Partner
Email Siobhan

T +61 2 9921 4339 | M +61 413 187 544

Kate Hilder
Consultant
Email Kate

T +61 2 9921 8785 |

For queries or to subscribe/unsubscribe to Governance News updates, please contact: kate.hilder@minterellison.com

Contents

Diversity

United States | Challenging gender quotas: A Californian law setting minimum numbers of female board members has been challenged in court

Judicial Watch has released a statement announcing that it has filed a lawsuit in Los Angeles County Superior Court on behalf of three California taxpayers to prevent the State from implementing Senate Bill 826, the Californian law requiring corporations headquartered in California to have at least one female director on their boards by 31 December 2019.

In its complaint Judicial Watch argues that the imposition of board gender quotas is illegal under the California Constitution. 'The legislation's quota system for female representation on corporate boards employs express gender classifications. As a result, SB 826 is immediately suspect and presumptively invalid and triggers strict scrutiny review' the statement reads.

[Note: The full text of the complaint is available here].

The statement goes on to raise concerns that: a) the quota will result in less qualified directors being appointed; b) is unlikely to have a 'significant effect on corporate culture' or to lead to a stronger pipeline of future female leaders; and c) is likely to benefit only those women actually selected to serve on boards. The group cites research which they say shows that this was the experience when quotas were adopted in Norway in support of their view.

Judicial Watch President Tom Fitton is quoted as commenting that 'California's gender quota law is brazenly unconstitutional…Even Gov Brown, in signing the law, worried that it is unconstitutional. Judicial Watch's California taxpayer clients are stepping up to make sure that California's Constitution, which prohibits sex discrimination, is upheld.'

[Sources: Judicial Watch media release 09/08/2019; Crest et al v Padilla Women on boards complaint 27561 08/08/2019]

Remuneration

50 years is too long to close the gender pay gap in Australia? Chifley Research Centre has released a policy brief outlining four proposed policy changes to accelerate the pace of reform

Key Takeouts

- The starting point for the report is that the projected 50 years to close the gender pay gap and achieve gender equality is unacceptable. The report outlines a number of policy actions aimed at accelerating progress towards closing the gender pay gap
- The report argues that closing the gender pay gap is 'economically the most sensible thing to do'. Australia stands to gain an extra $25 billion (or an additional 1% GDP) with an additional 6% of women in the workforce
- This report proposes four policies that if implemented, could (according to the report) reduce the gender pay gap by 12.8 percentage points from 28.7% to 15.9% by 2025. This compares to the current rate of reduction of 3.7% over the past 5 years as projected by current estimates
- The four proposed policies are: 1) increased pay transparency; 2) the creation of good quality and economically secure jobs in female dominated industries; 3) removing the 'motherhood penalty' (increasing the total amount of shared parental leave on a 'use it or lose it' basis and making further changes to the childcare rebate); 4) setting targets and timeframes to accelerate change

Chifley Research Centre has released a report outlining policies aimed at accelerating progress on closing the gender pay gap which they put at 28.7%. At this rate, without changes to current policy settings, it will take 50 years for the gap to close — an 'unacceptable' length of time, according to the report not only because it negatively impacts women and their families but also costs the Australian economy.

The paper identifies three barriers to progress that need to be addressed in order to accelerate progress towards narrowing the gender pay gap: unequal opportunity at work; underpayment of women in 'feminised industries' (female-dominated industries); and unpaid domestic work primarily performed by women.

The paper sets out four policy changes to address these issues.

1. **Increased pay transparency:** The paper identifies gender discrimination as the primary driver of the gender pay gap. It includes two measures to address this, both focused on increasing pay transparency. First, the paper proposes that the government should extend the reporting mandate of the Workplace Gender Equality Act 2012 to include all organisations with 100 employees or more across the public and private sectors. Second, the paper recommends changes to remove any adverse action to employees who openly disclose their wages or salary. According to the policy paper, addressing direct and indirect discrimination in this way could potentially close the gender pay gap by 11.2%

2. **The creation of good quality and economically secure jobs in female dominated industries:** Gender segregation in industries is identified as the second biggest contributor to the gender pay gap**.** The paper proposes to address this through a blanket uplift in base pay (commensurate with professional skills and experience through direct amendment of modern awards, and enterprise/collective and individual agreements) in female dominated industries eg education, health and social care. This would not only ensure women are paid more equitably, it would also attract more men to the industries, which are set to grow into the future. Addressing horizontal segregation/gender segregation in this way, could potentially reduce the gender pay gap by 2.7% in 2025 (ie from 28.7% to 26%).

3. **Removing the 'motherhood penalty' though increasing the total amount of shared parental leave on a 'use it or lose it' basis and making further changes to the childcare rebate:** Women on average face a wage penalty of about 7% a year for their unpaid work in raising children. To help reduce this impact, the paper proposes that the government should change the paid parental leave scheme by increasing the total amount of shared parental leave on a 'use it or lose it' basis. In addition, the paper proposes other changes to the childcare rebate. Removing the motherhood penalty in this way could reduce the gender pay gap minimally from 28.7% in 2016 to 28.2% in 2025. Enabling uptake of parental leave by men reduces the gender pay gap by one percentage point in 2025 (from 28.7% to 27.8%).

4. **Setting targets and timeframes to accelerate change:** Setting targets for action has the potential to both close the gender pay gap within a significantly shortened timeframe and to strengthen the impact and implementation of the three policies outlined above.

   The paper also proposes that a 'red light green light approach' should be applied to government procurement so that the private sector has a stronger incentive to address gender equality in a measurable way or risk losing competitiveness in the market. Additionally, the paper recommends implementing penalties for failure to comply with mandatory gender reporting requirements in the form of the risk of loss of public sector income streams.

According to the report, the collective impact of the first three policies would reduce the gender pay gap by 12.8 percentage points from 28.7% to 15.9% by 2025, compared to the current rate of 3.7%95 over the past 5 years as projected by current estimates.

[Source: Chiefly Research Centre report: Closing the Gender Pay Gap]

United Kingdom | FTSE 100 CEO pay has fallen to the lowest level in five years according to Deloitte research

Key Takeouts

- Deloitte has released a preview of its annual FTSE 100 Executive remuneration report
- Deloitte suggests that the impact of regulatory changes under the new UK Corporate Governance Code are being felt with FTSE 100 companies moving to reduce executive pensions and implement requirements for executives to hold shares post-leaving. Overall FTSE 100 CEO pay packages have also reduced — the median is now £3.4m (previously £4m)

- Shareholder support for pay in the FTSE250 is at its lowest level in five years indicating, Deloitte suggests, that shareholders are increasingly holding smaller companies to the same standards as their larger counterparts

Deloitte has released a preview of its annual FTSE 100 Executive Remuneration Report.

Some Key Points

- Median pay for a FTSE 100 CEO was £3.4m in the last financial year, down from £4m in the previous period which is the lowest level since 2014
- Around one-third of FTSE 100 companies reduced pensions for new executive hires
- Almost one third of FTSE 100 CEOs received zero increase in base salary, with a median salary increase overall at about 2%. Bonus payouts remained similar to the previous year — at a median level of 70% of salary compared with 72% in the previous year
- Only 5% of FTSE 100 companies are now operating more than one long-term incentive plan compared to almost 50% of companies five years ago
- The number of FTSE 100 companies receiving low votes (below 80% in favour) on pay decreased from 13% last year to 7% this year
- By contrast, about one in six companies in the FTSE 250 received low levels of shareholder support for their annual remuneration reports. This is the highest level of shareholder dissent in five years.
- Overall, the levels of investor support remain high with a median shareholder vote of around 96% across the FTSE 350

Conclusions?

- **Expectations of smaller companies have increased:** Deloitte Vice Chair Stephen Cahill said that the findings indicate that investors have increased their expectations of smaller companies, and now expect them to embrace the same sort of corporate responsibility as their larger peers. 'We are seeing continued evidence that investors expect the same standard of disclosure and engagement on pay across the UK market, with declining levels of shareholder support in the FTSE 250' Mr Cahill reported said. In particular, there is pressure for improved transparency around bonus plans.
- **The revised UK Corporate Governance Code is having an impact?** Mr Cahill also suggests that moves by FTSE 100 companies to reduce executive pensions and implement requirements for executive to hold shares after they leave, is an indication that the new UK Corporate Governance Code is having an impact. 'We have seen many companies come forward as 'first movers' in response to new regulatory changes with 29 companies reducing pensions for new hires. Without a doubt, executive pensions have been the hottest topic of 2019 and we expect this to continue, with a growing focus on incumbent executives receiving the highest pension rates' Mr Cahill said.
- **Predictions for the coming year?** Mr Cahill suggested that the coming year would see 'a further shift in reduced pensions and requirements for executives to hold shares post-leaving. Given current uncertainty in the UK business environment, shareholder pressure and regulatory controls should be balanced with the need to ensure that the UK is able to attract the calibre of talent that can deliver continued prosperity for businesses'.

