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Contents

Financial Services 15

Accounting and Audit 26

Top Story | Minute Taking: a joint statement from the AICD and the Governance Institute

Overview | Australian Institute of Company Directors and the Governance Institute, Joint statement on board minutes August 2019

Key Takeouts

- **Context:** The impetus for the Joint Statement was the heightened level of scrutiny that the practice of minute-taking has attracted since the Financial Services Royal Commission and the questions and concerns raised by both governance professionals and directors as to whether their minute taking practices remain fit for purpose while meeting the relevant legal obligations.

- **Guidance on minute taking:** The statement provides the AICD/GIA's shared perspective on minutes, and outlines general principles as to what should/should not be included; the factors relevant to determining the appropriate level of detail to include (including how challenge/dissent should be documented) and the approach to board papers and document retention policies. The statement also includes and is informed by legal opinion from Dominique Hogan-Doran SC and Douglas Gration which is included as an appendix to the statement.

- **Not a transcript:** Board minutes are not a transcript or verbatim report of the discussion or debate during the meeting or a record of an individual director's contribution. The AICD/GIA opine that this level of 'detail is not required by law, would be inconsistent with the established practice of minute taking and may stifle healthy boardroom debate'. Rather, the level of detail required is a question of judgment, but minutes should ultimately 'be written in such a way that someone who was not present at the meeting can follow the decisions that were made'

In light of heightened interest in board minutes in recent months in the wake of the Financial Services Royal Commission, The Australian Institute of Company Directors (AICD) and Governance Institute of Australia (GIA) have released a joint statement outlining their shared perspective on current issues in minute taking including the purpose of minutes; the scope of content to be included in minutes; factors relevant to determining the appropriate level of detail to include; how challenge and dissent should be treated; and the role of board papers and other supplementary material.

The statement also includes a legal opinion from Dominique Hogan-Doran SC and Douglas Gration to add legal context to the conclusions, recommendations and positions taken.

[Note: [Note: The full text of the legal opinion from Dominique Hogan-Doran SC and Douglas Gration covering matters including: a) the purpose of minutes and detail to be included; b) drafts and notes; c) amendments to minutes; d) challenge and dissent; e) board papers and other supporting documents; and f) legal professional privilege is included as an appendix to the joint statement and is available here.]

Some key principles

What is the purpose of board minutes?

'We concur with the statement of the UK counterpart of Governance Institute that '[t]he purpose of minutes is to provide an accurate, impartial and balanced internal record of the business transacted at a meeting', *Dominique Hogan-Doran SC and Douglas Gration, July 2019*

- 'Board minutes are a record of board decisions and the process, or proceedings, by which those decisions have been made. As well as being a legal record, the minutes convey these decisions to the executives who implement them, and serve as a reference for the board if it wishes to revisit them' the GIA/AICD write.

- Importantly, board minutes are not a transcript or verbatim report of the discussion or debate during the meeting or a record of an individual director's contribution. The GIA/AICD consider that this level of 'detail is not required by law, would be inconsistent with the established practice of minute taking and may stifle healthy boardroom debate'.

- Though minutes can facilitate regulatory oversight — minutes may be the only evidence before a court of what occurred at a meeting, because the directors or others present are not called to give evidence — 'this is not their primary purpose'. The GIA/AICD consider that minutes should not be treated as purely a compliance exercise and caution that a 'tick box' approach should be avoided.

What should be included in minutes?

- Though there is no 'one size fits all' approach to this question, the AICD/GIA consider that as a general principle minutes should include the key points of discussion and the broad reasons for decisions to help establish that 'directors have exercised their powers and discharged their duties to act with care and diligence and in good faith, for a proper purpose and in the best interests of the company'.
- In addition, it is also advisable to consider the principles of the business judgment rule when preparing and approving minutes. If judgment is required and directors are balancing a number of competing risks and considerations in their decision-making, it is prudent to actively consider whether the minutes capture them 'adequately but succinctly'. Further, the AICD/GIA note that if the minutes are silent on an issue, a 'court may adopt a degree of scepticism as to whether the matter was indeed considered by the board'.
- Typical inclusions in minutes are: the organisation’s name; the nature and type of meeting; place, date and starting time; chair name; attendees; invited guests; apologies accepted; presence of quorum; minutes of the previous meeting; materials distributed before and during the meeting; proceedings of the meeting and resolutions made (including details of director votes against or abstentions); when attendees leave and re-enter the room; closing time; and chair signature.
- Beyond this, the level of detail is a question of judgment and may vary from company to company and between the matters being considered by the board. The GIA/AICD suggest that the following relevant factors are appropriate to consider when determining the appropriate level of detail to include: a) the nature and importance of, and the risk attaching to, the decision and discussion concerned; b) the level of detail contained in any supporting board paper; c) the regulatory environment that either the company generally or the particular decision is subject to and the need to ensure that the minutes and documents referred to in them can demonstrate compliance with relevant regulatory requirements; d) any perceived self interest or conflict of interest on the part of management or the board in the decision concerned (it is desirable that the rationale for and basis of such decisions is carefully and fully recorded).

[Note: Paragraph 23 of the legal opinion attached to the joint statement sets out a similar list of considerations.]

- The GIA/AICD further suggest that a 'happy medium' between pure minutes of resolution and minutes of narration will often be appropriate, noting that it is 'important that the approach adopted with minutes is consistent'.

The treatment of 'Challenge' and Dissent?

Commenting on the extent to which minutes should reflect the way in which boards 'challenge' management the AICD/GIA consider that while it is a matter for judgment in each case, it is appropriate that the minutes record significant issues raised with management by directors and the responses received or action promised. However, the statement emphasises that 'It is neither necessary nor desirable to record every question put and every response received. It will normally be sufficient to record the thrust of significant issues raised in non-emotive and impartial language'.

[Note: The Financial Services Royal Commission's Final Report includes some discussion of the importance of boards getting the right information and challenging management. The extent to which this was evident from the minutes was also discussed briefly. See: Financial Services Royal Commission Final Report volume 1 at p396-397. The issue was also raised during the Round 7 hearings, see: Governance News 26/11/2018]

Unnecessary to include the finer details of 'robust discussion' in minutes

The AICD/GIA make the point that though minutes can assist in establishing that directors turned their minds sufficiently to matters under consideration, minutes should record the resolutions of the board as a whole, rather than the separate views of a group of individuals. For this reason, 'the details of any robust discussion that takes place along the way ideally should not be attributed in minutes'.

The statement adds that 'The more minutes are written in an "x said", "y said" manner, the less the minutes reflect the concept of directors acting as a collective and the more likely that board dynamics could be negatively impacted'. In addition, the statement draws a distinction between what might be characterised as 'robust discussion' leading to a collective decision and dissent.

Many discussions during board meetings include 'untested ideas or general thoughts on a topic' which might be described as 'robust discussion'. The ACID/GIA state that 'These comments are not necessarily for inclusion in minutes and including these details may discourage the free-flowing discussion that should be part of a well-functioning board'. Minutes should record the reason the majority of directors were in favour of the decision notwithstanding dissenting views.

The AICD/GIA suggest that board discussions of this kind might usefully and accurately be recorded using words such as the board 'discussed', 'debated', 'questioned', 'enquired', requested information on', 'tested their understanding'.

Dissent should be recorded: Minutes should record the reason the majority of directors were in favour of the decision notwithstanding dissenting views. The legal opinion accompanying the joint statement adds that though boards generally make collegiate decisions, for which 'they take collegiate responsibility', 'from time to time, an individual director may dissent or abstain from a particular decision and ask that the fact that this conduct be recorded in the minutes. Further, the law imposes individual duties on directors and expects the individual discharge of those duties to be recorded'.

Board papers and other supporting documents

The statement emphasises that 'a well-written board paper will complement the minutes, and can often demonstrate the reason a decision has been taken with little, if any, further elaboration required in the minutes. It is appropriate for board minutes to refer to, without repeating, the contents of board papers and other supporting documents'.

Further, the statement suggests that the content of the board papers should support the decisions being made by the board. Where a board makes a decision not canvassed in the supporting board paper or is contrary to management's recommendation it is 'good practice to include sufficient detail about the reasons for the decision to enable a reader to understand the rationale. Material information not included in board papers which forms part of the decision may also need to be referenced in the minutes.'

Draft Minutes and Meeting Notes: Board's need to 'properly evaluate the draft minutes'

- **Notes of meetings:** 'Minutes should be the sole, permanent record of the meeting proceedings. Retaining notes may undermine the integrity of the minutes as the final record of the meeting' the AICD/GIA write. As such, it's important for firms to adopt and consistently apply a document management and retention policy. The legal opinion accompanying the joint statement adds that 'Draft minutes and handwritten notes of meetings may be dealt with and disposed of in the same way as other documents (not being financial records) held by a company. Subject to the important caveat below with respect to actual and anticipated legal proceedings, there is no specific obligation to retain drafts and handwritten notes of meetings'.
- **Boards need to evaluate draft minutes:** The statement notes that as minutes prepared and signed in accordance with section 251 A of the Corporations Act are evidence of the proceedings and resolutions to which they relate (unless the contrary is proven) directors have a responsibility to properly evaluate the draft minutes circulated after meetings and should request additions, clarifications or corrections as needed.
- **Directors' personal notes:** Though there is no legal obligation for directors to take personal notes, many directors elect to do so. However, like minutes, directors' notes can be discoverable and admissible as evidence. The AICD/GIA observe that 'This might be helpful if the notes show that the director has adequately informed him/herself, questioned appropriately and used proper care and diligence' but caution that taking notes can 'create risk if the notes are considered to be ambiguous,

inconsistent or incomplete'. In addition, notes taken by an attendee at a meeting are not minutes, 'but represent the note taker's version of what occurred and may not be accurate'.

Legal professional privilege should be considered

Legal privilege is not usually lost by the board receiving a company's legal advice. Having said this, the statement notes the importance of exercising 'caution and judgment in determining the degree of detail of privileged information (if any) that is necessary to include in the minutes'. The AICD/GIA suggest that in many cases, it may be appropriate to note that the board considered relevant legal advice when making a decision.

The AICD/GIA further suggest that any privileged information in the minutes should be 'clearly identified and ideally included in an appendix or attachment. Legal advice should be sought where necessary'. The statement adds that where minutes refer to privileged advice 'they should not should not be provided to third parties without first taking legal advice, because disclosure of the substance of the legal opinion might result in the loss of privilege'.

