Governance News

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Remuneration

NAB has issued an update on CEO pay arrangements and the selection process for the appointment of a new Chair and Group CEO

National Australia Bank has issued a short statement confirming arrangements for outgoing CEO Andrew Thorburn and interim Group CEO Phil Chronican.

- **No unvested deferred awards:** Nab writes, 'Mr Thorburn has resigned and will finish at NAB on 28 February 2019. In accordance with his contractual entitlements, Mr Thorburn will receive payment of $1,041,449 in lieu of 26 weeks' notice, along with accrued leave entitlements. All Mr Thorburn's unvested deferred awards will be forfeited in accordance with plan rules'.
- **Interim CEO to receive no variable remuneration/director fees while in the role:** Interim CEO Mr Chronican, will commence in his new role on 1 March 2019, and will serve in the role until the appointment and commencement of a new Group CEO. For the period he is in the role, NAB writes, he will receive a fixed monthly fee of $150,000 including superannuation, representing an annualised remuneration of $1.8 million. The statement adds that he will not be eligible for any variable remuneration, nor will he receive Non-Executive Director fees in the role.

The statement also says that the NAB board has established two special committees to manage the selection processes for the Chairman and Group CEO roles.

The Chairman Selection Committee will be chaired by NAB Director David Armstrong and the CEO Selection Committee will be chaired by NAB Director Ann Sherry. Other committee members will be selected from the Board. The current Chairman will not be a member of either committee.

Global search firms will assist the committees by making recommendations for the board to consider.

[Sources: NAB ASX Announcement 20/02/2019; [registration required] The AFR 20/02/2019; Financial Standard 20/02/2019; The New Daily 20/02/2019; The SMH 20/02/2019]

Shareholder Activism

Top Story | Is Glencore a tipping point? Investor lobby group Climate Action 100+ will reportedly target 12 Australian companies following its successful campaign at Glencore

Following successful engagement with Climate Action 100+ signatories, miner Glencore has committed to aligning its business and investments with the goals of the Paris Agreement. Climate Action 100+ has welcomed Glencore's commitment and flagged that it will now look to other companies to follow suit.

Key Takeaways

1. Glencore recently announced its decision to cap coal production at current levels and to prioritise investment in commodities supporting low-emissions technology following engagement with global lobby group Climate Action 100+ signatory investors
2. Climate Action 100+ will reportedly target 12 Australian companies following its successful campaign at Glencore
3. Reportedly, Climate Action 100+ is not seeking coal mine closures and/or divestment, but rather will make 'reasonable asks' of companies in the best long-term interests of investors

Glencore will align its business and investments with the goals of the Paris agreement

Glencore PLC has issued a statement strengthening its commitment to combatting climate change following engagement with lobby group, Climate Action 100+ signatories (The Church Commissioners for England, Investec Asset Management and Kempen).

Among other things, Glencore has committed to:

- capping coal production at current levels;

- prioritising investment in commodities supporting low-emissions technology
- reiterated that it will continue to disclose the metrics, targets and scenarios used to assess and manage relevant climate-related risks and opportunities in alignment with the Taskforce on Climate-related Financial Disclosures (TCFD) recommendations
- committed to reviewing its trade association memberships to ensure they are consistent with its climate stance. Glencore has also said it will publicly disclose the result of the review including any material misalignments identified and actions that will be taken.

'To deliver a strong investment case to our shareholders, we must invest in assets that will be resilient to regulatory, physical and operational risks related to climate change. To meet the growing needs of a lower carbon economy, Glencore aims to prioritise its capital investment to grow production of commodities essential to the energy and mobility transition and to limit its coal production capacity broadly to current levels' Glencore states.

Tipping point? Will other companies follow suit?

Climate Action 100+ has welcomed Glencore's statement suggesting that it may be the beginning of a broader shift in approach. Fiona Reynolds, a member of the global Climate Action100+ Steering Committee and CEO, the Principles for Responsible Investment (PRI) said 'We welcome this announcement from Glencore and think it will send a powerful signal to other companies about aligning their businesses to the Paris Agreement. It also demonstrates the success of investor engagement. Both corporates and investors need to act now and with urgency on climate action'.

Emma Herd, a member of the global Climate Action 100+ Steering Committee and Chief Executive Officer of the Investor Group on Climate Change (Australia/New Zealand) said that Glencore's announcement represents 'a significant step for the mining sector with potentially wide-reaching implications' adding that 'Investors will now be looking for more companies in the sector to align their business decisions with the Paris Agreement'.

Glencore's announcement has received wide media attention.

- **A 'major reversal'?** The WSJ describes it as a 'major reversal' for the company given its investment in recent years in coal, and for the CEO Ivan Glasenberg who has championed that investment. The WSJ notes that Glencore is the latest company to agree to the investor climate demands to date, but suggests that 'many more are likely to follow as companies prepare for their annual meetings of shareholders in the coming months'.
- **A matter of 'value over volume'?** The AFR reports that analysts are sceptical of Glencore's motives suggesting that the company stands to benefit commercially from the production limits. Capping coal production was significant because prices could remain high amid tighter supplies. 'Glencore is chasing value over volume' Wood Mackenzie research director Prakash Sharma is quoted as saying.

Other companies to be similarly targeted

- **Shareholder resolution at BP:** Climate Action 100+ signatory investors have proposed what they describe as a 'far-reaching shareholder resolution' at BP committing the company to working to a business strategy consistent with the goals of the Paris Agreement. Significantly, BP's Board of Directors is recommending its shareholders support the resolution. Mindy Lubber, Climate Action 100+ global Steering Committee vice chair, and Ceres CEO and President said 'We are encouraged that BP will take this positive step to align its business strategy with the goals of the Paris Agreement. Going forward, investors will expect full and transparent disclosure, and will hold the board and company executives accountable for BP's progress against this critical commitment'.
- **12 Australian companies to be similarly targeted?** The AFR reports that Climate Action 100+ (which includes Australian Super as a signatory) has said it plans to target BHP and Rio Tinto over carbon emissions, following their successful campaign at Glencore.
- In addition, the group will reportedly target ten other Australian companies: Adelaide Brighton Ltd, AGL Energy Limited, Boral Limited, Qantas Airways Limited, Santos Limited, South32 Limited, Woodside Petroleum Ltd, Woolworths Group Limited, Bluescope Steel Limited and Origin Energy.

- **Not looking for coal mine closures?** The AFR quotes Australian Super senior manager of investment governance David Gray as saying that coal mine closures and divestment were not an objective of Climate Action 100+ engagement activity. Rather, he said that the group wants to engage with companies so it can make 'reasonable asks' about climate change risk in the best long-term interests of members. Mr Gray went on to say that the group is preparing reports on each of the 12 companies.

[Sources: Climate Action 100+ media release 20/02/2019; 01/02/2019; Glencore media release 20/02/2019; [registration required] The WSJ 20/02/2019; [registration required] The AFR 21/02/2019; 21/02/2019; 24/02/2019]

Exxon is reportedly seeking to block an investor climate disclosure proposal. Investors supporting the proposal have criticised the company's lack of engagement on the issue

ExxonMobil, has reportedly attempted to block an investor climate proposal (sponsored by New York State Common Retirement Fund and the Church of England among others) from being put to shareholders at its annual meeting May by applying to the Securities and Exchange Commission (SEC) to exclude it.

Reportedly, the proposal, led by the pension fund for New York state, calls on the company to set targets for green house gas (GHG) emissions that are 'aligned with the greenhouse gas reductions goals established by the Paris climate agreement'.

According to The FT, Exxon applied to SEC to exclude the proposal on the basis that it is:

- **misleading:** Exxon reportedly argues that the way in which the proposal is framed 'reflects a misunderstanding both of the nature of the Paris agreement and of the global energy economy' and this makes the proposal fundamentally misleading.
- **amounts to an attempt to 'micro-manage the company'**: Exxon reportedly argues that setting short, medium and long-term targets for GHG emissions as requested under the proposal amounts to giving shareholders oversight over its 'day-to-day considerations.
- **has already been substantially implemented**: Exxon reportedly argues that it is already reducing its emissions through initiatives such as its plan to cut leaks or methane from its operations.

Reportedly investors have expressed disappointment in Exxon's approach suggesting that its failure to engage on the issue is 'an outdated reflex'. A Calpers representative is quoted as suggesting that if Exxon disagreed with the plan, it should be discussed at the annual meeting and put up for a vote, adding that 'The SEC should not be in the role of muffler to important debate.'

The FT comments that SEC's decision on whether to allow Exxon to prevent a vote on the proposal will be an important test for the SEC, which in recent years has been inconsistent in its approach, accepting some requests from companies to avoid votes on climate-related proposals, but accepting others.