[Source: [registration required] The FT 19/08/2019; Deloitte media release 19/08/2019]

United States | Insights into emerging trends in NED pay practices: survey finds almost 40% of directors expect their time commitment to increase, but most won't receive additional compensation

Executive compensation consulting firm Pearl Meyer has released the results of an online survey into director pay practices conducted in March and April of 2019.

Some Key Findings

- **Time commitment:** Most respondents (67% within the entire sample) expect similar time commitments as compared with the prior year. Higher time commitments are expected this year by approximately 32% of public company and 21% of private company respondents. However, nearly 40% of director respondents anticipate higher time commitments this year as compared with 17% of management respondents.
- **'Non-standard' duties and pay:** Most respondents (60%) do not provide additional compensation for higher-than-expected time commitments, consistent with the retainer-only pay model adopted by most public companies.
- **Frequency of director pay reviews:** Public company respondents review NED pay more frequently than privately-held organisations, with twice as many conducting annual reviews.
- **Pay review and approval responsibility:** For most respondents, the compensation committee is responsible for reviewing NED pay (67% of total sample), while the full board approves actual pay levels (65% of total sample).
- **Pay positioning and benchmark comparisons:** Industry and company size are the most commonly cited criteria for NED compensation benchmarking.
- **Pay program changes:** Slightly more than half of the total sample has recently made or is planning changes to the NED pay program in 2019, with increases to board cash retainers, equity grant values, and committee chair retainers most common. NED pay program changes were more common for public company respondents (58%) than for private for-profit respondents (44%).
- **Equity grant practices:** Almost all public company provide equity grants to NEDs, usually in the form of restricted stock units or restricted shares, while most private for-profit respondents (58%) do not grant equity. For respondents providing equity grants, most (79%) use a fixed award value and 12% provide a fixed number of shares. Nearly half of public company respondents (47%) use one year vesting schedules and 26% provide immediately vested equity grants.
- **Response to enhanced external scrutiny of NED pay?** Enhanced external scrutiny of public company NED pay was found not to concern most respondents (87% of respondents). Only 4% said that they were concerned, and 9% said that they had not yet discussed the issue. The findings were similar at management and board level eg 88% of board members said they were unconcerned, vs 86% of management.
- **59% of companies do not anticipate any change in their proxy disclosure with respect to director compensation philosophy**, and 24% of respondents said that they have not discussed the issue. Only 7% said that they plan to make changes this year.
- **Anticipated pay proxy disclosure changes**? For those respondents making or planning changes, the most commonly cited actions are: enhanced discussion of director pay philosophy (78%); providing more details on the benchmarking process (61%); and providing more rationale for any pay increases/special compensation (30%).
- **Slightly less than half (45%) of public company respondents have established NED pay caps** within shareholder approved incentive plans, most commonly applying for equity grant values or total compensation. Five per cent of respondent said that they planned to add a cap.
- **63% of respondents do not support a 'say on NED Pay' requirement**, 15% are supportive of an advisory say on NED pay advisory vote and almost a quarter (22%) are undecided

About the survey: 204 companies from a number of industry sectors, including the financial sector, participated in the survey. Participants included: 143 publicly traded, 52 private for-profit, and nine not-for-profit (NFP) organisations)

[Source: Harvard Law School Forum on Corporate Governance and Financial Regulation 14/08/2019]

Other Shareholder News

In Brief | Targeting 'dual class enablers'? CII has released a list of directors who served on US public company boards in 2018/2019 at the time they went public with dual-class share structures with no provision to 'sunset' the structure within seven years or less. 'Investors may want to raise concern about that in their engagement with other boards on which these directors serve' CII Executive Director Ken Bertsch said

[Sources: CII media release; CII Dual-Class Enablers media release]

Corporate Social Responsibility and Sustainability

Top Story | More than maximising profits? Business Roundtable has issued a statement redefining the purpose of a corporation

Key Takeouts

- Business Roundtable has released a revised statement on the purpose of the corporation, as part of its work to ensure more 'inclusive prosperity'.
- The statement commits the 181 signatory companies to not only serve their own 'corporate purpose' but to commit to delivering benefits to all stakeholders (customers, employees, suppliers, communities and shareholders). As such, the New York Times characterises it as 'an explicit rebuke of the notion that the role of the corporation is to maximize profits at all costs — the philosophy that has held sway on Wall Street and in the boardroom for 50 years'.
- More to come? Reportedly, several signatories said that the group would soon offer more detailed proposals on how corporations can live up to the ideals outlined, rather than focusing purely on economic policies.

US association, Business Roundtable — an association of CEOs whose aim is the promotion of a thriving US economy and an expanded opportunity for all Americans through sound public policy — has released a revised statement on the purpose of the corporation, as part of its work to ensure more 'inclusive prosperity'.

Shift in approach

The statement commits the 181 signatory companies to not only serve their own 'corporate purpose' but to commit to delivering benefits to all stakeholders (customers, employees, suppliers, communities and shareholders). As such, the New York Times characterises it as 'an explicit rebuke of the notion that the role of the corporation is to maximize profits at all costs — the philosophy that has held sway on Wall Street and in the boardroom for 50 years'.

The group appear to take a similar view, noting that since 1978, they have periodically issued Principles of Corporate Governance which, since 1997 have endorsed principles of shareholder primacy ie that corporations exist principally to serve shareholders. The group writes that the new statement 'supersedes previous statements and outlines a modern standard for corporate responsibility'

Details: What's in the statement?

The statement commits signatory companies to not only serve their own 'corporate purpose' but to commit to the following:

1. 'Delivering value to our customers. We will further the tradition of American companies leading the way in meeting or exceeding customer expectations.
2. Investing in our employees. This starts with compensating them fairly and providing important benefits. It also includes supporting them through training and education that help develop new skills for a rapidly changing world. We foster diversity and inclusion, dignity and respect.

3. Dealing fairly and ethically with our suppliers. We are dedicated to serving as good partners to the other companies, large and small, that help us meet our missions.

4. Supporting the communities in which we work. We respect the people in our communities and protect the environment by embracing sustainable practices across our businesses.

5. Generating long-term value for shareholders, who provide the capital that allows companies to invest, grow and innovate. We are committed to transparency and effective engagement with shareholders'.

The statement concludes: 'Each of our stakeholders is essential. We commit to deliver value to all of them, for the future success of our companies, our communities and our country'

Signatories?

Among the signatories to the statement are the CEOs of a number of organisations including (among others): Amazon, Apple, Bank of America, Blackrock, BNY Mellon, BP, Chevron, Citigroup, Coco Cola, Deloitte, Exxon Mobil, Fedex, Fox, JP Morgan Chase & Co, Johnson & Johnson, KPMG, Pfzier, Procter & Gamble, PepsiCo, PWC, Vanguard and Xerox. A full list of signatories is available here

Why the shift in approach?

Commenting on the statement, Chairman and CEO of JPMorgan Chase & Co Jamie Dimon said 'The American dream is alive, but fraying. Major employers are investing in their workers and communities because they know it is the only way to be successful over the long term. These modernized principles reflect the business community's unwavering commitment to continue to push for an economy that serves all Americans'.

Chairman of the Board and Chief Executive Officer of Johnson & Johnson and Chair of the Business Roundtable Corporate Governance Committee Alex Gorsky said that the statement 'better reflects the way corporations can and should operate today…It affirms the essential role corporations can play in improving our society when CEOs are truly committed to meeting the needs of all stakeholders.

More detail to come?

The New York Times reports that the statement is a signal of companies' willingness to engage on issues of pay, diversity and environmental protection. Reportedly, several signatories said that the group would soon offer more detailed proposals on how corporations can live up to the ideals outlined, rather than focusing purely on economic policies.

Industry response

Some industry leaders have lent their support for the updated Business Roundtable Statement, citing the positive impact this commitment will have on long-term value creation.

- Tricia Griffith, President and CEO of Progressive Corporation said, 'CEOs work to generate profits and return value to shareholders, but the best-run companies do more. They put the customer first and invest in their employees and communities. In the end, it's the most promising way to build long-term value.

