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Diversity

Victorian government to introduce a gender equality Bill by the end of the year?

Following consultation in 2018 on a draft Gender Equality Bill, the Victorian Government has said it plans to progress the legislation, and anticipates it will be introduced into Parliament by the end of 2019.

What is being proposed? The Gender Equality Bill will require the Victorian public sector, universities and local councils to plan, implement strategies and report on gender equality in the workplace and promote gender equality across the wider community.

Response to the consultation: The feedback received through the consultation process was 'very positive' with stakeholders being the legislation as a 'once in a generation reform opportunity to influence policy shifts, social norms, cultural expectations and attitudes across Victoria as well as set the standard on gender equality legislation for other jurisdictions in Australia and internationally'.

[Source: Victorian Department of Premier and Cabinet: Gender Equality Legislation]

Remuneration

Pay consequences announced: Woolworths Chair and CEO 'acknowledge leadership responsibility' for payment shortfalls

Context: On 30 October, Woolworths Group issued a statement 'unreservedly' apologising after an internal review identified that approximately 5,700 salaried staff had not been paid in 'full compliance' with obligations under the General Retail Industry Award (GRIA). Woolworths estimated one-off impact for remediation, is expected to be in the range of $200-300 million (before tax) (see: Governance News 06/11/2019 at p19).

Announcement of pay consequences: In a statement to the market, entitled CEO and Chairman acknowledge leadership responsibility, Woolworths CEO Brad Banducci and Woolworths Chair Gordon Cairns ;acknowledged their leadership responsibility for the payment shortfalls' and announced that:

Mr Banducci had 'made the personal decision' to forgo his short term bonus for F20 ($2.6m) on the basis that it is the 'right thing for me to do as CEO'

Mr Cairns said his board fee for F20 would be reduced by 20% to reflect the 'higher level of responsibility' he, as Chair, has for the payment shortfalls.

The board endorsed the proposals.

Further consequences will be considered: The statement goes on to say that the 'goal remains to finalise a full review of this issue by the end of the financial year' and that once this is finalised 'further consequences will be considered by the Board'. Woolworths will provide further updates at the group's half year F20 results in February.

The Woolworths AGM will be held on 16 December.

[Sources: Woolworths ASX announcement 27/11/2019; [registration required] The AFR 27/11/2019]

Markets and Exchanges

Top Story | 1 December 2019 changes to the ASX Listing Rules – Final

Changes to the ASX Listing Rules are due to come into effect on 1 December 2019.

MinterEllison has prepared an expert summary of the most important changes for listed companies. This can be accessed on the MinterEllison website here.

Meetings and Proxy Advisers

Recent AGM results: Harvey Norman, Aurelia Metals

The **Aurelia Metals Ltd** AGM was held on 29 November. All resolutions were carried.

- **Remuneration Report:** 57.3% of shareholders voted in favour of adopting the remuneration report and 42.8% voted against it constituting a first 'strike'. A resolution granting performance rights to the new managing director and CEO received 92.4% support (7.6% of shareholders voted against it).

  Writing ahead of the meeting, Glass Lewis noted that the remuneration report covered former CEO and manager director James Simpson's exit payments. In addition to a contractual termination payment, the board exercised its discretion to pay Mr Simpson's 2019 short term incentive and long term incentive in full as well as waive all performance conditions on three tranches of unvested awards. Glass Lewis suggested that the arrangement was likely to be the subject of shareholder questions.

  In addition, Glass Lewis suggested the resolution granting performance rights to incoming CEO Dan Clifford could raise questions, given the board took a similarly generous approach.

- **Election/re-election of directors:** Lawrence Conway was re-elected to the board with 99.6% support. Paul Harris was elected with 99.7% support.

[Sources: Aurelia Metals Ltd ASX Announcement: AGM Result 2019 29/11/2019; Glass Lewis blog 20/11/2019]

The **Harvey Norman** AGM was held on 27 November.

- **Remuneration Report:** 52.42% of shareholders voted in favour of adopting the remuneration report and 47.58% voted against it constituting a 'second strike'. 88.79% of shareholders voted against spilling the board (11.21% voted in support).

  [Note: At the 2018 AGM over 25% of shareholders voted against the adoption of the remuneration report, constituting a 'first strike'. Following a 'second strike' at the 2019 AGM, members were given the opportunity to vote on a 'spill resolution' — a resolution to remove the entire board (except the CEO) from office. Ahead of the meeting, the board advised that had the spill resolution been passed, the existing directors all planned to stand for re-election and further that controlling shareholders (Mr Harvey and Mr Christopher Brown) intended to support their re-election.]

  Media reports attribute the result not so much to concerns with remuneration, but more general concerns about corporate governance and the company's strategy.

  According to The AFR institutional shareholders followed the advice of proxy advisers Ownership Matters and Glass Lewis in voting against the remuneration report.

  Reportedly, Australian Shareholders Association recommended Harvey Norman's 15,000 retail investors vote in favour of a spill so independent directors could be appointed and both The Australian Council of Superannuation Investors and proxy adviser Ownership Matters made similar recommendations. Despite this, institutional investors did not generally support the spill motion.

  Election/re-election of directors

  - **Board nominated candidates**: Three board nominated candidates — Kay Lesley Page (Director since 1983 and CEO since 1999), David Matthew Ackery (Director since 2005) and Kenneth William Gunderson-Briggs (Director since 2003) — stood for re-election at the meeting. In addition, Maurice John Craven stood for election as a an independent non-executive director.

    All were elected/re-elected: Ms Page was re-elected to the board with 91.09% support (8.93% of shareholders voted against her re-election). Mr Ackery was re-elected with 71.62% support (28.38% of shareholders voted against his re-election). Mr Gunderson Briggs was also re-elected with 84.89% support (15.11% of shareholders voted against his re-election). Mr Craven was elected with 99.73% support (0.27% of shareholders voted against his election).

- **Activist candidate**: In addition to the four board nominated candidates, self-nominated (and non-board endorsed) candidate Steven Mayne also stood for election at the 2019 AGM. Mr Mayne encouraged shareholders to vote him onto the board on the basis that he would advocate 'board renewal and more age and gender diversity on the board, the recruitment of a new independent chair, full consolidation of the franchise network in the accounts and valuation disclosure of individual properties in the $3 billion property portfolio similar to what listed property trusts do'. In addition, Mr Mayne raised concerns about the about the structure of the company's capital raisings, and the treatment of retail investors.

  97.76% of shareholders voted against Mr Mayne's election (8.24% voted in support).

Writing ahead of the meeting, Glass Lewis commented 'Whether the outsider Mayne garners much support from institutional investors remains to be seen, but given the current board controls the company, some shareholders may see this as an opportunity to lodge a more novel protest vote without running the risk of actually electing the outsider to the board. Such a novel protest vote is too novel for us here at CGI Glass Lewis as we don't believe it will be constructive for the insider-outside shareholder relationship, however media reports indicate other advisors around town might not feel the same way'.

No plans to change? The AFR reports that following the meeting, Mr Harvey said that despite the 'strong protest vote' over the company's corporate governance, he would 'not be intimidated' into changing the way in which the company is run. 'When I'm not performing then sure, I've got to listen more to people, but if I'm performing really well and my board's performing really well, all I've got to do is keep it up, don't change it, it's working' Mr Harvey reportedly said. Mr Harvey reportedly pointed to the company's 18.2% average annual return over the last 30 years as evidence of this.

Commenting directly on the issue of board renewal, Mr Harvey reportedly said 'I could put three or four outsiders on the board and it just costs me a heap of money. The suggestion independent directors are not independent because they've been around for 10 years is absolute bullshit. They're around a long time, they know the company, so why would we discard them – if it ain't broke, don't fix it.'

[Sources: Harvey Norman ASX Announcement: AGM Meeting Results 2019; Glass Lewis Blog 20/11/2019; [registration required] The AFR 27/11/2019; 28/11/2019; [registration required] The Australian 27/11/2019]

Regulators

APRA Chair Wayne Byres' opening statement before the parliamentary committee on economics released

Australian Prudential Regulation Authority (APRA) Chair Wayne Byres appeared before the House of Representatives Standing Committee on Economics on 2 December. A brief overview of Mr Byres' opening remarks is below.

[Note: The transcript of the hearing is not yet available. When it is released, it will be available here]

- **AUSTRAC statement of claim in relation to Westpac:** Commenting briefly on the allegations made by The Australian Transaction Reports and Analysis Centre (AUSTRAC) against Westpac (see: Governance News 27/11/2019), Mr Byres said that from a prudential standpoint, APRA considers that Westpac 'is financially strong' though the 'AUSTRAC matter has raised issues of governance, culture and accountability in relation to risk management, particularly as it relates to AML/CTF obligations'. Mr Byres went on to say that APRA is 'actively considering what further action' may be required including 'whether obligations under the Banking Executive Accountability Regime have been met, and how Westpac's management of operational and compliance risks more broadly needs to be enhanced. As would be expected, we are also ensuring we closely coordinate our activities with our fellow regulators – especially AUSTRAC and ASIC'.

- **Corporate Plan for 2019-2023:** Mr Byres spoke briefly about each of the four 'key community outcomes' or strategic priorities identified in APRA's latest corporate plan — 1) maintaining financial system safety and resilience; 2) improving outcomes for superannuation members; 3) transforming governance, culture, remuneration and accountability within the financial sector; and 4) improving cyber resilience across the financial system (see: Governance News 04/09/2019).

- **maintaining financial system safety and resilience**: Mr Byres said 'APRA has successfully delivered on its core mandate – the financial safety of regulated entities and a sound and resilient financial system – over a long period of time, and we certainly intend to continue to do that'. Mr Byres said that despite significant challenges eg increasing community demands and technological disruption, 'the financial system and most entities within it are financially sound and resilient'. Mr Byres added that this 'shouldn't be taken for granted', and that 'this is, and will remain, a core area of focus for APRA. The Capability Review recognised this as our traditional strength, and stressed the importance of not jeopardising this strength as we embrace a broader range of tasks'.

- **improving outcomes for superannuation members:** Mr Byres highlighted two initiatives aimed at improving outcomes for superannuation members: 1) the superannuation heatmap (which he said will 'be published in full next week'); and 2) the superannuation data transformation project. Mr Byres added that given the number of options available (over 40,000 superannuation investment options) and the 'major challenge' this represents in terms of the choices available, 'APRA will have to be more prescriptive in what we ask for, and potentially diverge from other reporting requirements in some areas. That will come at a cost to the system. But being able to genuinely assess member outcomes requires more granular product and investment option level data. On this score, there is no choice'.

- **governance, culture, remuneration and accountability (GCRA risk):** Mr Byres said that the fact that 'shortcomings in governance and risk culture continue to emerge in the financial services industry is concerning' and demonstrates the importance of APRA's work in this area, as well as the fact that there are 'no quick fixes'. Mr Byres went on to highlight the release of APRA's plans to 'scale up the intensity of its supervision in this area', and APRA's consultation on new draft Prudential Standard (CPS 511) proposing stronger and more prescriptive prudential requirements for remuneration across all APRA-regulated entities as examples of the regulator's work in this area.