Only a matter of time? Reuters suggests that given increasing investor pressure, companies are increasingly moving towards greater transparency. For example, Shell and BP have already made pledges along the lines of more transparent emissions reporting and have committed to reducing emissions in coming years. Given this, Reuters suggests that Exxon 'will be forced to join the group' in time.

[Sources: [registration required] The FT 25/02/2019; Climate Liability News 25/02/2019; Reuters: Oilprice 25/02/2019]

Setback for activist Edward Bramson's campaign for a board seat at Barclays? Aviva Investors has reportedly backed the bank against the activist

The FT reports that Aviva Investors, which has previously been supportive of activist Mr Bramson has said it will vote against his election to the Barclays board. Aviva’s decision not to support Mr Bramson will carry extra weight, The FT comments, because it is a shareholder in both the bank and Sherborne Investors, Mr Bramson’s investment vehicle.

Reportedly, Aviva's decision follows better than expected fourth quarter results for Barclays' markets division (a division which Mr Bramson has argued should be scaled back).

Barclays CEO Jes Staley has reportedly commented that Mr Bramson's position is unlikely to be supported by other large shareholders.

[Source: [registration required] The FT 21/02/2019]

Disclosure and Reporting

Alleged failure to meet continuous disclosure obligations: ASIC has commenced proceedings in the Federal Court against GetSwift Ltd and two directors

The Australian Securities and Investments Commission (ASIC) has commenced proceedings in the Federal Court against GetSwift Limited (GetSwift) and its director (and then executive Chair) Mr Bane Hunter and director (and then managing director) Mr Joel Macdonald.

ASIC alleges that:

- GetSwift made representations in a series of ASX announcements relating to client agreements, between February 2017 and December 2017 that 'were misleading' and also alleges that GetSwift failed to notify the ASX of material information in relation to the agreements. By engaging in this conduct, ASIC alleges that GetSwift contravened s674(2) and s1041H(1) 9of the *Corporations Act 2001 (Cth)* (Corporations Act) and s12DA(1) of the *Australian Securities and Investments Act 2001 (Cth)* (ASIC Act) .
- GetSwift directors were involved in the failure of GetSwift to meet its obligations and failed to discharge their duties to GetSwift 'with the requisite degree of care and diligence that a reasonable person in their respective positions would exercise'. ASIC alleges that they contravened s674(2A), s1041H(1) and s180(1) of the Corporations Act and s12DA(1) of the ASIC Act.

ASIC alleges that as a result these contraventions, the market traded on a 'materially uninformed or misinformed basis' and that the price for GetSwift securities was higher than it would have been had the disclosure of the relevant and material information been made.

ASIC is seeking:

- declarations that GetSwift, and the directors contravened provisions of the Corporations Act
- orders that GetSwift, and the directors pay penalties to the Commonwealth
- that the directors be banned from managing a corporation for such period as the Court thinks fit
- costs

The Australian reports that 'the company, Mr Macdonald and Mr Hunter irrefutably deny the accusations bought by ASIC and, collectively, will vigorously defend the proceedings.'

[Sources: ASIC media release 22/02/2019; Concise statement; Originating Process; [registration required] The Australian 25/02/2019; [registration required] The AFR 25/02/2019]

Spain | Minimal change required for companies with robust ESG reporting practices in place? Glass Lewis writes that Spain has become the first country to mandate shareholder votes on non-financial ESG reporting, adding that for some companies the reforms will require minimal change

Glass Lewis reports that by approving Law 11/2018, which transposes EU Directive 2014/95/EU on disclosure of non-financial and diversity information into Spanish law, Spain has become the first country to mandate shareholder votes on non-financial ESG reporting.

Reportedly, the law requires that large companies provide a report on non-financial information, which must be put to shareholder vote as a separate point in the annual general meeting.

The report on non-financial information must include:

- A description of a company’s business model and main factors that may affect its future development.

- A description of the policies applied by the company with respect to due diligence procedures and mitigation of risks.
- The results of these policies, including key indicators of relevant non-financial results that allow for the monitoring and evaluation of progress and facilitate comparability between companies.
- The main short, medium and long-term risks related to the activities of the company, how it manages such risks, explaining the procedures used to detect and evaluate them.
- Key non-financial indicators that are relevant to the business, and that meet the criteria of comparability, materiality, relevance and reliability.

The information included in the report must be independently verified.

The new requirements apply to financial years beginning 1 January 2018.

Compliance will not require substantial change for many companies? Glass Lewis comments that though the timeframe set for compliance is 'demanding', the European Commission guidance on the directive (on which the law was based) has been available since 2017, and that on this basis companies 'should not be entirely surprised by the requirements'. In addition, Glass Lewis writes that many Spanish companies have previously adopted robust reporting on ESG issues in line with stakeholder demand, and consequently that many will only need to make 'minor adjustments' in order to achieve compliance.

Glass Lewis adds that, for 2019 it will generally recommend voting for proposals seeking to approve a company's report on non-financial information, provided it is made available to shareholders in accordance with the law and that the companies identify a meaningful reporting framework that was used in drafting of the report.

[Source: Glass Lewis blog 20/02/2019]

Markets and Exchanges

Top Story | Proposed Changes to ASX Listing Rules in July 2019: Summary of important proposed changes for companies, directors and advisors

MinterEllison Partner, Shaun McRobert has released a summary of the more important of the proposed changes to the ASX Listing Rules. The full text of the article can be accessed on the MinterEllison website here: https://www.minterellison.com/articles/proposed-changes-to-asx-listing-rules-in-july-2019

Regulators

ACCC Chair Rod Sims' annual address to the CEDA conference has flagged competition in the financial services sector as a priority for the regulator over the coming year

In his annual address to the Committee for Economic Development Australia (CEDA, Australian Competition and Consumer Commission (ACCC) Chair Rod Sims Chair Rod Sims launched the ACCC's 2019 Compliance and Enforcement Policy. In addition to implementation of the Consumer Data Right, Mr Sims highlighted competition in the financial services sector including competition between the major banks, as a priority for the regulator over the course of the coming year.

Some Key Points

Competition in the financial services sector is a priority

Among other things, Mr Sims said that competition within the financial services sector is a priority for the ACCC in 2019. Noting that lack of competition between the major banks and in some parts of the financial services sector was a theme of the Financial Services Royal Commission's final report, he said that a unit within the regulator has been focussing on market studies in the financial sector for over a year and a new Financial Services Competition Branch (which includes a permanent competition investigation team that complements the market studies team) has now been established.

He said that the ACCC expects this team to complete a number of in-depth investigations potentially resulting in court proceedings, as well as providing support for the Commonwealth Department of Public Prosecutions (CDPP) prosecution of ANZ, Citigroup, Deutsche Bank and six senior officers.

Mr Sims added that the commercial construction sector would also be an area of focus.

Cartels and collusion

The ACCC continues to aim for two or three criminal cartel prosecutions each year. In 2019, with increased budget support, Mr Sims said that he expects at least three significant cartel investigations to be referred to the Commonwealth Director of Public Prosecutions (CDPP) for a decision on whether to prosecute. He identified conduct that may contravene the new misuse of market power and concerted practices provisions as an area of particular focus, flagging that he is 'confident that we will bring proceedings under these provisions this year'.

Policy advocacy

'Compliance with the law must be the responsibility of all firms; the ACCC's role is both in general education and in enforcement action to encourage this compliance' Mr Sims said. Areas in which the ACCC will continue to advocate for change include the following.

- The ACCC will continue to advocate for the prohibition of unfair contract terms in standard form contracts and for the imposition of penalties for their inclusion in standard form contracts. 'The guidance given by the ACCC since introduction of these laws in 2011 and recent ACCC court action should enable all businesses to avoid including unfair contract terms in their standard form contracts' Mr Sims said.
- The ACCC will also advocate that the sale of unsafe goods should be prohibited.
- Mr Sims said that the ACCC will continue to 'debate the adequacy of the laws against companies engaging in "harsh and unfair conduct" towards consumers.

New consumer enforcement priorities for 2019

Noting the passage of new laws which significantly increase the maximum penalties for contraventions of the Australian Consumer Law in 2018, Mr Sims outlined the ACCC's consumer enforcement priorities. These include the following.

- competition and consumer issues arising from customer loyalty schemes
- consumer guarantee rights in the context of the large retailers and manufacturers that supply high value consumer goods, including whitegoods and electrical goods. Mr Sims said that the regulator remains 'concerned that many such retailers and manufacturers are not complying with the consumer guarantee laws'
- advertising practices on social media platforms, and 'subscription traps'
- 'complexity and opacity of pricing' in the energy and telecommunications sectors which he commented 'are only in place to confuse and mislead consumers'

In addition, Mr Sims said that the regulator will continue to focus on the business-to-business unfair contract term laws, particularly in the agricultural sector, and 'in many others'. 'Unfair contract terms can cause great harm to small businesses and farmers' he said.