- Darren Walker, President of the Ford Foundation said 'This is tremendous news because it is more critical than ever that businesses in the 21st century are focused on generating long-term value for all stakeholders and addressing the challenges we face, which will result in shared prosperity and sustainability for both business and society'.

- Bill McNabb, former CEO of Vanguard welcomed the statement saying that 'By taking a broader, more complete view of corporate purpose, boards can focus on creating long-term value, better serving everyone – investors, employees, communities, suppliers and customers'.

More like a mission statement than an action plan?

Media reports suggest that there is also some scepticism that it will change the way in which companies do business

The New York Times comments that the reads more like a 'mission statement' than a plan of action, given the lack of detail as to how the new commitments will be implemented. For example, it makes no mention of curbing executive compensation, an issue of key concern to investors given the highest paid 100 CEOs make 254 times the salary of an employee receiving the median pay at their company. The article quotes Presidential hopeful, Elizabeth Warren as saying that the announcement, though a welcome change, is 'meaningless' without 'real action'. 'These big corporations can start following through on their words by paying workers more instead of spending billions on buybacks' she said.

The article goes on to suggest that in order for the companies in question to live up to their 'lofty promises' it will be necessary for a shift to take place in the way in which company success is measured by investors. 'Until investors start measuring companies by their social impact instead of their quarterly returns, systemic change may prove elusive'. Nancy Koehn, a historian at Harvard Business School is quoted by The New York Times as suggesting that the signatories to the statement 'perceive that business as usual is no longer acceptable. It's an open question whether any of these companies will change the way they do business.'

[Sources: Business Roundtable media release 19/08/2019; Statement on the Purpose of a Corporation; Fortune 19/08/2019; The New York Times 19/08/2019; Fortune 20/08/2019]

In Brief | Leaders of industry should ignore advice to 'stick to their knitting' and pursue only profit while disregarding -social and environmental issues. MinterEllison Partner Geraldine Johns-Putra and special counsel Sarah Barker are heading up a new environmental, social and governance group to deliver an integrated service to clients — advising them not only on their regulatory obligations but on how to seize on issues to gain business mileage

[Note: More information about MinterEllison's Responsible Business services can be accessed on the MinterEllison website here: https://www.minterellison.com/responsible-business]

[Source: [registration required] The Australian 16/08/2019]

In Brief | The Indian Ministry of Corporate Affairs has released the results of its review into the corporate social responsibility framework and made a number of recommendations to improve the current regime

[Source: Government of India, Ministry of Corporate Affairs August 2019: Report of the High Level Committee on Corporate Social Responsibility 2018]

Financial Services

Top Story | Brace for FSRC legislation? The Federal government has released an implementation roadmap with timelines for implementing its response to the Financial Services Royal Commission's recommendations

Key Takeouts

- The Federal government has released a roadmap with timelines for implementing its response to the Financial Services Royal Commission recommendations
- The Treasurer has said that more than 50 of 54 commitments will have been implemented or be subject to legislation by mid-2020 and the remaining four recommendations needing legislation will have been introduced by the end of 2020
- The Treasurer has said that his expectation is that the majority of measures contained in legislation introduced into the Parliament before 1 July next year, will commence by 1 July 2020 (or from the date of Assent)
- An independent review into the effectiveness of the changes will be held in three years

Treasurer Josh Frydenberg has outlined a 'full implementation roadmap' for actioning the 54 Financial Services Royal Commission (FSRC) recommendations directed at the government.

Announcing the plan, Mr Frydenberg reiterated the government's commitment to act on all 76 recommendations and to go further in some instances. Mr Frydenberg commented that the plan represents the most comprehensive corporate and financial services law reform process since the 1990s when the Corporate Law Economic Reform Program began.

Timing?

Mr Frydenberg highlighted the following implementation milestones.

- By the end of 2019, more than 20 commitments, around one third, will have been implemented or have legislation before the Parliament

- By mid-2020, more than 50 commitments, close to 90%, will have been implemented or have legislation before the Parliament

- By the end of 2020, remaining recommendations requiring legislation will have been introduced

- For measures contained in legislation introduced into the Parliament before 1 July next year, Mr Frydenberg said that the government expects the majority to commence by 1 July 2020 or from Royal Assent.

- The government will establish an independent review in three years' time to assess the extent to which changes in industry practices have led to improved consumer outcomes and the need for further reform. In addition, there will be a similar review into the regulators' actions, to be undertaken by the new financial regulator oversight authority that the Financial Services Royal Commission recommended, and the government agreed, be established.

- Additional resources: Over the next 18 months the reforms will 'dominate the Treasury's legislative program', with the work required equivalent to almost three-quarters of its current program. To achieve the implementation timetable, Mr Frydenberg said that additional resources will be provided to the Financial Services Reform Taskforce within Treasury and to the Office of Parliamentary Counsel.

Legislation will be introduced without 'undue delay'

'Implicit in our implementation plan is that consultation on individual measures will be focussed on how the measures can best be implemented, not whether they should be implemented. The Royal Commission's recommendations and the Government's response are clear, now is the time for action, not more debate' Mr Frydenberg said.

Mr Frydenberg went on to say that both the Federal Opposition and the government have agreed to implement the FSRC recommendations, he expects to achieve the 'passage of relevant legislation without undue delays'.

Further Details

Implementation progress update

[Note: The government's roadmap includes a table at p2 detailing the government's actions in implementing the Commission's recommendations to date. This can be accessed here]

Mr Frydenberg said that to date, the government has 'already implemented 15 of its commitments, 8 of which relate to Commissioner Hayne's recommendations and 7 to our additional commitments'.

The Treasurer added that significant progress has also been made on a further 5 recommendations with draft legislation either introduced to the Parliament, released for comment or detailed consultation papers issued.

Implementation roadmap — timelines for the implementation of the recommendations directed at government

[Note: Appendix A (p8) of the government's implementation roadmap sets out the timelines for the implementation of recommendations directed at the government. Appendix B sets out the actions and timing of the regulator's (ASIC and APRA's) implementation plans, and Appendix C sets out industry actions and implementation timelines. See: here. The government's initial response, released in February is here.]

Legislation to be consulted on and introduced by the end of 2019: measures to improve consumer protections

- Recommendation 1.2 – Mortgage broker best interests duty
- Recommendation 1.3 – Mortgage broker remuneration (consistent with the government's response)

[Note: In its initial response to the FSRC recommendations released in February the government said that from 1 July 2020, the government will prohibit for new loans the payment of trail commissions from lenders to mortgage brokers and aggregators, require that the value of upfront commissions be linked to the amount drawn-down by borrowers and not the loan amount, and ban campaign and volume-based commissions and payments. In addition, the government said that it would limit to two years the period over which commissions can be clawed back from aggregators and brokers and prohibit the cost of clawbacks being passed on to consumers. The government also said it would task the Council of Financial Regulators and the ACCC to conduct a review into the impact of the changes, and the implications for consumer outcomes and competition of moving to a borrower pays remuneration structure for mortgage broking, as recommended by the Commission. See: Government Response.]

- Recommendation 2.4 – Ending grandfathered commissions for financial advisers (legislation introduced on 1 August 2019)

[Note: This appears to be a reference to Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Bill 2019 which is at second reading stage before the House of Representatives. For a summary, see: Governance News 07/08/2019.]

- Recommendation 4.2 – Removing the exemptions for funeral expenses policies
- Recommendation 4.7 – Application of unfair contract terms provisions to insurance contracts

[Note: Treasury is consulting on draft legislation which proposes to extend the application of the unfair contracts terms regime to insurance contracts in line with Recommendation 4.7. See: Governance News 30/07/2019]

- Recommendation 4.8 – Removal of claims handling exemption for insurance

[Note: The timing for implementing this recommendation appears unclear given that the government's implementation roadmap lists it as being consulted on and introduced by the end of 2019, and also as being consulted on and introduced by 30 June 2020. Asked to clarify, Treasury has confirmed that the consultation period will take place by the end of 2019 and the legislation will be introduced by the end of 2020.]

[Note: The government issued a consultation paper seeking feedback on its proposed approach to implementing Recommendation 4.8, (for both life and general insurance products) in March. For a summary of the government's proposed approach see: Governance News The government consulted on 06/03/2019]

In addition the roadmap includes four 'additional commitments': ASIC's search warrants powers (ASIC Enforcement Review); ASIC's telecommunications interceptions powers (ASIC Enforcement Review); ASIC's licensing powers (ASIC Enforcement Review); ASIC's power to ban people in the financial sector (ASIC Enforcement Review).