[Note: APRA released an information paper — Information paper: Transforming governance, culture, remuneration and accountability: APRA's approach — setting out APRA's 'intensified approach to the supervision' of GCRA risk within regulated entities on 19 November. For a summary see: Governance News 20/11/2019]

[Note: APRA released a discussion paper and draft prudential standard (CPS 511 Remuneration) for consultation on 23 July. Consultation closed on 23 October. For a summary of the proposed changes see: Governance News 24/07/2019.]

Mr Byres commented that the 'proposals to overhaul the prudential requirements in relation to remuneration' had received a high level of interest and that APRA is currently working through the 74 submissions received in response to the consultation. 'As I said in a speech recently, our proposals – which are far more prescriptive than we have traditionally been about remuneration practices – have caused a fair amount of angst. The concerns have come from entities, industry bodies, investors and shareholder groups, and we are considering all of the issues carefully. We are not wedded to the specific proposals we put out for consultation, but equally we have been clear that the status quo will not be acceptable'. In terms of timing, Mr Byres said that APRA plans to release its response to feedback on the consultation 'early next year'.

[Note: Mr Byres appears to be referring to the speech he gave to the Women in Banking and Finance Series Luncheon, entitled Remuneration: reactions and responses, in which he provided an update on the remuneration consultation and the feedback received in response to the consultation. For a summary of Mr Byres' remarks see: Governance News 13/11/2019.]

- **Cyber resilience:** Observing that cyberattacks are a 'nowadays a routine occurrence' Mr Byres said that 'APRA cannot prevent cyber-attacks from occurring, but we think it important we play a role in ensuring regulated institutions are resilient to cyber-attacks through prevention, detection and response capabilities'. Mr Byres highlighted APRA's new Prudential Standard CPS234, which came into force in the middle of this year, as an example of APRA's work in this area. He added that APRA is also: a) strengthening its internal capability (in terms of assessing the cyber-resilience of regulated entities); b) using third party expertise for deeper assessments where necessary; and c) strengthening 'alliances with peer regulators and other government agencies' to ensure alignment with Australia's 2020 Cyber Security Strategy.

- **Regulatory changes/new powers may be needed?** Mr Byres said that 'it also needs to be acknowledged that the current regulatory framework is not designed for clouds, ecosystems and partnership models. Not only do regulators need new skills, resources and partnerships, but possibly new powers to ensure that as critical functions and data move outside the regulatory perimeter, we are able to satisfy ourselves that the requisite level of safety and control remain in place. As we develop our new cyber supervision strategy, we will need to consider how best to tackle these issues'.

[Source: APRA media release 02/12/2019]

'Whistleblower' allegations: The AFR reports that Westpac's former money laundering reporting and anti-bribery and corruption officer who was responsible for oversight of Westpac's response to AUSTRAC's investigation for the ten months until May (the 'whistleblower'), has accused the lender of demoting them (removing them from their role and offering them a position with less responsibility but the same pay) after they reported a significant number of breaches to AUSTRAC.

Reportedly they have said their advice about the seriousness of the breaches was not listened to. They have also reportedly suggested that the bank's culture is focused on obeying compliance laws without being committed to their underlying objectives. 'My fear is that the thing that drives Westpac and the problem at the bank is the people at the top are driven by status, power and money and they don't understand that the obligations have a social purpose' they reportedly said.

According to The AFR, APRA has said its investigation into Westpac will include the lender's treatment of the whistleblower. 'Where warnings were not listened to, it would be of interest to us' Mr Byres is quoted as saying.

Reportedly, the whistleblower has said they will co-operate with all regulators.

[Source: [registration required] The AFR 03/12/2019]

Toxic revenue: In a speech entitled — Consumer outcomes: A truth universally acknowledged — ASIC Deputy Chair Karen Chester spoke about the consequences of the failure to put consumers first (including large remediation costs) and the need to 'restore the balance' between consumer's personal responsibility and firm's responsibility. This rebalancing of responsibility is necessary, she said if firms are to 'arrest freefall beyond the $10 billion remediation provisioning tally' and if boards are 'to have confidence that they are managing non-financial risk. Or more simply, they are generating sustainable revenues and shareholder turns. And not toxic and unsustainable ones'

[Source: ASIC Deputy Chair Karen Chester, speech at the AICD Leaders' Lunch, Consumer outcomes: A truth universally acknowledged 29/11/2019]

Corporate Social Responsibility and Sustainability

In Brief | The Council of Financial Regulators has announced its seven work priorities for the coming year. Among them is facilitating the smooth transition to a low-carbon and climate-resilient economy. This initiative will be led by the RBNZ

[Source: RBNZ media release 29/11/2019]

In Brief | The British Academy has released a report setting out eight 'principles for purposeful business' for policymakers and business leaders. Principle 1 states that corporate law should 'place purpose at the heart of the corporation and require directors to state their purposes and demonstrate commitment to them'. Principle 4 states that 'corporate governance should align managerial interests with companies' purposes and establish accountability to a range of stakeholders through appropriate board structures'

[Source: British Academy report: Principles for Purposeful Business: How to deliver the framework for the Future of the Corporation]

Financial Services

Financial Services Royal Commission implementation updates

Top Story | ALRC suggests review of financial services regulation

The ALRC has released a suggested program of work for 2020-25 including a proposal to review financial services laws, consistent with FSRC recommendations 7.3 and 7.4

Australian Law Reform Commission: Suggested program of work released

On 2 December, the Australian Law Reform Commission (ALRC) released a report — The future of law reform: A suggested program of work 2020-2025 — suggesting (among other things) that a future law reform inquiry could look at simplifying and rationalising financial services laws in line with Financial Services Royal Commission recommendations 7.3 and 7.4.

[Note: Financial Services Royal Commission recommendation 7.3 recommends that as far as possible, exceptions and qualifications to generally applicable norms of conduct in legislation governing financial services entities should be eliminated. Recommendation 7.4 recommends that as far as possible, legislation governing financial services entities should identify expressly what fundamental norms of behaviour are being pursued when particular and detailed rules are made about a particular subject matter. Commissioner Hayne explained in his Final Report that the recommendations are intended to ensure that the law's intent is met. In making the recommendations, Commissioner Hayne cautioned that the task of simplification 'will not be easy' but 'will require examination of how the existing law fits together and identification of the policies given effect by the law's various provisions. Only once this detailed work is done can decisions be made about how those policies can be given better and simpler legislative effect. Implementing the recommendations I have made cannot wait for that larger task to begin, let alone end'. See: Financial Services Royal Commission Final Report, Volume 1 at p496.]

Details

Chapter 2 of the report outlines five suggested areas of focus for future law reform: 1) automated decision making, 2) principle-based regulation of financial services, 3) defamation,4) press freedom and public sector whistleblowers, and 5) legal structures for social enterprises.

Principle-based regulation of financial services: The ALRC suggests that 'A future law reform inquiry could consider whether reforms to the Corporations Act 2001 (Cth), the Australian Securities and Investments Commission Act 2001 (Cth), and any other Commonwealth law should be made in order to simplify and rationalise the regulation of financial services, consistent with recommendations 7.3 and 7.4 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. The ALRC suggests a timeframe of 36 months, with potential for interim reports on discrete aspects'.

Pay day lending: Other 'significant topics' highlighted in the report include (among others): regulation of debt management services, 'buy now pay later' services, or services targeting people at risk of financial hardship and the rights of creditors of an insolvent trustee, particularly when trust assets may be insufficient to meet creditors' claims.

[Note: On 2 December, Senators Griff and Mcallister introduced a private members Bill — National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2019 (No 2) — into the Senate proposing to strengthen the regulation of Small Amount Credit Contracts (SACC) and consumer leases. The explanatory memorandum states that the Bill 'replicates word for word the government's Exposure Draft legislation released on 23 October 2017'. This is covered in a separate post of this issue of Governance News 04/12/2019.]

[Source: ALRC report: The future of law reform: A suggested program of work 2020-2025]

Top Story | 5 out of six? A status update on the government's progress toward its goal of legislating six Financial Services Royal Commission Recommendations by the end of 2019

Key Takeout: Of the six Financial Services Royal Commission recommendations the government planned to consult on and legislate by the end of 2019: one is legislated, a Bill implementing four recommendations has been introduced and consultation on the remaining recommendation has commenced. Another Bill proposing to implement 'additional commitments' to strengthen ASIC has also been introduced.

The government's implementation timeline

In August 2019, the government released a roadmap outlining plans/timeframes for implementing the Financial Services Royal Commission's recommendations (see: Governance News 21/08/2019).

The roadmap committed the government to consult on/introduce legislation to implement six recommendations (1.2, 1.3, 2.4, 4.2, 4.7 and 4.8) by the end of 2019.

Progress against this timeline

- To date, of the six recommendations, only recommendation 2.4 (Ending Grandfathered Commissions for Financial Advisers) has been legislated (Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Act 2019). Under the legislation, grandfathered conflicted remuneration will be banned from 1 January 2021 and product issuers will be required to rebate the amounts to consumers. (For a summary see: Governance News 7/08/2019).
- Legislation to implement a further four recommendations — 1.2 (Mortgage broker best interests duty),1.3 (mortgage broker remuneration), 4.2 (removing the exemptions for funeral expenses policies) and 4.7 (application of unfair contract terms provisions to insurance contracts) — Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Bill 2019 — was introduced into the House of Representatives on 28 November. (For a high level summary see: Governance News 04/12/2019. The Bill is also covered in more detail in a separate post in this issue of Governance News 04/12/2019).
- On 29 November, the government released a draft Bill and regulations for consultation proposing to implement recommendation 4.8 (removal of the insurance claims handling exemption). Consultation will close on 10 January (after Parliament rises for 2019 on 5 December.) Both houses are scheduled to resume sitting on 4 February 2020. (This is covered in a separate post in this issue of Governance News 04/12/2019).

'Additional commitments': Legislating stronger powers for ASIC

In addition, the government's roadmap said that the government planned to implement a number of 'additional commitments' to strengthen ASIC (and implement the ASIC Enforcement Taskforce review's recommendations) by the end of 2019.

Legislation to implement these commitments — Financial Sector Reform (Hayne Royal Commission Response—Stronger Regulators (2019 Measures)) Bill 2019 — was introduced into the House of representatives on 28 November (A high level summary is also available on the MinterEllison website here. A more detailed summary is included in a separate post in this issue of Governance News 04/12/2019).

Legislation to implement FSRC recommendations 1.2, 1.3, 4.2, 4.7 introduced

Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Bill 2019 was introduced into the House of Representatives on 28 November.

The Bill proposes to implement the government's response to four Financial Services Royal Commission Recommendations.

1. Implement FSRC recommendation 4.7

Extend Unfair Contract Terms (UCT) protections to insurance contracts

Consultation on a draft Bill — Exposure draft legislation: Treasury Laws Amendment (Unfair Terms in Insurance Contracts) Bill 2019 — proposing to implement the government's response to Recommendation 4.7 closed on 28 August 2019.

Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Bill 2019 appears to be similar to the exposure draft legislation. (For a summary of the draft legislation see: Governance News 30/07/2019).