ACCC market studies

Market studies highlighted by Mr Sims included:

- Northern Australia Insurance Inquiry into whether some form of assistance may be appropriate to reduce rapidly rising insurance premiums in Northern Australia
- The initial focus of financial services work will be on why foreign exchange fees 'seem to remain stubbornly high'. There will also be further studies and investigations this year 'that go to the heart of competition in banking'

- The Digital Platforms Inquiry will be completed by 'mid-year'
- Electricity affordability will also continue to be an area of focus

Limits on the ACCC's ability to promote strong competition

Value of competition as a check on behaviour: Mr Sims made clear that in his view, 'company behaviour will most benefit consumers and the community if it occurs within a framework of those companies facing strong competition from a sufficient number of competitors'.

Limited appetite for the ACCC to enforce the law? Mr Sims noted that the law prohibits mergers and agreements likely to substantially lessen competition, but that enforcement was not always straightforward. 'We must in particular remember that when we oppose a proposed merger under Section 50, there is no question of a penalty for breaching the law. Instead, what is at stake is the level of concentration, and so the health, of the Australian economy. There seems, if anything, a current bias to excessive consolidation; to fewer firms in each sector. As a community we need to question whether this is the outcome we want' he said. He added that the ACCC is 'increasingly concerned that the bar for establishing a likely substantial lessening of competition is being raised to a height that is failing to protect competition and ultimately consumers' he said.

Excessive value placed on the capacity of market forces to overcome issues caused by lack of competition: Mr Sims said that 'there often seems to be too much weight placed on the capacity of market forces to overcome problems caused by a lack of competition in concentrated markets. There seems to be undue optimism that new entry will rapidly occur if firms attempt to exercise market power or that a small number of large players will compete rather than simply accommodate each other so that all can make abnormal profits. Further, at times considerable weight is given to the naturally self interested testimony of business executives about their intent and the impact of the transaction or conduct at issue, while at the same time there is little if any weight given to the ACCC's competition concerns and evidence regarding the likely future state of competition in the relevant markets.'

[Source: ACCC Chair Rod Sims' address to the Committee for Economic Development Australia (CEDA) 26/02/2019]

In his opening statement to the senate economics legislation committee APRA Chair Wayne Byres' said (among other things) that he expects the trend towards consolidation of the superannuation sector to continue

In his opening statement to the Senate Economics Legislation Committee, Australian Prudential Regulation Authority (APRA) Chair Wayne Byres emphasised that though 'there are areas where the financial sector clearly needs to make significant changes and improvements, the soundness and stability of the financial system has never been called into question by the Royal Commission'.

Mr Byres also commented on the recently completed Financial Services Royal Commission and reiterated APRA's planned actions in response (see: Governance News 13/02/2019); the trend towards consolidation in the superannuation sector; housing; and APRA's continued focus on implementation of the Banking Executive Accountability Regime (BEAR).

Some Key Points

Superannuation

- **Trend towards consolidation in the sector is expected to continue:** Mr Byres noted that while the asset pool being managed by the industry has increased, from $1.1 trillion to $2.7 trillion over the past 10 years, the number of APRA-regulated funds has more than halved over the same period, from 466 in 2008 to 198 in 2018 with the bulk of this consolidation occurring in the corporate and retail segments of the industry. He said APRA's work to improve member outcomes in superannuation (eg by strengthening the prudential regime) is one driver of the trend, adding that the regulator expects further consolidation in the superannuation system 'particularly to weed out underperformers' going forward.
- **Further consolidation is expected:** Mr Byres said that the combination of APRA's Member Outcomes Project, new prudential requirements setting a higher bar for RSE licensees (requiring a robust assessment of the outcomes delivered for members to be reflected in their strategic and business planning see:

Governance News17/12/2018) and the strengthening of the legislative framework (*Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 1) Bill 2017)* are likely to drive further consolidation. For example, he noted that already 13 of 28 funds identified by APRA as part of the Member Outcomes Project, have decided to exit the industry. Mr Byres appeared to welcome the shift commenting 'It is difficult to argue that Australia needs as many as 200 superannuation funds or 40,000 plus investment options',

[Note: *Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 1) Bill 2019* has passed the senate (having been amended) and is currently before the House of Representatives. See: Governance News 20/02/2019.]

- **To foster competition in the sector, APRA will continue to assess fund performance on a range of measures**: Mr Byres said is important that 'new competitors to the marketplace, who will inevitably start without a track record and potentially high costs until they can generate scale, are not prohibited from entering the system'. For this reason, he said that APRA would continue to advocate an approach that looks at performance of trustees across a number of dimensions, and does not rely solely on measures of historical returns over a particular time horizon as the only determinant of success or otherwise.

Banking Executive Accountability Regime (BEAR)

- Mr Byres said that APRA continues to devote 'significant resources' to the roll out of the BEAR. Once fully in force for all ADIs (1 July 2019), he said that the BEAR will apply to around 1,500 executives and directors in the banking sector.
- Mr Byres said that APRA is supportive of the Royal Commission's recommendation that the BEAR be extended to apply to all APRA-regulated entities and that consistent with its submissions to the Commission, APRA is also supportive of expanding the regime to more explicitly address misconduct, and in doing so provide for an explicit role for ASIC under the regime. This will largely mirror, he said, the Senior Manager Regime in the UK, and provide a clearer and more comprehensive set of accountability obligations across the financial sector.

Housing

Mr Byres said that 'banks remain willing to lend' adding that 'while approval timeframes may have lengthened and maximum loan amounts reduced, neither approval rates nor loan sizes have materially declined'. He went on to say that 'sound lending standards need to be applied through the cycle, regardless of whether housing prices are rising, falling or moving sideways'.

[Source: APRA Chair Wayne Byres, Opening statement to the Senate Economics Legislation Committee 21/02/2019]

APRA has reportedly welcomed new enforcement powers and is willing to use them but has cautioned that it 'will not be all of a sudden a police force'

Investor Daily and Independent Financial Adviser report that, appearing before the Senate Economics Legislation Committee, Australian Prudential Regulation Authority (APRA) Chair Wayne Byres has said that though the regulator is welcoming of additional enforcement powers, APRA's approach to enforcement will not be a complete shift away from the approach the regulator has traditionally taken. 'We will still be, at our heart though, a prudential regulator. We will not be all of a sudden a police force. But I think we can do more, particularly if we are well-equipped to do so, quicker than we have in the past' Mr Byres reportedly said.

Media reports have commented that APRA is currently reviewing its enforcement strategy with the assistance of an Independent Expert Panel (see: Governance News 19/11/2019). This review has a wide scope that includes consideration of when to hold individuals to account (including under the BEAR), when it would be appropriate to take enforcement action to achieve general and specific deterrence in appropriate cases and APRA's governance and other arrangements in relation to enforcement decisions. The report is expected to be completed at the end of March 2019 and published shortly thereafter.

[Sources: APRA media release 21/02/2019; Investor Daily 25/02/2019; Independent Financial Adviser 25/02/2019; Financial Standard 22/02/2019; Pensions and Investments 25/02/2019]

'Generally high conformity to international best practices': APRA and the Treasurer have welcomed IMF's assessment of the Australian Financial System

The Australian Prudential Regulation Authority (APRA) Chair Wayne Byres, and Treasurer Josh Frydenberg have separately released statements welcoming the results of the IMF assessment of the financial stability and regulatory oversight of the Australian financial sector.

The assessment was conducted 2018 as part of The Financial Sector Assessment Program (FSAP).

As part of the FSAP review, APRA was subject to an assessment of its supervisory approach and capabilities in banking and insurance supervision. The IMF also assessed the adequacy of systemic risk oversight by APRA and other members of the Council of Financial Regulators (CFR), as well as crisis preparedness, and financial safety nets.

Among the findings highlighted by APRA Chair Wayne Byres were the following:

- The FSAP made positive findings on important issues of financial stability and resilience in the Australian system:
    - policy action has lowered financial stability risks in the banking system through the introduction of stronger lending standards, including the temporary restrictions on the growth of investor loans and the share of interest-only mortgages
    - bank capital requirements have been raised and applied more conservatively than minimum Basel standards and Australian authorities have taken welcome steps to further strengthen the resilience of banks through stress testing programs
    - bank solvency appeared resilient to stress based on the IMF's own stress testing exercise with the results broadly in line with stress testing undertaken by APRA
- 'prudential supervision shows generally high conformity to international best practices, but with opportunities to strengthen practices further in some areas'
- He added that 'amongst other findings, the report notes the need for additional investment in data and analytical tools to strengthen prudential supervision and systemic risk oversight' which he said is already recognised in APRA's 2018-2022 Corporate Plan.