[Source: Joint Statement: Governance Institute, Australian Institute of Company Directors August 2019]

In Brief | The AICD's 10th Annual Not for Profit Governance Survey has found (among other things) that directors are spending more time on their governance role with 55% of directors surveyed spending one to five days a month on their NFP role and 23% spending more than five days a month on a single NFP

[Source: Australian Institute of Company Directors Report: Not for Profit Governance and Performance Study 2019]

Remuneration

Incentives based on group performance: ANZ has reportedly redesigned its pay structure to align with the Financial Services Royal Commission recommendations

ANZ has reportedly redesigned its pay structure, based on the recommendations of the Financial Services Royal Commission, and in alignment with the Australian Prudential Regulation Authority's proposed approach.

Details

- Reportedly the changes will remove individual bonuses for 80% of the banks workers (including customer-facing front line staff) and replace them with a group performance dividend.
- According to The SMH, customer-facing sales staff who have previously received large individual bonuses determined by their manager and based on meeting or exceeding sales targets, will be rewarded by an increase in their base pay.
- Under the new scheme, all employees within the same pay band will get the same share of the performance pool — the amount of which will be determined each year by the ANZ board. Commenting on this, ANZ CEO Shayne Elliott reportedly said 'There is no differentiation between good and great when it comes to the bonus…If you are a great performer it will be reflected in the base pay'. Reportedly, most ANZ staff who have done a 'good job' can expect to receive the dividend this year.
- Reportedly ANZ did not outline the exact criteria the board will use to determine the group dividend, but it is expected to be determined by reference to benchmarks such as risk, the bank's reputation and financial performance.
- Under the new scheme, 20% of staff (primarily in senior roles in the institutional business) will be eligible to receive the group dividend and in addition, will be eligible to receive individual performance bonuses (or 'at risk' pay).

Reportedly ANZ CEO Shayne Elliott said that the organisation has been working on reviewing remuneration arrangements for a number of years 'well before the royal commission' and that the will enable stronger oversight of remuneration frameworks, and increase emphasis on non-financial risk factors.

[Note: The Financial Services Royal Commission Final Report referenced ANZ's project to review pay arrangements. Commissioner Hayne commented that there are 'evident advantages and no obvious disadvantages' of moving to the ANZ model, or indeed to other models that increase the amount of fixed remuneration paid to staff and decrease variable remuneration or that remove variable remuneration altogether. See: Financial Services Royal Commission Final Report volume one at p372-374. Redesigning pay structures was among the initiatives ANZ announced as part of its initial response to the Financial Services Royal Commission recommendations.]

Financial Sector Union of Australia

In a statement, Finance Sector Union of Australia (FSU) national secretary Julia Angrisano welcomed ANZ's reforms on the basis that they are a step in the right direction: 'The Royal Commission identified the need for major changes in remuneration models in the financial services sector and it is hoped the changes at ANZ will be a positive step forward for the bank and its staff' she said. Ms Angrisano went on to say that FSU believes the only system of remuneration in the financial services sector should be one in which workers are paid for their skills and experience rather than the current model that relies on targets and bonuses.

[Sources: The SMH 06/08/2019; [registration required] The Australian 06/08/2019; Financial Standard 06/08/2019; Financial Sector Union media release 06/08/2019]

Why more prescriptive rules for boards won't boost pay accountability: The AICD has raised concerns about proposed changes

Australian Institute of Company Directors (AICD) CEO and Managing Director Angus Armour has raised concerns about the Australian Prudential Regulation Authority's (APRA's) proposed remuneration reforms, and the proposed 'veto power' over board appointments put forward in the recent APRA capability review. His chief concern is that the proposed changes undermine boards' ability to structure pay in alignment with company needs, and effectively shifts accountability for governance to the regulator.

'Rather than a principles-based approach to this issue, APRA's proposals apply a uniform approach that undermine the responsibility of a board to structure remuneration strategies aligned with the company's needs and strategy. Expanding the board's role to approve remuneration arrangements and outcomes for a significantly expanded number of employees is unworkable. Boards should set the principles for remuneration structures but delving into the detail of pay structures deep in an organisation blurs accountability and confuses the vital oversight role of boards. The unintended consequence will be more remuneration consultants providing opinions to help boards wade through the complexity of remuneration issues, which already dominate board agendas' he writes.

Mr Armour went on to argue that 'The task of restoring trust in our governance frameworks is challenging. It is essential we succeed, for the benefit of society. It will require a commitment to principle: that the role of regulators is to regulate and enforce the law, that boards oversee and govern and that executives manage the organisation. And we're all held to account'.

[Sources: [registration required] The Australian 05/08/2019; [registration required] The AFR 05/08/2019]

Regulators

APRA's latest stakeholder survey has found 90% of regulated entities believe APRA's supervision helps to protect both their industry and the Australian community

Key Takeouts

- More than 90% of respondents believed APRA's supervision helped to protect both their industry and the Australian community
- Almost all results were down from when they were last observed in 2017, including with respect to APRA's supervisory team capability

The Australian Prudential Regulation Authority's (APRA's) 2019 Stakeholder Survey has found that APRA regulated entities and 'knowledgeable observers' (auditors, actuaries, and industry associations) perceive APRA's regulatory and supervisory approaches to be having a positive impact on risk management and culture.

Some Key Findings

- Overall, respondents 'strongly believe' APRA's supervision and enforcement of prudential requirements is benefiting the Australian community, strengthening their entity and positively impacting their industry.
  - 93% of APRA regulated entities believe APRA's supervision helps to protect both their industry and the Australian community a finding consistent with previous stakeholder surveys
  - 86% of respondents believe APRA's increased focus on risk culture has had a positive impact on their entity
  - 81% of respondents believe APRA is effective in identifying risks across their industry
  - 86% believe APRA's supervision enhances the financial and operational strength of their entity
  - 92% agree that APRA's public communications are clear and effective
- Despite the strong overall results, almost all changes observed from 2017 (when the survey was last conducted) are downwards. Results where were statistically significantly lower include the following:
  - perceptions of the importance of APRA's harmonisation of the prudential framework across regulated industries (REs) has been in steady decline since 2009 and dropped significantly in 2019, and to the lowest level recorded
  - perceptions of several dimensions of risk assessment declined significantly in 2019, but remain within the normal range for these measures observed over multiple surveys
  - perceptions of the capabilities of the supervisory teams were also 'slightly but significantly lower' in 2019, and generally at the lower end of what has been observed over time

The survey also highlighted industry concern about the costs of regulatory compliance, identified that a third of respondents thought APRA collected too much statistical data, and indicated that entities were placing less importance on the harmonisation of the prudential framework across regulated industries.

APRA Chair Wayne Byres said that in the wake of the Financial Services Royal Commission and the recent APRA Capability Review, the regulator is 'taking stock of how it can bring into effect a significant number of recommendations about how we must do more in new areas of risk, without compromising APRA's primary focus on financial safety and stability'. Mr Byres added that the biennial stakeholder surveys are an important tool for APRA to monitor its performance and effectiveness and that the publication of the results, underlines APRA's commitment to 'transparency and accountability'.

About the survey: Orima Research conducted the survey, which received responses from 280 regulated entities and 70 Knowledgeable Observers. This is the sixth such survey undertaken since 2011.

[Sources: APRA media release 31/07/2019; Stakeholder Survey; Investor Daily 01/08/2019; registration required] The Australian 01/08/2019; Investor Daily 01/08/2019]

Ethical concerns? ASIC executive Michael Saadat has reportedly left the regulator to head up regulatory affairs at Afterpay

The AFR reports that Michael Saadat, the senior executive leader at the Australian Securities and Investments Commission (ASIC) who led an industry investigation into the buy now pay later sector and oversaw potential changes to responsible lending laws (see: Governance News 20/02/2019; 03/07/2019) has left the regulator to head up regulatory affairs at Afterpay.

Ethical concerns? The AFR queries whether public servants like Mr Saadat should be able to move so rapidly from having regulatory oversight of a company to being part of its executive team especially in light of recent 'concerns' about Afterpay's management of its regulatory obligations (eg the issues raised by

AUSTRAC with respect to Afterpay's compliance with the Anti-Money Laundering and Counter Terrorism Financing Act (see: Governance News 19/06/2019)). Consumer groups have also reportedly expressed 'surprise' at the appointment.

[Sources: [registration required] The AFR 01/08/2019; 02/08/2019]

Disclosure and Reporting

Top Story | ACSI report into ESG reporting by the ASX 200 has identified some overall improvement but also highlights some 'glaring gaps'

Report Overview | Australian Council of Superannuation Investors (ACSI) report, ESG reporting by the ASX 200

Key Takeouts

- 'Good quality ESG reporting' is crucial maintaining community trust: The Australian Council of Superannuation Investors (ACSI) considers that one way boards can demonstrate that they are acting in accordance with community expectations is through 'good quality ESG reporting'. ACSI cautions that boards that fail to do so 'will face a trust deficit of their own making'
- ACSI's 12th annual assessment of ESG reporting by the ASX 200 assesses the level of disclosure on a range of issues including disclosure of risks associated with climate change; safety and human capital (including diversity)
- Overall, ACSI found that reporting standards have improved significantly over the past five years, with a majority of ASX200 now providing 'comprehensive reporting'. However, the report also highlights that 'glaring gaps remain'. For example, ACSI identifies a deficiency in reporting on safety and a small number of companies were found to have made no improvement in their ESG reporting overall
- Six companies are named in the report as 'laggards' (companies that have provided no reporting for two or more years of the study)

The Australian Council of Superannuation Investors (ACSI) recently released its 12th annual assessment of the level and quality of environmental, social and governance (ESG) reporting by ASX200 companies.

The report assesses and benchmarks all ESG disclosures for the year to 31 March 2019 including annual reports, ASX announcements and corporate reports to determine how well companies are identifying, managing and monitoring a range of material ESG risks and opportunities, including risks posed by climate change, worker safety and workforce metrics.

A high level overview of some of the key findings is below

Context: 'Good quality ESG reporting' is crucial maintaining community trust

ACSI draws a link between the quality of reporting and the way in which a company is viewed by society ie good quality reporting signals that issues are being monitored and managed, whereas poor reporting is a signal of risk and shows a 'disregard for stakeholders' needs'.

As such ACSI considers that 'good quality' ESG reporting is also a way for companies to maintain community trust. 'As the Financial Services Royal Commission highlighted, behaving consistently with community expectations is critical. It’s clear the community wants to know more about what companies are doing to manage ESG issues. Boards can meet this obligations through good quality ESG reporting. Those that don’t will face a trust deficit of their own making' the report states.