Broadly speaking the Bill will:

- **Extend unfair contract terms regime** in the Australian Securities and Investments Commission Act 2001 (Cth) — ie sections 12BF to 12BM of the ASIC Act — to apply to insurance contracts under the Insurance Contracts Act 1984.
- **Amend the Australian Securities and Investments Commission Act 2001 to tailor the existing unfair contract terms regime in its application to insurance contracts.**
    - **Main subject matter:** Terms that define the main subject matter of a contract are currently excluded from the unfair contract terms regime. The Bill will amend the ASIC Act to provide that the main subject matter of an insurance contract is limited to the description of what is being insured.
    - **Transparent excess terms**: The Bill will amend the ASIC Act to exclude terms that set the quantum of the excess or deductible in an insurance contract from the unfair contract terms regime as long as they are presented transparently.
    - **Third party beneficiary:** The Bill will amend the ASIC Act to allow for third party beneficiaries of insurance contracts to bring actions against insurers under the unfair contract terms regime.
    - **Duty of utmost good faith:** The explanatory memorandum states that the duty of the utmost good faith will continue to apply to insurance contracts concurrently with the unfair contract terms regime.

Implement FSRC recommendation 4.2

Extend consumer protection provisions of the ASIC Act to funeral expenses policies

Consultation on a draft Bill — [exposure draft] Financial Services (Improved Consumer Protection) (No. 1) Bill 2019: funeral expenses facilities — and draft regulations, proposing to implement the government's response to recommendation 4.2 closed on 18 October (for a summary see: Governance News 16/10/2019).

The changes in the Bill appear to be similar to those on which the government previously consulted.

Briefly, Schedule 2 to the Bill gives effect to recommendation 4.2 of the Financial Services Royal Commission to ensure that the consumer protection provisions of the Australian Securities and Investments Commission Act 2001 (Cth) apply to funeral expenses policies.

The explanatory memorandum states that the amendments do not impact the treatment of prepaid funerals which continue to operate as funeral benefits.

Implement FSRC recommendations 1.2 and 1.3

Legislate a best interests duty for mortgage brokers (FSRC recommendation 1.2)

Address conflicted remuneration for mortgage brokers (FSRC recommendation 1.3)

Consultation on a draft Bill — [draft] National Consumer Credit Protection Amendment (Mortgage Brokers) Bill 2019 — and regulations proposing to give effect to the government's response to recommendations Recommendation 1.2 (best interests duty) and Recommendation 1.3 (mortgage broker remuneration) closed on 4 October. The changes in the Bill, appear to be similar to those on which the government previously consulted. (For a summary of the draft legislation, see: Governance News 28/08/2019).

[Note: The government's initial response to the Financial Services Royal Commission Final Report Recommendations released in February specified, with respect to recommendation 1.3, that the government will not move to implement a 'borrower pays' model (pending the outcome of a review) but would move forward with other recommended changes to broker remuneration. The government's implementation roadmap for implementing the Commission's recommendations reiterated that recommendation 1.3 will be implemented in line with the government's initial response. For a summary of the government's implementation roadmap/timelines for implementing the Commission's recommendations see: Governance News 21/08/2019.]

Broadly speaking, Schedule 3 to the Bill proposes to:

- **Introduce of a new requirement for mortgage brokers to act in the best interests of consumers in relation to credit assistance in relation to credit contracts.** Further, where there is a conflict of interest, mortgage brokers will be required to give priority to consumers in providing credit assistance in relation to credit contracts. The explanatory memorandum states that the 'obligations are directed at improving outcomes for consumers by legally requiring that mortgage brokers act in their consumer's best interests and place their consumer's interests before their own'.

  The explanatory memorandum also states that the best interests duty and responsible lending obligations are separate obligations that operate alongside each other and 'apply every time credit assistance regulated by the Credit Act is provided by a mortgage broker. The best interests duty is not intended to duplicate these obligations. There are circumstances where the mortgage broker may not have acted in a consumer's best interests even if the responsible lending obligations were complied with. For example, even if a home loan product is 'not unsuitable', recommending it to the consumer might not be in the consumer's best interests'.

- **Address 'conflicted remuneration' for mortgage brokers.**
  - **Definition of 'conflicted remuneration'**: The explanatory memorandum says that the definition is 'in substance' drawn from the definition of conflicted remuneration in Part 7.7A of the Corporations Act 2001 (Cth). Conflicted remuneration means any benefit, whether monetary or non-monetary, that is:
    a) given to a licensee, or a representative of a licensee, who provides credit assistance to consumers that, because of the nature of the benefit or the circumstances in which it is given, could reasonably be expected to influence the credit assistance provided (including, therefore, the choice of credit contract or credit provider or the choice of whether to provide credit assistance or not); or
    b) given to a licensee, or a representative of a licensee, who acts as an intermediary and because of the nature of the benefit of the circumstances in which it is given, could be reasonably expected to influence whether or how the licensee or representative acts as an intermediary.
  - **Prohibitions on giving/receiving conflicted remuneration:** The Bill proposes to: a) prohibit mortgage brokers and mortgage intermediaries from accepting conflicted remuneration; and b) prohibit employers, credit providers and mortgage intermediaries from giving conflicted remuneration to mortgage brokers or mortgage intermediaries. The circumstances in which these bans on conflicted remuneration apply are to be set out in the regulations.
- **A contravention of each obligation in Schedule 3 to the Bill is a civil penalty.**

(Proposed) timing?

- The unfair contract terms regime will apply to new or renewed insurance contracts from 5 April 2021. Contracts which are renewed or varied after this date will also be covered by the UCT regime.
- The explanatory memorandum observes that the application of the unfair contract terms regime to insurance will coincide with the new Design and Distribution Obligations set out in Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019.
- Consumer protection provisions (of the ASIC Act) will apply to funeral expenses policies from the day after the Bill receives Royal Assent.
- Broker reforms will apply from 1 July 2020

The explanatory memorandum states that the changes are intended to 'improve consumer outcomes by requiring brokers to act in the best interests of their clients and by reducing the potential for conflicts of interests to arise which may impact the advice consumers receive from brokers'.

Announcing the changes, the Treasurer said that 'consumers and small businesses will be further protected under legislation introduced into the Parliament today by the Morrison Government'.

[Sources: Financial Sector Reform (Hayne Royal Commission Response – Stronger Regulators (2019 Measures)) Bill 2019, Explanatory Memorandum; Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Bill 2019; Explanatory Memorandum; Treasurer Josh Frydenberg media release 28/11/2019; Second reading speeches]

Stronger powers for ASIC? Legislating the government's 'additional commitments', as outlined in the Financial Services Royal Commission implementation roadmap

In addition to introducing a Bill to implement recommendations 1.2, 1.3, 4.2, 4.7 of the Financial Services Royal Commission — Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Bill 2019 — [as covered in a separate post in this issue of Governance News], the government's implementation roadmap flagged plans to implement a number of 'additional commitments' requiring a legislative response, by the end of 2019.

Namely: harmonising ASIC's search warrants powers, improving ASIC's ability to access certain telecommunications information; strengthening ASIC's licensing powers; and strengthening ASIC's power to ban people in the financial sector in line with the ASIC Enforcement Taskforce Review Recommendations.

On 28 November, Financial Sector Reform (Hayne Royal Commission Response – Stronger Regulators (2019 Measures)) Bill 2019 was introduced into the House of Representatives.

[Note: The introduction of the Bill follows consultation five separate draft Bills — 1) Financial Regulator Reform (No 1) Bill 2019: Access to telecommunications; 2) Financial Regulator Reform (No 1) Bill 2019: Banning orders; 3) Financial Regulator Reform (No 1) Bill 2019: ASIC search warrant powers; 4) Financial Regulator Reform (No 1) Bill 2019: (Licensing); and 5) Financial Regulator Reform (No 1) Bill 2019: (Penalties) — which closed on 9 October. The Bill, as introduced, appears to be similar to the draft legislation on which the government previously consulted. For a summary of see: Governance News 18/09/2019]

[The ASIC Enforcement Taskforce Review Recommendations can be accessed here. The government's response to the Taskforce Recommendations is here. For a summary of the government's response see: Governance News 23/04/2018]

Snapshot

Bring ASIC's current range of search warrant powers into line with those in the Crimes Act

Schedule 1 to the Bill proposes to align ASIC's search warrant powers across various Acts, and align them with the search warrant powers in the Crimes Act 1914 (modified 'as necessary'). Under the proposed changes, ASIC would be able to apply for a search warrant where the contravention would be an indictable offence and to search for and seize evidential material.

The Bill also proposes to make amendments to ASIC's search warrant powers to 'modernise and make the powers more useful, recognising the integral part technology plays in the storage and communication of information'. For example, the proposed changes would give ASIC the ability to: take photographs and make video recordings of the search; operate electronic equipment on the premises to access data; move devices to another place for processing to determine if the devices contain evidential material; and operate seized devices to access data.

(Proposed) timing of these changes: The proposed commencement date for the amendments in Schedule 1 to the Bill is the day after Royal Assent.

If passed, the amendments made by Schedule 1 will apply to search warrants applied for on or after that date. However, the matter to which the warrant relates may have occurred before this date.

The changes (if passed) will implement the government's Recommendations 11-16 in Chapter 2 of the Enforcement Taskforce Report.

Improve ASIC's ability to access telecommunications intercept material (eg phone taps) for the investigation and prosecution of serious corporate law offences

Chapter 3 of the ASIC Enforcement Review Taskforce Report recommended that the Australian Securities and Investments Commission (ASIC) should be able to receive telecommunications intercept material (eg real time listening to telephone calls (phone taps)) to investigate and prosecute serious offences (as currently ASIC is not currently an interception agency (ie Federal and state police, the Australian Security Intelligence

Organisation and anti-corruption bodies) or recipient agency under the Telecommunications Act 1997 (TIA Act)).

Schedule 2 of the Bill proposes to give effect to the government's response to this recommendation by amending the TIA Act to allow ASIC to receive and use intercepted information for its own investigations and prosecutions of serious offences.

The explanatory memorandum emphasises that the Bill does not allow ASIC to intercept information itself but rather allows ASIC to receive and use information already intercepted by other agencies.

Strengthen ASIC's licencing powers

Schedule 3 to the Bill amends the Corporations Act 2001 and the National Consumer Credit Protection Act 2009 (Credit Act) to strengthen ASIC's licensing powers and the offences for false and misleading documents (by aligning the consequences under the Corporations Act for making a false and misleading statement to ASIC with those in the National Consumer Credit Protection Act).

In his second reading speech, Treasurer Josh Frydenberg said that 'Strengthening ASIC's licensing powers will ensure that credit and financial service licensees, and the people who control them, are fit and proper to be carrying on a financial services business. Ensuring that controllers such as significant shareholders are fit and proper is essential in deciding whether a licence should be granted or retained'.

Extend ASIC's banning powers to ban individuals from managing financial services businesses

The amendments in Schedule 4 to the Bill would expand the scope of ASIC's powers to ban a person from performing functions in a financial services or credit business where they are not a fit and proper person and provide new grounds for ASIC to ban a person, for example where: they have twice been linked to a refusal or failure to give effect to a determination of the Australian Financial Complaints Authority; or where ASIC has reason to believe that a person is not adequately trained, or is not competent, to perform one or more functions as an officer of an entity that carries on a financial services business, or to control such an entity.