Legislation to be consulted on and introduced by 30 June 2020: measures to improve consumer protections

- Recommendation 1.7 – Removal of point-of-sale exemption
- Recommendation 1.15 – Enforceable code provisions for industry codes of conduct
- Recommendation 2.1 – Annual renewal and payment for financial advice
- Recommendation 2.2 – Disclosure of lack of independence of financial advisers
- Recommendation 3.1 – No other role or office for trustees of Registrable Superannuation Entities (RSE)
- Recommendation 3.2 – No deducting advice fees from MySuper accounts
- Recommendation 3.3 – Limitations on deducting advice fees from choice superannuation accounts
- Recommendation 3.4 – No hawking of superannuation products
- Recommendation 4.1 – No hawking of insurance products
- Recommendation 4.3 – Deferred sales model for add-on insurance
- Recommendation 4.4 – Cap on commissions paid to vehicle dealers for sale of add-on insurance products
- Recommendation 4.5 – Duty to take reasonable care not to make a misrepresentation to an insurer
- Recommendation 4.6 – Limiting circumstances where insurers can avoid life insurance contracts
- Recommendation 4.8 – Removal of claims handling exemption

[Note: The timing for implementing this recommendation appears unclear given that the government's implementation roadmap lists this recommendation as being consulted on and introduced by the end of 2019, and also as being consulted on and introduced by 30 June 2020. Treasury has confirmed that the consultation period will take place by the end of 2019 and the legislation will be introduced by the end of 2020]

  - Additional commitment in response to Recommendation 4.2 – Restricting use of the term 'insurer' and 'insurance'
  - Recommendation 1.6 – Reference checking and information sharing for mortgage brokers
  - Recommendation 2.7 – Reference checking and information sharing for financial advisers
  - Recommendation 2.8 – Licensee obligations to report compliance concerns
  - Recommendation 2.9 – Licensee obligations where misconduct by financial advisers
  - Recommendation 3.8 – Adjustment of APRA's and ASIC's roles in superannuation
  - Recommendation 6.3 – General principles for ASIC and APRA to co-regulate superannuation
  - Recommendation 6.4 – ASIC as conduct regulator for superannuation
  - Recommendation 6.5 – APRA to retain current functions for superannuation
  - Recommendation 6.9 – Statutory obligation for APRA and ASIC to co-operate and share information
  - Recommendation 6.14 – A new oversight authority for APRA and ASIC

- Recommendation 6.11 – Improving ASIC's Board meeting procedures
- Recommendation 7.2 – Implementing the ASIC Enforcement Review Taskforce's recommendations to improve the breach reporting regime
- Additional commitment in response to Recommendation 7.2 – Implementing the ASIC Enforcement Review Taskforce's directions power recommendations

Legislation to be consulted on by the end of 2020

Access to redress and a new disciplinary body: Recommendation 2.10 – A new disciplinary system for financial advisers; Recommendation 7.1 – Compensation scheme of last resort

Measures to strengthen financial regulators

- Recommendation 3.9 – Extending the Banking Executive Accountability Regime (BEAR) to RSE licensees
- Recommendation 4.12 – Extending the BEAR to APRA-regulated insurers
- Recommendation 6.6 – Joint administration of the BEAR
- Recommendation 6.7 – Statutory amendments to facilitate co-regulation
- Recommendation 6.8 – Extending the BEAR to all APRA-regulated financial services institutions.
- Additional commitment – extension of the executive accountability regime to non-prudentially regulated financial entities to be administered by ASIC

Reviews to be conducted in 2022

- Recommendation 1.4 – Council of Financial Regulators and the Australian Competition and Consumer Commission review of changes to mortgage broker remuneration and operation of upfront and trail commissions
- Recommendation 2.3 – Review of measures to improve the quality of financial advice – Consistent with the Royal Commission recommendations, the review will examine all exemptions from the ban on conflicted remuneration, including for general insurance, consumer credit insurance, timeshare and stockbroking remuneration, and stamping fees
- Recommendation 2.6 – Review of each remaining exemption from the ban on conflicted remuneration. This review will occur as part of the review of measures to improve the quality of financial advice (recommendation 2.3)
- Additional commitment – Independent inquiry into changes in industry practices
- Additional commitment – Assessment of the effectiveness of changes made by the regulators following the Royal Commission by the (to be established) financial regulator oversight authority

Other measures

- Recommendation 1.11 – A national farm debt mediation scheme – The government is working with states and territories through the Agriculture Ministers' Forum (AGMIN) to progress work on the establishment of a national farm debt mediation scheme
- Recommendation 1.5 – Regulating mortgage brokers as financial advisers – This recommendation will be progressed following the review of financial advice reforms (recommendation 2.3), given that review may recommend changes to the regulation of financial advisers

- Recommendation 3.5 – One default superannuation account – Implementation of this recommendation will be considered in the context of the findings and recommendations of the Productivity Commission's report Superannuation: Assessing Efficiency and Competitiveness

- Additional commitment in response to Recommendation 7.1 – Increasing AFCA's role in remediation programs – legislation to be introduced by mid-2021

- Additional commitment – Extension of Federal Court jurisdiction in relation to criminal corporate crime – legislation to be introduced by mid-2020

Industry Response to the release of the government's implementation roadmap

- **Australian Banking Association:** In a statement, The Australian Banking Association (ABA) welcomed the release of the government's road map. ABA CEO Anna Bligh said that lenders are already 'well down the track' of making changes to earn back the trust of the community following the release of the Financial Services Royal Commission's final report six months ago. More particularly, Ms Bligh said that of the ten recommendations directed at industry, six involved changes to the Banking Code, all of which are under way, with five awaiting approval by the regulators (with a planned implementation date of March 2020). 'Make no mistake, banks understand what the community and government expects of them and are raising their standards to rightly meet those expectations' Ms Bligh said.

- **Financial Services Council:** In a statement, welcoming the release of the implementation roadmap, Financial Services Council CEO Sally Loane, cautioned that though it is 'very important to move quickly to rebuild consumer confidence and enhance consumer outcomes' there remain areas that need to be 'discussed with government' eg recommendation 2.10 (a new disciplinary system for advisers) and recommendation 7.1 (a compensation scheme of last resort). Ms Loane said that 'any legislation to implement the recommendations should be treated with the same diligence and rigour as any other new Bill to be brought before the parliament'.

- **Australian Institute of Superannuation Trustees:** Financial Standards quotes the Australian Institute of Superannuation Trustees (AIST) as criticising the pace at which the government has responded to the recommendations and the time taken to release the implementation plan, 'the government's response so far has been tepid at best' AIST CEO Eva Scheerlinck is quoted as saying. With respect to the recommendation to end grandfathered conflicted remuneration, Ms Scheerlinck reportedly expressed disappointment that the government's approach has 'fallen short on consumer protection'. Reportedly, Ms Scheerlinck has called on the government to prioritise recommendations to stop conflicts of interest in the sector as well as the 'worst practices' among banks and other for profit entities eg the ban on the hawking of superannuation products.

[Sources: Treasurer Josh Frydenberg, speech to the Victorian Chamber of Commerce: Taking Action on the Banking Superannuation and Financial Services Royal Commission Implementation Roadmap 19/08/2019; Financial Services Royal Commission Implementation Roadmap 19/08/2019; FSC media release 19/08/2019; ABA media release 19/08/2019; [registration required] The Australian 20/08/2019;19/08/2019; Financial Standard 20/08/2019; InvestorDaily 19/08/2019; The ABC 19/08/2019]

Study finds that the cost of misconduct and other issues with financial services providers has cost households an estimated combined $A201 billion over the past five years

Key Takeouts

- A study commissioned by the University of Melbourne in the wake of the Financial services Royal Commission has found that more than 50% of Australians have lost money as a result of misconduct and other issues with financial services providers over the past five years

- The cost of misconduct and other issues with financial services providers has cost households an estimated combined $A201 billion over the past five years

- The study concluded that scandals/misconduct in the financial services sector have led to a substantial erosion of trust in Australian financial institutions and further, that this lack of trust is a barrier to consumers' ability to improve their financial situation (as they were unwilling to trust financial institutions or advisers)

- University of Melbourne academics have released a whitepaper calling on the financial sector to reorient itself, and 'rediscover its purpose — serving the community'. The paper includes five suggested actions to assist in this task

In March 2019, academics at the University of Melbourne commissioned independent research agency Forethought Research to conduct research into how Australians feel about their finances. The findings were part of a nationally representative study commissioned by the University of Melbourne in the wake of the Financial Services Royal Commission.