Some Key Findings

Overall ESG Reporting Trends

- ACSI found that the United Nations Sustainable Development Goals (SDGs) are gaining traction with the number of ASX200 companies now using them in their reporting almost doubling since last year (60 ASX200 companies now use them in their reporting, up from 39 last year)
- ACSI found that reporting standards have improved significantly over the past five years, with the number of 'detailed' and 'leading' reporters increasing by 19% over the period
- Large companies provide the most detailed reporting: all ASX20 companies are now rated as either 'Detailed' or 'Leading'. By contrast, smaller companies (ASX101-200), make up 80% of 'poorest' reporters
- One-third of companies are providing investors with comprehensive and transparent ESG disclosures and are rated as 'Leading'
- 16 companies provide no ESG information, indicating that they are now 'outliers'. Of this group, ACSI identifies six as 'laggards' ie companies that have provided no reporting for two or more years of the study). ACSI has communicated their poor performance rating to them and is engaging further on how they can improve their ranking.

Climate Change Reporting

- Adoption of the Task Force on Climate-related Financial Disclosures (TCFD) framework has more than doubled from last year, with 26 companies having adopted the framework.
- 18 companies now use scenario analysis to assess the potential impacts of climate change risk on their business
- 31 different scenarios are being used. Many are based on International Energy Agency guidelines, but there is a wide variation in scenarios and levels of reporting.
- Most companies are not using a 1.5-degree Celsius scenario. ACSI found that only six companies are using this scenario to assess business resilience.
- Long-term emissions-reduction targets (ie those beyond 2040) are scarce with only six companies disclosing net zero emissions-reduction targets for 2050.

[Note: For expert insights into increased expectations concerning the disclosure of financial impacts associated with climate change see: Heightened expectations of climate-related disclosure and assurance. For a discussion of the supplementary Hutley Opinion (which concludes that directors' exposure to the risk of climate change litigation has only increased since 2016) see: Governance News 05/04/2019).

Improvement area? Safety data

For the first time, the report includes analysis of safety metrics.

- ACSI found that 22 fatalities were reported in the ASX200 by 13 companies.
- Contractor safety emerged as an area of concern with contractors making up 16 of the reported workplace deaths. ACSI considers that this may indicate a 'disconnect' between the safety practices and culture of companies’ own workforces, and those of their contractors.
- More than half the ASX200 report some form of safety metric (lost-time injury frequency rate is the most commonly used metric) but disclosure was found to be limited. For example: few companies give any insight into the severity of injuries (except fatalities) and only nine companies reported their ‘near misses’. ACSI observed that more 'mature reporters' disclosed forward-looking metrics alongside lagging safety metrics.
- ACSI comments that though executive remuneration outcomes at 85 companies include a safety component, eight of these companies did not report any safety metrics. ACSI comments that this makes the task of assessing how these metrics were applied to pay outcomes difficult for investors.
- 67% of companies report no safety data, including two companies from the Materials and Energy & Utilities sectors, as well as multiple Retailing companies. This, ACSI comments, 'does not meet investors' expectations'.

Commenting on these findings ACSI writes that the research highlighted a 'deficiency in regulations surround reporting on safety and a lack of available data on workplace fatalities across the Australian market'. ACSI goes on to say express concern that it is 'the lack of transparency about workplace fatalities in Australia may mask the extent of this tragedy and slow the identification of systemic risks.

Human Capital

- Companies appear to recognise the value of managing and retaining their workforce: disclosures were observed to include employee engagement surveys, voluntary turnover and training, although there was limited standardisation in reporting. For example, one-quarter of the ASX200 report voluntary turnover but fewer than half of those (22 companies) also provided staff engagement scores, making it difficult to assess how effectively companies engage their workforce.
- Employee training was the most frequently reported workforce metric with ‘leadership’ and ‘safety’ the most commonly cited forms of training.

Consequence Management

Disclosures were observed to include issues that are reported through whistleblower lines, employee outcomes from Code of Conduct breaches and how companies are managing their culture. ACSI comments that this new emphasis on consequence management in reports reflects the increased interest in the issue in the wake of the Financial Services Royal Commission.

Gender Diversity

ACSI found that gender diversity in executive management teams is still low with only 21% of executive/ leadership roles in ASX200 held by women.

All-male executive leadership teams were found to make up 16% of the ASX200 (32 companies). By contrast, every ASX200 company in the Transportation, Banking, and Food and Staples Retailing sectors had gender-diverse leadership teams.

[Note: ACSI announced in June that female board representation on ASX200 boards had reached the 30% target, but that despite this, that gender representation on company to be 'far from equal'. For example, ACSI found that five ASX200 companies have no women directors (see: Governance News 19/06/2019). ACSI has also released a policy proposal calling for listed companies to set a 'reasonable' timeframe for achieving gender balanced boards (ie a 40% men, 40% women and 20% of either gender:40:20) and advocating regulatory intervention should this not occur by 2025. Until then, ACSI has said it will continue to advocate for increased female board representation (see: Governance News 08/05/2019.)]

ACTU Response to the Report

The Australian Council of Trade Unions (ACTU) is reportedly supportive of ACSI's finding that disclosure of safety data needs improvement. ACTU assistant secretary Scott Connolly is quoted as commenting that 'reporting of workplace safety incidents, injuries and fatalities is vital to ensuring investors can make informed decisions about material risks. In order for investors to be able to compare like for like, and for companies to remain accountable for their work health and safety practices, companies should be required to report their rate of injuries and their level of compliance with WHS laws'.

Mr Connolly reportedly went on to say that: a) disclosure requirements should equally apply to gender equity and retention as they exposed companies to 'more frequent hiring cost'; and b) publicly listed companies should also be required to report any potential wage theft or superannuation theft to investors as this represents a clear material risk to investors in that company.

The AFR comments that the inclusion of safety data and workplace metrics in ACSI's report follows pressure from unions on superannuation funds to consider insecure work and underpayments as an investment risk.

[Sources: ACSI Report, ESG Reporting by the ASX 200; [registration required] The Australian 06/08/2019; [registration required] The AFR 06/08/2019]

United States | Strong investor support for the current quarterly reporting model and support for ESG disclosures to be a regulatory requirement for public companies? The CFA institute has released a report presenting the views of its global membership base

In light of the US Securities and Exchange Commission's (SEC's) request for comment on earnings releases and quarterly reports, the CFA Institute has released a report — **The case for quarterly and environmental social and governance reporting** — which presents the findings of a survey of the CFA's global membership and a roundtable discussion on the issues.

Some Key Points

Views on the quarterly reporting model — the current model should be retained

- Investors strongly support quarterly reporting and that there is no support for alternative reporting models or reduced reporting frequency.
- The majority of respondents indicated that companies should no cease releasing quarterly guidance.
- The CFA concludes that 'all companies with any type of securities listed on regulated markets should be required to publish financial information quarterly. Timely and accurate financial information is the lifeblood of financial markets'.
- The CFA considers that a better approach to deterring short termism might be to focus on companies' incentive structures. More particularly, the CFA suggests that companies interested in encouraging a long term view should consider adopting five year performance periods, in their incentive plans.

[Note: The Council of Institutional Investors argued in a submission to the SEC that the current reporting model should be retained. See: Governance News 10/04/2019]

ESG reporting: In addition, the CFA found that investors believe that specific ESG and sustainability disclosures should be a regulatory requirement for public companies and that securities regulators should either develop ESG disclosure standards or support an independent standards setter (ie a single global standards setter in their field to develop such standards).

[Sources: Harvard Law School Forum on Corporate Governance and Financial Regulation 05/08/2019; CFA Institute Report, The case for quarterly and environmental, social and governance reporting]

Markets and Exhanges

ASIC Review upholds Australian equity market's record for cleanliness

Report Overview | ASIC Report 623 Review of Australian equity market cleanliness: 1 November 2015 to 31 October 2018

Key Takeouts

- The Australian Securities and Investments Commission (ASIC) has released a report setting out the findings of a review of Australian equity market cleanliness for the period 1 November 2015 to 31 October 2018. The focus of the review was on possible insider trading and information leaks ahead of material price sensitive announcements (MPSAs).
- Overall, the review concluded that Australian equity markets are operating with a high degree of integrity. The findings 'complement' independent research released in 2018 by Intralinks and Cass Business School which found that Australia was the cleanest market over the last decade among a sample of major markets.
- ASIC plans to tighten monitoring and surveillance of trading with increased focus on: a) trading ahead of mergers and acquisitions; b) brokers with high levels of unusual order flow; and c) clients that repeatedly exhibit unusual trading behaviour.

Context for the review: The review extends ASIC's work in Report 487 Review of Australian equity market cleanliness (released in 2016) which found an overall improvement in market cleanliness over the 10 years to 31 October 2015. Like report 487, the focus of the review was on insider trading and information leaks ahead of material market announcements. The period for the review was 1 November 2015 to 31 October 2018.

Overall conclusion: In a clean market, prices react immediately after new information is released through the proper channels. Abnormal price movements and unusual trading patterns ahead of material announcements may indicate an 'unclean market'. Overall the review concluded that equity markets are operating with a high degree of integrity. ASIC observes that the findings 'complement' independent research released in 2018 by Intralinks and Cass Business School which found that Australia was the cleanest market over the last decade among a sample of major markets.

[Note: The report referred to appears to be The 2018 Intralinks Annual M&A Leaks Report, the full text of which can be accessed here]

Some Key Conclusions

- the overall cleanliness of the market fluctuated between 2015 and 2018. However, despite a deterioration in 2016, market cleanliness improved in 2017 and 2018 to settle around 2015 levels
- on average, 0.6% of accounts that traded before material price-sensitive announcements (MPSAs) were deemed suspicious, with these accounts trading profitably on average 5.1% of the volume before each announcement
- while the percentage of suspicious accounts remained stable over the period, the volume traded by those accounts appears to have increased
- on the whole, there was more suspicious trading before announcements related to mergers and acquisitions (M&As) than for other announcement types. However, the suspicious trading was generally accompanied by less abnormal price reactions
- there was more suspicious trading and abnormal price reactions before unscheduled announcements than scheduled announcements.
- suspicious trading and/or abnormal price reactions before unscheduled announcements were less likely to be driven by normal speculation than scheduled announcements
- announcements by smaller companies were more likely to appear unclean. Many of these smaller companies were in the materials sector

Commenting on the findings, ASIC Commissioner Cathie Armour said 'Markets cannot operate with a high degree of integrity if people trade with inside information. We expect all parties involved in mergers and acquisitions to put in place meaningful confidentiality controls at the start of a transaction – and make sure the controls are rigorously followed. Controls for some small cap companies are clearly lacking and need to be tightened.'

