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Contents

Shareholder Activism

2018 was a 'record breaking' year for activism globally according to the latest annual report from Lazard

Lazard Ltd has released its *2018 Review of Shareholder Activism*, which tracks key trends globally. According to the report, 2018 was a 'record-breaking year for activism', both in terms of the number of companies targeted (226 in 2018 vs 188 in 2017), the amount of capital invested in the targets ($65bn in 2018) and number of first-time activists (40 in 2018).

Some Key Findings

- **Q4 2018 was the most active Q4 on record both by campaign volume and capital deployed**
  - **20% jump in the number of companies targeted by activists:** A record number of companies (226) were targeted by shareholder activists in 2018, compared to 188 companies in 2017.
  - **$65.0bn of capital deployed in 2018**, up from $62.4bn in 2017
- **The report found that more investors are using activism as a tactic:**
  - **A record 131 investors engaged in activism in 2018**, reflecting the continued expansion of activism as a tactic.
  - **A record 40 first-time activists launched campaigns in 2018**, an increase of 33% on the previous high of 30 in 2016 and an increase of 10% on 20017.
- **Elliott continues to be the most prolific activist** with 22 campaigns launched in 2018, though nine of the top 10 activists invested more than $1bn in new campaigns.
- **Board change: Activism is 'reshaping boardrooms'**
  - **According to the report, activist campaigns won 161 board sets in 2018**, an increase of 56% on 2017, and 11% on the previous record of 145 seats in 2016.
  - **Activists continue to name experienced, male candidates (but were less likely than previously to be activist employees):** 27% of activist appointees had public company CEO/CFO experience and18% of activist appointees in 2018 were female, as compared to 40% of new S&P 500 directors in 2018. The number of nominees who were activist employees decreased slightly to 22% (down from the 2013-2017 average of 29%).
  - **Activists employed a variety of tactics to exert influence on boardrooms in 2018** including proxy fights; long slates (instances where an activist nominates directors to replace 50%+ of the target's incumbent board); and litigation either to extend director nomination deadlines or to challenge company decisions on proxy fights.
- **Activism is a global phenomenon and activist activity in Europe and the Asia Pacific (APAC) Region is at record levels**
  - **Activists still most active in the US:** 57% of campaigns launched, and 62% of capital deployed was in the US.
  - **One-third of all campaigns and capital deployed were in APAC and Europe.** Activist campaigns in Europe and the Asia-Pacific (APAC) region accounted for 23% and 12% of companies targeted globally, respectively.
- **Other trends:**
  - **Traditional investors more vocal:** The report identifies a trend towards traditional active managers taking a proactive stance in recent activist campaigns, using public forums to express support or opposition to activist campaigns

- **Growing influence of passive managers:** The report also identifies that passive managers appear to be increasingly influential in raising structural and/or regulatory questions

[Sources: Lazard media release 10/01/2019; 2018 Activism Year in Review; [registration required] The FT 11/01/2019]

Roundup of recent activist developments

- **Activist Sherborne (Edward Bramson) is reportedly seeking a board seat at Barclays:** Edward Bramson (Sherborne) has reportedly written to shareholders informing them he will seek a seat on the Barclays board as engagement with the lender has failed to deliver a change in the bank's strategy and a consequent improvement in share performance. Sherborne is reportedly pressing Barclays to director resources towards consumer operations and to wind down parts of its investment banking division which it considers a drag on the company's valuation. Mr Bramson's announcement to shareholders reportedly follows a long period of engagement with the lender on the issue and the recent refusal of the Barclay's board to add him as non-executive director. The FT comments that if he is successful, it will mark the first time in recent history that an activist has forced their way on to the board of a large UK-listed bank, though the article notes that it is unclear whether he has the required support among investors to actually win a board seat. The WSJ reports that Barclays executives have questioned the value of Mr Bramson's strategic vision, stating that they have yet to see a concrete plan around how he would improve returns at the bank.

[Sources: [registration required] The FT 08/01/2019; The Guardian 08/01/2019; The WSJ 07/01/2019]

- **Activist Starboard Value LP is reportedly seeking changes (including board change) at Dollar Tree:** Activist Starboard Value LP has reportedly called on Dollar Tree Inc to sell its underperforming Family Dollar business, rethink its pricing strategy and has proposed replacing a majority of the board after revealing a 1.7% stake in the retailer (making it the 9th biggest shareholder). Reuters quotes Dollar Tree as stating that its board has 'the right balance', adding that the company did not comment on either Starboard's calls for a change in pricing strategy or the sale of Family Dollar.

[Sources: Reuters 07/01/2019; [registration required] The WSJ 07/01/2019; The Street 07/01/2019]

- **Activist Elliott Management Corp to acquire QEP Resources Inc?** Elliott has reportedly made a \$2 billion proposal to acquire the portion of QEP Resources Inc that it doesn't already own (reportedly Elliott holds a 5% stake). Bloomberg reports that in a letter to QEP's management, Elliott said that it is willing to pay \$8.75 a share in cash for QEP, a 44% premium on the shareprice (at the time the offer was made). The bid is subject to due diligence and also is contingent on QEP selling certain assets, Elliott reportedly said. Reportedly, QEP has confirmed it has received a preliminary proposal from Elliott and the company's board will review and carefully consider it. Bloomberg comments that Elliott has been engaging with QEP leadership since the beginning of 2018, and that though the activist has been supportive of QEP's plans to optimise value, it nevertheless remains of the view that the company 'deeply undervalued' and that 'a sale of the company would be the best approach to deliver maximum value to shareholders'. Separately, The FT has suggested that in a shift away from its usual approach, Elliott appears to be moving towards adopting a private equity strategy, noting that the activist has completed a number of buyout deals of late.

[Source: Bloomberg 08/01/2019; [registration required] The FT 03/01/2019]

- **Activist ValueAct is reportedly seeking a board seat at Olympus:** Reuters reports that Japanese firm Olympus Corp has proposed giving US activist ValueAct Capital (which has a 5.04% stake in the company) a board seat. Olympus has reportedly said that as part of a broader leadership reshuffle to improve governance at the company, current Vice President Yasuo Takeuchi will take over as CEO from 1 April (replacing the current CEO) and ValueAct Partner, Rob Hale will be named as a director (subject to shareholder approval) at the company's AGM in June. Olympus also reportedly said it would seek advice from ValueAct in the selection of two additional board directors. Reuters suggests that the move by Olympus to engage with ValueAct in this way is indicative of a more general shift in Japan's attitude toward activists (which has traditionally favoured a strategy of resistance) toward viewing active engagement between firms and shareholders as a valuable 'spur' to economic growth. Nikkei Asian Review suggests that the leadership reshuffle at Olympus is attributable to the firm's desire to placate foreign investors who have reportedly been critical of the way in which the company has handled past 'accounting improprieties', adding that ValueAct has been pressuring the company to change strategy (move into medical technology for some time). Mr Hale's appointment to the board is reportedly expected to accelerate this change in strategy. Reuters quotes Mr Hale as commenting that the 'governance changes Olympus announced today will better enable the board to support and supervise management in their implementation of Olympus's strategy to become a global leader in the medical technology Industry'.