Some Key Points

- Almost 1 in 10 Australians are extremely dissatisfied with their financial situation while 1 in 5 Australians are somewhat dissatisfied.
- The majority of Australians (54%) had experienced at least one issue with a financial services provider over the past 5 years. Almost 1 in 3 Australians self-reported that they had been charged high fees and 1 in 10 had received poor or misleading information.
- The most common barriers stopping Australians from improving their financial situation is a lack of trust in financial institutions and advisors (27%). Feeling overwhelmed by finance (22.9%) and lacking financial skills (16.1%) as well as lacking the time to spend on managing finances (15.8%) were also cited as barriers.
- The cost of the issues reported with financial service providers was significant and far exceeded the estimated $10 billion in remediation costs that financial service providers have faced as a result of the Financial Services Royal Commission. The estimated cost of these issues (in the last 5 years) to Australian households is $201 billion dollars.
- Most Australians are unprepared to deal with unexpected financial shocks. The survey results showed that 1 in 5 Australians have less than $1,000 dollars in savings and 1 in 2 have less than $10,000.

Suggested way forward for the financial services sector: White paper, The Future of Personal Finance in Australia

In light of the findings above, Melbourne University has released a whitepaper outlining an alternative approach for the financial services sector. The suggested approach aligns the sector with its 'core objective' of improving 'individual financial wellbeing'.

The paper sets out five steps. These are as follows.

1. **The development and adoption of a National Financial Wellbeing Framework (the Framework) to provide a shared/agreed definition of the aspects of financial wellbeing and how these should be measured.** In addition, the paper proposes the establishment of a National Financial Wellbeing Agency (the Agency) which would be responsible for whole-of-system coordination and guiding of actions on financial wellbeing in Australia. This Agency would coordinate across sectors and institutions, including regulators, financial firms, technology firms, consumer groups and universities.
2. **The paper proposes the introduction of compulsory, national, evidence based financial literacy training** in schools. In addition, it's suggested that financial literacy training should also be offered at TAFE and in universities. The paper also suggests that research will need to be conducted on how existing and emerging technologies may be used to improve financial capabilities on an ongoing basis. Further, its suggested that there should be access to free basic financial health checks and advice for all Australians at critical points in a person's life cycle as well as access to free financial counselling as needed
3. **Clearer contracts:** The paper proposes that 'customer contracts, and the rights and obligations of the parties under such contracts, should be fair, transparent and capable of being assessed by the individual as to whether a given contract is expected to enhance his or her financial wellbeing'. It's also proposed that the Framework should become the basis for professional standards in financial services and regulation,

including the provision of advice. To address financial exclusion and predatory pricing, it's proposed that basic financial services be designated as 'essential services' on a national basis and that legal and regulatory requirements be implemented to ensure that similar services are priced on a similar basis.

4. **The paper proposes that legislation, in particular Chapter 7 of the Corporations Act, should be simplified,** and that exceptions and qualifications should be eliminated to the greatest possible extent. We also suggest that it is necessary to move beyond prescriptive, rules-based regulation toward principles-based, outcomes-focused regulation that is supported by regulatory guidance. Importantly, we propose that financial service providers should be subject to a duty to consider financial wellbeing in performing their functions and providing their services; in particular, they should be required to consider what impact a course of action would have, or would be reasonably likely to have, on the financial wellbeing of an individual.

5. **GDPR:** Further, the paper argues that increases in data-sharing should be balanced by stronger privacy protection as has occurred in the EU and that Australia should adopt similar protections offered by the EU's General Data Protection Regulation (GDPR). In addition, it's proposed that financial institutions should be required to give access to a public application program interface for algorithms that determine the terms and conditions of financial services. Further, we propose that in the absence of a chartered body for data science, financial service companies should establish an industry code of conduct that requires customer data to be used only within a consent framework and in a manner that is not detrimental to the financial wellbeing of the customer. For firms and others who provide financial advice and financial services, meeting regulatory duties such as acting in a customer's best interests – which we define as part of the process of co-creating financial wellbeing – will give rise to mutually beneficial outcomes. This is because it provides a shared purpose that goes beyond a profit-driven goal, which may provide short-term gains but does not lead to sustainable outcomes or the maintenance of a sustainable ecosystem.

[Sources: University of Melbourne, Improving the finance sector for all Australians, Consumer research report; How Australians Feel about their financials and financial services providers 2019; FinFuture White Paper: The Future of personal finance in Australia; ABC News 19/08/2019]

ASIC's new 'Why not litigate?' enforcement approach is having an impact: ASIC's latest enforcement update reveals that enforcement investigations have increased 20% over the past 12 months

Report Overview | ASIC Report 625: ASIC enforcement update January to June 2019

Key Takeouts

- Enforcement investigations are up 20% over the past year and wealth management investigations increased 216%
- The number of enforceable undertakings accepted decreased to one during the period (as compared with nine for the period July to December 2018)
- The majority of case outcomes that the commission secured in the first half of this year involved small businesses
- ASIC has said it will 'prioritise' work on the 14 investigations launched in the wake of the Financial Services Royal Commission as well as 'significant number of other investigations into Australia's major financial institutions'. Media reports suggest there could be 50+ court actions launched before the end of the year
- ASIC Deputy Chair (Enforcement) Daniel Crennan said that the Office of Enforcement had allowed ASIC to continue to pursue its new enforcement approach. 'ASIC's enforcement work has a core focus on deterrence, public denunciation and punishment. We continue to pursue this work via our 'Why not litigate?' enforcement approach' he said

The Australian Securities and Investments Commission (ASIC) has released its enforcement update report for the period 1 January 2019 to 30 June 2019.

Some Key Points

- **Office of Enforcement is now established and is allowing the regulator to continue to pursue its new enforcement approach**: ASIC Deputy Chair Daniel Crennan QC said that the Office of Enforcement is now in place. It is comprised of two specialist enforcement teams: Markets Enforcement and Financial Services Enforcement, as well as the Enforcement Oversight Committee.

- **Accelerating court-based matters:** ASIC is working to strengthen its enforcement effectiveness by accelerating court based matters. In illustration, Mr Crennan pointed to the fact that between July 2018 and June 2019 ASIC increased the number of ASIC enforcement investigations by 20%; enforcement investigations involving the big six (or their officers or subsidiary companies) by 51%; and wealth management investigations by 216%. Mr Crennan said that the core focus of ASIC's enforcement work is 'deterrence, public denunciation and punishment'.

- **Australian Financial Service (AFS) licensees were cautioned to expect ASIC's office of enforcement to pursue 'the harsher civil penalties now available'** against them if they fail to ensure their financial services are provided 'efficiently, honestly and fairly' (s 912A of the Corporations Act 2001). For conduct on or after 13 March 2019, the law now provides for financial penalties of up to $525m per contravention. Meanwhile, a person who engages in dishonest conduct in carrying on a financial services business can face imprisonment of up to 15 years.

- **ASIC is deploying additional funding to build internal capacity:** The next year will see ASIC continue with its recruitment program to increase its capability to investigate and litigate misconduct, by increasing the number of analysts, investigators and lawyers at the regulator. This expansion is being funded by the $404 million over four years provided to ASIC by the government following the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Financial Services Royal Commission).

- **ASIC is responding to the Financial Services Royal Commission recommendations:** Many of the tools necessary to deliver a 'stronger legislative, enforcement and regulatory framework with tougher penalties' in line with the Financial Services Royal Commission recommendations are now in place, Mr Crennan said. He added that the government has proposed additional new laws to further strengthen ASIC's enforcement powers and that ASIC stands ready to use them as appropriate.

- **Progress on FSRC referrals:** The Office of Enforcement is continuing its work on the 13 matters referred to ASIC by the Royal Commission as well as a significant number of matters that were examined as case studies in the Royal Commission hearings. Though ASIC does not comment on actual or potential investigations it is prioritising work on these matters and 'a significant number of other investigation into Australia's major financial services institutions'.

Some Key Enforcement Outcomes

- **Corporate governance outcomes**: In the six months between 1 January and 30 June 2019, ASIC recorded 14 corporate governance-related outcomes. Additionally, as at 1 July 2019, ASIC had nine criminal and nine civil corporate governance-related matters underway that had not attained a final result.

- **Financial services outcomes:** In the six months between 1 January and 30 June 2019, ASIC recorded 51 financial services-related outcomes. Additionally, as at 1 July 2019, ASIC had 17 criminal and 29 civil financial services-related matters underway that had not attained a final result.