The AFR highlights a number of instances where the report suggests improvement is warranted including with respect to data collection and analysis: 'Relative to international experience, the assessment identified shortfalls in the granularity and consistency of data to support the analysis of supervisory and systemic risks and the formulation of policy'. Investor Daily also comments that the assessment warns of a number of risks to the financial system including stretched real estate valuations and high household debt levels.

[Sources: APRA media release 22/02/2019; Treasurer Josh Frydenberg media release 22/02/2019; [registration required] The AFR 22/02/2019; Investor Daily 26/02/2019]

Open Banking | APRA is open to extending timeframes (if needed)? The AFR reports APRA Chair Wayne Byres has told the senate committee that he doesn't 'have any information at this stage' to indicate big banks won't be ready to supply product data to customers by 1 July (the date at which a pilot program to test the reliability of the open banking system is set to commence) but that it is important to keep the timelines 'under review' given the industry has some 'legitimate concerns' about the regime

[Source: [registration required] The AFR 24/02/2019]

ASIC Chair James Shipton's opening statement to the senate economics legislation committee reiterated the regulator's tougher stance on enforcement

Australian Securities and Investments Commission (ASIC) Chair James Shipton's opening statement to the senate economics legislation committee largely reiterated the content of ASIC's recent update on implementation of the Financial Services Royal Commission Recommendations including emphasising ASIC's tougher approach to enforcement (see: Governance News 20/02/2019.)

'ASIC is very focused on enforcement and litigation. Corporate Australia should know that ASIC has the very clear will to take wrongdoers to court. As the Royal Commission found, that is what Australians expect of their regulator. And that is what ASIC will deliver' he said.

The AFR reports that ASIC Chair James Shipton and head of ASIC's new enforcement unit Daniel Crennan also called, during the course of questions, for the regulator to be granted confiscation powers and for the creation of a criminal division of Federal Court.

[Sources: Opening statement by James Shipton, Chair, Australian Securities and Investments Commission, Senate Economics Legislation Committee 20/02/2019; [registration required] The AFR 21/02/2019; 26/02/2019]

Financial Services

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

Treasurer Josh Frydenberg has released an update on implementation of Hayne Commission recommendations 1.7, 2.4, 4.2, 4.8 & 4.11

Treasurer Josh Frydenberg has released a statement providing an update on the government's progress on implementing the Financial Services Royal Commission Final Report recommendations.

The statement also responds to the Federal Labor Party's proposed reform agenda, which the Treasurer describes as a 'part-response'. Mr Frydenberg also rejects Labor's assertions that the government is not acting swiftly enough, and/or that legislative change is necessarily required.

[Note: Labor's proposed response is outlined in a separate post in this issue of Governance News.]

Implementation update

Recommendation	Action	Timeline
Recommendation 1.7: Removal of point-of-sale exemption	**Consultation paper being prepared:** The Financial Services Reform Implementation Taskforce is preparing a consultation paper. Consultation is necessary, the Treasurer said, to ensure that the recommendation is implemented 'in a manner that ensures balance is achieved between consumer protection and access to products and services'.	None given
Recommendation 2.4 – Grandfathered commissions	**Exposure draft legislation:** The Treasurer said that the Financial Services Reform Implementation Taskforce (Taskforce) has been working on exposure draft legislation which is planned for release on Friday 22 February 2019.	Draft legislation was released on the 22 February. Submissions are due by 22 March. [Note: This is covered in more detail in a separate post in this issue of Governance News]
Recommendation 4.2 – Removing the exemptions for funeral expenses policies	**Repealing the exemption:** Treasury has consulted with ASIC on repealing the exemption, while also ensuring the interests of consumers who currently hold policies with such firms are protected.	None given
Recommendation 4.8 – Removal of claims handling exemption	**A consultation paper is being prepared:** The Financial Services Reform Implementation Taskforce	Sometime within the period: 24/2 to 3/3

	is preparing a consultation paper for 'public release next week'.	
Recommendation 4.11 – Co-operation with AFCA	**New regulation:** Financial Services Reform Implementation Taskforce is preparing a regulation to be finalised 'in March'. The regulation will 'ensure all consumers that are subject to dispute resolution by AFCA benefit from this recommendation'.	March

Mr Frydenberg also said that the government has already 'passed' two of the recommendations in the senate.

[Note: This appears to be a reference to *Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No 1) Bill 2019* which passed the senate on 14 February and is now before the House of Representatives. See: Governance News 20/02/2019]

[Source: Treasurer Josh Frydenberg media release 20/02/2019]

Proposed government reforms to implement Hayne recommendation 2.4: The government is consulting on draft legislation to ban grandfathering of conflicted remuneration paid to financial advisers

The government has released draft legislation *Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Bill 2019* and explanatory material for consultation to implement Financial Services Royal Commission Final Report recommendation 2.4 (ie that grandfathering arrangements for conflicted remuneration in relation to financial advice provided to retail clients should be removed as soon as is reasonably practicable).

Consistent with the government's initial response, the Bill proposes to remove grandfathering arrangements for 'conflicted remuneration and other banned remuneration from 1 January 2021'.

In addition, the explanatory material accompanying the draft Bill states that the Government will put forward regulations prior to 1 January 2021 which would repeal a number of other grandfathering arrangements which are continued in Part 7.7A of the *Corporations Regulations 2001 (Cth)*.

If enacted, the effect of this would be that from 1 January 2021 all remuneration of a kind banned by Divisions 4 or 5 of Part 7.7A of the *Corporations Act 2001 (Cth)* will be subject to the bans in those Divisions.

The Bill also proposes to enable the regulators to provide for a scheme under which amounts that would otherwise have been paid as conflicted remuneration are rebated to affected consumers. It's also proposed that failure to pay an amount or monetary benefit in accordance with the Regulations will attract a civil penalty.

The Treasurer said that the reform 'will benefit consumers, as they will receive higher quality advice and stop paying higher fees to fund grandfathered conflicted remuneration'. He also commented that the proposed reforms 'go further' than what was recommended by Commissioner Hayne.

Finally Mr Frydenberg said that the Government has issued a Ministerial Direction under section 14 of the ASIC Act, requiring that ASIC undertake an investigation to monitor and report on industry behaviour in the period 1 July 2019 to 1 January 2021.

The deadline for submissions is 22 March.

[Sources: Treasurer Josh Frydenberg media release 22/02/2019; Treasury media release 22/02/2019; Exposure draft: Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Bill 2019; Draft explanatory material]

Australian Financial Complaints Authority (AFCA) to accept legacy complaints from 1 July 2019

In line with the government's initial response to the Financial Services Royal Commission Final Report recommendations, Treasurer Josh Frydenberg has announced that the government has extended the Australian Financial Complaints Authority's (AFCA's) remit to consider eligible financial complaints dating back to 1 January 2008.

He said that AFCA will now consult on updating its rules so that it is in a position to begin receiving complaints under its expanded remit from 1 July 2019.

AFCA has welcomed the Treasurer's announcement. Chief Ombudsman and Chief Executive Officer, David Locke said AFCA would work with all stakeholders to implement the changes fairly and effectively.

Mr Locke added that 'AFCA's remit will be expanded for a period of 12 months to accept eligible complaints regarding conduct dating back to 1 January 2008. In most cases, we are currently only able to consider matters that have occurred within the last six years. When a complaint has been through a financial firms' internal dispute resolution process, this timeframe is reduced to two years. This change means that many more people will be able to get access to justice and have their matters properly considered.'

Further detail:

- AFCA will consider eligible complaints between 1 July 2019 and 30 June 2020, following the AFCA Rules being updated. Compensation of up to $500,000 will be available for consumers, $1m for small businesses and $2m for primary producers.
- AFCA will run a limited consultation regarding required changes to its Rules, which will need to be approved by the Australian Securities and Investments Commission. No timeframe is given.
- AFCA will issue guidance prior to 1 July 2019 to explain how people can raise their matters.

[Sources: Investor Daily 21/02/2019; AFCA media releases 04/02/2019; 20/02/2019; Treasurer Josh Frydenberg media release 20/02/2019]

Federal Labor's scheme

The AFR reports that the Federal Labor party have said that, if elected, it will establish a second financial complaints body to revisit old claims. The scheme will:

- cover misconduct by banks, insurers, financial advisers, pay-day lenders, consumer lease providers, mortgage brokers and other lenders
- be funded from a new levy paid by financial institutions
- quadruple the government's compensation limits for individuals and double the amount for small business

In addition, the CEOs of the big four banks would be required to report on progress in implementing the Financial Services Royal Commission reforms twice annually to Parliament.