Increased Monitoring

In light of the results, ASIC said it will continue to strengthen its surveillance of listed equity markets and use historical trading behaviour before market announcements to enhance its market supervision work.

ASIC plans to increase its monitoring of: a) trading ahead of mergers and acquisitions; b) brokers with high levels of unusual order flow; and c) clients that repeatedly exhibit unusual trading behaviour.

[Sources: ASIC media release 31/07/2019; ASIC Report 623 Review of Australian equity market cleanliness: 1 November 2015 to 31 October 2018]

In Brief | The ASX has released its response to submissions on proposed changes to Guidance Note 1 Admission as a Participant, and Guidance Note 10 Business Continuity and Disaster Recovery relating to business continuity and cyber resilience as well as the effective dates for the amendments

[Sources: ASX media release 05/08/2019; ASX response to submissions; consultation paper]

Financial Services

Stop Press | (Some) details for public hearings on ASIC's responsible lending guidance announced

ASIC will hold public hearings in Sydney on the 12th of August and Melbourne on the 19th of August.

The hearings are part of the wider public consultation on ASIC's guidance on the responsible lending obligations including with respect to proposed changes to ASIC's guidance in Regulatory Guide 209 Credit Licensing: responsible lending conduct

[Note: For background on the hearings see: Governance News 03/07/2019]

Details:

- The hearings will be conducted by Commissioner Sean Hughes and Deputy Chair Karen Chester with Commissioner Danielle Press also in attendance
- ASIC has contacted the parties who are invited to appear. ASIC's website will be updated with a list of participants the day before each of the hearings.
- The hearings are open for the public to attend and audio from the proceedings will be live streamed via ASIC's website at: asic.gov.au/responsible-lending-hearings.
- A transcript of proceedings will be made available on ASIC's website following the hearings.

[Source: ASIC Media release 07/08/2019]

Top Story | Foreign financial services regime reworked

ASIC is undertaking a further consultation process in its attempts to get the new regime for foreign financial services providers right. The proposed changes are contained in Consultation Paper 315(CP 315) and a draft updated Regulatory Guide 176.

MinterEllison's Richard Batten has written an article providing expert insights into the implications. The article is available on the MinterEllison website here: https://www.minterellison.com/articles/foreign-financial-services-regime-reworked

The Treasurer has confirmed that the inquiry into the financial services sector and Financial Services Royal Commission implementation has been expanded

In a statement, Treasurer Josh Frydenberg announced that the government has asked the House of Representatives Standing Committee on Economics to inquire into progress made by relevant financial institutions in implementing the ten recommendations of the Financial Services Royal Commission directed to the financial services sector.

The inquiry's remit has also been expanded to include other major relevant financial institutions and leading financial services associations.

[Note: The Australian Banking Association (ABA) has said previously that Treasurer Josh Frydenberg has requested the House Economics Committee to broaden its scope include industry associations, including the Australian Banking Association, as well as CEOs of superannuation funds and insurers. See: Governance News 31/07/2019]

Mr Frydenberg that 'Commissioner Hayne made clear that primary responsibility for misconduct in the financial sector lies with the institutions concerned and their boards and senior management'. He added that the inquiry will complement the continuation of the broader inquiry into the four major banks which the Government announced in 2016.

Timeframe: The Government has asked the inquiry to commence as soon as possible.

[Source: Treasurer Josh Frydenberg media release 02/08/2019]

APRA will appear before the House Economics Committee on 9 August as part of its review of the performance and operation of Australia's banking, insurance and superannuation sectors

The Australian Prudential Regulation Authority (APRA) will appear before the House Economics Committee at a public hearing on Friday 9 August 2019 (between 1:30pm and 4pm) as part of the Committee's review of the performance and operation of Australia's banking, insurance and superannuation regulator.

Chair, Tim Wilson said that the hearing would focus on the following:

- **Progress update on the implementation of the Financial Services Royal Commission recommendations and the recent Capability Review recommendations**: Mr Wilson said that the Committee will question APRA on its performance and operation including how it is implementing the recommendations of the Hayne Commission and the recently completed capability review. Mr Wilson commented that 'a common theme across the Royal Commission and capability review reports was that APRA is a strong regulator in the area of traditional financial risk, but that more work needs to be done to ensure APRA is prepared to respond to future challenges, particularly in relation to non-financial risk'.
- **Approach to supervision:** Mr Wilson said that the Committee will scrutinise how APRA promotes financial stability through the prudential regulation and supervision of Authorised Deposit-taking Institutions, insurers and superannuation licensees. Mr Wilson appeared to indicate that there may be a focus on APRA's approach to the superannuation sector as he noted that since APRA last appeared before the Committee a 'comprehensive package of superannuation reforms' has been passed which ensures that 'APRA can take effective action against underperformance and conduct that is contrary to members' best interests'.

[Note: The reforms referred to appear to be those included in Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No 1) Act 2019.]

The hearing will be broadcast live at: www.aph.gov.au/live

[Sources: Parliament of Australia media release 06/08/2019; Inquiry home page: Review of the Australian Prudential Regulation Authority Annual Report 2018]

Related News: RBA Governor will also appear before the Committee

The Chair of the House Economics Committee, Mr Wilson also announced that Governor of the Reserve Bank of Australia Dr Philip Lowe would appear before the Committee on 9 August (9:30am-12:30 pm).

Mr Wilson said that 'many Australians question the justification of a low interest rate environment for the foreseeable future. The committee will examine the decisions of the RBA in the context of Australia's broader macroeconomic conditions and assess the RBA's confidence in current monetary policy settings which aim to encourage growth and keep inflation consistent with the target over the coming years.'

[Sources: Parliament of Australia media release 06/08/2019; Inquiry home page: Review of the Reserve Bank of Australia Annual Report 2018 (Second Report)]

Implementing FSRC recommendation 2.4: Bill to end grandfathered provisions for conflicted remuneration introduced

Overview | Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Bill 2019

Key Takeouts

- The Bill was introduced into the House of Representatives on 1 August following earlier consultation (see: Governance News 27/02/2019)
- The Bill proposes to implement Recommendation 2.4 of the Final Report of the Financial Services Royal Commission that grandfathering provisions for conflicted remuneration should be removed as soon as is reasonably practicable
- Consistent with the government's initial response, the Bill proposes to remove grandfathering arrangements for conflicted remuneration (ie for financial advice, volume-based shelf-space fees and

asset-based fees on borrowed amounts), effective from 1 January 2021

- The Bill further provides for a scheme, to be made by regulations, under which benefits amounting to conflicted remuneration that would otherwise continue to be given after 1 January 2021 are rebated to affected customers

The Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Bill 2019 was introduced in the House of Representatives on 1 August. In line with the Treasurer's statement last week (see: Governance News 31/07/2019) the Bill proposes to ban grandfathered conflicted remuneration paid to financial advisers.

The Bill proposes to remove the grandfathered arrangements that currently provide an exception from the ban on accepting and giving conflicted remuneration in respect of arrangements entered into before 1 July 2013. The Bill also proposes to end the grandfathering of volume-based shelf space fees and asset-based fees to retail clients on borrowed amounts.

The Treasurer said that the Bill will go further than the Financial Services Royal Commission recommendation by including an obligation for Australian Financial Service (AFS) licensees and financial product issuers to rebate product holders for any grandfathered conflicted remuneration that they are legally obliged to pay after 1 January 2021.

The Bill also proposes to enable regulations to provide for a scheme to rebate conflicted remuneration to customers via a payment or monetary benefit (eg reduced fees). Draft Regulations were previously released for consultation on 28 March 2019 (see: Governance News 05/04/2019)

Timeframe: The proposed timeframe for implementation is 1 January 2021.

[Sources: Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Bill 2019; Exposure Draft Bill: Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Bill 2019;

Not constitutionally valid? The Australian reports that the Association of Independently Owned Financial Professionals (AIOFP) has said it plans to lodge a High Court challenge against the ban on grandfathered commissions, potentially creating a hurdle to the implementation of the Bill (if passed). According to the Australian the AIOFP has said that the government's reforms are invalid and that a legal action will be lodged soon after the legislation receives Royal Assent. The group has reportedly hired constitutional law specialist barrister Peter Kulevski for its High Court challenge.

[Note: Following the release of the Financial Services Royal Commission's final report recommendations, media reports said that the AIOFP planned to mount a High Court challenge if necessary. The basis of the constitutional challenge is not clear based on media reports. Reportedly, a letter to members noted that Bill Shorten has previously (in his role as Financial Services Minister) cast doubt on the constitutionality of banning grandfathered commissions on the ground that 'the proposal to ban particular remuneration structures can only operate prospectively, due to constitutional restrictions concerning acquisition of property'. see: Governance News 06/03/2019]

[Source: [registration required] The Australian 01/08/2019]

$119.7m in compensation paid to 30 June: ASIC has provided an update on compensation paid by institutions for poor financial advice

Key Takeouts

- ASIC has reported that AMP, ANZ, CBA, NAB and Westpac have paid a total of $119.7m in compensation as at 30 June 2019 to customers who suffered loss or detriment because of non-compliant financial advice

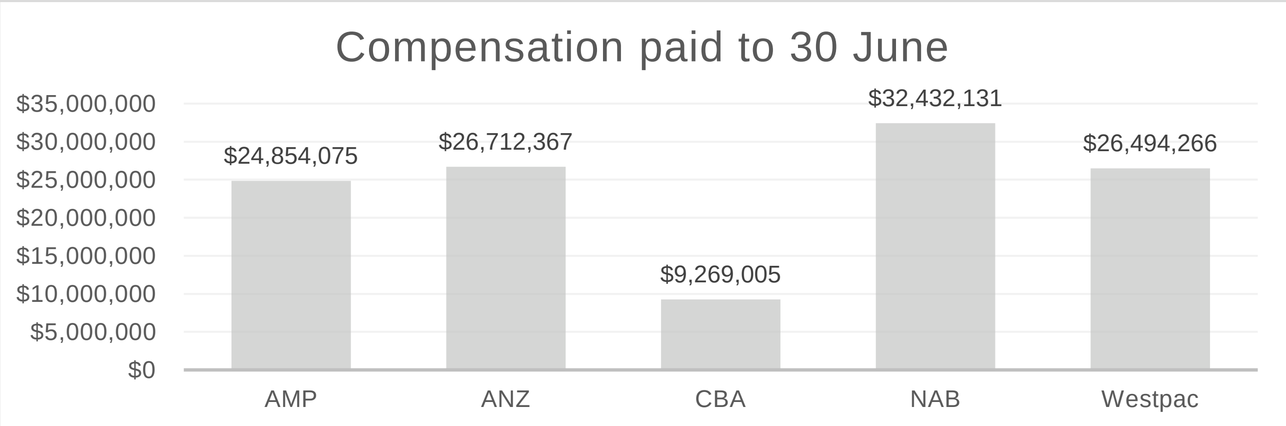
The Australian Securities and Investments Commission (ASIC) has released an update on compensation paid by Australia's five largest banking and financial services institutions to customers who have suffered loss/detriment because of noncompliant financial advice.