- **Markets outcomes:** In the six months between 1 January and 30 June 2019, ASIC recorded 11 markets-related outcomes. Additionally, as at 1 July 2019 ASIC had eight criminal and 18 civil markets-related matters underway that had not attained a final result.

- **Small business outcomes:** In the six months between 1 January and 30 June 2019, ASIC recorded 278 small business related outcomes. Additionally as at 1 July 2019, ASIC had 161 small business related criminal matters underway that had not yet attained a final result.

[Sources: ASIC media release 18/08/2019; Report 625: ASIC Enforcement Update January to June 2019; [registration required] The Age 19/08/2019; Independent Financial Adviser 19/058/2019; [registration required] The AFR 19/08/2019; Investor Daily 20/08/2019]

Related News: ASIC expects to action 50+ FSRC court cases within weeks?

The AFR reports that ASIC deputy Chair (enforcement) Daniel Crennan has said that on top of the 13 referrals from the Financial Services Royal Commission, ASIC is looking at taking court action in 'three times as many' further matters. The AFR quotes Mr Crennan as saying that there are a 'very large number of investigations on foot and there will be cases issued in the coming weeks which are the result of those investigations. Those matters will culminate in proceedings being issued before Christmas, and over the next few months'. Reportedly, Mr Crennan added that 'If ASIC does not pursue a case that is either referred to us or related to the royal commission we will be in a position to explain why.'

Reportedly, Mr Crennan has said that warnings by himself, and by ASIC Chair James Shipton had resulted in a shift in the way in which entities are engaging with the regulator which is allowing actions to proceed more swiftly than was the case previously. 'It's a responsible and sensible way to deal with the legacy of the conduct of the past, in circumstances where we're looking at a new world – or a new paradigm – where the laws are different and the penalties are different. I think some of them are getting on board and I encourage those who are less interested in doing so, to do so' Mr Crennan reportedly said.

Commenting on the recent loss of the responsible lending case against Westpac, Mr Crennan is quoted as saying that 'obviously were disappointed to lose…We don't run cases in the hope that we win. We run cases because we wish to, and expect to, win.' Reportedly he added that where the law is unclear, it's a 'legitimate objective' for ASIC to pursue a case.

[Sources: [registration required] The Australian 19/08/2019; [registration required] The AFR 19/08/2019]

ASIC Commissioner John Price has given a speech in which he outlined how ASIC's seven strategic priorities will address the 'harms' the regulator has identified in the financial services sector

Overview | Speech by ASIC Commissioner John Price: Keynote address at Risk Australia Conference

Australian Securities and Investments (ASIC) Commissioner John Price's keynote address at the Risk Australia Conference outlined the regulator's approach to identifying and eliminating harms, emerging threats and harms so far identified by ASIC, and how these are being addressed through ASIC's strategic priorities ahead of the release of the regulator's corporate plan later this month.

Some Key Points

ASIC is focused on eliminating or addressing harms, not on defining acceptable levels of risk

Mr Shipton said that ASIC is focused on addressing or eliminating harms to consumers or to the financial system as a whole, rather than on defining thresholds of acceptable risk. Mr Shipton said that harms are likely to result when 'basic principles of conduct are not followed'. Citing the six norms of conduct for the financial services industry set out by Commissioner Hayne in his Final Report — 1) obey the law; 2) do not mislead or deceive; 3) act fairly; 4) provide services that are fit for purpose; 5) deliver services with reasonable care and skill; and 6) when acting for another person, act in their best interests — Mr Shipton said that corporate cultures whish support these norms 'will go a long way in preventing future harms from misconduct'.

Harm Reduction Approach at ASIC

Mr Shipton said that as part of ASIC's strategic change program the regulator has developed a Threat, Harm and Behaviour Framework, to enable it to identify, analyse and measure the threats and harms manifesting in regulated industries in a consistent and systematic way. Mr Shipton said that the framework is informed by 'extensive data' from a detailed environmental scan, as well breach reporting data and published reports and that internal and external experts are involved in the eventual prioritisation of threats. This annual planning process spans the full year, and culminates in ASIC's final business plan.

In addition to this annual planning process, Mr Shipton said that the Emerging Threats and Harms Committee, also steers 'deep dive' analysis of specific threats and harms throughout the year, and seeks to look 'over the horizon' to identify threats as they begin to manifest.

ASIC's seven strategic priorities

Ahead of the release of ASIC's corporate plan (at the end of the month) Mr Shipton outlined ASIC's seven strategic priorities and explained how they address the harms identified.

1. **Effective and efficient enforcement action:** As part of its new approach (Why not Litigate?) to enforcement, ASIC is focused on cases with a high deterrence value and those involving 'egregious conduct, especially those impacting vulnerable consumers'. Mr Shipton said that this 'addresses the community expectation that unlawful conduct should be brought to account and publicly denounced by the courts'. Mr Shipton said that ASIC will 'continue to use all of our regulatory tools, sometimes in combination, to ensure we get the best outcomes'.

2. **Addressing the Royal Commission's recommendations and referrals**: Mr Shipton said that ASIC fully supports the Financial Services Royal Commission's recommendations and has advocated many of the reforms arising from the Royal Commission for some time. In particular Mr Shipton referenced the Product Intervention Power and the Design and Distribution obligations regime as 'vital reforms'. With respect to the Product Intervention power, Mr Shipton said that it will strengthen ASIC's consumer protection toolkit and better enable ASIC to prevent or mitigate significant harms to consumers. He added that the regulator has released a consultation paper (see: Governance News 03/07/2019) and is engaging several organisations for input on how ASIC can apply this power in practice. Further, he noted that ASIC recently consulted on applying the power to a specific short-term credit product, which would be ASIC's first use of the power (see: Governance News 10/07/2019). Mr Shipton went on to say that ASIC is prioritising the Royal Commission's enforcement referrals and key case studies for action, in particular enforcement action.

3. **Establishing ASIC as conduct regulator for superannuation**: Mr Shipton said that superannuation consumers are susceptible to the threats of poor product design and substandard governance and risk management. As part of ASIC's broadening regulatory ambit, ASIC is committed to delivering in its emerging role as the primary conduct regulator of superannuation. In particular, he said that ASIC will: a) take decisive regulatory and enforcement action to deter misconduct; b) undertake the necessary supervision and surveillance of superannuation trustees, including more frequent on-site visits to ensure trustees act in the best interests of consumers; c) increase our consumer testing and shadow shopping; d) further its understanding of causes for consumer disengagement in superannuation; and e) work closely with APRA to achieve good outcomes effectively and efficiently.

4. **Addressing harms in insurance**: Mr Shipton said that ASIC supports the implementation of insurance law reforms, particularly surrounding unfair contract terms and issues in claims handling. He added that ASIC is continuing its reviews into specific insurance areas including: a) Consumer Credit Insurance; b) Total and Permanent Disability insurance; c) Travel Insurance; and d) Fraud Investigation Practices. Mr Shipton said that ASIC is prepared to take enforcement and other regulatory action against insurance misspelling and reviewing product features and practices that raise concerns. Mr Shipton cited ASIC's actions with respect to Consumer Credit Insurance (ie requiring lenders to remediate over 300,000 affected consumers with over $100m in remediation payments) in illustration of this.

5. **Improving governance and accountability**: Mr Shipton said that in conjunction with ASIC's enforcement priority, it is prioritising action against individuals for governance failures in financial institutions and superannuation trustees that result in consumer harm through poor governance and risk management. In addition, he said that ASIC is ready to support the proposed conduct accountability regime when legislated, to hold senior office holders and managers accountable for poor conduct in the financial sector. Mr Shipton added that ASIC is 'well advanced' in its Close and Continuous Monitoring program, noting that between October 2018 to June this year ASIC staff were onsite for a total of 119 days, held meetings with 425 banking staff at all levels, and reviewed thousands of documents. Mr Shipton said that ASIC's Corporate Governance Taskforce has also commenced work reviewing the corporate governance practices of 21 large listed companies. Key areas of work include examining governance processes and practices around the oversight of non-financial risk and practices regarding payment of variable remuneration to key management personnel. In addition, ASIC is looking at more targeted governance issues in particular industry sectors. For example, ASIC is enhancing our oversight of market infrastructure providers and intermediaries in wholesale over-the-counter markets. Themes covered by onsite reviews include culture and conduct risk programs and training, corporate governance, compliance arrangements, pre-trade and post-trade controls, and client disclosure arrangements.