[Note: Labor's response to the Financial Services Royal Commission Final Report Recommendations is covered in more detail in a separate post of this issue of Governance News.]

[Source: [registration required] The AFR 25/02/2019]

Round two: Treasury Laws Amendment (Putting Members' Interests First) Bill 2019 proposes to introduce opt-in insurance in superannuation for under-25s and holders of low balance accounts

Following the passage of the *Treasury Laws Amendment (Protecting Your Superannuation Package) Bill 2018* (see: Governance News 20/02/2019), the government introduced *Treasury Laws Amendment (Putting Members' Interests First) Bill 2019* into the House of Representatives on 20 February.

Key Points

The Treasurer and Assistant Treasurer said in a joint statement that the Bill (if enacted will):

- Require insurance in superannuation for under 25 year olds and members with low balance accounts (account balances less than $6,000) to only be offered on an opt-in basis from 1 October 2019.
- Will not prevent anyone who wants insurance in superannuation from being able to obtain it – members will still be able to opt in.

The explanatory memorandum to the Bill notes that *Treasury Laws Amendment (Protecting Your Superannuation Package) Bill 2018* as amended by the senate, will already prevent trustees from maintaining opt out insurance where a member's account has been inactive for 16 months or more.

The Treasurer said the changes seek to prevent the erosion of super savings through inappropriate insurance premiums and duplicate cover.

[Sources: Treasurer Josh Frydenberg and Assistant Treasurer Stuart Robert joint media release 20/02/2019; Treasury Laws Amendment (Putting Members' Interests First) Bill 2019; Explanatory Memorandum]

Consultation on draft regulations to implement the 'Protecting your Super' reform package

The *Treasury Laws Amendment (Protecting Your Superannuation Package) Bill 2018* passed the senate on 14 February with amendments from the Australian Greens. The Bill finally passed both Houses on 18 February (see: Governance News 20/02/2019).

On 22 February the government released draft regulations and explanatory material to implement the 'Protecting Your Super' reforms for consultation.

The deadline for submissions is 1 March 2019.

The regulations include the following information.

- **Notifications: insurance information in relation to inactive superannuation accounts**
  - when a trustee must notify a member that their account has been inactive and that insurance may no longer be offered or maintained without a direction from the member
  - where the member has directed the trustee to take out or maintain their insurance coverage, how the member can cancel their insurance
  - the information that must be included in those notices
- **Fee cap:** provide further detail to enable administration of the fee cap including the percentage of the cap and how to determine which fees are capped
- **Consolidation of inactive accounts:** The Regulations will amend the *Superannuation (Unclaimed Money and Lost Members) Regulations 1999* (SUMLM Regulations) to support account consolidation by setting out rules to direct the Commissioner as to which fund amounts should be paid.

The proposed date of effect is 1 July 2019.

[Sources: Treasury media release 22/02/2019; Exposure draft; Explanatory materials]

Labor has tabled three reform Bills in response to the FSRC Final Report Recommendations

Federal Labor leader Bill Shorten has said that Labor plans to introduce three new private member Bills to deal with five Financial Services Royal Commission Final Report recommendations.

The three Bills are:

1. *Treasury Laws Amendment (Banking Royal Commission Recommendations Implementation—Enhancing Consumer Protection) Bill 2019***:** Labor leader Bill Shorten said that the Bill amend the law to give effect to Commissioner Hayne's recommendation to strengthen consumer protection, and for related purposes.
2. *Corporations Amendment (Banking Royal Commission Recommendations Implementation—Strengthening AFCA Processes) Bill 2019*: Mr Shorten said that the Bill would give effect to Commissioner Hayne's recommendations to strengthen AFCA processes, and for related purposes.
3. *Banking Royal Commission Recommendations Implementation—Ending Grandfathered Commissions) Bill 2019*: Mr Shorten said that the Bill would amend the *Corporations Act 2001(Cth)* to give effect to Commissioner Hayne's recommendations to end grandfathering of commissions in financial advice, and for related purposes.

[Sources: House Notice Paper No. 161: Private members' business 20/02/2019; The Guardian 19/02/2019; Investor Daily 21/02/2019]

Labor to implement 75 of 76 FSRC Recommendations in full: The Federal Labor party has released a 'full response' to the Financial Services Royal Commission Final Report

The Federal Labor Party has released a full response to the Financial Services Royal Commission's Final Report recommendations. According to the statement, if elected, Labor will implement 75 of 76 'recommendations in full' (Recommendation 1.3 Mortgage Broker Remuneration is the recommendation the exception) and 'act faster and go further in standing up for victims of banking misconduct' than the government.

Some Key Points

Mortgage brokers

With respect to Recommendation 1.3: Mortgage broker remuneration, Labor has said that the recommendation 'will be implemented in a manner that will achieve the objectives set out by Commissioner Hayne. Labor will still achieve the objective of ending conflicted remuneration in mortgage broking, but we will do so in a manner that does not harm competition in the mortgage market'.

If elected Labor has said that it will:

- introduce a best interests duty for brokers;
- ban trail commissions for brokers (prohibition to apply from 1 July 2020);
- ban payment of any other incentives to brokers by lenders;
- cap commissions at a fixed percentage of loan size so that banks can't offer brokers incentives to choose their products; and
- regulate that a commission can only apply to the amount drawn down by the borrower, not the total loan amount.

Accountability measures

In addition, Labor plans to introduce accountability measures requiring:

- major companies, industry bodies, APRA and ASIC, to publicly report to the Royal Commission Implementation Taskforce about their progress in implementing recommendations every 6 months
- the four major banks, APRA and ASIC to develop Royal Commission implementation plans by 1 August 2019 and submit them to the Royal Commission Implementation Taskforce
- the four major bank CEOs and the Australian Banking Association (ABA) to report to the House of Representatives Economics Committee on the progress of their banks in implementing the recommendations of the Royal Commission every 6 months

Compensation scheme of last resort

Labor will establish a more 'comprehensive retrospective compensation scheme than the Government'. The scheme would be: funded by AFCA members (which Labor says is a saving of $30m for taxpayers); 'cover more victims' than the government's scheme; be able to award more compensation; and be independent of Australian Financial Complaints Authority (AFCA).

Additional Measures:

- **Extension of legislation for Product Intervention Powers (PIPs) and Design and Distribution Obligations (DDOs):** Labor has circulated amendments in the House of Representatives to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018* to extend the DDOs and PIPs to ASIC Act products and the DDOs to NCCP Act products. Labor writes that the measures 'could easily be passed into law before the May 2019 election if the Parliament was permitted to sit in March 2019'.
- **Review of the effects of vertical and horizontal integration in the financial system to occur in Labor's first term (if elected):** Labor will require the ACCC to undertake 5 yearly market studies on the

effect of vertical and horizontal integration in the financial system. If elected, the first of these reviews will be undertaken during Labor's first term in office.

- **Whistleblowing:** Labor plans to set up a Whistleblower Rewards Scheme; establish a Whistleblower Protection Authority; 'overhaul our whistleblowing laws with a single Whistleblowing Act'; and fund a special prosecutor to bring corporate criminals to justice.
- **'Improvements to the Australian Financial Complaints Authority':** Labor adds that, if elected, it will substantially increase AFCA compensation caps, 'quadrupling the compensation cap for consumers and doubling the compensation cap for small businesses'. Labor will remove the AFCA sub-cap on non-financial loss, recognising the serious non-financial impacts of financial service provider misconduct. Labor will require AFCA to report the names of financial firms in published determinations where AFCA finds in favour of the customer. Labor will also increase Parliamentary oversight of AFCA by requiring AFCA to report to the House Economics Committee about its activities and any systemic issues it has observed.
- **Funding for Financial Counselling:** Labor has committed to delivering 'stable, long-term funding for financial counselling and financial services specialist community legal centres'.
- **Accountability mechanisms:** Labor will: require major companies, industry bodies, APRA and ASIC, to publicly report to the Royal Commission Implementation Taskforce about their progress in implementing recommendations every 6 months; require the ABA, the four major banks, APRA and ASIC to develop Royal Commission implementation plans by 1 August 2019 and submit them to the Royal Commission Implementation Taskforce; and require the four major bank CEOs and the Australian Banking Association (ABA) to report to the House of Representatives Economics Committee on the progress of their banks in implementing the recommendations of the Royal Commission every 6 months.
- **Access to Justice Senate inquiry:** Labor will consider reforms to improve access to justice in financial services disputes for consumers and small businesses. Labor has called for and will participate actively in the Senate inquiry into access to justice in financial services.
- **Reforms to regulation of other financial service providers:** Labor Senators will be making a range of recommendations about regulation of financial service providers covered by this inquiry, and Labor will make further announcements about these recommendations in due course
- **New civil enforcement body:** If it becomes apparent that ASIC is not sufficiently enforcing laws within its remit, Labor will consider establishing a specialist civil enforcement agency.