The compensation has been paid under review and remediation programs initiated as a result of the ASIC review reported on in Report 515 Financial advice: Review of how large institutions oversee their advisers (REP 515). The report looked at non-compliant advice by financial advisers between 1 January 2009 and 30 June 2015. The report was released in 2017.

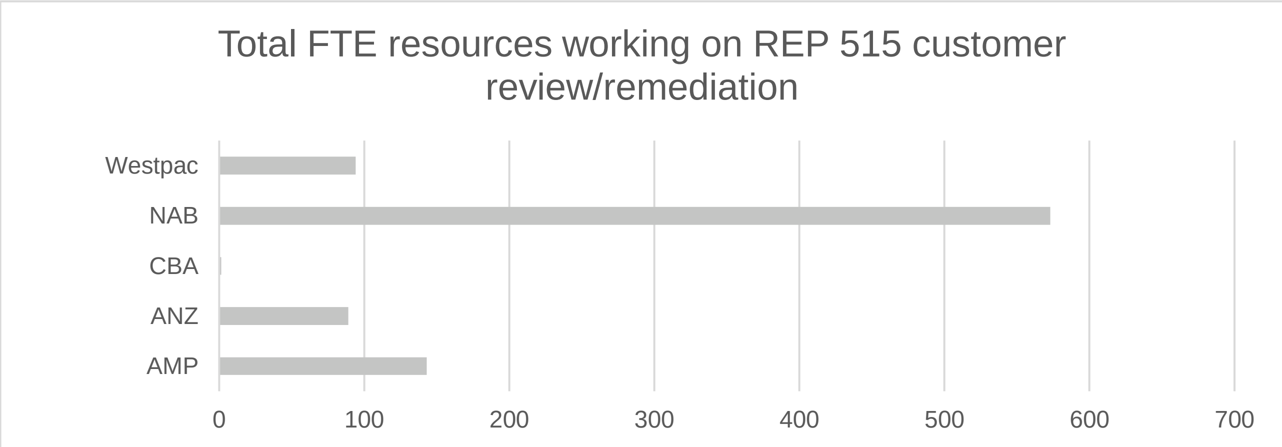
The review had three areas of focus: The review, which commenced in July 2015, focused on: a) how AMP, ANZ, CBA, NAB and Westpac identified and dealt with non-compliant advice by their advisers between 1 January 2009 and 30 June 2015; b) the development and implementation by these institutions of a framework for the large-scale review and remediation of customers who received non-compliant advice between 1 January 2009 and 30 June 2015; and c) a review of Australian financial services (AFS) licensees, selected from within the institutions, to test their current processes for monitoring and supervising their advisers.

Since the publication of REP 515, ASIC has been monitoring the ongoing implementation and expert assurance of the institutions' customer review and remediation programs.

Progress update: As at 30 June 2019 institutions have paid a total of $119.7m in compensation. The table below provides a snapshot of overall compensation paid by each institution to 30 June.



The table below provides an overview of the full time equivalent resourcing each institution has allocated to working on REP 515 customer review and remediation.



	AMP	ANZ	CBA	NAB	Westpac
FTE resources	143	89	1.5	573	94

Estimated completion dates

- AMP: December 2021
- ANZ: October 2021
- CBA: November 2019
- NAB: December 2022
- Westpac: June 2020

ASIC's statement includes a more detailed table outlining progress to date (available here).

[Sources: ASIC media release 01/08/2019; [registration required] The AFR 01/08/2019]

Open Banking | The Open Banking Bill has passed both houses

Treasury Laws Amendment (Consumer Data Right) Bill 2019 passed both Houses on 1 August.

[Note: For expert insights into the implications of the legislation see: Current state of play for the Consumer Data Right on the MinterEllison website here: https://www.minterellison.com/articles/current-state-of-play-consumer-data-right]

Implementation timeline

A timeline for the roll out of the CDR is available on the Treasury website here. The table below sets out some key dates.

Action	Timeframe
▪ Big Four Banks: The big four banks voluntarily provided access to product data for credit and debit cards, deposit accounts and transaction accounts from 1 July. Other banks are able to make this information available if they wish.	1 July 2019
▪ The ACCC has opened registration of interests for Data Recipient Accreditation	From July 2019
▪ Big Four Banks: Beta testing of consumer, account and transaction data access information systems, including extended consumer testing.	From July 2019
▪ Big Four Banks: Access to consumer, account and transaction data for credit and debit cards, deposit accounts, and transaction accounts.	No later than February 2020
▪ Big Four Banks: Access to product data for mortgages Big Four Banks: Access to consumer, account and transaction data for mortgage accounts	February 2020
▪ Big Four Banks: Access to product data for personal loan and other accounts. Big Four Banks: Access to consumer, account and transaction data for personal loan and other accounts.	July 2020
▪ Other Banks: Access to product, account and transaction data for credit and debit cards, deposit accounts, and transaction accounts.	July 2020
▪ Other Banks: Access to product, account and transaction data for mortgage products	February 2021
▪ Other Banks: Access to product, account and transaction data for personal loan and other accounts	July 2021

OAIC to release the first stage of draft privacy safeguard guidelines for comment next month

In a statement acknowledging the passage of the primary legislation, The Office of the Australian Information Commission said that it is working closely with the Australian Competition and Consumer Commission (ACCC) and Data61 to progress the Consumer Data Right (CDR) and ensure strong privacy safeguards are built into the data portability system.

OAIC adds that it plans to release the first stage of our draft privacy safeguard guidelines for comment next month.

[Source: OAIC media release 02/08/2019]

A 'game changer for Australians'

In a joint statement Prime Minister Scott Morrison and Assistant Minister for Superannuation Financial Services and Financial Technology Jane Hume said that the passage of the legislation would give consumers more power to get cheaper deals. 'Australians will have more power to compare and switch home loans and credit cards, as well as energy and phone and internet companies… The news laws are a game changer for Australians. The Consumer Data Right will revolutionise the way consumers and small businesses use their data and not only help them switch to cheaper offers, but encourage competition between service providers, leading to better prices and more innovative products and services'.

[Source: Prime Minister Scott Morrison and Assistant Minister for Superannuation, Financial Services and Financial Technology media release 01/08/2019]

Australian Banking Association: In a statement, the ABA said that the 'New Consumer Data Right is a win for competition' and 'charts the way forward for a more innovative and customer focussed banking industry that will deliver better deals for Australians'.

CEO of the Australian Banking Association Anna Bligh added that industry expects the ACCC to act to 'lock down' the final version of the 'rules governing the system' by the end of August. 'Following the passage of the legislation and the ACCC guidance on the rules, the industry, together with regulators, will begin rigorous testing to ensure the system is safe for Australian bank customers to use. The industry will continue to work with the government in the final stage of the introduction of Open Banking to deliver a system which both increases competition and ensures data is kept secure' Ms Bligh said.

[Source: ABA media release 01/08/2019]

IT News comments that the passage of the Bill has returned 'a degree of strategic investment certainty' to Australia's banking and financial technology sector.

[Source: ITNews 02/08/2019]

Financial Services Council 2019 State of the industry report released

Report Overview | Financial Services Council, 2019 State of the Industry report

Key Takeouts

- **Strengths:** Financial services contributed more than any other industry to economic growth since 1974 and had the second least volatile growth over that period, after Information Technology
- **Improvement areas:** A lack of women in senior management roles and a failure to maximise exports

The Financial Services Council has released its fourth annual high level summary of the performance and emerging trends in the Australia's financial services sector.

Overall findings: Some Key Points

- The financial services industry is the largest industry in Australia and has been largest for most of the period since 2006, producing about $6,400 per person or about 9% of GDP
- Financial services contributed more than any other industry to economic growth since 1974 and had the second least volatile growth over that period, after Information Technology
- Financial services had one of the fastest rates of productivity growth from 1990 to 2018
- The industry is the largest industry in both NSW and Victoria, with almost half of national production of financial services occurring in NSW, and just over a quarter in Victoria
- About 450,000 people are employed in financial services, or 3.5% of total employment numbers
- Wages are above average in financial services, likely reflecting higher training and education standards, with employees more likely to participate in training and have a degree
- The industry paid $8.5 billion in industry specific taxes in 2017–18, and paid 34% of all company tax revenue, well above the industry's share of profits of 14%

Areas for improvement? A lack of women in senior management roles and a failure to maximise exports

- **Australia exports a much lower share of financial services than the OECD average:** Based on World Bank data, Australia's financial services exports in 2018 were 5.9% of all service exports, well below the OECD average of 12.7% the high income average of 13.3% and the world average of 11.7%
- **Women are underrepresented in senior roles**: Though the number of male and female employees in the industry is approximately equal; the data shows that the split becomes less equal at senior levels. According to 2018 data, 29 of key management roles were held by women (less than the 31% average for all industries). At board level, women accounted for 26% of directorships (in line with the overall average across industries). At CEO level, women accounted for 9% of roles, significantly lower than the 17% average for all industries

Sector Specific Findings

Superannuation

- Australia's superannuation system is the fourth largest retirement/pension system in the world
- Superannuation assets are currently $2.8 trillion (or about 150% of GDP). Industry assets have historically grown faster than GDP and is forecast to reach 167% of GDP in 2028
- Australia's Age Pension provides better retirement incomes for low income earners than most other OECD countries
- Australia's superannuation system had the highest real rate of return of any private pension system in the OECD over the five years to 2017 (after deducting investment fees)
- The OECD forecasts Australia to spend less on government pensions than any other OECD country in 2025, 2035 and 2045. Australia spends less on the Age Pension in total because it is much more targeted at low income earners
- The superannuation industry has four main segments: industry, retail, public sector, and self-managed (SMSFs), which have all grown faster than GDP. The number of SMSFs has grown over time, but the number of all other types of funds has declined
- About 25% of superannuation assets are in MySuper accounts, while 55% of the total number of accounts are in MySuper
- Almost half of total assets in large funds are held in the top 10 large funds; and 85% of assets are held in in the 36 funds with assets of more than $10 billion
- About one-third of superannuation assets are invested in unit trusts, about 15% is invested in Australian shares, about 15% is in overseas assets, and about 15% is invested in debt
- The relative tax incentives for superannuation in Australia are below the OECD average, and are approximately equal for low, middle and high income earners – by comparison, many OECD countries provide a greater relative tax incentive for high income earners
- While average superannuation balances have been increasing strongly in Australia, a large gender gap in super savings exists, with average balances for women 35% below the balances for men
- The industry is undergoing an unprecedented period of change which, ultimately, should reduce costs and enhance trust in the industry