[Sources: Reuters 11/01/2019; Nikkei Asian Review 12/01/2019]

- **Citigroup is reportedly opting to engage with activist ValueAct on strategy and governance:** Shares of Citigroup Inc have reportedly improved (having lost value over the past 12 months) after the bank announced it had formalised an information sharing and engagement agreement with activist ValueAct Capital (which is reportedly the bank's sixth largest shareholder with a 1.3%). Reportedly, Citi said the agreement provides opportunities to discuss strategy, governance and operational planning with Citi's management team and board of directors. According to MarketWatch, ValueAct is not pursuing a board seat at Citi as a ValueAct representative sits on the board of Alliance Data Systems Corp which competes with Citi in certain businesses.

[Sources: MarketWatch 11/01/2019

Remuneration

'Fat Cat Friday': FTSE 100 CEOs earned the annual wage of an average British worker in 3 days according to the CIPD and the High Pay Centre; the organisations have launched a report recommending various reforms to address the issue

The Chartered Institute for Professional Development (CIPD) and the High Pay Centre announced that 4 January was 'Fat Cat Friday' — the day on which the earnings of average FTSE 100 CEO on an average (median) pay packet of £3.9m, exceeded the annual salary of the average British worker (£29,574). Put differently, according to the CIPD and the High Pay Centre, FTSE 100 CEOs working an average 12-hour day only needed to work for 29 hours in 2019 to earn the average worker's annual salary.

The CIPD and the High Pay Centre argue that the issue of rising executive salaries as highlighted by 'Fat Cat Friday' is problematic and, in a report launched to coincide with 'Fat Cat Friday' entitled *RemCo reform: Governing successful organizations,* put forward a number of recommendations for addressing the issue. These include the simplification of existing pay structures and the replacement of remuneration committees with 'people and culture committees' which would have both a broader membership and a broader range of skills than existing remuneration committees.

Some Key Points

- **The report questions the basis for justifications provided by remuneration committees (remcos) for increasing CEO pay**, such as the 'myth' that increases are justified by the need to attract and retain a 'super' talented CEOs.
- **Argues that greater diversity (diversity of professional backgrounds and expertise, gender and ethnicity) among decision makers is needed** to combat the issue of 'group think' on remuneration committees and to overcome barriers to addressing the issue of excessive pay.
- **Argues that current pay mechanisms contribute to the problem of excessive pay**, suggesting that complex Long Term Incentive Plans should be replaced with a less complex system based on a basic salary and a much smaller restricted share award. This would simplify the process of setting executive pay and ensure that pay is more closely aligned to executive performance, the report argues.
- **Remcos should be replaced with People and Culture Committees (PACCs):** The report argues that the simplification of executive pay would free up time for remcos to focus on other issues critical to wider corporate governance such as corporate culture, good people management and sustainable performance driven by positive purpose which, the writers argue, (should) have a bearing on executive

remuneration. To reflect this wider remit, the CIPD and High Pay Centre suggest both refocusing and renaming remuneration committees so they become People and Culture Committees (PACCs).

[Sources: High Pay Centre media releases 03/01/2019; 03/01/2019; Executive Pay: review of FTSE 100 Executive Pay August 2018; RemCo Reform: governing successful organisations that benefit everyone January 2019; The Sunday Times 04/01/2019; [registration required] The FT 04/01/2019; BBC 04/01/2019; Forbes 07/01/2019]

Trends in CEO remuneration: An Equilar study of global pay trends has found (among other things) that US CEO pay has increased over the past five years in medium sized companies, whereas it has been stagnant in Canada and has decreased overall in Europe.

A recent study from Equilar analysed how the compensation of CEOs of medium-sized companies in Europe and Canada — defined as companies with revenues between $1-5 billion — compares to those in the US.

About the study: The study included 853 US companies, 98 Canadian companies and 54 European companies of similar size and tracks trends over the past five years (2014-2018).

Some Key Findings

- **US CEO pay has increased year on year:** The median total compensation of US CEOs has generally increased year on year, with the exception of 2017, which experienced a 2% decline in median pay.
- **US trend not reflected in Europe or Canada:** The US trend was not reflected in Europe where median pay over the period fell from $5.5 million in 2014 to $4.5 million. Nor was it reflected in Canada where median CEO pay In Canada median pay increased to a lesser extent, from $3.1m in 2014 to $3.2m in 2018.
- **Snapshot of 2018:**
    - In 2018, the median compensation of CEOs in US medium-sized companies was approximately $5.3 million (an increase on $4.8m in 2017) while that of Canada and Europe were $3.2 million and $4.5 million, respectively.
    - The highest median CEO compensation for Europeans in 2018 was at companies based in the Netherlands at $8.8 million, followed closely by Ireland at $7.8 million and the UK at $6.3 million. Canadian compensation levels were more stagnant, staying at around $3 million across the years studied.
    - US CEO pay packages appear to more heavily equity-based compensation: The median equity component value of a CEO's compensation in US mid-sized companies in 2018 was nearly $3m ($2.8m) or roughly 60% of total compensation paid. This proportion was lower in both Canada (46% of total compensation) and Europe (50% of total compensation).

[Sources: Equilar blog 20/12/2018]

The European Commission has launched a public consultation on EU rules guaranteeing equal pay between men and women

As part of the European Commission's (EC's) action plan to address the gender pay gap, launched in November 2017, The EC has launched a public consultation to gather information on the impact of EU rules on equal pay and seeking input on plans to better implement and enforce the equal pay principle enshrined in the Gender Equality Directive and the 2014 Pay Transparency Recommendation.

Consultation will close on 5 April.

Commenting on the consultation, EU Commissioner for Justice, Consumers and Gender Equality, Commissioner Jourová, said: 'Women still earn on average 16.2% less than men in the EU. This is simply unfair. This inequality has not changed over the last several years. We need to work together to bring change and make sure this inequality becomes a thing of the past.'

[Source: European Commission Press Release 11/01/2019]

Evidence that gender pay gap reporting works? An INSEAD study on Danish companies has found the introduction of compulsory gender pay gap disclosure has been effective in narrowing the gender pay gap, primarily through slowing the wage growth for male employees

A paper released by international business school, INSEAD suggests that there is evidence that disclosure of gender pay statistics by companies has a positive impact on narrowing the gender pay gap.

About the study

The study examined the effect of a 2006 legislative requirement for Danish companies with more than 35 employees to report gender specific wage statistics.