Measures possible to implement prior to the election (were extra sitting days added)

Labor also identifies a number of recommendations which it maintains, could be actioned ahead of the Federal election (expected in May), if more sitting days were added in March. These include the following:

Recommendation 1.7 (removal of the point of sale exemption)	Recommendation 2.2 (disclosure of independence)
Recommendation 2.4 (grandfathered commissions)	Recommendation 3.4 (no hawking)
Recommendation 4.2 (removing the exemption for funeral expenses policies)	Recommendation 4.8 (removal of claims handling exemption)
Recommendation 4.11 (cooperation with AFCA)	

Rushing through legislation is not the best way forward?

Responding to the release of Labor's statement, Treasurer Josh Frydenberg said that 'In calling for additional sitting weeks to rush their flawed legislation full of loopholes through parliament they have not only acted against the clear warnings of the Law Council of Australia that "Parliament must hasten slowly" but even more importantly, they ignored Commissioner Hayne's finding that complexity of financial services laws has been part of the problem. Their desire to rush ill-conceived laws into Parliament has been exposed for what it is: irresponsible and serving to only compound the problem'.

[Sources: Shadow Treasurer Chris Bowen 22/02/2019; Labor's response to the Royal Commission into misconduct in the banking, superannuation and financial services industry 22/02/2019; Treasurer Josh Frydenberg media release 22/02/2019]

(If elected) Labor plans to establish a 'Banking Fairness Fund' and will impose a levy on Australia's largest banks to fund services to those in financial difficulty

Federal Labor leader Bill Shorten has said that if elected, Labor will establish a $640 million Banking Fairness Fund and impose a levy on Australia's biggest banks. The levy will raise $160m per year and be used to fund services to those in financial difficulty.

- Labor plans to double the number of financial counsellors across Australia from 500 to 1000 with a $320 million commitment from the Banking Fairness Fund over the next 4 years.
- The new financial counsellors will be able to assist Australians to pursue fair compensation through the Australian Financial Complaints Authority under significantly increased compensation caps.

Mr Shorten said that further announcements about the other programs that will be funded by the Banking Fairness Fund will be made over coming days.

[Source: Bill Shorten media release 25/02/2019]

Not waiting: ANZ has released a statement outlining its planned actions in response to the Financial Services Royal Commission's Final Report recommendations

ANZ has released a statement outlining the 'first phase' of its planned actions response to the release of Financial Services Royal Commission's Final Report recommendations. ANZ writes that the sixteen actions are aimed at improving the treatment of retail customers, small businesses and farmers as well as 'publicly reporting on the remediation of existing failures'. In addition, ANZ commits to supporting the implementation of changes to the Australian Banking Association Code of Conduct.

The statement includes the following commitments.

- Removing overdrawn and dishonour fees on Pensioner Advantage accounts
- In anticipation of the passage of *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018*), ANZ has committed to 'accelerating work' on improving the way in which it designs and sells products, 'so that customers get products that meet their needs'.
- Improving accessibility of services to Aboriginal and Torres Strait Islander customers in remote communities by: setting up a dedicated phone service and giving Aboriginal and Torres Strait Islander customers easier options to prove their identity when opening and using a bank account.
- Proactively contacting customers paying little off persistent credit card debt to encourage them to move to lower cost options and contacting customers in receipt of eligible Centrelink or Veterans' Affairs benefits to help them move to low-cost basic bank accounts.
- Providing farmers with early access to farm debt mediation, favouring 'work-outs' over either enforcement or appointing external managers, valuing farm land separately from the loan origination process and stopping the practice of charging farmers default interest in areas declared to be affected by drought or other natural disasters.
- With respect to remuneration, ANZ has committed to 'redesign how we manage and reward our people to better focus on the interests of our customers, the long term health of the bank and team, rather than individual outcomes' and to continue to implement the recommendations of the Sedgwick review.
- With respect to the issues of accountability, culture and governance ANZ committed to strengthening its accountability and consequence framework and to supplementing existing culture audits. In addition, ANZ committed to allocating specific responsibility to a BEAR executive for products and complaints about them, making BEAR executives 'explicitly responsible for preventing conduct that

harms customers' and requiring BEAR executives to be 'open, constructive and cooperative with the Australian Securities and Investments Commission (ASIC).

- Publicly reporting on how 'significant failures' (including remediations identified at the Financial Services Royal Commission) are being addressed, including the nature of the issues and progress on paying customers back.
- With respect to financial advice, ANZ committed to focus on how ongoing financial advice is provided to ensure they receive the service/value they pay for, and to telling customers in writing of areas where financial advisers may not be independent, impartial or unbiased.
- With respect to dispute resolution, ANZ committed to acting as a 'model litigant' in the context of dispute with small businesses or retail customers and to cooperating with AFCA in the resolution of disputes dating back to 1 January 2008.

[Source: ANZ media release 20/02/2019; ANZ table of detailed actions;

Is abolishing mortgage broker commissions in the interests of prospective borrowers? UNSW academic argues implementing Commissioner Hayne's recommendations could have negative unintended consequences for prospective borrowers

Writing in the Conversation, UNSW Associate Professor of Finance Mark Humphrey-Jenner has questioned whether mortgage broker commissions are in fact a problem from the perspective of prospective borrowers, suggesting that instead brokers often provide 'good service' and that they have little incentive to 'push bad loans'.

Mr Humphrey-Jenner also argues that the impact of banning broker commissions could have unintended, negative impacts for consumers. 'While there are always bad apples in every industry, removing [mortgage broker] commissions would be a blunt – and potentially unnecessary – instrument with plenty of downsides' he writes. More particularly, he argues that abolishing mortgage broker commissions and requiring prospective borrowers to pay a fee, could result in a proportion of people opting to go directly to lenders to avoid fees.

Were this to occur it could mean, he suggests:

- fewer brokers;
- less access to advice (from brokers) for prospective borrowers, and more reliance on banks' advice which he comments is 'hardly less independent about their products than are brokers'; and
- higher costs for consumers both financially (as banks could pass on any additional borrowing fees could be passed to consumers) and in terms of the time borrowers would need to spend to identify a lender.

[Source: The Conversation 21/02/2019]

In Brief | Reportedly Treasurer Josh Frydenberg has written to the Insurance Council of Australia (ICA) and separately Financial Services Council asking for a prompt response outlining 'when and how' members will implement Hayne royal commission recommendations. Reportedly the ICA has already responded to the Treasurer's letter

[Source: Insurance.com.au 21/02/2019]

In Brief | Commissioner Hayne's recommendations don't go far enough to address endemic cultural issues? Writing in The Age, John Hewson has called for a 'complete rethink of banking legislation and regulatory structures'

[Source: [registration required] The Age 21/02/2019]

In Brief | The Financial Services Royal Commission has made it tougher for SMEs to access business funding? According to a national survey, 22% of SMEs said they had experienced difficulties accessing

business funding due to banks tightening lending conditions, and 34% said they expect it to be harder to access funding going forward

[Source: Scottish Pacific media release (accessed via LexisNexis Capital Monitor — registration required) 22/01/2019]

Other Developments

Buy now pay later inquiry | The Senate inquiry into the buy-now-pay-later sector has recommended stronger regulation and oversight

The senate inquiry into the small credit sector — the inquiry into credit and financial services targeted at Australians at risk of financial hardship — released its final report after the markets closed on 22 February. The report includes 20 recommended changes to improve protections for consumers.

Recommendations include the following.

- **Consultation on a new regulatory framework for the buy now pay later sector:** The report recommends that there be a consultation (between Australian Securities and Investments Commission (ASIC), consumers and industry) as to what regulatory framework would be appropriate for the buy now pay later sector. This regulation should ensure that: before credit is extended, providers appropriately consider consumers' personal financial situations; consumers have access to internal and external dispute resolution mechanisms; providers offer hardship provisions; products are affordable and offer value for money; and consumers are properly informed, prior to entering into agreements, about their terms and conditions (Recommendation 9).
- **Implementation of a new regulatory framework for all credit and debt management, repair and negotiation activities** that are not currently licensed by the Australian Financial Security Authority, including: compulsory membership of the Australian Financial Complaints Authority, giving clients access to an External Dispute Resolution scheme; strict licensing or authorisation by the Australian Securities and Investments Commission (ASIC) or the Australian Financial Security Authority; prohibition of upfront fees for service; prescribed scale of costs; an obligation to act in the best interests of their clients; and banning unsolicited sales (Recommendation 8)
- **The development of an industry code of practice** for the buy now pay later sector (Recommendation 10).
- **Implementation of the Financial Services Royal Commission's Recommendation 1.7 to remove the point of sale exemptions from the *National Consumer Credit Protection Act* 2009.**

[Note: In their dissenting report, coalition senators noted that the coalition has already agreed to implement this recommendation. Separately, the Labor party has also committed to implementing this recommendation. Labor's response to the Financial Services Royal Commission's Final Report is covered in a separate post in this issue of Governance News.]