The expanded grounds also authorise ASIC to make banning orders against officers who control, manage or oversee the conduct of a financial services business

These changes ensure that ASIC is appropriately empowered to remove individuals from continued involvement in the financial sector, particularly those in senior positions of control and influence, and expand the grounds on which ASIC can issue banning orders.

Proposed timing? The proposed commencement date is generally the day after Royal Assent. The proposed commencement date for Schedule 1 (as described above) is the day after Royal Assent.

Commenting on the Bill, Treasurer Josh Frydenberg said that it will 'ensure that ASIC can effectively enforce existing laws'.

[Sources: Financial Sector Reform (Hayne Royal Commission Response – Stronger Regulators (2019 Measures)) Bill 2019, Explanatory Memorandum; Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Bill 2019; Explanatory Memorandum; Treasurer Josh Frydenberg media release 28/11/2019; Second reading speeches]

Consultation on legislation to implement FSRC recommendation 4.8 (make insurance claims handling a financial service)

Key Takeouts

- The Financial Services Royal Commission recommended that the handling and settlement of insurance claims, or potential insurance claims, should no longer be excluded from the definition of 'financial service' (see recommendation 4.8).
- Following earlier consultation, on 29 November, the government has released a draft Bill and regulations for consultation proposing to: 1) remove the exclusion of insurance claims handling and settlement services from the definition of a 'financial service' in the Corporations Act 2001; 2) make handling and settlement of an insurance claim, or potential insurance claim, a 'financial service' under the

Corporations Act 2001; and 3) tailor application of the existing financial services regime to the new financial service of handling and settling an insurance claim.

- Consultation will close on 10 January.

Context: Handling and settling an insurance claim is currently excluded from being a financial service by regulation 7.1.33 of the Corporations Regulations 2001. The effect of the exclusion is that persons handling and settling an insurance claim are not obliged to act efficiently, honestly and fairly, disclose important information to insureds or, if the claim is in relation to retail clients, have an internal dispute resolution process in place or be a member of AFCA.

Financial Services Royal Commission recommendation 4.8 recommended that the handling and settlement of insurance claims, or potential insurance claims, should no longer be excluded from the definition of 'financial service'.

A number of inquiries have made a similar recommendations including: ASIC Report 633 Holes in the safety net: A review of Total and Permanent Disability insurance claims (see: Governance News 23/10/2019); the Parliamentary Joint Committee Report on Corporations and Financial Services: Inquiry into life insurance industry (see: Governance News 03/04/2018); and ASIC Report 498 Life insurance claims: An industry review recommended removing the exclusion.

Draft legislation released: Following the release of a consultation paper earlier in the year (see: Governance News 06/03/2019) and consistent with the government's response to the Financial Services Royal Commission recommendation, the government has released exposure draft legislation – [exposure draft] Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Bill 2020: claims handling; [exposure draft] Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers) (Claims Handling and Settling Services) Regulations 2020: claims handling – for consultation.

Timing: Consultation closes on 10 January 2020.

Details

The draft Bill proposes to create the new 'financial service' of handling and settling an insurance claim under the Corporations Act 2001.

It's proposed that from 1 July 2020, handling and settling an insurance claim will be a 'financial service' regardless of when the insurance product was entered into.

A person handles and settles an insurance claim for the purposes of the Corporations Act 2001 if they: a) make a recommendation or state an opinion that could influence a decision whether to make an insurance claim; b) assist another person to make an insurance claim; c) assess whether an insurer is liable under an insurance product; d) make a decision to accept or reject all or part of an insurance claim; e) quantify an insurer's liability under an insurance product; f) offer to settle all or part of an insurance claim; or g) satisfy a liability of an insurer under an insurance claim.

The Bill also proposes to amend the Corporations Act 2001 to tailor the application of the existing financial services regime to the new financial service of handling and settling an insurance claim.

These changes include:

- **AFSL requirement:** Requiring specified persons – insurers, loss assessors/loss adjustors acting on behalf of the insurer, insurance claims managers, insurance brokers who handle insurance claims on behalf of insurers or financial advisers who handle/settle insurance claim on behalf of insurers - to either hold an Australian financial services licence (AFSL) that covers handling and settling an insurance claim or become an authorised representative of such a licence holder in order to handle and settle an insurance claim.

- **Product advice exemption:** Excluding recommendations or opinions that are reasonably necessary as part of handling and settling an insurance claim from the financial product advice regime.

- **New requirement to provide a Statement of Claim Settlement Options to retail clients** if the insurer is offering to settle all or part of a general insurance claim through cash settlement instead of repairing or replacing the insured product.

The draft Regulations propose to amend the Corporations Regulations 2001 to apply the existing financial services regime to handling and settling an insurance claim. The Regulations also create a new subsector to enable ASIC to recover its regulatory costs incurred from supervising persons that handle and settle insurance claims.

Superannuation claims handling? The draft explanatory memorandum states that the regulation of handling and settling an insurance claim by registrable superannuation entity licensees will be addressed as part of the Government's response to the Financial Services Royal Commission recommendations related to superannuation regulators (recommendations 3.8, 6.3-6.5). Consultation on that legislation will take place in early 2020.

[Sources: [Exposure Draft] Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Bill 2020: claims handling; [Exposure Draft] Regulation; Explanatory Memorandum; Explanatory Statement]

Implementing FSRC recommendation 6.10: Updated MoU between ASIC and APRA, separately the Treasurer has said the government is preparing draft legislation to give effect to recommendation 6.9

Context: Financial Services Royal Commission Recommendation 6.10 recommends that ASIC and APRA should prepare and maintain a joint memorandum setting out how they intend to comply with their statutory obligation to cooperate.

Recommendation 6.9 recommends that the law should be amended to oblige the Australian Securities and Investments Commission (ASIC) and the Australian Prudential Regulation Authority (APRA) to cooperate, share information to the maximum extent practicable and notify the other whenever it forms the belief that a breach for which the other agency has enforcement responsibility may have occurred.

Updated Memorandum of Understanding (MoU released)

On 29 November the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC) released an updated Memorandum of Understanding (MoU) committing them to strengthening engagement, deepening cooperation and improving information sharing in line with the Commission's recommendation.

Objectives: The objectives of the MoU are as follows: 1) facilitate cooperation and collaboration between the agencies; 2) strengthen the effectiveness and contribute to the efficiency of regulatory outcomes across the financial sector; and 3) promote a whole-of-system perspective in meeting each agency's responsibilities. In addition, the MoU is intended to minimise duplication of effort, facilitate early detection of prudential and conduct issues and promote more timely supervisory or enforcement responses.

The MoU also outlines the regulators' respective responsibilities under the 'twin peaks' model and describes how the regulators intend to engage in key areas such as policy, monitoring and supervision, investigations and enforcement.

The MOU states that the regulators will publicly report on their engagement activities annually and will review the effectiveness of the MoU annually.

ASIC Chair James Shipton said the updated MoU builds on the open and collaborative relationship across all levels the regulators. 'ASIC and APRA will continue to proactively engage and respond to issues efficiently to deliver positive outcomes for consumers and investors. The MoU facilitates more timely supervision, investigations and enforcement action and deeper cooperation on policy matters and internal capabilities' Mr Shipton said.

APRA Chair Wayne Byres said enhanced cooperation reinforced the twin peaks model of regulation that has operated in Australia for more than 20 years. 'ASIC and APRA share an interest in protecting the financial wellbeing of the Australian community and achieving a fair, sound and resilient financial system,' Mr Byres said.

The MoU is part of a broader shift towards 'establishing closer cooperation': The regulators state that the MoU is only one aspect of the ways in which they are working more closely. For example the regulators are: regularly meeting under a revised engagement structure and working together on areas of common interest, including data, thematic reviews, governance and accountability. They are also focused on detecting prudential and conduct issues early and working to resolve them efficiently and effectively.

APRA and ASIC add that they are also working closely with government on the legislative changes required to implement the Commission's recommendations.

Next steps?

Exposure draft legislation is being prepared: In a statement welcoming the release of the MoU, Treasurer Josh Frydenberg said it will also support the implementation of recommendation 6.9 which will create a statutory obligation on each of ASIC and APRA to cooperate, share information, and notify each other of suspected breaches of laws administered by the other. Mr Frydenberg said that the government is preparing exposure draft legislation to give effect to recommendation.

[Source: ASIC media release 29/11/2019; Memorandum of Understanding 28/11/2019; Treasurer Josh Frydenberg 29/11/2019]

Other Developments

Top Story | MinterEllison's M&A Outlook: Australian Financial Services Towards 2030

MinterEllison has released a report offering expert insights into the unprecedented environment in which financial institutions are now operating. It brings together compelling financial, commercial, risk and legal perspectives that predict the changes in the market.

The Report is available on the MinterEllison website here

Stop Press | Following consultation, ASIC has announced a ban on unfair cold call sales of direct life insurance and consumer credit insurance. The ban will take effect from 13 January 2020. ASIC says of the 15 non-confidential responses to the consultation on the ban, no responses opposed it. ASIC has also updated Regulatory Guide 38 The hawking provisions to reflect the ban

[Note: ASIC recently consulted — CP 317 Unsolicited Telephone sales of direct life insurance and consumer credit insurance — on a proposed a total ban on direct telephone sales of life insurance and consumer credit insurance in July. Consultation closed on 29 August.

ASIC pointed out when proposing the ban that the proposed action is consistent with the Financial Services Royal Commission anti-hawking recommendations, which recommended that the law should be changed to clearly prohibit unsolicited sales of superannuation (recommendation 3.4) and insurance products (recommendation 4.1). ASIC considers that the proposed ban will provide interim protection for consumers ahead of broader law reform by the government. (For a summary of ASIC's proposal see: Governance News 24/07/2019 at p13).]

[Sources: ASIC media release 04/12/2019; Updated Regulatory Guide 38 The hawking prohibitions; Report 640 Response to submissions on CP 317 Unsolicited telephone sales of direct life insurance and consumer credit insurance; Submissions on CP 317; ASIC Corporations (Hawking—Life Risk Insurance and Consumer Credit Insurance) Instrument 2019/839]

CommInsure was fined $700,000 after pleading guilty to 87 counts of 'hawking' insurance products. ASIC points out that if the conduct were to occur under the new penalty regime, the maximum penalty would be $10,962,000

Context

- **On 4 October,** the Australian Securities and Investments Commission (ASIC) announced that Colonial Mutual Life Insurance Society Ltd, trading as CommInsure, had been charged (following an ASIC investigation) with 87 counts of offering to sell insurance products in the course of 'non-compliant unsolicited telephone calls' contrary to s992A(3) of the Corporations Act ('hawking').
- **On 19 November**, ASIC announced that CommInsure had pleaded guilty to 87 counts of 'hawking' but had not yet been sentenced. Separately, ASIC announced that following concerns raised by ASIC about

unfair telephone sales of life insurance, CommInsure has been conducting a remediation program (to refund approx. 30,000 more than $12m), which is expected to be completed by the end of 2019. The remediation program includes refunding some of the customers impacted by charges (see: Governance News 20/11/2019).

CommInsure fined $700,000

On 28 November ASIC announced that CommInsure has been fined $700,000 and convicted of 87 counts of offering to sell insurance products in the course of unlawful, unsolicited telephone calls, contrary to s992A(3) of the Corporations Act (hawking).