The researchers examined wage statistics of companies prior to, and following, the introduction of the reporting requirement. They analysed data from 2003 to 2008, focusing on companies with 35-50 employees and compared their pay data with identical information from a control group of firms with 25-34 employees (firms of a similar size but that were not required to release gender-segregated data).

Some Key Findings

- The researchers found that firms paid their male employees a 18.9% wage premium before the regulation was introduced. Following the regulation, he gender pay gap was found to have narrowed to 17.6% in the firms required to report, relative to the control firms. A 7% reduction in the pay gap.
- The researchers found that the reduction in the pay gap between men and women varied widely between different types of firms. The reduction was greater where company executives themselves have more diverse families – especially if they have more daughters than sons. This was also the case in industries that had larger wage gaps prior to the legislation.
- According to the study, the legislation also seems to have driven an increase in the number of women hired and promoted in firms that are subject to the legislation.
  - Firms included in the legislation hired 4% more women in the intermediate and lower hierarchy levels than control firms, suggesting firms are able to attract more female employees in positions where they offer higher wages.
  - Women were promoted from the bottom of the hierarchy to more senior positions, after the implementation of the law, while researchers found no significant change in promotions for male employees.

- Slower wage growth for male employees: Although wages for both male and female employees increased over the period, researchers found an overall decline in the wage premium for male employees in firms subject to the legislation.
- Reduction in productivity? The researchers found that in firms subject to the legislation there was a 2.5% decline in productivity. However, they also found that there was a simultaneous drop of 2.8% in the total wage costs for these firms and therefore no significant effect on the overall profitability of the firms in question.

Morten Bennedsen, professor of economics at INSEAD and the University of Copenhagen is quoted as commenting: 'For the first time we are able to document, that pay-transparency really works'. He went on to say that the study findings suggest the measure could be implemented nationally or internationally to address gender pay disparity.

[Sources: INSEAD media release 06/12/2019; Do firms respond to gender pay gap disclosure? October 2018; MyBusiness 04/01/2019]

Is (gender) wage gap reporting helping? The gender pay gap at HSBC's UK business has reportedly continued to widen, despite wage reporting requirements

Bloomberg reports that the gender pay gap at HSBC Holdings Plc's UK business has widened further since last year with female employees earning 61% less on average than their male colleagues as compared with a 59% gap last year. This is reportedly significantly higher than the national average, which Bloomberg states is closer to 17% and higher than other organisations in the same sector (eg Lloyds Banking Group Plc (31.5%) and Nationwide Building Society (28%)).

Reportedly HSBC said the large gap is attributable to a number of factors including: the high proportion of men in senior leadership roles and the 'over-representation' of women in junior and part time roles. Bloomberg quotes HSBC as stating that it will make 'appropriate adjustments' where unequal pay cannot be justified by experience or performance.

Bloomberg comments that HSBC CEO John Flint is a signatory to the 30% Club Campaign which aims to have 30% of senior leadership roles held by women by 2020. Currently, 23% of HSBC's senior leaders are women.

[Sources: Bloomberg 09/01/2019]

The FT reports that Deutsche Bank is expected to reduce executive bonuses by 15-20% in light of continuing poor financial performance

The FT reports that investment bankers at Deutsche Bank are expecting their bonuses to be significantly reduced, possibly by as much as 15-20% (though the size of the bonus pool will not be known until 22 March), following a poor financial performance over the past year.

According to the FT, as part of a cost-cutting initiative led by CEO Christian Sewing, a number of roles at Deutsche have been cut over the past year and a number of executives and managing directors have gone to rival organisations. Reportedly, both the cuts to the workforce and the executive departures have contributed to the smaller bonus pool since many of the recent departures were senior bankers with above-average bonuses.

The FT writes that Mr Sewing, has come under pressure from the bank’s largest shareholders not to repeat the tactic employed by the organisation's previous CEO, of paying bonuses to retain staff (despite substandard performance), as occurred in 2018 especially given that the organisation has continued to lose ground.

[Sources: [registration required] The FT 09/01/2018]

Apple CEO Tim Cook's annual pay reportedly jumped 22% last year and is 283 times that of the median Apple worker's compensation of $55,426

Reportedly, Apple CEO Tim Cook's total compensation for the year ended September 2018 increased 22% to $15.7m, marking the second year his pay has increased. According to media reports, the increase was largely driven by a $12m cash bonus that hinged on achievement of financial targets set by the board. Mr Cook’s pay was reportedly about 283 times the median Apple employee’s pay ($55,426).

Mr Cook's award was disclosed a week after he notified Apple shareholders that the company would miss revenue estimates for the three months ended in December, for the first time in 15 years due to declining iPhone sales.

For the latest year, Apple’s other highest-paid executives received 10% increases in total compensation to about $26.5 million. The WSJ comments that Mr Cook’s annual compensation is lower than that of other Apple executives, though he received a large restricted stock grant in 2011.

[Sources: [registration required] The FT 09/01/2018; [registration required] The WSJ 08/01/2019; [registration required] The AFR 09/01/2019; Market Watch 08/01/2019]

In Brief | The FT reports that Rio Tinto is seeking to postpone payment of bonuses to former CEO Sam Walsh for a second time as US and UK investigations into bribery allegations in relation to the Simandou project (Guinea) continue. In the event that Mr Walsh does not agree to a further deferral, there is reportedly an arbitration process in place, the FT writes. Mr Walsh has reportedly declined to comment but has previously said he had always acted lawfully and in accordance with his duties during his time at Rio.

[Sources: [registration required] The FT 02/01/2019]

Institutional Shareholders and Stewardship

The FT reports that a group of campaigners has challenged BlackRock do more to support climate shareholder proposals ahead of the anticipated release of BlackRock CEO Larry' Fink's annual letter to CEOs.

The FT reports that ahead of the anticipated release of BlackRock CEO Larry Fink's annual letter to CEOs, a group of campaigners has written to Mr Fink challenging BlackRock to do more to support shareholder climate resolutions. The FT quotes Jeanne Martin, senior campaigns officer at ShareAction and one of the 12 campaign bodies that have written to Mr Fink as writing 'The words of the world's largest asset manager carry weight and its contribution to this narrative is welcome…However, the danger lies in these words not being followed up with meaningful action.'

Reportedly, the letter cites figures compiled by the 50/50 Climate Project which indicate that BlackRock was less supportive of climate related shareholder proposals than (some) other large investors. For example in the spring 2018 AGM season BlackRock reportedly supported only 23.1% of climate-related shareholder proposals at S&P 500 oil, gas and utility companies and 14% of shareholder climate disclosure resolutions.