Funds Management

- A majority of funds managed in Australia are sourced from superannuation funds, with smaller contributions from retail and wholesale trusts, government and life insurance providers
- There is currently $2.9 trillion invested in Australian managed funds, which pool money from many investors together to invest on their behalf
- There are also institutions that provide investment advice, but do not own assets on behalf of investors, bringing the total size of the industry to $3.6 trillion
- Only 5.7% of funds managed in Australia are sourced from offshore (effectively Australia's export of funds management services). In the recent past, when taxes were cut, the export of fund management grew, but tax increases have halted export growth

- The top 10 managed funds had total assets of $74 bn, 13% of total assets in managed funds but only 0.3% of the total number of funds. There are 118 funds with more than $1bn, representing just under half of total assets of managed funds but only 4% of the number of funds

Exchange Traded Funds (ETFs)

- ETFs have around $50 bn under management, which has grown 27% over the past year, and 328% over past five years
- Globally, there is about $5.4 trillion in ETFs and similar products, with the Australian market just under 1% of the total, though the Australian market is growing more quickly
- There are 12 ETFs with value over $1bn, representing just under half of all ETF assets. Just under half of all ETF assets are in international equity, and about a third in Australian equity

Financial advice

- There are over 26,000 active licenced financial planners who work for over 2,200 financial service licensees
- After a substantial increase in adviser numbers in late 2018, the number of advisers has fallen due to increased regulation and market movements in adviser groups. Education standards are tightening with advisers required to pass an exam by 2021 and have a relevant degree by 2024
- Commissions for financial advice are generally coming to an end, thought commissions remain for life insurance, but with substantial reforms underway to the structure of these commissions
- The number of advisers in large advice groups is declining over time, with the share of advisers in groups with more than 100 advisers declining from 65% in late 2016 to 55% in July 2019. There are 845 advisers who were sole traders, or about 3% of all advisers
- Many financial advisers make use of platforms, which allow advisers or clients to manage portfolios directly at low cost, with greater access to greater information and investments
- There is about $860bn invested through platforms including master trusts and wraps

Life insurance

- Life insurers paid $10.5bn in claims in the year to March 2019. The value of claims has been growing faster than GDP. About 82% of Australia's adult population has life cover (almost 16 million people)
- Accidents were the number one cause of claim, with payouts of $1.3 billion in 2018. Cancer had a higher value of claims at $1.7 billion in 2018. Mental health conditions had the third highest value of claim at $750m
- Income protection insurance saves the government money in the long term for middle and high income earners, while the impact on Government budgets of Total and Permanent Disability insurance for these groups is small
- Insurance is subsidised for low income earners, meaning the premiums are lower, or payouts higher, for this group than without the subsidy
- Life insurance products purchased by individuals represent 65% of total insurance revenue, the remainder being group insurance (particularly through superannuation)
- Substantial changes are expected in the industry over time with several large mergers, acquisitions or disposals completed, underway, or proposed
- The FSC's Life Insurance Code of Conduct has resulted in major changes to every aspect of a consumer's interaction with the industry, and a current Code review is likely to make further extensive improvements to the industry's performance

[Source: FSC media release 31/07/2019; FSC Report Summary; Financial Services Council State of the Industry Report 2019; Investor Daily 05/08/2019]

ASIC has reminded superannuation trustees that using improper inducements to influence employers in their choice of default fund is illegal

Overview | ASIC Information Sheet 241

Key Takeouts

- In line with Financial Services Royal Commission recommendation 3.6, section 68A of the Superannuation Industry Supervision Act (SIS Act) now prohibits a trustee, or its associates, from using goods or services to influence employers to nominate a default superannuation fund for employees, or to encourage employees to choose or retain a particular superannuation fund. Civil penalties enforceable by ASIC apply for breaches of s 68A from 6 April 2019
- ASIC has released an information sheet reminding superannuation trustees of their obligations not to use improper inducements to influence employers' choice of default fund and giving examples of what is likely/unlikely to be considered a breach of s68A

Context

Earlier this year, the Financial Services Royal Commission found that some large superannuation trustees were 'treating' employers ie spending significant amounts to maintain or establish good relationships with employers or their officers responsible for nominating the default fund for employees and that this practice should not be permitted (see: Financial Services Royal Commission Final Report, Volume 1 at p251-252). The Final Report recommended (Recommendation 3.6) that section 68A of the Superannuation Industry (Supervision) Act 1993 (SIS Act) should be amended to address the issue.

Changes to s68A: The scope of s68A of the SIS Act and the penalty for breach increased as a result of the passage of Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No 1) Act 2019. Section 68A prohibits a trustee, or its associates, from using goods or services to influence employers to nominate a default superannuation fund for employees, or to encourage employees to choose or retain a particular superannuation fund. Civil penalties enforceable by ASIC apply for breaches of s 68A from 6 April 2019.

New information sheet

Following these changes, The Australian Securities and Investments Commission (ASIC) has issued an information sheet — Information Sheet 241 — cautioning trustees about influencing employers in their choice of default fund through improper inducements. The guidance draws attention to the recently amended s68A of the Superannuation Industry (Supervision) Act 1993 and provides illustrative examples of common scenarios to assist superannuation trustees in understanding what may/may not be a breach of s68A.

One example of a likely breach cited by ASIC, is a superannuation trustee giving tickets to a sporting event grant final to employers who have selected its fund as the default fund for employee superannuation guarantee contributions. However, more modest hospitality (eg tea and coffee provided over the course of a meeting) would be unlikely to constitute a breach. 'If the corporate hospitality is tea and coffee at a meeting to discuss the fund, it is unlikely to be a breach of section 68A because the goods offered are of such low value that they could not be considered reasonably likely to influence the employer' ASIC states.

ASIC Commissioner Danielle Press commented that 'superannuation trustees must understand that providing inducements to employers to influence them in their choice of a default super fund is generally illegal. The recent amendments mean civil and criminal penalties can be imposed on superannuation trustees who don't comply with the law'.

Ms Press went on to say that ASIC expects the 'changes to the law will ensure that super trustees are promoting their products to employers on their merits, rather than the inducements they can provide. ASIC's new guidance will make it easier for them to understand their new obligations, and not engage in potential misconduct'.

[Sources: ASIC media release 31/07/2019; ASIC Information Sheet 241 July 2019; [registration required] The AFR 31/07/2019; [registration required] The SMH 31/07/2019]

Time to implement FSRC recommendation 3.5? The Financial Services Council (FSC) has called for the government to act to address the issue of superannuation account proliferation

The Financial Services Council (FSC) has issued a statement calling for the government to act to prevent the creation of unnecessary 'zombie' superannuation accounts. The FSC supports both the recommendation of the Productivity Commission and the Royal Commission into Financial Services that superannuation fund members should be defaulted into a superannuation account only once, and should remain in their existing account when they change jobs unless they actively choose a new fund.

[Note: Recommendation 1 of the Productivity Commission's Final Report into the superannuation sector recommended that Default superannuation accounts only created once for new workforce entrants. The report said that the system should be in place no later than the end of December 2021. See: Governance News 16/01/2019. Recommendation 3.5 of the Financial Services Royal Commission Final Report recommended that 'a person should have only one default account. To that end, machinery should be developed for 'stapling' a person to a single default account' (see: Financial Services Royal Commission final report vol 1 at p250-253). In its initial response to the Financial Services Royal Commission's final report the government said that it 'agrees that a person should have only one default account', and that the recommendation builds on the Protecting Your Super Reforms.]

FSC CEO Sally Loane said: 'Unless the Government legislates the recommendations of both Hayne and the Productivity Commission, account proliferation will continue to be a substantial cost burden for people with multiple jobs, many of whom, as the data indicates, are women and young people, who are likely to earn lower incomes than people with only one job. The current default super system is clearly failing people with multiple jobs and this data demonstrates the importance of implementing reforms to prevent the ongoing creation of new duplicate accounts'.

[Source: FSC Media release 01/08/2019]

United Kingdom | The Bank of England and the Prudential Regulation Authority have released the Resolvability Assessment Framework for banks in final form, among other things, the new scheme will entail public disclosure by banks and the regulator of their assessments of the resolvability of firms

On 30 July, The Bank of England (BoE) and Prudential Regulation Authority (PRA) put in place the final major piece of the UK's resolution regime for banks — the Resolvability Assessment Framework.

Purpose of the Framework? The Resolvability Assessment Framework (RAF) is intended to make resolution 'more transparent, better understood, and more successful. It builds on the work done since the financial crisis, ensuring that firms are, and are able to demonstrate that they are, resolvable'.

Key Elements: The Framework establishes the capabilities firms should have and the outcomes they must achieve to be resolvable and is designed to ensure firms are accountable for their own resolvability. The framework has three elements.

1. The BoE's policy statement — The Bank of England's Approach to Assessing Resolvability — which sets out how the BoE as resolution authority, will assess resolvability, building on work that both firms and the Bank have already done. This requirement applies to firms where the BoE, as home resolution authority, has notified them that their preferred resolution strategy is bail-in or partial transfer, or the BoE has notified them as host resolution authority that they are a 'material subsidiary' of an overseas based banking group for the purposes of setting internal MREL.

2. A new PRA policy statement — PRA Policy Statement 15/19: Resolution Assessment and public disclosure by firms — which will form a new part of the PRA Rulebook. This requires the major UK firms to perform an assessment of their preparations for resolution (including identifying any risks to successful resolution and the plans in place to address them), submit a report of that assessment, and publish a summary of their most recent report. The PRA Supervisory Statement SS14/19 Resolution assessment and public disclosure by firms sets out the PRA's expectations on how firms should comply with the new Part of the PRA Rulebook and sets out the PRA's expectations regarding the importance of senior management accountability within firms. The Resolution Assessment Part of the PRA Rulebook

applies to UK banks and building societies with retail deposits equal to or greater than £50 billion on an individual or consolidated basis, as at the date of their most recent annual accounts.