ASIC comments that the fine takes into account CommInsure's early guilty plea to the charges, which carried a maximum total penalty of $1,848,750. According to ASIC, if the conduct were to occur under the new penalty regime, effective from March 2019, the maximum penalty would be $10,962,000.

Commenting on the outcome, ASIC Deputy Chair Daniel Crennan said 'The conviction and sentence today sends a significant message to the financial services industry. The model operated by CommInsure carried risks for consumers due to the unsolicited sale of complex insurance products which consumers may not have needed, wanted or understood'.

[Source: ASIC media release 28/11/2019]

The government's payday loans Bill has been introduced into the senate (by Labor and Centre Alliance Senators), CALC has called on the government to support the Bill

On 2 December, senators Griff and Mcallister introduced a private members Bill — National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2019 (No 2) — into the Senate proposing to strengthen the regulation of Small Amount Credit Contracts (SACC) and consumer leases.

The explanatory memorandum states that the Bill 'replicates word for word the Government's Exposure Draft legislation released on 23 October 2017'.

CALC has called on the government to support the Bill: In a statement, welcoming the introduction of the Bill and calling on the government to support it, Consumer Action Law Centre (CALC) CEO Gerard Brody said 'in the three years that these reforms have stalled, payday lenders have profited to the tune of some $550 million…There is a broad consensus across the community that stronger consumer protections for payday loans are needed. Why, then, are Prime Minister Scott Morrison and Treasurer Josh Frydenberg letting payday lenders and consumer lease providers escape legislative reform?'

[Note: Labor has previously introduced a version of the Bill into the House of Representatives — National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2019 — but the Bill failed to progress past second reading stage in the House and lapsed at the dissolution of Parliament on 11 April. The Bill was considered by the Senate Standing Committee for the Scrutiny of Bills and the Committee noted in the Scrutiny Digest that the Bill was identical to Bills previously introduced in 2018 and that concerns raised by the Committee previously around the way the offences and civil penalty provisions are structured in the Bill remain unaddressed. The concerns referred to (Scrutiny Digest 3 of 2018) are around the appropriateness of leaving 'significant elements of the offences of civil penalty provisions in proposed sections…to regulations and other forms of delegated legislation.]

[Sources: National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2019 (No 2); Explanatory Memorandum]

'Generally appropriate' but room to improve: ASIC report 639 has found that less than 50% of personal financial advice by superannuation funds demonstrated full compliance with the best interests duty and related obligations, though members were at risk of suffering financial/non-financial detriment in only 15% of cases

Report overview | ASIC Report 639 Financial Advice by Superannuation Funds

The Australian Securities and Investments Commission (ASIC) has released a report — ASIC Report 639 Financial advice by superannuation funds (Rep 639) — presenting the findings of a project looking at: a) the ways in which superannuation funds provide personal financial advice to members (survey); and b) the overall quality of personal financial advice provided to members of those funds (advice review).

ASIC notes that the project did not include a review of general advice.

How advice is being provided

In December 2018, ASIC surveyed 25 superannuation funds to understand the ways in which financial advice is provided to members and engaged an independent actuarial consulting firm to analyse the results. Survey participants included 11 retail superannuation funds (44%), 10 industry superannuation funds (40%), two corporate superannuation funds (8%) and two public sector superannuation funds (8%).

[Note: Appendix 1 of the report (at p55) is a list of project participants.]

ASIC found that:

- Across all funds, general advice made up 75% of advice accessed by members from their superannuation fund
- The most popular advice topics sought by members were member investment choice, contributions and retirement planning
- The most common delivery channels for providing advice to members were in-house call centres (37%) and advice providers employed by a related party (26%)
- Across all funds, the key identified conflicts of interest were: a) vertical integration; b) relationships with third-party advice providers; and c) bonuses paid to advice providers. A minority of the industry funds (20%) and retail funds (22%) stated that they do not feel subject to any conflicts of interest due to operating a fully outsourced advice model.
- Asked about their approaches to managing their conflicts of interest, seven funds (29%) referred to the use of a conflicts management framework which the report comments, was 'lower than anticipated' given APRA's Prudential Standard SPS 521 Conflicts of interest requires all superannuation funds to have a conflicts management framework in place.
- 61% of funds intend to increase their use of member self-directed digital advice that can generate Statements of Advice (SOAs)

Advice review

ASIC examined the personal advice provided to members of 21 of the 25 funds surveyed (as four of the funds in the sample do not provide personal advice to members).

Specifically, 32 intra-fund advice files; 68 scaled advice files; and 133 comprehensive advice files were reviewed to assess whether advice providers had complied with the best interests duty and related obligations when providing this advice. In total, 233 advice files were reviewed to test whether the advice provided to members was legally compliant.

Advice review findings — ASIC says that the quality of advice is 'generally appropriate'

- **49% of the files demonstrated full compliance** with the best interests duty and related obligations
- **36% of the files did not demonstrate full compliance with the best interests duty** and related obligations, but the file did not indicate that the member was at risk of suffering financial or non-financial detriment as a result of following the advice provided
- **15% of the files did not comply with the best interests duty** and related obligations and there was an indication that the member was at risk of suffering financial or non-financial detriment as a result of following the advice provided. ASIC said that 'In the small number of files where there was an indication that the member was at risk of suffering financial or non-financial detriment, [ASIC] will contact the advice licensee about our expectation that they will review the advice and where required, remediate those affected members. We will ask advice licensees to confirm that they have undertaken the appropriate steps and provide us with an update on the outcome'.

- **Two reasons for non-compliance:** The report identifies two 'main reasons' for files not complying with the best interests duty and related obligations:

    1. the advice provider failed to identify the subject matter of the advice and the member's objectives, financial situation and needs; and

    2. he advice provider failed to conduct a reasonable investigation into financial products and base all judgements on the member's relevant circumstances.

- **Conclusions?** Overall, ASIC says that the quality of personal advice provided to members by both retail and industry funds is 'generally appropriate', though there is 'room to improve'.

    'Our advice reviews showed that the compliance rate for retail, industry, corporate and public sector fund types varied within a moderate range'.

    Commenting on the findings, Commissioner Danielle Press said that 'I know there will be general interest in whether retail or industry funds provided better quality advice. We found the quality of advice to be similar across retail and industry funds.'

    Ms Press added that 'due to the different sample sizes we used in our work however, it is not possible to properly compare the overall quality of advice based on all four fund types, and our findings are presented on an aggregate basis'.

Oversight of the quality of advice?

ASIC notes that in some cases, the superannuation fund was not the advice provider.

Out of the 21 funds that provide personal advice to members, 18 funds use third-party advice providers or advice providers employed by a related party. Of those 18 funds, 12 funds said they had a role in the oversight of the quality of advice provided.

Future plans for advice?

Asked what future plans they have for the advice services they offer members: 61% of funds indicated they intend to increase the use of member self-directed digital advice tools that can generate SOAs; 44% of funds indicated they intend to increase their in-house advice capacity; and 39% of funds indicated they intend to increase advertising and promotion of their advice services.

The report draws attention to the ASIC guidance on providing digital advice in: Regulatory Guide 225 Providing digital financial product advice to retail clients.

Next steps

- The report includes a number of 'practical tips' for superannuation trustees, advice licensees and advice providers to improve the quality of the advice that they provide to superannuation members. The 'tips' cover the following areas: a) oversight of advice providers; b) managing conflicts of interest; c) scoping advice; d) providing intra-fund advice; e) charging of fees; and f) record keeping.

- ASIC says it has also provided the 'tips' to relevant industry associations for circulation to their members.

[Sources: ASIC media release 03/12/2019; ASIC Report 639 Financial Advice by superannuation funds]

Steeper premiums and fewer benefits? APRA has launched what it describes as 'an intervention' into the life insurance market in response to 'ongoing heavy losses' in respect of individual disability income insurance (IDII)

The Australian Prudential Regulation Authority (APRA) has written to all life insurers and friendly societies announcing a series of measures to 'address the poor performance of individual disability income insurance (IDII) and move the product to a sustainable state'.

Why APRA is acting now: APRA says that the measures are in response to 'ongoing heavy losses' in respect of individual disability income insurance (DII). According to APRA, life companies have collectively lost around $3.4 billion over the past five years through the sale of IDII to individuals (rather than through superannuation).

Further, APRA says that despite writing to industry in May requesting urgent action, insurers have reported further losses of $1 billion.

'In a drive for market share, life companies have been keeping premiums at unsustainably low levels, and designing policies with excessively generous features and terms that, in some cases, provide a financial disincentive for policyholders to return to work. Insurers know what the problems are, but the fear of first-mover disadvantage has proven to be an insurmountable barrier to them making the necessary changes. By introducing this package of measures, APRA is forcing the industry to better manage the risks associated with DII and to address unsustainable product design features – or face additional financial penalties' APRA Executive Board Member Geoff Summerhayes said.

Further, with at least one major reinsurer indicating it was no longer prepared to reinsure individual DII, Mr Summerhayes cautioned, that there is now a genuine risk insurers may start withdrawing from the market.

The measures announced Mr Summerhayes said, should result in 'more financially resilient life companies and more sustainable products for policyholders. Unless insurers stop losing hundreds of millions of dollars each year, it's only a matter of time until individual DII – and the protection it provides – is no longer available at all.'

Measures include the following:

- **Imposition of an upfront capital requirement on all individual DII providers, effective from 31 March 2020.** The capital requirement will remain in place until individual insurers can demonstrate they have taken adequate and timely steps to address APRA's sustainability concerns. In instances where individual insurers continue to fail to meet APRA's expectations, APRA may also issue directions or make changes to licence conditions.
- **Introduction of individual DII data collection.** This data collection, due to be released mid-next year, will 'further assist life companies' to gain insights into market trends/developments and will also assist APRA to monitor life companies' progress in meeting APRA's expectations.
- **APRA also expects life companies to better manage riskier product features**, including by: a) ensuring DII benefits do not exceed the policyholder's income at the time of claim, and ceasing the sale of Agreed Value policies; b) avoiding offering DII policies with fixed terms and conditions of more than five years; and c) ensuring effective controls are in place to manage the risks associated with longer benefit periods.

Next steps: APRA says it will engage with industry stakeholders on the implementation of the measures and to ascertain other possible measures to assist returning IDII to sustainability.

Potential impact? Media reports suggest that customers are now likely to face steeper premium increases, while prospective disability insurance policyholders are likely to be offered more benefits as the regulator's capital charge will reduce the profitability of the products.

[Sources: APRA media release 02/12/2019; APRA letter to industry: Sustainability measures for individual disability income insurance 02/12/2019; [registration required] The AFR 02/12/2019; [registration required] The Australian 02/12/2019]

APRA is consulting on a proposed new capital framework for private health insurance

The Australian Prudential Regulation Authority (APRA) has commenced a consultation aimed at updating and strengthening the capital framework for private health insurance (PHI) with a view to ensuring that insurers have an appropriate level of financial resilience for the protection of policyholders.

APRA says that it considers that the current PHI capital framework 'is less robust than the capital requirements that apply in other insurance sectors in Australia'. APRA says it is concerned that the current PHI capital framework does not appropriately reflect the risks faced by insurers, and allows for inadequate consideration of extreme adverse events.