The 12 signatories also reportedly called on BlackRock to:

- vote in favour of specific shareholder proposals including one filed by the pension funds of New York state and the Church of England for ExxonMobil, calling for the company to set targets for cutting its greenhouse gas emissions; and
- more generally, to back proposals requesting greater transparency on a company's spending in relation to climate lobbying and to reject remuneration policies where companies did not agree to link incentives to climate risk.

[Source: [registration required] The FT 14/01/2019]

In Brief | Culture a key area of focus for State Street? The FT reports that the CEO of the world's third largest asset manager, State Street Global Advisors, has written to the independent Chairs or lead independent directors of more than 1,100 companies in the S&P 500, FTSE350 and equivalent indicies in Australia, Frank, Germany and Japan calling on boards to review the culture at their firms and explain how it aligns with their strategy. The letter also reportedly sets out how directors can assess, influence and report on their culture and says they should expect to answer questions on it from SSGA over the coming year.

[Source: [registration required] The FT 15/01/2019]

Other Shareholder News

In Brief | The International Finance Corporation (IFC), a member of the World Bank Group, and the West Africa Regional Stock Exchange (BRVM), have signed an agreement to cooperate toward improving corporate governance practices among West African listed companies. Under the agreement, IFC will help BRVM design, develop, draft and implement a Corporate Governance Code.

[Source: IFC media release 10/01/2019]

Meetings and Proxy Advisers

Recent AGM outcomes | ANZ and NAB joined Westpac in receiving first 'strikes' on executive pay at their recent AGMs

Both the NAB and ANZ AGMs were held on the 19 December 2018.

- **NAB AGM results:** More than 88% of shareholders (88.1%) voted against the remuneration report at National Australia Bank (NAB) delivering a 'first strike'. Separately, 64.06% of shareholders voted against the award of bonus shares to CEO Andrew Thorburn. In his address to shareholders, ANZ

Chair Ken Henry acknowledged that a high 'against' vote was likely and said that based on conversations with major investors the board understood this to be because of changes to the design of the remuneration scheme, the quantum of remuneration and the way in which the board applied the scheme for the first time. He added that the board accepted the feedback and remained determined 'to have a framework' in line with stakeholder expectations.

- **ANZ AGM results:** Over a third (33.8%) of ANZ shareholders voted against the lender's remuneration report. Separately, 94.95% of shareholders approved the grant of performance rights to CEO Shayne Elliott and 27.08% of shareholders voted against the reelection of non-executive director, Paula Dwyer (who is also Chair of Tabcorp). In his address to the AGM, ANZ Chair David Gonski acknowledged the likelihood of a 'strike' against the remuneration report, noting that reductions in compensation had been implemented 'across the group' including at board level to reflect 'accountability' (20% in fees to existing non-executive directors and a 20% in the Chair's fee). He added that the lender would 'work hard' in the coming year to ensure alignment between compensation and shareholder interests.

The results follow Westpac shareholders also delivering a first strike (64.2%) against the bank's remuneration report and media speculation of similar results at ANZ and NAB (see: Governance News 17/12/2018).

[Note: The CBA elected to reduce bonuses to zero ahead of the AGM on 7 November 2018. The remuneration report was approved by 94.2% of shareholders. See: CBA ASX Announcement 07/11/2018; Chair's address 07/11/2018]

Media reports

The results of the AGMs have received wide media coverage some suggesting that each of the boards will be under increased pressure to set higher hurdles for executive bonuses and to exercise more willingness to reduce bonuses going forward, if they are to avoid second strikes.

Expectation of zero bonuses? In each case, executive bonuses were reduced by the boards, but media reports suggest that shareholders were of the view that in light of the issues identified by the Financial Services Royal Commission, they were not reduced sufficiently. For example,

- The Australian Shareholders Association (ASA) has reportedly suggested that the only appropriate bonus would be zero. Similarly, The AFR suggests that that there is 'widespread incredulity' among investors that boards of the three banks failed to exercise their discretion not to pay bonuses given the issues that have come to light.

- CEO of AustralianSuper Ian Silk, is quoted by the AFR as saying that the fund is 'disappointed' by the approach adopted by the Westpac, ANZ and NAB boards on executive remuneration. 'In what has been an annus horribilis for the banking sector, there has been a distinct lack of transparency from the banks around their rationale for paying executive bonuses this year…While the banks have acknowledged the need for executive accountability, there is no clear basis provided as to why bonus payments and incentives for senior executives were at the right level. Therefore they are unsupportable' he reportedly said.

- Australian Council of Superannuation Investors (ACSI) CEO Louise Davidson reportedly expressed a similar view adding that the results should not have been a surprise to the Chairs or boards in question, 'We and other investors have been given them this message for some months now. There's sort of this view that nothing could be done to avert this situation, that it was somehow inevitable. That is just wrong…these events would not have occurred if bank boards had listened to shareholders and made an independent judgment themselves about what was the right thing to do under the circumstances' she reportedly said.

The AFR suggests that the result at the three lenders is an indication of the growing influence of funds and potentially of their willingness to take a tougher stance on remuneration than they have done to date.

[Sources: NAB ASX Announcements: Results of 2018 AGM 19/12/2018; Chair and Group CEO address 2018 AGM 19/12/2018; ANZ ASX Announcements: Results of 2018 AGM 19/12/2018; ANZ 2018 Chair's address 19/12/2018; ACSI media release 19/12/2018; The SMH 21/12/2018; [registration required] The AFR 19/12/2018; 19/12/2018; *The AFR 19/12/2018; 19/12/2018; 27/12/2018; The ABC 19/12/2018; Financial Standard 19/12/2018*

Disclosure and Reporting

ASIC consultation on simpler fee disclosure: ASIC is consulting on proposed reforms to simplify fee and costs disclosure for superannuation and managed investment schemes

The Australian Securities and Investments Commission (ASIC) is consulting on proposed changes to the fees and costs disclosure regime for managed investment schemes and superannuation. *Consultation Paper 308 Review of RG 97 Disclosing fees and costs in PDSs and periodic statements* (CP 308) sets out the regulator's response to recommendations from a review of the regime conducted last year by external expert, Mr Darren McShane in *Report 581 Review of ASIC Regulatory Guide 97: Disclosing fees and costs in PDSs and periodic statements* (REP 581) which made various recommendations as to how disclosure could be improved. ASIC proposes to take forward a number of recommendations from Report 581.

Proposed changes

The paper includes a proposed updated *Regulatory Guide 97 Disclosing fees and costs in PDSs and periodic statements* (draft updated RG 97) Regulatory Guide (RG 97), as well as draft amendments to Sch 10 of the Corporations Regulations.

ASIC is seeking feedback on proposals to:

- simplify how fees and costs information is presented to consumers;
- reduce data inputs, including eliminating the requirement for fees and costs disclosure to incorporate some costs categories, particularly property operating costs, borrowing costs and implicit costs; and
- make disclosure for managed investment schemes more consistent with superannuation.