6. **Protecting vulnerable consumers:** Mr Shipton said that ASIC will take regulatory action to help ensure consumers in financial hardship are treated fairly and that financial services providers act responsibly and with accountability. ASIC will be engaging with industry on the application of fairness within the sectors, products and services we regulate and the consumer outcomes we strive to achieve. ASIC will also be using 'behavioural insights to better understand what drives certain behaviours and how to influence them for the better'.
7. **Addressing poor financial advice outcomes**: Mr Shipton said that ASIC is focused on enhancing the professionalism of financial advisers, to address misconduct and consumer harm in the sector. Examples of projects in this area include: a) approving and monitoring code compliance schemes; b) reviewing minimum training and education requirements and c) enhancing the Financial Adviser Register. ASIC is also consumer testing more appropriate labels and descriptors for general advice.

Mr Shipton concluded by emphasising that the 'embedding appropriate norms of conduct at all levels of your organisations is your best defence against misconduct that can cause harm to your clients, the wider market and ultimately, your own firm'.

[Source: Keynote address by John Price, Commissioner, Australian Securities and Investments Commission at the Risk Australia Conference 15/08/2019]

Mandatory comprehensive credit reporting regime to be introduced: The Government has released an exposure draft legislation for consultation

The Government has released an exposure draft of the National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Bill 2019 which is designed to introduce a mandatory comprehensive credit reporting regime.

The original Bill to implement the regime — (National Consumer Credit Protection Amendment (Mandatory Comprehensive Credit Reporting) Bill 2018) — lapsed at the end of the last parliament (when the Federal election was called).

Key Change: The revised (draft) Bill introduces a new category of information within credit reporting, enabling hardship information to be reported alongside repayment history information, in line with Attorney-General Christian Porter's recent announcement.

Some Key Points:

- Schedule 1 of the draft Bill proposes to:
  - amend the National Consumer Credit Protection Act 2009 to mandate a comprehensive credit reporting regime which would apply from 1 April 2020. Under this mandatory regime, 'eligible licensees' (large authorised deposit taking institutions (ADIs) or a body corporate of a kind prescribed in the regulations) would be required to provide comprehensive credit information on consumer credit accounts to certain credit reporting bodies. The supply of information under the mandatory regime includes an initial bulk supply of credit information and an ongoing requirement to keep information up to date and accurate. Failure to provide the data could result in a penalties.
  - expand the Australian Securities and Investment Commission's (ASIC's) powers to enable it to monitor compliance with the mandatory regime
  - impose additional requirements on where data held by a credit reporting body must be stored.
- Schedule 2 of the draft Bill proposes to:
  - amend the Privacy Act 1988 to permit reporting of financial hardship information within the credit reporting framework and to make other minor changes to improve the overall administration of credit reporting
  - create a new category of credit information to accompany repayment history information known as 'financial hardship information'. This new category would comprise a 'hardship arrangement indicator' and a 'contract variation indicator'. This will enable credit reporting bodies to collect, use, disclose and retain hardship information. The hardship information disclosed may include an

indicator of hardship arrangements and contract variations that were made before or after commencement of Schedule 2 of the Bill.

Independent review of the regime: The draft bill includes a requirement that the Treasurer must cause an independent review of the mandatory regime to be completed and a written report provided to the Treasurer by 1 October 2023. The Treasurer would then be required to table the report in each House of Parliament within 15 sitting days of receiving the report.

Timeline: The deadline for submissions is 5 September 2019

[Sources: Treasury media release 15/08/2019; Exposure Draft Bill: National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Bill 2019; Draft Explanatory Materials; Attorney General Christian Porter media release 02/08/2019; Investor Daily 16/08/2019]

APRA is consulting on proposed changes to Prudential Standard CPS 226 Margining and risk mitigation for non-centrally cleared derivatives (CPS 226)

The Australian Prudential Regulation Authority (APRA) is consulting on proposed changes to Prudential Standard CPS 226 Margining and risk mitigation for non-centrally cleared derivatives (CPS 226). CPS 226 applies to all authorised deposit-taking institutions, general insurers, life companies and registrable superannuation entities. It is relevant to those entities who transact in material levels of non-centrally cleared derivatives.

Extending the implementation timeline for initial margin requirements: In July 2019, the Basel Committee on Banking Supervision (BCBS) and the International Organization of Securities Commissions (IOSCO) released amendments to the margin requirements. APRA is consulting on proposed revisions to CPS 226 to extend the implementation timeline for margin requirements by one year to 1 September 2021, as well as making other minor amendments (which is in line with the BCBS and IOSCO decision to approve a one year extension to the final implementation of the margin requirements).

The deadline for submissions is 28 August 2019.

[Sources: APRA media release 14/08/2019; Letter: Consultation on amendments to margin requirements August 2019]

Treasury is seeking feedback on the design and operation of the methodology used in calculating the Financial Institutional Supervisory Levy

Treasury has released a discussion paper on the design and operation of the Financial Institutions Supervisory Levy. The levy is designed to cover the majority of the costs of APRA, and to fund specific costs for a range of other Commonwealth agencies and departments (eg ATO and ASIC).

This paper seeks submissions on the design and operation of the levy. The focus of the consultation paper is on the methodology that is applied in calculating the levies and is separate to the annual 'Proposed Financial Institutions Supervisory Levies' paper released each year.

Treasury notes that the maximum amount payable by ADIs under the restricted component was unable to be increased for 2019-20 due to a cap imposed by legislation. As a result, funding associated with the supervision of large institutions was deferred until 2020-21, subject to legislative changes amending the statutory cap.

Questions raised for consultation in the paper include:

- whether the current levy base appropriate for each industry sector
- what the appropriate level for the statutory cap for the restricted component on the levels on ADIs should be
- what changes stakeholders would find useful to the annual levies consultation process

The deadline for submissions is 13 September 2019.

[Sources: Treasury media release 16/08/2019; Consultation paper: Financial Institutions Supervisory Levies Methodology Discussion Paper August 2019]

ASIC's second public hearing on Responsible Lending: reportedly, concerns remain over ASIC's proposed changes to lending guidance

The Australian Securities and Investments Commission (ASIC) held a second day of public hearings as part of its consultation on proposed changes to its responsible lending guidance on 19 August.

The following entities appeared: Consumer Action Legal Centre; Consumer Credit Legal Services (WA); The Melbourne Institute; LIXI Limited; Mortgage Choice; Connective; Australian Finance Group; Australian Financial Complaints Authority (AFCA); Auscred Ltd (Lendi); National Australia Bank; and the Australia and New Zealand Banking Group (ANZ).

The transcript of the proceedings is not yet available on the ASIC website. According to media reports:

- Some groups appearing before ASIC cautioned against making responsible lending guidelines too prescriptive, arguing instead that the principles based approach to guidance should be maintained.
- The SMH reports that ANZ told ASIC that ANZ is not approving loans that were too expensive for borrowers in the belief that the borrowers in question would cut their expenses. 'We test the 10 categories against HEM [Household Expenditure Measurement] for testing reasonableness. We would use the higher of declared expenses for HEM. We are not working on the basis of them reducing their expenses after they take out the loan' ANZ managing director consumer banking Kate Gibson is quoted as saying.

[Note: The way in which banks assess a borrower's ability to repay a home loan and the ability of borrowers to trim expenses is a question that has received a high level of media interest over the past week in light of the Financial Services Royal Commission and more particularly in light of the decision in Australian Securities and Investments Commission v Westpac Banking Corporation (No 2) [2018] FCA 751. Justice Perram found, among other things, that a lender 'may do what it wants in the assessment process' and is not obliged under the NCCP Act to take into account a prospective borrower's actual/declared expenses when assessing whether a loan will be unsuitable to consumers. For a summary see: Governance News 14/08/2019]

- Reportedly, Mortgage Choice CEO Susan Mitchell has said that one third of all lenders are not asking for information to determine whether a borrower has debts with other lenders (eg credit cards, car loans) before approving a home loan. In addition, Ms Mitchell reportedly said that there is variation in the approach used by lenders with respect to the assessment of living expenses. 'The biggest variation is when you come to living expenses…Everyone now asks for information on expenses. But they all ask for a different structure. That's quite time consuming for a broker and a consumer' she is quoted as stating. Reportedly Ms Mitchell attributed the variation in approach to the failure by lenders to adopt industry lending standards. Though they all used benchmarks (eg the Household Expenditure Measure or HEM) to assess borrowers expends they used benchmarks in different ways. She suggested it would be helpful for ASIC to set minimum requirements for assessing a loan to provide certainty for brokers on the issue.