In a discussion paper released on 3 December, APRA sets out its proposed structure for the future PHI capital framework including:

- aligning the PHI capital framework with the framework applying to life and general insurers, unless characteristics of the industry warrant a different approach
- integrating changes stemming from the Australian Accounting Standards Board's new standard AASB 17 Insurance Contracts (AASB 17)
- applying the capital framework to the insurer's entire business, rather than just the health benefits fund.

APRA Executive member Geoff Summerhayes commented that 'it's possible the revised framework may increase some insurers' minimum capital requirements' but APRA does not expect this to be significant. Importantly, APRA's capital requirements do not have a material impact on premiums so they will not contribute to the affordability problem that has pushed many policyholders to cancel or downgrade their cover.'

Timing: The consultation will close on 27 March 2020, with APRA expected to release draft updated prudential standards in the second half of next year for further consultation.

APRA says that it plans to implement the finalised PHI capital framework from 1 July 2023 to align with its proposed adoption of AASB 17 for prudential purposes.

APRA's plans to 'usher in a raft of mergers'? Commenting on APRA's proposed plans, The Australian suggests that the new requirements may lead to consolidation of smaller private health insurers.

[Sources: APRA media release 03/12/2019; Discussion paper: Private Health Insurance Capital Standards Review; [registration required] The Australian 04/12/2019]

Taking steps towards establishing a consumer advocacy body for superannuation in line with the Productivity Commission's recommendation

Context: The Productivity Commission's (PC's) final report into the efficiency and competitiveness of the superannuation system: Superannuation: Assessing Efficiency and Competitiveness - Inquiry report was released to the government on 21 December 2018 and publicly released on 10 January 2019. Recommendation 28 recommended the establishment of a government funded superannuation members' advocacy and assistance body (for an overview of the recommendations, see: Governance News 16/01/2019).

Seeking expressions of interest: On 2 December, Assistant Minister for Superannuation Jane Hume announced that the government is taking the first step towards establishing a consumer advocacy body for superannuation in line with the Productivity Commission's recommendation.

Expression of Interest (consultation) process

Treasury has opened an expression of interest (EOI) process to give interested parties the opportunity to contribute to the development of this new body.

Treasury invites feedback (in particular) on the following:

- **Functions and outcomes:** What core functions and outcomes do you consider could be delivered by the advocacy body? What additional functions and outcomes could also be considered? What functions would the advocacy body provide that are not currently available?
- **Ongoing costs:** What would be the indicative ongoing costs of delivering these functions? What would be the indicative costs of delivering any additional functions?
- **Establishment:** What would be the likely set-up costs for the advocacy body and approximately how long would it take to establish such a body?
- **Governance and accountability:** What governance and accountability models (including assessment of impact and performance) do you consider to be most appropriate for the advocacy body?

Timing: The EOI will be open for a period of six weeks until 13 January 2020.

[Sources: Treasury EOI 02/12/2019; Assistant Minister for Superannuation, Financial Services and Financial Technology Jane Hume media release 02/12/2019]

Westpac has provided updated on actions being taken in response to the AUSTRAC allegations

Context: On 20 November The Australian Transaction Reports and Analysis Centre (AUSTRAC) commenced civil proceedings against Westpac alleging the lender contravened its obligations under the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) (Act).

AUSTRAC is seeking declarations of contravention and pecuniary penalties pursuant to s175(1) of the Act.

[Note: The Concise Statement, Statement of Claim and Originating Application are available on the AUSTRAC website here. For a brief summary of the allegations, the lender's initial response see: Governance News 27/11/2019]

Over the past week, Westpac has provided updated on actions being taken in response to the AUSTRAC allegations.

External Accountability Review: Westpac Chair Lindsay Maxsted has announced that Promontory has been appointed to undertake the External Accountability and Financial Crime Program Review (as outlined in Westpac's Response Plan).

The review will commence immediately. Mr Maxsted said the first priority would be reviewing issues associated with LitePay.

Mr Maxsted said that 'If and where procedural, escalation or accountability failings are confirmed through Promontory's review, there will be immediate action taken.'

Board Financial Crime Committee established: Overseeing the review (on behalf of the board) is a new Committee, newly appointed Westpac Board Financial Crime Committee. This Committee is Chaired by Non-Executive Director Peter Nash and includes other non-executive Directors, Nerida Caesar, Steven Harker and Margaret Seale.

Accountability Review advisory panel: In addition to Promontory's appointment, Westpac will also establish an Accountability Review advisory panel of three independent experts to consider Promontory's report and provide recommendations on governance as well as Board accountability. The makeup of the panel will be confirmed in coming days. The recommendations of the reviews will be made public and implemented as soon as possible

Mr Maxsted added, 'Westpac is determined to urgently address the issues that have given rise to the AUSTRAC statement of claim. We are genuinely remorseful for any hurt caused by the shortcomings in our systems and processes and understand we need to find the root causes and ensure accountability.'

[Source: Westpac media release 28/11/2019]

Westpac share purchase plan withdrawal option: On 28 November, Westpac issued a statement advising that following discussions with the Australian Securities and Investments Commission (ASIC), it would provide a withdrawal option for eligible withdrawal applicants who applied for Shares under the Share Purchase Plan prior to the AUSTRAC announcement on 20 November 2019.

[Source: Westpac media release 28/11/2019]

Related News: Westpac director Ewen Crouch has reportedly stepped down from his part time role at the Remuneration Tribunal following notice from AUSTRAC that it had commenced proceedings against Westpac. Mr Crouch reportedly said given the Tribunal is an independent statutory authority primarily responsible for inquiring into and determining the remuneration and allowances paid to holders of public offices, including AUSTRAC and ASIC he considered 'it is appropriate to set aside my role with the Remuneration Tribunal at this time'

[Source: [registration required] The Canberra Times 03/12/2019]

No issues to report: ANZ is reviewing AML/CTF systems/processes and has uncovered no issues to date, the lender also confirmed it is not aware of any impending litigation by AUSTRAC

In response to shareholder queries, ANZ issued an update on actions being taken to prevent financial crime. ANZ Chief Risk Officer Kevin Corbally said that in light of 'recent issues identified by AUSTRAC within the industry' ANZ has been 'reviewing the systems and processes we use to transfer money to ensure we are reporting the information required by regulators'. Mr Corbally said that thought the review is ongoing, it has 'found no material issues to date'.

The lender also confirmed it is not aware of any impending litigation by AUSTRAC.

[Sources: ANZ media release 27/11/2019; [registration required] The AFR 27/11/2019; [registration required] The Australian 27/11/2019]

ASIC has released updated RG 97 on fees and costs disclosure for issuers of superannuation and managed investment products

Following consultation, The Australian Securities and Investments Commission (ASIC) has released updated Regulatory Guide 97: Disclosing fees and costs in PDSs and periodic statements (RG 97) on fees and costs disclosure for issuers of superannuation and managed investment products.

[Note: Consultation on ASIC's response to the recommendations in Report 581 Review of ASIC Regulatory Guide 97: Disclosing fees and costs in PDSs and periodic statements and seeking feedback on a draft updated Regulatory Guide 97 Disclosing fees and costs in PDSs and periodic statements and proposed amendments to Sch 10 to the Corporations Regulations closed on 2 April. See: Governance News 16/01/2019.]

ASIC says that the guide is also relevant to issuers of investment life insurance products and operators of investor directed portfolio services (IDPSs) and managed discretionary account (MDA) services.

ASIC identifies the following as the 'main changes': a) a re-grouping of values in the re-named fees and costs summary to more clearly show fees and costs that are on-going and those that are member-activity based; b) a simplification of on-going fees and costs into three groups – Administrative, Investment and Transaction; c) including a single 'Cost of Product' figure in a PDS; and d) simplifying how fees and costs are presented in periodic statements.

Transition to new requirements: The new disclosure requirements in updated RG 97 will apply to all PDSs issued on or after 30 September 2020. Periodic and exit statements with reporting periods commencing from 1 July 2021 must comply with the new requirements. However, where a fund is ready, an early opt-in is available for reporting periods commencing from 1 July 2020.

The existing requirements under ASIC Class Order 14/1252 and the transitional version of RG 97 will continue to apply until the end of the transition period. However, the updated version of RG 97 provides clearer guidance about those existing fees and costs disclosure requirements that have not changed.

Next steps: ASIC says it plans to undertake focused work on fees and costs disclosure on platform arrangements in 2020. In addition, ASIC says it will work with industry bodies to clarify how financial advisers should use fees and costs information when giving advice.

Finally, ASIC says it will also monitor fees and costs disclosure going forward and consider taking action where we find misconduct.

[Sources: ASIC media release 29/11/2019; Regulatory Guide 97 Disclosing Fees and Costs in PDSs and Periodic Statements *(RG 97)]*

ASIC report has identified widespread non-compliance with fee disclosure obligations

Report Overview | ASIC Report 636 Compliance with the fee disclosure statement and renewal notice obligations (REP 636)

Key Takeouts

- ASIC sampled 1496 fee disclosure statements (FDSs) and 373 renewal notices (RNs) from 30 Australian financial services licensees. In every case, compliance issues were identified.

- Non-compliance by fee recipients ranged from less material and technical breaches to more significant breaches.
- ASIC said consumers of financial advice could be at risk of receiving incorrect information or being charged ongoing fees after agreements had ended.
- ASIC commissioner Danielle Press said the findings raised concerns about industry practices more broadly. Ms Press said, 'Our review has found widespread noncompliance with fee disclosure obligations across the sample of AFS licensees and their representatives, suggesting that compliance with the fee disclosure statement and renewal notice obligations may be an industry-wide problem'
- The 30 licensees in the review have been advised of ASIC's concerns. Separately, ASIC is investigating a number of other advice licensees for potential breaches of the FDS and RN obligations. ASIC will determine whether court action is appropriate at the end of these investigations.
- ASIC Commissioner Danielle Press called on AFS licensees to lift standards. ASIC is 'strongly urging all AFS licensees to immediately take steps to improve the robustness of their compliance measures' she said.

The Australian Securities and Investments Commission (ASIC) has released a report — ASIC Report 636 Compliance with the fee disclosure statement and renewal notice obligations (REP 636) — presenting the findings of ASIC's review of a compliance assessments (carried out by ASIC) of fee disclosure statements (FDSs) and renewal notices (RNs) issued by 30 randomly-sampled Australian financial services (AFS) licensees and their representatives.

Some Key Findings

- In 7% of cases, fee recipients did not give clients the required FDS at all, and in 9% of cases the FDS was not provided within the required timeframe
- 80% of FDSs did not include accurate information about the services clients were entitled to receive (15% were compliant)
- 73% of FDSs did not accurately describe the services the client received (25% were compliant)
- 44% of FDSs did not accurately reflect the fees paid by the client during the relevant period (in 22% of cases this could not be determined, and in 35% of cases the FDSs reviewed were compliant)
- More than 50% of licensees did not have effective processes to remind them when renewal notices (RNs) are due or to turn off ongoing fees.
- 35% of the time, fee recipients did not give clients the required renewal notice (in 65% a renewal notice was given)
- In 8% of cases, renewal notices were given outside of the required timeframe (in 92% of cases, the renal notice was given on time)

ASIC says that the report shows that consumers receiving financial advice could be at risk of receiving wrong information about advice fees, or in some cases, being charged fees after ongoing fee arrangements have terminated.