ASIC also said it will continue to monitor disclosure and advertising to ensure issuers are not misleading consumers about fees and costs.

The aim of the proposed reforms, ASIC writes is to ensure that consumers seeking information on fees and costs receive transparent and useable information that helps them understand fees and costs, compare products, and make confident and informed choices' as well as to ensure that the proposed fees and costs disclosure regime is practicable for industry.

Commenting on the proposed changes, the SMH quotes Mr McShane as stating that the changes are broadly in line with those he put forward in Report 581 and that ASIC's proposal 'delivers more simplicity and consistency to enable better comparison of super products'. He added that retail and industry super funds should generally be happy with the recommendations but now needed to work collaboratively to see them introduced.

Timeline: The deadline for submissions is 2 April 2019. ASIC will also hold roundtable discussions on the proposed changes.

Industry response

CEO of the Financial Services Council Sally Loane has also reportedly welcomed the proposed changes. 'We are assessing the proposals with members. Any changes to disclosure documents and systems do incur a cost. However, additional costs need to be viewed in the context of how they may benefit the consumer' Ms Loane is quoted as stating.

The proposed changes do not go far enough?

- **The Australian Institute of Superannuation Trustees (AIST)** has reportedly expressed disappointment that ASIC's proposals do not include a requirement for superannuation funds to disclose fees and costs for platform based superannuation as was recommended by Mr McShane in his review. AIST CEO is quoted as stating that 'This is critical to enable consumers to compare the fees and costs of MySuper products with the fees and costs of superannuation held via a platform. Most bank-owned and other retail choice superannuation products are held through platforms'.
- **Industry Super Australia (ISA)** reportedly welcomed ASIC's 'overdue attempts to improve superannuation fee disclosure', but also cautioned that the failure to include a requirement for funds

to disclosure fees and costs for platform based superannuation could further complicate fees for consumers. 'The concept of including a "prominent statement" is, to be blunt, a cop out…It's essentially just a warning to members that what you see is not what you get when it comes to platform fees. This simply continues to place consumers at risk, rendering it almost impossible to make meaningful comparisons between products' ISA director of research and campaigns Nick Coates is quoted as stating.

[Sources: ASIC media release 08/01/2019; Consultation paper 308: Review of RG 97 Disclosing fees and costs in PDSs and periodic statements; The SMH 08/01/2019; [registration required] The Australian 09/01/2019; Financial Standard 09/01/2019; Money Management 08/01/2019; The New Daily 09/01/2019]

Related News: ASIC has temporarily extended the disclosure exemption for RSE licensees to 9 January

The Australian Securities and Investments Commission has temporarily extended the compliance date for Responsible Superannuation Entity (RSE) licensees to comply with certain disclosure requirements under the *Superannuation Industry (Supervision) Act 1993* (SIS Act).

Section 29QC of the SIS Act requires an RSE licensee to ensure that information it provides to Australian Prudential Regulation Authority (APRA) under an APRA reporting standard, is consistent with (ie is calculated in the same way) and the same information provided by the trustee to other entities/provided via the trustee's website.

Reason for the extension: The ASIC relief is to help facilitate the ongoing consideration and finalisation of aspects of policy relating to disclosures by superannuation funds, and which may impact APRA reporting standards including of consideration of government policy in relation to the requirements for superannuation funds to publishing product dashboards, and the consideration of fees and costs disclosures.

Temporary extension only: The relevant ASIC Class Order [CO 14/541] provides relief from section 29QC of the SIS Act and was due to expire on 1 January 2019. The extension will maintain the status quo, ASIC writes. The new expiry date specified in the instrument aligns with the usual 10-year sunsetting period for legislative instruments, but it should not be assumed, ASIC cautions, that the relief instrument will continue in force for that length of time.

[Sources: ASIC media release 19/12/2018; ASIC Superannuation (Amendment) Instrument 2018/1080 (F2018L01779)]

United Kingdom | The FRC has announced the composition of the advisory group for its major project on the future of corporate reporting

The Financial Reporting Council (FRC) has announced the composition of the 15 member advisory group for its project on the future of corporate reporting. The group will advise the regulator on the development of the project, and have input into the eventual recommendations for changes to reporting regulation and practice.

The group is includes representatives of the FRC's major stakeholder groups (companies, investors, civil society groups, academics, auditors, audit committee chairs, lawyers and design agencies) to ensure there is an appropriate balance of members from different backgrounds. The group includes (among others): Managing Partner, Assurance, UK Head of Audit, EY Hywel Ball; Company Secretary, M&C Saatchi PLC Andy Blackstone; Corporate Engagement, Hermes Investment Management Roland Bosch; Lecturer in Accounting, London School of Economics Yasmine Chahed; Senior Investment Stewardship Analyst, Church Commissioners for England Carlota Garcia Manus; Corporate Reporting and IFRS Technical Controller, Howden Joinery Group Simon Gleadhill; Chair in Accounting, Governance and Social Innovation, University of Edinburgh Business School Paolo Quattrone; and Professor of Accounting, Georgia Institute of Technology Chair, Sustainability Accounting Standards Board Simon Messenger.

[Sources: FRC media releases 17/12/2018; 17/12/2018]

In Brief | A group of 27 NGOs has called on the European Commission to implement various recommendations to improve the quality and consistency of corporate sustainability reporting

including integrating 'precise requirements' aligned to the TCFD recommendations into EU Non-financial reporting directive.

Sources: European Commission for Corporate Justice media release 29/11/2018; Statement: The European Commission must take action to improve the reporting obligations of companies on sustainability issues 29/11/2018; EU Non-Financial Reporting Directive; Board Agenda 04/12/2018]

Markets and Exchanges

The ASA has reportedly expressed support for certain proposed changes to the ASX listing rules including the introduction of standardised disclosure requirements for reporting AGM results and the proposal to reduce suspension periods.

Recap: Consultation on changes to the ASX Listing Rules

As previously reported in Governance News (see: Governance News 03/12/2018) the Australian Securities Exchange (ASX) released a consultation paper in November 2018 seeking feedback on a package of proposed listing rule amendments. The proposed amendments related to eight broad categories: 1) improving market disclosures and other market integrity measures; 2) making the rules simpler and easier to follow; 3) making aspects of the listing process and ongoing compliance with the listing rules more efficient for issuers and for ASX; 4) updating the timetables for corporate actions; 5) enhancing ASX's powers to operate the market and to monitor and enforce compliance with the listing rules; 6) correcting gaps or errors in the listing rules; 7) general drafting improvements , including removing redundant rules; and 8) more and better guidance.

Timeline: The deadline for submissions is 1 March 2019. ASX will be conducting a national roadshow in early February 2019 to inform listed entities and other interested stakeholders about the proposed changes.