3. The BoE will publicly disclose its assessment of the resolvability of the major UK banks for the first time. This will include any shortcomings identified. The intention is for this to take place at the same time as the firms make their own disclosures.

[Sources: BoE press release 30/07/2019; Bank Policy Statement 'The Bank of England's approach to assessing resolvability'; PRA Policy Statement 15/19 'Resolution assessment and public disclosure by firms'; PRA Supervisory Statement 4/19 'Resolution assessment and public disclosure by firms']

Change of CEO at HSBC announced as the bank prepares for a more challenging environment

- Reportedly as part of an executive reshuffle, HSBC CEO John Flint will step down after eighteen months in the role. HSBC has reportedly said that it needed a change in leadership to address a 'challenging global environment' (eg geopolitical issues including uncertainty over Brexit and the US/China trade war)
- Reportedly Mr Flint, who has been in the role for a year said he is stepping aside by 'mutual agreement' with the board.
- Media reports have commented that Mr Flint resigned on the same day that HSBC, reported 'solid results'. Profit after tax for the first half of 2019 reportedly rose 18.1% to $9.9 billion, while revenue was up 7.6 percent to $29.4 billion. Mr Flint, who has worked at HSBC for 30 years, reportedly commented: 'I have agreed with the board that today's good interim results indicate that this is the right time for change, both for me and the bank.'
- HSBC has reportedly granted Mr Flint 'good leaver' status, which means he will be entitled to any stock options that vest after he exits the bank, provided he does not work at a competitor for two years.
- Mr Flint will reportedly cease his day to day responsibilities immediately but has said he will 'remain available to HSBC' to assist the transition to a new CEO.
- Mr Noel Quinn will reportedly take over as interim CEO.
- HSBC has reportedly said it has begun a search for a new chief executive and 'will be considering internal and external candidates'

[Sources: The BBC 05/08/2019; The New York Times 05/08/2019]

In Brief | A KPMG report on the future of banking suggests that by 2030 leading banks will become a 'trusted interface for life, embedded within the needs and lifestyles of consumers' and able to adapt to individual customer needs. The survey of over 1,000 Australian consumers found that the increasing savviness of consumers will drive an intense and urgent competition between incumbents and challengers to be the consumer interface of choice. The report also said biometrics such as facial and voice recognition would have completely replaced other forms of digital security like passwords and PINs by 2030

[Source: KPMG Report: The Future of Digital Banking]

In Brief | Industry Super Australia has released research confirming strong support (87%) for an increase in super contributions above the current 9.5% level, and high levels of anxiety among Australians with respect to the future with 43% of respondents expecting to retire with less than $200,000 in super savings. Industry Super CEO Bernie Dean said that the findings show that 'Australians have overwhelmingly rejected a push to wind back the super guarantee. These results should send a clear message to the Government to keep their hands off Australians' super'

[Sources [registration required — accessed via LexisNexis Capital Monitor] Industry Super Australia media release 29/07/2019; Public Attitudes to increasing the Super Guarantee July 2019]

In Brief | ASX has issued guidance on cryptocurrency related activities, cautioning that cryptocurrency-related activities raise significant legal, regulatory and public policy issues and their

regulatory status in a number of overseas jurisdictions remains subject to considerable uncertainty and rapid change. The guidance is intended to make clear to listed entities involved in cryptocurrency-related activities, ASX's position on the issues those activities raise under the listing rules

[Source: Listed@ASX Compliance Update 1 August 2019 Update no 06/19]

In Brief | Consumers should be 'cautious': The UK FCA released final guidance on cryptoassets which fall within its regulatory remit on 31 July. The guidance is intended to provide clarity on the types of cryptoassets that fall within the FCA's regulatory remit and the resulting obligations on market participants and regulatory protections for consumers. It also provides information on those cryptoassets that are outside the FCA's perimeter, and what this means for market participants and consumers

[Sources: FCA Policy Statement PS 19/22 July 2019; [registration required] The AFR 01/08/2019; Accountancy Age 05/08/2019]

Accounting and Audit

Parliamentary Joint Committee on Corporations and Financial Services inquiry into the regulation of Audit announced

On 1 August 2019 the Senate referred an inquiry into the regulation of auditing in Australia to the Parliamentary Joint Committee on Corporations and Financial Services for report by 1 March 2020.

The Inquiry has been asked to inquire into the regulation of auditing in Australia with particular reference to the following.

- the relationship between auditing and consulting services and potential conflicts of interests
- other potential conflicts of interests
- the level and effectiveness of competition in audit and related consulting services
- audit quality, including valuations of intangible assets
- matters arising from Australian and international reviews of auditing
- changes in the role of audit and the scope of audit products
- the role and effectiveness of audit in detecting and reporting fraud and misconduct
- the effectiveness and appropriateness of legislation, regulation and licensing
- the extent of regulatory relief provided by the Australian Securities and Investments Commission through instruments and waivers
- the adequacy and performance of regulatory, standards, disciplinary and other bodies
- the effectiveness of enforcement by regulators
- any related matters

Timeline: Consultation closes 30 September. The reporting date is 1 March 2020.

Second inquiry: A second inquiry, to be carried out by the Legal and Constitutional Affairs References Committee will inquire into the cost of outsourcing of government services, with a focus on the privatisation of programs/consultancy contracts. The reporting date is 16 October.

The AFR reports that the big four accounting firms have welcomed the two inquiries.

Media commentary

- The Australian reports that former Australian Securities and Investments Commission (ASIC) Chair Greg Medcraft has reportedly cautioned that another 'Enron-type failure' may be on the cards in Australia due to the very close relationship between companies and their auditors.
- The AFR comments that the inquiries were announced following media reports over the past week that it carried out an independent prudential report for NAB while also collecting $20 million as the bank's external auditor raising questions about its independence.

[Sources: Parliamentary Joint Committee on Corporations and Financial Services Inquiry: Regulation of auditing in Australia; Terms of Reference; [registration required] The Australian 02/08/2019; [registration required] The AFR 02/08/2019; 06/08/2019; Inquiry Home Page: The impact of changes to service delivery models on the administration and running of Government programs]

United Kingdom | UK audit regulator, the Financial Reporting Council, has imposed higher fines and opened more new enforcement cases during the year to 31 March

The Financial Reporting Council (FRC) has issued its first Annual Enforcement Review. Among other things, the review found there has been a significant increase in sanctions and settlements over the past year. The review is intended to provide a baseline for measuring future enforcement performance as the regulator transitions into the Audit, Reporting and Governance Authority (ARGA).

Some Key Findings

- **The review found that annual fines nearly trebled** from £15.5m in 2017/18 to £42.9m (pre-discount) in 2018/19. The FRC attributes this increase to both: an increased number of cases being concluded either following Tribunal proceeds or firms agreeing to settle prior to a Tribunal hearing); and to the 'serious nature' of the misconduct and the size/financial resources of the firms.
- **During 2018/19, 13 cases were concluded**, a significant increase on previous years (9 cases concluded in 2017/2018, and the same number in 2016/2017).
- **The review also highlights an increase in the use and range of non-financial sanctions** rising from 11 in 2017/18 to 38 in 2018/2019
- **25% in year growth in the Enforcement Division**
- **There was a significant reduction in 'legacy' cases**
- **Increased use of 'horizon scanning techniques' to identify issues requiring investigation**.

Commenting on the findings, the FRC Executive Counsel Elzabeth Barrett said that 'the significant increase in the number, range and severity of sanctions sends a clear message that where behaviour falls short of what is required, we will hold those responsible to account. Improved behaviour by those we regulate requires recognition that where failures occur their root causes must be identified, effectively addressed and reported to us. Where such co-operation occurs due credit will be given; where it does not, consequences will be severe.'

[Sources: FRC media release 31/07/2019; FRC Annual Enforcement Review; [registration required] The WSJ 30/07/2019]

Risk Management

Cybersecurity, Privacy and Technology

Consultation on the ACCC digital platforms report has opened: the consultation will inform the government's response to the report recommendations

In a joint media release, Treasurer Josh Frydenberg and Minister for Communications, Cyber Safety and the Arts Paul Fletcher announced a public consultation on the recommendations in the final report of the Australian Competition and Consumer Commission's (ACCC) Digital Platforms Inquiry Final Report (see: Governance News 31/07/2019).

Consistent with the government's initial response to the report, the statement says that 'the precise form of the reforms' and the government's final response to the 23 report recommendations will be informed by the consultation process which will be led by Treasury and involve the Department of Communications and the Arts and well as the Attorney General.

No specific questions have been posed. Rather, the government seeks 'stakeholder comments on the ACCC's findings and recommendations. In particular, we would welcome views on practical options for implementation, timing and any impediments or challenges.'

Timeline: Consultation will close on 24 October.

[Sources: Treasurer Josh Frydenberg and Minister for Communications, Cyber Safety and the Arts Paul Fletcher joint media release 01/08/2019; Treasury media release 01/08/2019]

United States | Ending autoplay videos? US Senator Josh Hawley has introduced a Bill proposing to help protect social media users from forming addictive habits

The Social Media Addiction Technology Act, (or the SMART Act) a Bill aimed at protecting social media users from forming addictive habits has been introduced into the US Senate by Senator Josh Hawley.

Among other things, the Bill proposes to: prevent social media platforms from using features that automatically generate an endless stream of content; require social media companies to add an automatic time lint of 30 minutes per day for all users (though users could change it); and inform users of how much time they have spent on the platform every 30 minutes.

Senator Hawley is quoted as commenting 'Big tech has embraced a business model of addiction," Hawley said. “Too much of the 'innovation' in this space is designed not to create better products, but to capture more attention by using psychological tricks that make it difficult to look away.'

[Sources: The Verge 30/07/2019; Business Insider 31/07/2019]

United States | A data breach at US bank Capital One has reportedly affected more than 100m Americans

- **100m people impacted:** A lone actor has reportedly hacked into US bank Capital One in a data breach affecting more than 100 million Americans. Fourteen years' worth of customer data including 140,000 social security numbers and 80,00 bank account numbers were compromised in the incident.
- **FBI investigation:** The Federal Bureau of Investigation is reportedly examining whether the woman charged with stealing the data, former Amazon employee Paige Thompson, successfully hit any other targets.
- **Class action lawsuit?** Reportedly a class action lawsuit has been lodged in California against both the bank (Capital One) and GitHub (a code sharing site). The lawsuit reportedly alleges that Capital One failed to secure or prevent the security breach. It further reportedly alleges that GitHub allowed the hacked data to be posted, displayed used and made available for three months until it was spotted and Capital One was notified (contrary to its obligation to keep off or remove Social Security Information and personal information from its site). However, reportedly both Capital One and GitHub have said that the data uploaded on GitHub by the hacker did not contain any personal information.