- **Extension of the proposed product intervention power in *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018* to buy now pay later products (Recommendation 11).**

[Note: In their dissenting report, coalition senators noted that the government has tabled an amendment to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Power) Bill 2018* to extend it to Buy Now Pay Later products. The Bill is currently before the House of Representatives.]

- **The enactment of *The National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2017* (Recommendation 2).**

[Note: *National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2019* was recently introduced into the House of Representatives on 18 February. See: Governance News 20/02/2019.]

- **The *National Consumer Credit Protection Act 2009* be amended to contain strong anti-avoidance provisions 'that are capable of capturing both new, emergent credit-like products**, and attempts to disguise the nature of existing credit products' (Recommendation 7).

- **Additional funding for the Australian Securities and Investments Commission (ASIC)** to police the small and medium credit contract sector and consumer leasing sector (Recommendation 3).
- **Review into addressing underreporting of malpractice:** ASIC, the Australian Competition and Consumer Commission (ACCC) and the Australian Financial Complaints Authority (AFCA) to undertake a review to assess what systems and mechanisms would counteract the underreporting of malpractice and how best to allow consumers to make complaints about the behaviour of consumer lease and payday lending providers (Recommendation 4).
- **Review of regulatory arrangements for medium amount credit contract products to be undertaken by Treasury:** Treasury to undertake a review to identify necessary reforms to regulatory arrangements for medium amount credit contract products (Recommendation 5).
- **ASIC to review how financial products and services (including credit) are advertised** and issue an updated regulatory guide to how credit products interact with consumers in an online environment (Recommendation 12).
- **Centrepay recommendations:** The report recommends that centrepay should only be available to entities that can demonstrate historic and ongoing compliance with relevant regulations, and that provide products at a fair price and in a fair manner. In addition, the report recommends that the Department of Human Services develop the capability to review Centrepay data to identify clients who are at risk of serious financial hardship and develop appropriate interventions, such as referral to a financial counsellor (Recommendations 13 and 14).
- **Supporting/expanding financial counselling services:** Recommendations 15-17 concern the need to support and expand existing financial counselling services, for example by increasing government funding to enable a substantial increase in the number of full time employed financial counsellors across the country (including in regional areas) as well as increasing the funding available to community and financial rights legal centres. (Recommendation 15).

[Note: In their dissenting report Coalition senators noted that as part of its response to the Financial Services Royal Commission's final report recommendations, the government has announced it would be commencing an immediate review that will focus on the coordination and funding of financial counselling services. For a summary of the Treasurer's announcement see: Governance News 13/02/2019]

- The government should consider what tax and other incentives could be used to encourage mainstream credit providers to offer low interest products to vulnerable Australians (Recommendation 19)

Afterpay supports the report recommendations

In a statement to the market, Afterpay has said that it supports the committee's recommendations describing them as 'sensible, appropriate and a proportionate policy response to the buy now pay later industry'. Afterpay also noted that the committee process had highlighted the need for a separate regulatory framework outside the National Credit Code for the buy now pay later sector. In addition, Afterpay writes that it is 'proud of the fact we already have strong in-built consumer protections in place that in many respects go further than current legislative requirements and the practices of traditional credit providers. On top of this, our technology produces superior results (lower default rates) for consumers than those under traditional credit regimes'.

The statement adds that Aferpay does 'not expect any material impact on our business or business model based on the recommendations in the report'.

Commenting specifically on recommendation 9 (consultation on an appropriate regulatory framework for the sector), Afterpay writes that it 'looks forward to working with ASIC, the government consumers and industry on a suitable regulatory framework and to achieve the best possible outcomes for consumers.' Likewise, Afterpay writes that it supports the recommendation to develop an industry code of practice for the sector and states that it is 'well progressed' in 'developing a set of principles'.

Media reports

Media reports have commented that prior to the publication of the report, there was a sell off of Afterpay shares, which ASIC is investigating. Reportedly, the senate committee on Friday has said it has no evidence to suggest the report was leaked to external parties prior to its official release and is not undertaking an investigation.

Reportedly, AfterPay's shares gained 14% following the release the company's statement and the release of the report.

[Sources: Senate Standing Committee on Economics Report: Credit and financial services targeted at Australians at risk of financial hardship Final Report 22/02/2019; ASX Announcement Afterpay Touch Group Ltd: Afterpay's response to the senate economics references committee report 25/02/2019; [registration required] The AFR 21/02/2019; 21/02/2019; 25/02/2019; The SMH 21/02/2019; The Guardian 23/02/2019; Investor Daily 26/02/2019]

Review of the Scheme for the Compensation for Detriment Caused by Defective Administration (the CDDA Scheme)

The government has announced the appointment of Robert Cornall AO, a former Secretary of the Attorney-General's Department, to lead a review of the Scheme for the Compensation for Detriment Caused by Defective Administration (the CDDA Scheme). The CDDA Scheme allows Commonwealth Government agencies to pay discretionary compensation when a person or organisation has suffered detriment as a result of defective administration, but when there is no legal requirement to make a payment.

The review was commissioned to consider the operation by the Australian Taxation Office (ATO) of the CDDA Scheme in relation to small business. The review is intended to ensure that small business has access to a fair and transparent system for administrative review of small business tax disputes.

The review will consider: the consistency of the ATO's CDDA Scheme processes for small businesses; the timeliness of decisions; how effectively findings are communicated to small business; how independent decision-making can be best achieved in future; and the adequacy of compensation for small businesses that have suffered an economic and / or personal loss as a consequence of the ATO's actions.

Timeline: Mr Cornall has been asked to report to the Government in 'early 2019'.

[Sources: Joint media release: Assistant Treasurer Stuart Robert; Minister for Finance and the Public Service Mathias Cormann 25/02/2019]

ASIC has finalised its monitoring of HSBC Bank Australia Limited's enforceable undertaking after almost three years

The Australian Securities and Investments Commission (ASIC) has finalised its monitoring of HSBC Bank Australia Limited's (HSBC) compliance with the court enforceable undertaking (EU) entered into by HSBC on 13 May 2016.

The EU required HSBC to develop and implement a review and remediation program to compensate customers who lost money due to receiving inappropriate advice.

As part of the remediation program, ASIC writes:

- HSBC reviewed 510 structured product advice files and determined that 82 files (16%) contained inappropriate advice.
- HSBC tested and reviewed advice provided on other product types such as superannuation, insurance, annuities and other investments, and identified much lower instances of inappropriate advice having been provided in those areas.
- HSBC has offered affected clients approximately $690,000 in compensation across all product types.

Ernst & Young (who performed the role of independent expert) determined that HSBC has materially delivered on its requirements in the EU and made no further recommendations.

ASIC adds that HSBC ceased providing all personal financial advice to customers on 2 March 2018.

[Sources: ASIC media release 20/02/2019; Independent Financial Adviser 20/02/2019; Ernst and Young: Final Report Summary HSBC Bank Australia Ltd 20/11/2019]

APRA has released superannuation statistics for the December 2018 quarter

The Australian Prudential Regulation Authority (APRA) has released its Quarterly Superannuation Performance publication and the Quarterly MySuper Statistics report for the December 2018 quarter.

Some Key Points

- Superannuation assets totalled $2.7 trillion at the end of the December 2018 quarter.
- Over the 12 months from December 2017 there was a 1.3% increase in total superannuation assets
- Total assets in MySuper products were $670.6 billion at the end of the December 2018 quarter.
- Over the 12 months from December 2017 there was a 5.3% increase in total assets in MySuper products
- There were $27.3 billion of contributions in the December 2018 quarter, up 5.3% from the December 2017 quarter ($26.0 billion). Total contributions for the year ending December 2018 were $112.3 billion. Outward benefit transfers exceeded inward benefit transfers by $0.7 billion in the December 2018 quarter.
- There were $18.2 billion in total benefit payments in the December 2018 quarter, an increase of 9.6% from the December 2017 quarter ($16.6 billion). Total benefit payments for the year ending December 2018 were $73.6 billion.
- Pension benefit payments ($9.2 billion) were 50.3% and lump sum benefit payments ($9.1 billion) were 49.7% of total benefit payments in the December 2018 quarter. For the year ending December 2018, pension payments ($37.9 billion) were 51.5% and lump sum benefit payments ($35.7 billion) were 48.5% of total benefit payments.
- Net contribution flows (contributions plus net benefit transfers less benefit payments) totalled $8.4 billion in the December 2018 quarter, a decrease of 1.8% from the December 2017 quarter ($8.6 billion). Net contribution flows for the year ending December 2018 were $35.7 billion.