ASX has said that it plans that the final rule amendments and amended guidance will be released in May 2019 and will take effect on 1 July 2019.

The ASA has reportedly expressed support for the proposed changes

The AFR reports that the Australian Shareholders Association (ASA) has expressed support for some of the proposed changes ahead of submitting its response to the ASX. In particular, ASA has reportedly expressed support for proposals to introduce public censure for company executives and directors who contravene the rules, of the introduction of standardised disclosure requirements for reporting AGM results and of the proposal to reduce suspension periods.

[Source: [registration required] The AFR 07/01/2019]

Financial Services

Top Story | Productivity Commission's final report into superannuation released

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.

The report found that inadequate competition, governance and regulation in the superannuation sector has led to a number of weaknesses including prevalent high fees, unintended multiple accounts, underperformance of certain funds and lack of competition in the default fund system.

The report makes 31 recommendations to address these issues (increased from the 22 recommendations made in a draft report released in May 2018 See: Governance News 04/06/2018). It also sets out a 'transition road map' with indicative timeframes for implementing some of the report recommendations over the period December 2019 to December 2023.

In a statement, the Treasurer said that the government would 'carefully consider the recommendations' and will await the findings of the Financial Services Royal Commission's final report (expected on 1 February) before finalising its response. According to media reports, both Labor and industry have expressed concerns about some report recommendations, in particular, the 'best in show' recommendation.

A high level overview of the report findings, recommendations and indicative timeframes is below.

Some Key Findings

- There is a lack of competition in the default segment and there 'are signs of unhealthy competition in the choice segment (including product proliferation)'. Many funds lack scale, with 93 APRA‑regulated funds — half the total — having assets under $1 billion.
- A third of accounts (about 10 million) are unintended multiple accounts. These erode members' balances by $2.6 billion a year in unnecessary fees and insurance.
- The default segment outperforms the system on average, but the way members are allocated to default products has meant many (at least 1.6 million member accounts) have ended up in an underperforming product, eroding nearly half their balance by retirement.
- The PC identified mixed performance across funds with some funds consistency achieving high net returns while others, both default and choice funds, were found to underperform. Most (but not all) affected members were in retail funds.
- Much scale, and the associated benefits (lower fees/higher returns) associated, remains elusive with too few mergers.
- There is a lack of access to clear information: The system offers products that meet most members' needs, but members lack simple and salient information and impartial advice to help them find the best products.
- There is evidence of 'excessive and unwarranted fees' in the super system. Reported fees have trended down but a 'tail' of high‑fee products remains.
- Not all members get value out of insurance in super. Many see their retirement balances eroded by duplicate or unsuitable policies.
- Regulations (and regulators) focus too much on the interests of funds and not members. Subpar data and disclosure inhibit accountability to members and government.

Overall, the report found that 'Fixing some of the worst problems in the current superannuation system would bring substantial benefits. If there were no unintended multiple accounts (and the duplicate insurance that goes with them), members would have been collectively better off by about $2.6 billion a year. If members in bottom quartile MySuper products had instead been in the median of the top quartile performing MySuper products they would collectively have gained an additional $1.2 billion a year'.

Recommendations to 'modernise' the superannuation system and indicative timeframes

Below is an overview of the 31 report recommendations and recommended timeframes for implementation (where indicated in the report).

- **Recommendation 1: Default superannuation accounts only created once for new workforce entrants.** To facilitate this, the Australian Government and the ATO should continue work towards establishing a centralised online service for members, employers and the Government that builds on the existing functionality of myGov and Single Touch Payroll.

  Timeframe: The system should be fully in place no later than the end of December 2021.

- **Recommendation 2: A single 'best in show' shortlist of up to 10 superannuation products should be developed** and presented to all members who are new to the workforce (or do not have a superannuation account), from which they can choose a product. Any member who does not have an existing account and who fails to make a choice of fund within 60 days should be defaulted to one of the products on the shortlist, selected via sequential allocation.

  Timeframe: The first 'best in show' shortlist should be in place by no later than the end of June 2021.

- **Recommendation 3: The government should appoint an independent expert panel should be to run a competitive process to develop the 'best in show' shortlist.** The panel should be comprised of independent experts appointed through a 'robust and independent' selection process and the panel should be reconstituted every four years. The panel should have flexibility to select up to 10 products, with the exact number at the panel's discretion.

- **Recommendation 4: Elevated MySuper and choice outcomes test for all APRA-regulated funds:** The government should legislate to require all APRA regulated superannuation funds to undertake annual outcomes tests for their MySuper and choice offerings. The outcomes tests should include: a) a requirement for funds to obtain independent verification, to an audit level standard, of their outcomes test determination, at least every three years (starting with the first test); and b) clear benchmarking requirements for all MySuper and choice investment options (with consequences for failing to meet benchmarking requirements).

  Timeline: Funds should be required to complete their first (annual) elevated outcomes tests by no later than the end of December 2020 for MySuper products, and no later than the end of June 2021 for choice investment options.

- **Recommendation 5: Clean up unintended multiple accounts through auto-consolidation:** The government should seek the passage of legislation to require the auto consolidation of superannuation accounts with balances under $6000 and 13 months or more of inactivity. Trustees should be required to transfer these accounts to the ATO for auto consolidation with a member's matched active account.

- **Recommendation 6: Introduce new requirement for funds to publish simple and single page product dashboards for all superannuation products.**

  Timeline: ASIC should prioritise the implementation of these dashboards for choice investment options to achieve full compliance by the end of 2019.

- **Recommendation 7: Access via the centralised online service:** The ATO should be required to provide a link to the single page product dashboard on a member's existing account on its centralised online service.

- **Recommendation 8: Clarification of the term 'advice'; disclosure of approved product lists (APLs).**

  - The definition of 'advice' in the *Corporations Act 2001 (Cth)* should be amended to clarify that the term can only be used in association with 'personal advice' ie advice that takes into consideration personal circumstances.

  - Australian Financial Service Licensees should also be required to disclose information in relation to approved product lists (APLs) to ASIC. ASIC should conduct selected audits of the information received to facilitate assessment of the effectiveness of advisers in meeting clients' best interests.

- **Recommendation 9: Evaluate financial literacy programs:** The government should evaluate government funded financial literacy programs to those that are most effective. This could be done through a review of the National Financial Capability Strategy.

- **Recommendation 10: Reassess need for the Retirement Income Covenant.** The government should reassess the benefits, costs and detailed design of the Retirement Income Covenant and only introduce the Covenant if 'design imperfections (including equity impacts) can be sufficiently remediated.' In conjunction with this, the government should also explore the business case for investing in digital technology to assist people's financial decision making and consider cost-effective options for providing retirees with access to a one-off impartial information session to assist them in navigating retirement income decisions.