[Sources: [registration required] The WSJ 31/07/2019; 04/08/2019; CBS News 31/07/2019; CNet 03/08/2019; ZDNet 03/08/2019]

In Brief | The US Federal Trade Commission (FTC) has issued a statement urging consumers affected by Equifax's 2017 data breach to consider signing up for the free credit monitoring offered as part of the settlement rather than the alternative $125 cash payment, as the benefits funding the cash payment option is capped at $31 million, and due to the 'overwhelming' demand, consumers who select that option may not receive the $125 they had expected

[Source: FTC Media release 31/07/2019]

In Brief | Time to consider instituting an Australian GDPR? Reportedly, a recent study has found there is no clear or consistent approach to the disclosure of personal data about consumers and that Australian consumers wanting access to their personal data (eg from telecommunications companies, social media platforms, fitness trackers) were not always given all the data collected about them. The researchers have called for Australia to establish a local equivalent of Europe's General Data Protection Right (GDPR) to better protect consumers

[Sources: IT News 31/07/2019; UTS, ACCAN report: Data Access in the Communications Sector]

Climate Risk

In Brief | Not following suit? South32 reportedly has no plans to set public targets on scope 3 (customer emissions) despite BHP's recent commitment to set public targets to do so

[Note: In a recent speech, BHP CEO Andrew Mackenzie committed the organisation to public goals to address scope 3 emissions in 2020 as part of a broader decarbonisation strategy. der plan to reduce emissions. See: Governance News 31/07/2019]

[Source: [registration required] The AFR 05/08/2019]

In Brief | Australian councils have reportedly launched an alliance — Climate Emergency Australia — to lobby the government for action on climate change with a particular focus on: a) boosting the flow of funding from state and federal governments to councils; b) advocating for federal and state action; and c) pushing for legislative reform to empower councils to act to curb climate change. The group will also reportedly work together to encourage local grassroots action on the issue

[Source: Government News 05/08/2019]

Other Developments

In Brief | The Australian Securities and Investments Commission has announced that former Leighton Holdings director and CFO Peter Gregg has received an indication of a total effective sentence of two years' imprisonment, to be served by way of an Intensive Corrections Order (ICO) after being found guilty by a jury in December last year of engaged in conduct that resulted in the falsification of the Leighton Holdings' books (in contravention of section 1307(1) of the Corporations Act 2001). In addition to any ICO that Mr Gregg must serve, he will also be automatically disqualified from managing corporations for a period of 5 years as a result of his conviction

[Sources: ASIC media release 30/07/2019]

Other News

Improving the 'efficiency of environmental approvals'? The Productivity Commission will review regulation in the resources sector with a view to streamlining requirements and removing 'unnecessary costs for business'

In a joint media release, Treasurer Josh Frydenberg, Minister for Resources and Northern Australia Matt Canavan and Assistant Minister to the Prime Minister and Cabinet Ben Morton announced that the Productivity Commission (PC) will conduct a twelve month review into streamlining regulation in the resources sector.

Purpose of the review: Noting the 'vital role' the resources sector plays in sustaining Australia's national prosperity, the statement said that the sector is nevertheless being held back by complex layers of state and federal regulations. To address this, the statement says that the PC will look at 'best-practice examples of regulation that removes unnecessary costs for business, while maintaining sound oversight.'

The aim of the review is to 'ensure that resources projects are transparently and efficiently assessed while upholding robust environmental standards'.

Areas of focus

- The statement says that improving the efficiency of environmental approvals will reduce the regulatory burden on business.
- The review will also examine as a priority, community engagement practices and principles across jurisdictions, including best-practice community engagement, land-access and benefit-sharing practices by industry, governments and other bodies.

Context

The statement adds that the that review will complement the statutory review of national environmental protection law – the Environment Protection and Biodiversity Conservation Act 1999 – due to commence in October 2019.

The review also forms part of a broader reform agenda 'tackling a range of barriers to investment in key industries and activities, with the aim of boosting efficiency, productivity and job creation'. The Productivity Commission work will both complement and contribute to the joint Prime Minister and Cabinet/Treasury Deregulation Taskforce currently being established by Assistant Minister Morton.

In addition, the review will deliver on a commitment in the government's National Resources Statement to assess regulatory settings across the Australian resources sector, and delivers on a joint commitment by the COAG (Council of Australian Governments) Resources Ministers to examine best-practice resources sector regulation across Australia.

[Source: Joint media release: Treasurer Josh Frydenberg, Minister for Resources and Northern Australia Matt Canavan and Assistant Minister to the Prime Minister and Cabinet Ben Morton 05/08/2019]

Positive response from the Business Council: In a statement, the Business Council of Australia (BCA) welcomed the review on the basis that 'unnecessary regulation' is a 'drag on productivity and job creation'. BCA CEO Jennifer Westacott said that 'removing unnecessary barriers to the success of the sector and the people it supports must be a national priority.' Ms Westacott added that 'Excessive regulation can be a hidden cost to communities and jobs. Red tape and ineffective regulation slow down Australian businesses and make it harder to compete overseas' and said that a balance needed to be stuck between 'effective rules and the dead weight of unnecessary regulation that makes it harder for businesses to compete, invest, innovate, export and employ Australians'. 'Importantly this review will look to improve the efficiency of environmental approvals…We can't stand in the way of sensible changes that makes us more productive as a nation' Ms Westacott said

[Source: Business Council of Australia media release 05/08/2019]

Parliamentary Committee to consider nuclear power options for Australia?

According to media reports, Federal Energy Minister Angus Taylor has requested the Environment and Energy Committee conduct an inquiry into the potential for nuclear power in Australia, though Mr Taylor has reportedly said that 'there is absolutely no plan to change' the moratorium on nuclear power in Australia.

The ABC quotes from a letter written by Mr Taylor to Committee Chair Ted O'Brien, 'This will be the first inquiry into the use of nuclear power in Australia in more than a decade and is designed to consider the economic, environmental and safety implications of nuclear power…I am confident that your committee — involving all sides of politics — is the best way to consider this issue in a sensible way'.

According to The Australian, the inquiry has been asked to focus on the fast changing technology of small modular reactors which are factory produced and installed on site.

Reportedly, a review into nuclear energy was last conducted under the Howard government with the report finding 25 reactors would be needed across Australia to supply one-third of the nation's electricity supply by 2050.

[Sources: The ABC 03/08/2019; World Nuclear News 02/08/2019; [registration required] The Australian 05/08/2019]

Should Buy Now Pay Later providers be able to provide their services under the new (voluntary) Energy Tech Consumer Code? The ACCC has released a draft determination proposing to grant authorisation for five years to signatories, and has called for submissions ahead of releasing a final determination in September/October 2019

- **Context:** On 30 April 2019, the Clean Energy Council (CEC), the Australian Energy Council (AEC), the Smart Energy Council (SEC) and Energy Consumers Australia (ECA) lodged an application on behalf of themselves and future signatory providers of 'new energy tech' (eg solar generation systems, energy storage systems, electrical vehicle charging and other emerging energy products and services) for authorisation for the New voluntary Energy Tech Consumer Code (Code).

- **New Code to set minimum standards of good practice/customer protection:** The voluntary Code sets minimum standards of good practice and consumer protection and will apply to all aspects of customers' interactions with participating retailers, including marketing; finance and payments; warranties and complaints handling processes. Among other things, signatories will be required to a) avoid high pressure sales tactics; b) ensure their advertising is clear and accurate; c) educate consumers about their rights; d) provide clear information about product performance and maintenance; e) take extra steps to protect vulnerable consumers, and f) implement effective complaints handling processes.
- **Why seek ACCC authorisation?** Because the Code imposes conditions on the sales practices of competing companies, and includes sanctions for non-compliance, the Code's developers sought ACCC authorisation to ensure they were not breaching competition laws.
- **Draft determination:** On 1 August 2019, the ACCC released a draft determination proposing to grant authorisation for five years. The ACCC plans to issue a final determination in September/October 2019.
- **ACCC consider that compliance with the Code will result in public benefits:** The Draft Determination states that compliance with the Code will result in public benefit by improving business practices of signatory retailers and the level of consumer protection provided and is unlikely to lessen competition between supplied of New Energy Tech products or services. The ACCC goes on to say that it does not consider that compliance with the Code will prevent 'vigorous competition' though it will limit 'certain practices that are not in the best interests of customers'.
- **Administration of the Code?** The ACCC notes that the administrator of the Code is yet to be appointed and that membership of the Council charged with appointing the Code Administrator has also yet to be settled but that the provisions of the Code will enable the Council to discharge their duties, including imposing sanctions as appropriate.
- **Finance arrangements permitted under the Code:** Under the Consumer Code, consumer finance associated with New Energy Tech products and services is only permitted if the credit products are regulated under the National Consumer Credit Protection Act 2009 (NCCPA) and the National Credit Code (NCC) and provided by credit providers licensed under the NCCPA. These regulations provide important protections for consumers; they require credit providers to provide relevant product information disclosures, take appropriate steps to assess a consumer's ability to pay, and provide access to external dispute resolution.
- **What about the buy now pay later sector?** The ACCC notes that a number of 'buy now, pay later' providers that currently supply finance for a sizeable share of New Energy Tech products, particularly solar products, would not be permitted to provide finance under the Consumer Code as it is presently drafted. The ACCC further notes that these providers submit that though they are not captured by the NCCPA and NCC regulation, they are subject to separate regulation that provides equivalent consumer safeguards and that preventing consumers from accessing their services could limit access to New Energy tech products.

  The ACCC invites further submissions on whether it is 'feasible and desirable to modify these provisions of the Consumer Code to permit finance arrangements that fall under other regulatory regimes if they can be demonstrated to provide equivalent consumer safeguards to those in the NCCPA and NCC'.

[Source: ACCC New Energy Tech Consumer Code; ACCC media release 01/08/2019; ACCC Draft Determination 01/08/2019]

In Brief | 'Big stick' divestment legislation due to be reintroduced in September? The Australian reports that Energy Minister Angus Taylor has said that the government plans to reintroduce legislation aimed at addressing energy market manipulation, price gouging and anti-competitive conduct despite industry concerns

[Note: Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2018 progressed to second reading stage in the House of Representatives prior to the Federal Election, but lapsed at dissolution on 11 April. The Parliamentary Committee report into the Bill recommended that the Bill be passed]

[Source: [registration required] The Australian 30/07/2019]