[Sources: ASIC public hearings on responsible lending; [registration required] The AFR 19/08/2019; The SMH 19/08/2019; The SMH 19/08/2019; ITNews 20/08/2019]

In Brief | Leadership changes at APRA? The AFR reports that APRA is seeking a new head of policy and advice following the resignation of Pat Brennan, who had responsibility for developing the regulator's policies on banks, insurers and super funds. Mr Brennan reportedly declined to comment on the reasons for his departure. In addition, APRA is also reportedly interviewing for a new executive general manager for 'specialised' institutions, which has been vacant for several months

[Source: [registration required] The AFR 16/08/2019]

In Brief | APRA has released a strengthened prudential standard aimed at 'mitigating contagion risk' within banking groups: Prudential Standard APS 222 Associations with Related Entities. The new APS 222 will come into effect from 1 January 2021. In a statement to the market, ANZ said that APRA's announcement could mean that the lender has 'limited capacity to inject capital into ANZ NZ' and in consequence, that ANZ NZ 'may be required to retain a higher proportion of its earnings to meet any potential increased capital requirements'

[Sources: APRA media release 20/08/2019; APRA response to consultation: Revisions to the related parties framework for authorised deposit-taking institutions; ANZ ASX statement 20/08/2019; [registration required] The AFR 20/08/2019; The SMH 20/08/2019]

In Brief | The SMH reports that AUSTRAC has said it is likely to take more action against financial institutions after being 'flooded' with reports of potential AML breaches

[Source: The SMH 19/08/2019]

In Brief | The end of credit cards? As Buy Now Pay Later becomes more popular, young consumers are increasingly opting out of credit cards and some of the larger banks are making moves to invest in buy-now-pay-later offerings, which could signal that credit cards will cease to exist in future

[Source: FinTech Australia 20/08/2019]

In Brief | Study funds only 14% of Australian consumers (less than half the APAC average) will consider switching to a digital-only bank in the next two years, but 76% of Australian retail banking customers, and 44% of Australian life insurance customers prefer digital channels. The report suggests that customers' preference for digital channels and growing regulatory support point to digital banks gaining ground in the next few years, including in Australia

[Sources: FinTech Australia 20/08/2019; Forrester Report: The Pulse of Financial Services Customers in Asia Pacific]

Accounting and Audit

More time for smaller players to respond? The parliamentary audit inquiry submission deadline has been extended to the end of October

The Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the Regulation of Auditing in Australia, has extended the deadline for submissions from 30 September to 28 October 2019. The AFR reports that the extension on the previous submission deadline is in response to the high level of interest in the inquiry.

Liberal member and inquiry committee member Jason Falinski is quoted as saying that non-government groups don't have the same resources as the big four accounting firms, and requested additional time. 'It's [the extension] to allow parties that don't have the resources to put in a comprehensive submission' Mr Falinski reportedly said.

The AFR goes on to quote Mr Falinski as saying that he does not 'believe that there's anything wrong with the auditing industry in Australia at the moment. I think the real question is around whether the accounting industry is best structured to take into account all the issues that modern finance presents'. Reportedly Mr Falinski added that he views the terms of reference for the inquiry as being too broad. Mr Falinski also reportedly suggested that the current March reporting date could be 'pushed out' if required (though this would require a motion in the Senate).

The AFR comments that Labor Senator Deborah O'Neill has recently called for whistleblowers to come forward to the inquiry to report poor practices/conflicts of interest within the sector.

[Sources: [registration required] The AFR 14/08/2019; 18/08/2019]

In Brief | No incentive for auditors to be critical? Firms appear to be less likely to hire auditors with a history of critical audits according to new US research

[Sources: [registration required] Cowle, Elizabeth and Rowe, Stephen P., Don't Make Me Look Bad: How the Audit Market Penalizes Auditors for Doing Their Job (August 7, 2018). Available at SSRN: https://ssrn.com/abstract=3228321; [registration required] The WSJ 12/08/2019; MarketWatch 13/08/2019]

Risk Management

The Future of the Governance Professional? Royal Commission fallout will define the governance professional's role through to 2025 the Governance Institute writes

Report Overview | The Future of the Governance Professional

The Governance Institute have released a report — The Future of the Governance Professional — into the ways in which the role of governance professionals may evolve over the next five years, the factors driving this evolution and the skills, resources and support governance professionals will need from executive leaders going forward.

Some Key Points

- **Factors driving governance changes in the future**? Over 83% of governance professionals expect their roles to change by 2025**.** Factors driving this change include, increased regulatory scrutiny/change (especially with respect to increased focus on/need to report metrics on non-financial risks such as sustainability and culture), business complexity, and technological disruption. The 'leading theme' nominated by respondents is the increased complexity of many organisations in terms of their internal operations and well as the influence of shareholders and other external stakeholders.
- **Key changes?** Overall, the report suggests that the governance professional of 2025, regardless of industry, will still be working to manage additional regulatory scrutiny, more extensive compliance requirements within a more complex working environment, on top of the technological issues around disruption, data management and rate of change.
- **Other findings** from the report include the following:
  - Respondents saw AI as a positive for example, as an aid to making decisions based around quantitative assessments and emotional intelligence (39%), improving the quality of data a board receives (25%) and taking over routine administrative tasks (23%). Just 4% think AI will cause job losses in administrative roles.
  - Only 30% of governance respondents stated that they were 'well prepared' or 'very well prepared' to face the challenges of the future, over a quarter of respondents said that they were 'neutral' (28%) and 9% said they were not prepared.
  - Community expectations have changed in that the community doesn't trust institutions anymore and it does not want regulators to deal amicably with them. It wants to see public revelations when people fail to comply and, in some instances, it wants people brought to the courts and punished.

Implications for governance professionals?

- Directors may need to limit the number of board appointments they accept as the role becomes more complex and demanding of their time.
- There is likely to be a stronger focus on board renewal and the maximum tenure of board members. This has potential result in increased board diversity as more boards seats open up.
- The role of company secretaries is likely to change. For example, the role of the company secretary could increasingly be separated from other roles such as CFO and general counsel. In addition to the CEO and CFO, company secretaries will also have stronger relationships with the chief risk officer, chief technology officer and chief human resources officer. Future company secretaries may be asked to sit on the boards of other organisations to gain different perspectives to support their internal roles. The company secretary is expected to play an important role and become the 'conscience' of the board or its 'chief ethical adviser'.
- There will be more Millennials on boards and they are likely to place greater emphasis on ethics and social good. They may also be less rigid in their understanding and style and keener to 'push the envelope'.
- Scrutiny of both director and executive pay is likely to rise and government professionals may have to lend their legal expertise to help simplify long-term and short-term incentive plans, which are becoming more complex and may not be achieving their intended aims.

Commenting on the findings, Governance Institute of Australia CEO Megan Motto said that though much of the research focused on the effects of technology by 2025, it is clear that most governance professionals believe they will be 'dealing with the fallout of this year's enormous regulatory changes for the foreseeable future'. Ms Motto went on to comment that 'what is interesting is that this effect [of the Financial Services Royal Commission and other regulatory changes] flows on beyond the financial sector and into all Australian organisations, regardless of size or industry. They all expect additional regulatory scrutiny, and compliance burdens, especially amongst the next generation of governance professionals.'

About the report: The report is based on the results of interviews, an online survey and a roundtable discussion with primarily Australian governance professionals from a range of industries. Forty one per cent of participants identified as senior governance or risk management professionals, 20% identified as early career governance or risk professionals and 17% identified as CEO or C suite executives. The remainder comprised, consultants (11%), non-executive directors (7%) and retired risk/governance professionals (4%).

[Sources: Governance Institute of Australia media release 20/08/2019; Whitepaper: The Future of the Governance Professional]

Your ICT contract is coming up for renewal: now what?

The issue of ICT contracts coming up for renewal was explored by a panel of MinterEllison and ITNewcom professionals and industry experts in Sydney in June 2019. Among other questions the panel considered the questions: When should purchasers start thinking about options to pursue as an ICT contract is coming up for renewal? What are the issues to consider?

An article summarising insights from the discussion is available on the MinterEllison website here: https://www.minterellison.com/articles/your-ict-contract-is-coming-up-for-renewal-now-what

In Brief | Calls for meetings to be recorded? Reportedly, there are calls for local governments to record, and publicly release the recordings, of council meetings (with the minutes) as a record of proceedings following a recent inquiry into an altercation at one council meeting

[Note: The Governance Institute and the Australian Institute of Company Directors recently released a joint statement on minutes. Among other things, the statement says that minutes should not be a transcripit/verbatim report. For a summary see: Governance News 07/08/2019]

[Source: [registration required] The Advertiser 16/08/2019]