- **Recommendation 11: Better guidance for pre-retirees.** The Australian Government should prompt all superannuation members when they reach 55 years of age to visit the: 'Retirement and Superannuation' section of ASIC's MoneySmart website and the Department of Human Services' Financial Information Service website.

- **Recommendation 12: Stronger 'safeguards' for SMSF advice.** The government should require specialist training for persons providing advice to set up an SMSF; require persons providing advice to set up an SMSF to give prospective SMSF trustees a document outlining ASIC's 'red flags' prior to establishment; and extend the proposed product design and distribution obligations to SMSF establishment.

- **Recommendation 13: Roll-out Consumer Data Right for superannuation:** The government should automatically accredit superannuation funds to be eligible to receive (following member consent) information held by banks under the Open Banking Initiative. The Government should also roll out the new Consumer Data Right to superannuation in parallel with implementation of the elevated outcomes tests (recommendation 4).

- **Recommendation 14: Ban trailing financial adviser commissions in superannuation, and fees charged by APRA-regulated superannuation funds to be levied on a cost-recovery basis.** The government should require that all fees charged by APRA regulated superannuation funds are levied on a cost recovery basis and ban trailing financial adviser commissions.

  Timeline: Trailing commissions to financial advisers should be banned 'as soon as practicable'.

- **Recommendation 15: Insurance through superannuation should be offered on an opt-in basis for members under 25 years of age** and trustees should be required to cease all insurance cover on inactive accounts ie where no contributions have been made for 13 months (unless the member provides express permissions that the cover is to be retained.

- **Recommendation 16: APRA-regulated funds should be required to 'articulate and quantify' insurance balance erosion trade-offs to APRA.** As part of this, trustees should clearly articulate in their annual report why the level of default insurance premiums and cover chosen are in members' best interests. Trustees should also be required to provide on their websites a simple calculator that members can use to estimate how insurance premiums affect their balances at retirement.

- **Recommendation 17: The government should 'immediately' establish a joint regulator task force to advance a 'binding and enforceable' Insurance in Superannuation Voluntary Code of Practice.** Both ASIC and APRA should be members of the taskforce, with ASIC taking the lead. The taskforce should annually report findings on industry progress on the code.

  Timeline: The code owners should be given two years to strengthen the code and make it binding and enforceable on signatories. After two years, adoption of the code should become a condition of holding a Registrable Superannuation Entity (RSE) Licence for all superannuation funds that offer insurance.

- **Recommendation 18: The government should commission an independent public inquiry into insurance in superannuation.** The inquiry should: evaluate the effectiveness of initiatives to date, examine the costs and benefits of retaining current insurance arrangements on an opt out (as opposed to an opt in) basis, and consider if more prescriptive regulation is required. It should also look at the intersection of insurance in super with other schemes (such as workers' compensation).

  Timeline: The insurance inquiry should be initiated within four years.

- **Recommendation 19: APRA should be more prescriptive in its requirements of trustee board directors:** APRA should amend its prudential standards to be prescriptive in: a) requiring effective board performance and individual directors assessment processes to be in place, and to be disclosed annually; b) requiring all board to maintain and annually publish a 'consolidated summary' of a skills matrix and the 'collective skills of trustee directors'; c) requiring trusts to have and disclose a process to seek external third party evaluation of the performance and capability of the board (against the skills matrix) every three years, the results of which should be provided to APRA; d) requiring trustee board directors to have a 'professional understanding of the superannuation system and investment decision making' either through industry experience or formal training; and e) defining what constitutes an 'independent director', based on the definition currently in the *Superannuation Laws Amendment (Strengthening Trustee Arrangements) Bill 2017*.

[Note: The definition of 'independent director' in the *Superannuation Laws Amendment (Strengthening Trustee Arrangements) Bill 2017* excludes individuals with a current or recent relationship with the RSE licensee or related bodies corporate and organisations representing employer sponsors and members. The explanatory memorandum states that under the definition in the Bill, those who would not be considered independent include: those who are substantial shareholders of the RSE licensee; those who have, or have had, within the last three years, a material business relationship with the RSE licensee; or those who have served as a director or executive officer of the RSE licensee. See: Explanatory Memorandum]

In addition, the Report recommends that APRA should be given powers to interpret and enforce the definition of an independent director.

- **Recommendation 20: Disclosure of merger activity and new powers for the regulators**: Require trustee boards of all APRA-regulated superannuation funds to disclose to APRA when they enter a memorandum of understanding with another fund in relation to a merger attempt. Where mergers do not proceed, the board should be required to disclose to APRA (at the time) the reasons why it did not proceed, and the members' best interests assessment that informed the decision. APRA should also be empowered to prevent mergers that are not in members' best interests. In addition, the government should legislate new powers and penalties to explicitly enable ASIC to pursue action against trustee directors for misconduct in relation to mergers.
- **Recommendation 21: Capital gains tax relief for mergers:** The government should legislate to make permanent the temporary loss relief and asset rollover provisions that provide relief from capital gains tax liabilities to superannuation funds in the event of fund mergers and transfer events.
- **Recommendation 22: Clarification of the trustee's duty to act in the best interest of members** in the *Superannuation Industry (Supervision) Act 1993 (Cth)* (SIS Act). The definition should reflect the 'twin principles that a trustee should act in a manner consistent with what an informed member might reasonably expect and that this must be manifest in member outcomes'.
- **Recommendation 23: Areas of focus for APRA:** APRA should focus more on matters relating to licensing and authorisation, ensuring high standards of system and fund performance. The government should set an explicit 'member outcomes' mandate for APRA in its regulation of superannuation.
- **Recommendation 24: Areas of focus for ASIC:** ASIC should focus more on the conduct of superannuation trustees and financial advisers, and on the appropriateness of products (including for particular target markets) and disclosure.
- **Recommendation 25: Clarify the roles of APRA and ASIC in relation to superannuation** with the benefit of the final report and that of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. In doing so, it should consider the suitability of each regulator's powers, the suitability and strength of penalty provisions for misconduct, and whether there are any undesirable constraints on either regulator engaging in strategic conduct regulation.
- **Recommendation 26: Immediately initiate and independent capability review of APRA**. The review should also examine how effectively and efficiently APRA operates to achieve its strategic objectives in relation to superannuation.

  Timeline: The review should be completed and published during 2019
- **Recommendation 29: The government should establish a permanent superannuation data working group**, comprised of APRA, ASIC, the ATO, the ABS and the Commonwealth Treasury. The group should be required to report annually to the Council of Financial Regulators on its progress on improving the consistency and scope of data collection and on the data analytics capabilities of each regulator.
- **Recommendation 28: The government should establish a government funded superannuation members' advocacy and assistance body.**
- **Recommendation 29: Ongoing review of the superannuation system**
  - APRA and ASIC to produce a joint report every two years on the performance of the superannuation system;

- commission an independent review, every five years, of the effectiveness of the MySuper and choice elevated outcomes tests at meeting their objectives, and whether they are being suitably applied by APRA to remove underperforming funds and options from the super system;
- commission an independent public inquiry, every ten years, of the superannuation system, including a review of the criteria used to assess 'best in show' products.