Indicative of a broader issue: Ms Press added that the findings have raised concerns about industry practices more broadly in relation to fee disclosure to clients. 'Our review has found widespread non-compliance with fee disclosure obligations across the sample of AFS licensees and their representatives, suggesting that compliance with the FDS and RN obligations may be an industry-wide problem' Ms Press said.

ASIC has advised the 30 licensees in the sample of its concerns

Next steps?

- ASIC says it is investigating a number of other advice licensees for potential breaches of the FDS and RN obligations. ASIC will determine whether court action is appropriate at the end of these investigations.

- ASIC Commissioner Danielle Press said ASIC is 'urging all AFS licensees to immediately take steps to improve the robustness of their compliance measures.'

Financial Services Royal Commission recommendation 2.1 (annual renewal and payment for financial advice)

The Financial Services Royal Commission recommended (recommendation 2.1) that the law should be amended to provide that ongoing fee arrangements (whenever made): must be renewed annually by the client; must record in writing each year the services that the client will be entitled to receive and the total of the fees that are to be charged; and may neither permit nor require payment of fees from any account held for or on behalf of the client except on the client's express written authority to the entity that conducts that account given at, or immediately after, the latest renewal of the ongoing fee arrangement.

Implementation timeline: The government has said it will implement this recommendation. The government's implementation roadmap indicates that it intends to consult on/introduce legislation by **30 June 2020**. (For a summary of the government's legislative priorities in implementing the Commission's recommendations see: Governance News 21/08/2019.)

[Sources: ASIC media release 28/11/2019; ASIC Report 636 Compliance with the fee disclosure statement and renewal notice obligations (REP 636); [registration required] The Australian 29/11/2019]

Bill to enable employees under workplace determinations/enterprise agreements to choose their superannuation fund introduced: Treasury Laws Amendment (Your Superannuation, Your Choice) Bill 2019

Treasury Laws Amendment (Your Superannuation, Your Choice) Bill 2019 was introduced into the House of Representatives on 27 November and has progressed to second reading stage. The Bill referred to the Senate Economics Legislation Committee on 28 November for a report by 21 February 2020.

The Bill reintroduces amendments to the Superannuation Guarantee (Administration) Act 1992 that were previously introduced on 14 September 2017 through Schedule 1 to the Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No 2) Bill 2017.

[Note: Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No 2) Bill 2017 passed the House of Representatives and progressed to second reading stage in the senate, but lapsed at the end of parliament on 1 July]

The explanatory memorandum accompanying the Bill states that the amendments are intended to ensure employees under workplace determinations or enterprise agreements have an opportunity to choose the superannuation fund for their compulsory employer contributions.

The measure was announced on 20 October 2015 in the government's response to the Financial System Inquiry.

Proposed date of effect: This measure applies to new workplace determinations and enterprise agreements made on or after 1 July 2020.

The Financial Services Council (FSC) welcomed the bill as a 'positive step forward' in 'modernising' the current default superannuation system. FSC CEO Sally Loane said 'It's unacceptable that even today, when there is so much pressure on super funds to modernise and be more efficient, a worker can arrive at a new job only to find they must open a new superannuation account with a fund specified in an enterprise agreement – whether they want to or not. This is particularly important for the two million Australians working multiple jobs, who may still today find themselves in the position of being required under outdated superannuation laws to have multiple accounts. This erodes their capacity to maximise their super savings'.

Call to enact reforms to address the issue of multiple accounts: The statement goes on to say that the FSC will continue to 'urge the government to enact the recommendations of the Productivity Commission and Royal Commission and implement a default once system for superannuation so that all Australians can take their super fund with them from job to job, just as they do with bank accounts and tax file numbers.

[Note: Among other things, the Productivity Commission's (PC) Final Report — Superannuation: Assessing Efficiency and Competitiveness — recommended that members default once and retain their existing account for new jobs as a means of addressing the issue of fee erosion. The PC recommended that the recommendation should be fully in place by no later than December 2021. For a summary of the PC findings and recommendations see: Governance News 16/01/2019.

Recommendation 3.5 of the Financial Services Royal Commission Final Report also recommended that a person should have only one default account and 'To that end, machinery should be developed for 'stapling' a person to a single default account'. The government's initial response to the Commission's recommendations stated that the government 'agrees that a person should have only one default account'. The government's roadmap for implementing the Commission's recommendations, released in August states that 'implementation of this recommendation will be considered in the context of the findings and recommendations of the Productivity Commission's report Superannuation: Assessing Efficiency and Competitiveness' but does not appear to specify a hard timeline for implementation. For a summary of the government's proposed roadmap for implementation of the Commission's recommendations see: Governance News 21/08/2019]

[Source: Treasury Laws Amendment (Your Superannuation, Your Choice) Bill 2019; Explanatory memorandum; Minister's second reading speech; FSC media release 27/11/2019]

Combatting elder financial abuse: The ABA has welcomed the decision by the Council of Attorney's General to create a national Power of Attorney register

At a meeting of the Council of Attorneys-General (CAG) in Adelaide on 29 November 2019, Ministers from all jurisdictions agreed to:

1. pursue a staged approach to enduring power of attorney reform for financial decisions, first focussing on law reforms to support the establishment of a mandatory national register of enduring power of attorney instruments, followed by further consideration of reforms to enhance safeguarding provisions and enhance access to justice arrangements
2. consider a detailed proposal and implementation plan for a Commonwealth established and maintained register in stage 1 reforms at the first CAG of 2020.

The Australian Banking Association (ABA) has welcomed the decision by the Council of Attorneys General in Adelaide to set 'baseline minimum standards' for Powers of Attorney and create a mandatory national online register as 'a big leap forward' in combating elder financial abuse.

ABA CEO Anna Bligh said the decision represented a major win for the 'coalition' of banks, Bauer media and seniors advocacy groups and would be a reform that protects older Australians at risk of this insidious abuse. The 'commitment to a mandatory register for Power of Attorney documents will be one more measure to reduce the likelihood of financial abuse of older Australians. I look forward to ensuring that the advance made at today's meeting of the Attorneys General remains a key priority with defined outcomes' Ms Bligh said.

Ms Bligh added that 'The campaign still has a long way to go, we need to see this register established as quickly as possible, completely standardised Power of Attorney laws across the country and a safe place to report abuse to help tackle elder financial abuse'

The coalition has specifically called on governments across Australia to act and establish: a) power of Attorney laws which are the same across the country and protect people from this kind of abuse; b) a National Power of Attorney (POA) register to check if POA documents are legitimate and current; and c) somewhere to report abuse in each state that can investigate and act.

Related News: The Federal Attorney-General, Christian Porter, has launched a new online resource to help tackle elder abuse. Developed by Elder Abuse Action Australia (EAAA), COMPASS - Guiding Action on Elder Abuse brings together resources and information on elder abuse from across the country. A statement announcing the release of the report, describes it as 'a major step towards the Morrison Government meeting its commitment, under the National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019-2023, to improve community awareness of elder abuse and access to information'.

The statement adds that the resource will be regularly expanded and updated, with greater functionality and service sector resources available from mid-2020.

[Sources: Council of Attorney's-General communique 29/11/2019; 29/11/2019; ABA media release 29/11/2019]

Guidance to help minimise non-financial risk: The BCCC has released guidance on complying with the Banking Code of Practice obligation to engage with customers in a 'fair, reasonable and ethical manner' and separately has released two reports raising concerns about Code compliance

Key Takeouts

- The Banking Code Compliance Committee (BCCC) has released two reports identifying: a) 'significant concerns about the reporting of breaches under the 2013 Code of Banking Practice during 2018-19'; b) identifying significant concerns about compliance with the 2019 Code; and c) cautioning lenders that they will need 'to continue ongoing efforts in order to meet the BCCC's expectations and the higher standards of the new 2019 Banking Code of Practice'.
- The BCCC has also released a Guidance Note on clause 10 of the Banking Code of Practice (2019) — banks' obligation to engage with customers in a fair, reasonable and ethical manner. The guidance is intended to highlight that Clause 10 is a broad obligation and extends to the design of banks' products and services, marketing and sales practices, processes and policies. In accordance with clause 9 of the Code, banks must ensure staff are supported and trained to competently comply with clause 10. Banks must identify, investigate and fix any breaches of the fairness obligation and report them to the BCCC.
- Noting APRA's information paper on industry self-assessments into governance, culture and accountability (see: Governance News 28/05/2019), the BCCC suggests that compliance with Clause 10 is an important way for banks to minimise non-finanical risk and 'expects that the bank's senior leadership consider and determine how clause 10 will be effectively embedded into its risk and governance frameworks'.
- The BCCC says that given the level of 'ongoing community concern about the quality and fairness of banking services, the BCCC intends to use its sanction powers to **name individual banks publicly** if they fail to adequately change their processes in a timely manner when serious breaches are brought to their attention for rectification by the BCCC'.

'Significant concerns' about the reporting of breaches under the 2013 Code of Banking Practice during 2018-2019

The report on Compliance with the Code of Banking Practice 2018-19 summarises banks' compliance with the 2013 Code in 2018-2019.

Some Key Points

- The 15,597 Code breaches that banks reported in 2018–19 affected at least 9 million customers and had a financial impact of more than $90 million.
- The total number of breaches is a 54% increase from the previous reporting period, with the number of impacted customers rising by 167%.
- Banks also updated the BCCC on breaches that remained under investigation in 2017–18, providing details of both an additional 300,000 affected customers and an extra financial impact of over $110 million.
- Banks continue to report the highest number of breaches in privacy and confidentiality and provision of credit. Both obligations saw increases in reported breach numbers since 2017–18.
- Two areas that also saw significant increases in breach numbers were internal dispute resolution and financial difficulty. These two areas are now among the top five breach categories.

'Significant concerns' about compliance with the 2019 Code? The BCCC says that this correlates with the findings of a second report into Banks' transition to the 2019 Banking Code of Practice, which found that while transition to the new code was a major priority for all banks in the lead-up to its implementation on 1 July 2019, the BCCC has 'significant concerns' about compliance across the industry in several key areas as well as 'some specific concerns in relation to individual banks'. For example, the BCCC found 'many banks did not provide an adequate response to questions about how they would monitor compliance with the accessibility obligations' in Chapter 13.

Consider naming individual banks? The BCCC writes that 'In light of the ongoing community concern about the quality and fairness of banking services, the BCCC intends to use its sanction powers to name individual banks publicly if they fail to adequately change their processes in a timely manner when serious breaches are brought to their attention for rectification by the BCCC'.

Guidance released: 'Clause 10 of the Code has a broad application. It should form the backbone of a bank's internal culture and must be upheld by all staff'

On 29 November, The Banking Code Compliance Committee (BCCC) published a Guidance Note on clause 10 of the Banking Code of Practice (2019) — banks' obligation to engage with customers in a fair, reasonable and ethical manner.

The guidance explains how the BCCC assesses compliance with Clause 10 of the Code and the circumstances under which the BCCC will consider Clause 10 (including case studies and example of non-compliance with Clause 10).