[Sources: APRA media release 26/02/2019; Quarterly Superannuation Performance Statistics December 2018 26/02/2019]

'Modest' improvement? A study into how US bank boards have improved since the 2008 GFC has found there has been relatively minimal change

US academics have released a research paper presenting the results of their study into the extent to which the boards of US banks have acted to address key 'deficiencies' since the 2008 global financial crisis.

In particular, the researchers assessed the extent to which boards had taken action to address the following issues:

1. **group think** among bank board members;
2. **skills/knowledge gap:** absence of prior banking experience of board members;
3. **overboarding:** the inability of board members (especially of the chairperson) to devote time to understanding the bank's business model; and
4. **inadequate emphasis on risk management**.

Overall, the researchers concluded that 'in sum, bank boards seem to have responded modestly to the financial crisis' as there were no substantial changes over the period 2008-2015. For example there was no evidence: that the turnover rate for bank directors was higher for banks than for other industries; that bank boards are more diverse or more skilled; no evidence of any change in the number of outside boards on which bank directors sit; and no change in the proportion of bank chairs who are also CEOs.

The one area in which there was change was the emphasis placed on risk management.

- Virtually every bank now has a Chief Risk Officer (CRO) but the CRO is unlikely to feature among the top five most compensated employees of the average bank.

- The number of banks that have an independent risk committee and a committee devoted to reputation management has increased since the crisis.

The researchers conclude that given the limited improvements in board governance, the 'prospects for significant improvement in the governance structure of banks remain limited'.

[Source: Harvard Law School Forum on Corporate Governance and Financial Regulation 19/02/2019]

In Brief | Financial Hardship research: Financial hardship is 'just a bill away'? New research from the University of Melbourne has found that two thirds of Australian adults feel financially insecure. Almost half have less than three months' income saved, and almost one in three have less than one month's income and one in seven have negligible or no savings

[Source: The Conversation 16/02/2019]

In Brief | The AFR reports that smaller lenders have welcomed the introduction of the government's fundraising Bill on the basis that it will help them compete. The Customer Owned Banking Association has called on both sides of politics to continue to drive policy in support of competition

[Note: *Treasury Laws Amendment (Mutual Reforms) Bill 2019* was introduced into the senate on 13 February. The Bill proposes to (among other things) enable mutual entities registered under the *Corporations Act 2001 (Cth)* to issue equity capital without risking their mutual structure or status. See: Governance News 20/02/2019]

[Source: [registration required] The AFR 24/02/2019]

In Brief | The UK Financial Conduct Authority Wholesale Insurance Brokers market study has found 'no evidence of significant levels of harm that merit the introduction of intrusive remedies'

[Sources: Financial Conduct Authority media release 20/02/2019; [registration required] The FT 20/02/2019]

Accounting and Audit

In Brief | Media reports suggest that the Joint Committee on Corporations and Financial Services believes a 'serious review' of the Australian audit market is merited due to the tightly held power concentration of the big four and potential conflicts of interest in services provided

[Sources: Accountants Daily 19/02/2019; [registration required] The AFR 18/02/2019]

Risk Management

Cybersecurity and privacy

Anniversary of Notifiable Data Breaches scheme: OAIC has called on companies to reflect on the causes of breaches that put personal data at risk and how they are managing their privacy obligations

The Office of the Australian Information Commissioner (OAIC) has released a statement commemorating the first anniversary of the Notifiable Data Breaches scheme.

Australian Information Commissioner and Privacy Commissioner Angelene Falk said that the scheme is increasing awareness and called on firms to reflect on the causes of breaches that put personal data at risk and how they are managing their privacy obligations. 'Most of the data breaches reported to us over the past year involved a human factor, like sending information to the wrong person or someone's login credentials being compromised through phishing or other means and used in a cyber-attack. We expect organisations and agencies to act on the risks highlighted by these reports — whether or not they were directly affected — and take steps to prevent a similar breach of Australians' personal data' she said.

From the scheme's introduction on 22 February to the end of December 2018, 812 data breaches were notified. Ms Falk said that 'The growing number of data breaches notified to my Office is consistent with trends experienced by our counterparts overseas and indicates agencies and organisations are complying with their notification obligations'.

[Source: OAIC media release 22/02/2019]

Climate Risk

In Brief | New CSIRO report has found Australia is likely to experience more extreme weather events in future. The AFR reports that insurers have responded by calling for the government to take action to force companies to adopt climate change action plans and to invest more in climate change-proofing Australian communities. If communities are open to major damage due to increasingly brutal weather events, then insurance companies will be unable to bear the risk unless action is taken they reportedly argue

[Sources: [registration required] The AFR 24/02/2019; CSIRO State of the Climate Report 2018]

In Brief | UN Climate Change has released an overview of the Katowice Climate Package adopted at the UN Climate Change Conference COP24 in Katowice last December. The package constitutes the guidelines for the implementation of the Paris Climate Change Agreement

[Source: UNFCC media release 19/02/2019]

In Brief | SDG recommendations cannot be ignored by the government: Leading humanitarian organisations say Australia will suffer internationally if senate recommendations for the Sustainable Development Goals are ignored by the government

[Sources: Senate Standing Committee on Foreign Affairs Defence and Trade, UN Sustainable Development Goals (SDG) Report 14/02/2019; ProBono News 20/02/2019; Australian Council for International Development media release 19/02/2019]

Other News

Top Story | CCA changes: repeal of IP exemption and new small business powers

A new bill passed on 18 February 2019 that amends the *Competition and Consumer Act 2010 (Cth)* by repealing the historic IP licensing exemption. It also facilitates small businesses pursuing private litigation against anti-competitive conduct under the CCA.

You can access MinterEllison's article, written by Miranda Noble, Justin Oliver and Kylie Diwell, on the implications of the changes on our website here: https://www.minterellison.com/articles/repeal-of-ip-exemption

Consumer Data Right update | ACCC is consulting on proposals to expand the CDR to the energy sector

The Australian Competition and Consumer Commission (ACCC) is consulting on three proposed data access models to enable energy market consumers to access their data through accredited data recipients.

Context: The Consumer Data Right (CDR) will commence in the energy sector in the first half of 2020. The regulator observes that though there is likely to be commonality in the CDR rules that apply across sectors, there are a number of sector-specific considerations. More specifically, the ACCC suggests that in the context of the energy sector, one relevant consideration is that a consumer's energy data may be held by a number of organisations and it may therefore be appropriate to impose CDR obligations on more than one entity in the energy sector.

[Note: The Bill to introduce a consumer data right and open banking — *Treasury Laws Amendment (Consumer Data Right) Bill 2019* — was introduced into the House of Representatives on 13 February. The Bill was referred to the Senate Economics Legislation Committee for report by 18 March. See: Governance News 20/02/2019]

Three options

The consultation paper sets out the three options and the ACCC's views on relevant principles and considerations for the assessment of each model. The ACCC seeks stakeholder comments on the advantages, disadvantages and participant implementation costs in respect of each of the models. The regulator also seeks stakeholder views on what additional requirements the ACCC would need to consider including in the CDR energy rules if the 'gateway model' (see below) were adopted.

The three options are:

- **Model 1, the Australian Energy Market Operator (AEMO) centralised model:** AEMO would be the sole data holder of a centralised data set, which includes consumer energy data that it currently does not hold under national energy legislation, and would be responsible for providing CDR data directly to accredited data recipients
- **Model 2, the AEMO gateway model:** AEMO would provide a gateway function (acting as a pipeline for the provision of CDR data from data holders which may include retailers and potentially also distributors, to accredited data recipients) and may also be a data holder providing CDR data directly to accredited data recipients
- **Model 3, the economy-wide CDR model:** existing data holders (for example, retailers) would be responsible for providing CDR data directly to accredited data recipients and/or consumers ie the model used for the banking sector.

The deadline for submissions is 22 March 2019.

[Sources: Australian Competition and Consumer Commission media release 25/02/2019; ACCC consultation paper: Data access models for energy data 25/02/2019]