The BCCC says that the guidance is intended to highlight that Clause 10 is a broad obligation and extends to the design of banks' products and services, marketing and sales practices, processes and policies. Banks are required to identify, investigate and address any breaches of the fairness obligation and report them to the BCCC.

Further, the guidance makes clear that in accordance with clause 9 of the Code, banks must ensure staff are supported and trained to competently comply with clause 10. Banks must identify, investigate and fix any breaches of the fairness obligation and report them to the BCCC.

The BCCC says that it considers that 'Clause 10 is one of the Code's most important obligations and should be embedded within banks' internal culture to ensure they meet the BCCC's expectations – to act fairly, reasonably and ethically in all circumstances'. Together with the Guiding Principles that underpin the Code, the BCCC says that clause 10 is as much about the culture of a bank as it is about the way its staff engage with customers.

As such, the BCCC will assess whether a Code subscribing bank has engaged its customers in a fair, reasonable and ethical manner in every aspect of its monitoring work.

[Source: Banking Code Compliance Committee media release 26/11/2019; 26/11/2019; Guidance Note on clause 10 of the Banking Code of Practice; BCCC reports: Compliance with the Code of Banking Practice during 2018-2019; Transition to the 2019 Code of Banking Practice]

Updated superannuation guidance released: APRA has released revised guidance on the business outcomes review and the legislated outcomes assessment

Following consultation, Australian Prudential Regulation Authority (APRA) Deputy Chair Helen Rowell has written to Registrable Superannuation Entities (RSEs) announcing the release of the final revised Prudential Practice Guide SPG 516 Business Performance Review and outlining APRA's response to submissions.

Key changes? APRA says that the key changes to SPS 515 are: 1) the introduction of the business performance review (BPR) and; 2) requirements to support the outcomes assessment required under section 52 of the Superannuation Industry (Supervision) Act 1993 (SIS Act).

The changes are intended to 'ensure all RSE licensees clearly understand APRA's expectations in respect of undertaking the BPR and the outcomes assessment'.

Part of APRA's heightened supervisory focus on addressing underperformance: Ms Rowell said that the release of SPS 515, the release of an information paper on APRA's forthcoming MySuper heatmap (see: Governance News 20/11/2019), and the commencement of APRA's Superannuation Data Transformation project, are 'mutually reinforcing' initiatives designed to ensure an industry wide focus on enhancing member outcomes and signal to industry APRA's 'heightened focus' on ensuring areas of 'underperformance across industry are addressed in a timely manner'.

Timeline? APRA says it expects that all RSE licensees will have updated their strategic objectives, business plans and expenditure management processes, so as to be compliant with SPS 515 from 1 January 2020.

[Sources: APRA letter to industry: Response to submissions — proposed revisions to SPG 516 27/11/2019; Prudential Practice Guide SPG 516 Business Performance Review]

In Brief | Super merger announced: Industry superannuation funds MTAA Super and Tasplan have reportedly finalised an unconditional agreement to merge on 1 October 2020. Reportedly, the merger will create a combined national superannuation fund with more than $23 billion funds under management and approximately 335,000 members

[Source: InvestorDaily 29/11/2019]

In Brief | Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019 — the Bill proposing to provide for a one-off amnesty to encourage employers to self-correct historical superannuation guarantee non-compliance — has progressed to second reading stage in the Senate

[Source: Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019]

In Brief | The Australian Banking Association Council has appointed CBA CEO Matt Comyn as Chair, and Managing Director of Bendigo and Adelaide Bank Marnie Baker as Deputy Chair, at its Annual General Meeting

[Source: ABA media release 03/12/2019]

Corporate Misconduct and Liability

Top Story | DPA scheme? Combatting Corporate Crime Bill introduced (again)…

Overview | Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 and the consultation on draft guidance

On 2 December, the government introduced the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 into the senate.

Broadly, the Bill proposes to introduce a new corporate offence for the failure to prevent the commission of a foreign bribery offence by an associate of a body corporate and to introduce a deferred prosecution agreement scheme (DPA scheme).

[Note: A similar Bill, Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (2017 Bill), was introduced in December 2017 and lapsed at the end of parliament on 1 July 2019. Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (2019 Bill) differs from the 2017 Bill in that the 2019 Bill proposes to introduce a general definition of 'dishonest' into the Dictionary of the Criminal Code which will replace the two-limb test for dishonesty with the objective test for dishonesty endorsed by the High Court in Peters v The Queen (1998) 192 CLR 493. This was not included in the 2017 Bill.]

Snapshot

Broadening the offence of foreign bribery and the introduction of a new offence

Schedule 1 would amend the Criminal Code by amending Division 70 (bribery of foreign public officials). Schedule 1 of the Bill proposes to:

- Amend the offence of bribery of a foreign public official (section 70.2 of the Criminal Code) by 'broadening the offence, removing unnecessarily restrictive requirements and clarifying some requirements'. The explanatory memorandum identifies the main changes to the existing offence, as follows.
    1. Extension of the definition of foreign public official to include a candidate for office
    2. Removal of the existing requirement that, for the offence to be established, the foreign public official be influenced in the exercise of their official duties

3. Replacement of the requirement that a benefit and business advantage must be 'not legitimately due,' with the concept of 'improperly influencing' a foreign public official
4. Extension of the offence to apply to bribery to obtain a personal advantage

- Introduce a new offence of failure of a body corporate to prevent foreign bribery by an associate. The body corporate would be liable where the associate committed the bribery for the profit or gain of the body corporate. The offence would not apply if the body corporate had in place adequate procedures designed to prevent the commission of the foreign bribery offence by its associates.

[Note: The government has separately released draft guidance on the steps that a body corporate can take to prevent an associate from bribing a foreign official for consultation. This is outlined briefly at the end of this post.]

- Schedule 1 also makes consequential amendments to the Income Tax Assessment Act 1997 to ensure the continuation of the existing policy of prohibiting a person from claiming a deduction for a loss or outgoing the person incurs that is a bribe to a foreign public official.

Deferred Prosecution Agreement Scheme

Schedule 2 of the Bill would implement a Commonwealth Deferred Prosecution Agreement (DPA) scheme.

- **How would it work?** Under the DPA scheme, the Commonwealth Director of Public Prosecutions (CDPP) would be able to invite a corporation that has engaged in serious corporate crime to negotiate an agreement to comply with a range of specified conditions. Subject to corporation fulling its obligations under the agreement (the DPA), the corporation would not be prosecuted in relation to the offences specified in the DPA. A breach of the terms of a DPA could result in the CDPP commencing prosecution or renegotiating the terms of the DPA with the corporation. DPAs would only available with respect to a specific set of serious corporate criminal offences.
- **DPAs would only apply to corporations (not natural persons):** The explanatory memorandum explains that the DPA scheme is intended to encourage corporations to self-report misconduct by offering greater certainty of outcome when compared to litigation, and an opportunity to avoid some of the reputational and financial costs associated with lengthy criminal investigations and trial processes. The explanatory memorandum adds that, for this reason, DPAs are not available to natural persons, and the scheme is designed to apply to corporations.
- **Admissions of misconduct, financial penalties and disgorgement of profits/benefits:** The explanatory memorandum states that the scheme is aimed at enhancing business accountability and supporting improved corporate culture. On this basis, parties to a DPA would be required to admit to agreed facts detailing their misconduct, pay a financial penalty to the Commonwealth and disgorge profits and other benefits obtained through the misconduct. The explanatory memorandum adds that it is also likely that a DPA would typically require a corporation to implement or improve a compliance program or policies, and cooperate in any investigation relating to the matters specified in the DPA (including any investigation against individual company officers).
- **'No free passes':** The Explanatory Memorandum notes that the Bill contains a number of safeguards to ensure that the DPA scheme does not represent a 'free pass' to corporations who have engaged in serious corporate crime. For example the Bill provides that: a DPA will not enter into force until it has been independently assessed by an 'approving officer' who is an appointed former judicial officer; the Director of the CDPP must be satisfied that entering into a DPA is in the public interest before submitting a DPA to an approving officer for consideration; and allows for the prosecution of a party who materially contravenes a DPA, or who provided inaccurate, misleading or incomplete information to a Commonwealth entity in connection with a DPA or a DPA negotiation.

[Note: On 15 November, The Australian Law Reform Commission released a discussion paper seeking feedback on 23 proposals to reform the Corporate Criminal Regime (for a summary see: Governance News 20/11/2019). Among other things, the ALRC seeks feedback on whether a deferred prosecution agreement (DPA) scheme for corporations should be introduced into Australia as proposed by the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (or with modifications). As flagged above, the 2019 Bill is largely similar to the 2017 Bill.]

New definition of 'dishonest'

Schedule 3 of the Bill proposes to repeal the existing definitions of 'dishonest' in the Criminal Code and replace it with a new definition of 'dishonest' into the Code's Dictionary.

Under the new definition, dishonest means 'dishonest according to the standards of ordinary people', consistent with the test for dishonesty endorsed by the High Court in Peters v The Queen (1998) 192 CLR 493.

The new definition of 'dishonest' would apply to conduct occurring wholly on or after the commencement of the Bill. Where a relevant offence involves ongoing criminal conduct which begins before and continues after the commencement of these amendments, the current test in the Criminal Code will apply.

The explanatory memorandum states that the new general definition of 'dishonest' is not intended to impliedly affect the meaning of 'honest' or 'honestly' when those words are used in the Criminal Code within their ordinary meanings.

[Sources: Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019; Explanatory Memorandum; Senator Duniam, second reading speech: Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019]

Consultation on draft guidance

The government also released draft guidance on the steps that a body corporate can take to prevent an associate from bribing a foreign official for consultation.

Some Key Points

- Part 1 of the guidance sets out the foreign bribery offence and the proposed corporate offence of failing to prevent foreign bribery with examples to illustrate how the foreign bribery offences operate.
- Part 2 sets out draft guidance on the types of measures a body corporate could implement and suggested steps/procedures it could take to prevent an associate from bribing a foreign public official including: risk assessment; management dedication; due diligence; communication and training confidential whistleblowing reporting mechanisms, and monitoring and review of compliance programs. The guidance is principles-based, 'rather than a checklist for compliance and is designed to be of general application to corporations of all sizes and in all sectors' and as such it anticipates that the approaches taken by different firms will vary. For example, it's suggested that in general, small firms may need less extensive policies and implementation mechanisms than large organisations that face the same foreign bribery risk because larger organisations will need to implement the polices on larger scale (and usually have more complex reporting and managerial structures).
- Part 3 provides examples to demonstrate how policies and procedures to prevent foreign bribery could be applied in practice.

In his second reading speech, Senator Duniam said that the draft guidance is largely modelled on the UK government's guidance that accompanies the 'failure to prevent' offence under section 7 of the UK Bribery Act.

He added that in preparing the guidance, the government also had regard to existing guidance published by the Australian Trade Commission, the OECD and other international organisations with a view to enabling Australian companies that have already framed their anti-bribery policies on international guidelines to easily incorporate additional policies relevant to the Australian context.

Timeline: The deadline for submissions is 28 February 2020. The government plans to finalise the guidance before the new foreign bribery offences are operative, if the Bill is passed by Parliament.

[Sources: Attorney General's Department media release 02/02/2019; Draft guidance on adequate procedures to prevent the commission of foreign bribery; Senator Duniam, second reading speech: Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019]