- **Recommendation 30: The government should commission and independent public inquiry into the role of compulsory superannuation in the broader retirement incomes system.** This should be completed in advance of any increase in the superannuation guarantee rate.
- **Recommendation 31: The government should establish a steering group of departmental and agency heads to oversee the implementation of the report recommendations.** The group should include the Secretary of the Department of the Prime Minister and Cabinet, Secretary to the Treasury, Chairs of APRA and ASIC and the Commissioner of Taxation.

The full report and an overview are available on the Productivity Commission website. The full report includes a transition timetable: Figure 14 Implementation: a transition roadmap.]

Response to report recommendations

Government's response to the Report: Treasurer Josh Frydenberg said in a statement that the government would carefully consider the recommendations, and would await the recommendations of the Financial Services Royal Commission before issuing a formal response to the PC's report. He added that a number of recommendations in the report 'endorse' government reforms currently before parliament, which he called on Labor to support.

[Source: Treasurer Josh Frydenberg media release 10/01/2019]

APRA's response to the report recommendations: The Australian Prudential Regulation Authority (APRA) issued a statement welcoming the release of the report. Deputy Chair Helen Rowell said many of the findings and recommendations in it aligned closely with APRA's ongoing focus on ensuring superannuation funds delivered quality, value-for-money outcomes for their members. In particular, Mrs Rowell said that she is 'particularly pleased to see the Productivity Commission back our [APRA's] call for parliament to pass legislation that would give APRA greater powers, including to direct superannuation licensees to take specific actions, such as merging or winding up should that be in the best interests of members'. Mrs Rowell added that APRA would consider the report, together with the Financial Services Royal Commission's final report and the Government's subsequent response, as part of its review of priorities for supervision of the superannuation industry for the next few years.

[Source: APRA media release 10/01/2019]

'Best in Show' recommendation remains controversial?

According to media reports, the most controversial recommendation appears to be the 'best in show' proposals about which both industry and the Labor party reportedly have concerns.

- **Labor** has reportedly said that it is opposed to both the best in show recommendation and to the recommendation to delay the increase in retirement contributions to 12% The AFR reports. Reportedly Treasury spokesman Chis Bowen said that the 'best in show' recommendation is of concern because 'a fund that might be well performing at one particular time might not be well performing in the future years' and also because selecting just 10 funds could undermine competition between funds.

[Source: [registration required] The AFR 10/01/2019]

- **The ACTU** has reportedly expressed concern about the 'best in show' proposal on the basis that it would operate to 'block working people from being represented in the system which manages their money, while handing a huge amount of power to financial regulators which the ongoing Banking Royal Commission has demonstrated are grossly ineffective at shielding working people from banks which regulatory put profit before their own customers. Any attempt to dismantle this world-class model would inevitability damage the performance of these funds.'

[Source: [registration required] The Australian 10/01/2019]

- **ASFA and AIST**: The Association of Superannuation Funds of Australia (ASFA) has reportedly also expressed disappointment that the best in show recommendation was retained in the final report as has the Australian Institute of Superannuation Trustees (AIST). ASFA CEO Martine Fahy is quoted in The Australian as stating that 'ASFA is disappointed that the Productivity Commission has doubled down on the so called "top 10 best in show" as a mechanism for allocating default super. AIST CEO Eva Scheerlinck is quoted as saying that the report's 'proposal for a top ten default list is a blunt mechanism that will be needlessly disruptive and fails to address the more serious problem of underperformance in the wider super system'.

[Source: [registration required] The Australian 10/01/2019]

- **FSC:** Financial Services Council CEO Sally Loane reportedly expressed concern that the best in show proposal would stifle competition, particularly for new entrants to the market.

[Source: The New Daily 10/01/2018]

- **SMSF Association** issued a statement welcoming the release of the final report recommendations and expressing support for the recommendation for higher standards of SMSF advice rather than a minimum balance approach for establishing SMSFs. SMSF Association CEO John Maroney agreed with the Commission that setting a minimum balance requirement for establishing SMSFs would be a 'blunt tool' compared with improving SMSF advice standards.

[Source: SMSF Association media release 10/01/2019]

Future Fund to offer low-fee superannuation accounts?

The AFR reports that the government is considering allowing the Future Fund (or another public wealth management entity) to offer low fee superannuation accounts and be eligible to accept default members as a means of enhancing competition in the sector. According to The AFR, the superannuation industry, unions and the Labor Party are likely to oppose a government default fund taking away money that currently flows into retail and industry funds.

[Source: [registration required] The AFR 12/01/2019]

Open Banking status update: Time for testing of the system integrated into the proposed implementation timeline

- **Time for 'beta testing' of the system integrated into the proposed implementation timeline for open banking:** In a statement released in late December 2018, Treasurer Josh Frydenberg provided an update on Open Banking. In it, he noted a proposed change in the implementation timeframe to allow time to 'test the performance, reliability and security of the Open Banking system'. From 1 July, the ACCC and Data 61 will launch a pilot program with the big four banks 'to test the performance, reliability and security of the Open Banking system' the Treasurer said. Mr Fydenberg added that 'Once the ACCC is comfortable with the robustness of the system, banks will publicly share consumer data about credit and debit cards, deposit accounts and transaction accounts, which will be no later than 1 February 2020'. He said that Treasury have released a 'comprehensive timeline on their website.

[Sources: Treasurer Josh Frydenberg media release 21/12/2018; Treasury timeline; *[registration required] The Australian 24/12/2018; Innovation Aus 15/01/2019]*

- **Status update on the Consumer Data Right (CDR) legislation:** The Treasury has published the latest version of the *Treasury Laws Amendment (Consumer Data Right) Bill 2018* 'to inform the community of the contents of the Bill prior to its introduction'. Treasury indicates that the Bill is expected to be introduced into Parliament in February 2019.

[Note: Parliament resumes sitting on 12 February. See: Parliamentary Sitting Calendar 2019]

[Sources: [Draft] Treasury Laws Amendment (Consumer Data Right) Bill 2018; [Draft] Explanatory Materials]

- **ACCC has released a CDR Rules Outline:** In late December 2018, the Australian Competition and Consumer Commission (ACCC) released the 'Rules Outline' for the new Consumer Data Right (CDR) which is intended to provide guidance to stakeholders, including designated data holders, potential data recipients, and consumers, on what the Rules will require of CDR participants. The ACCC writes that it intends to release draft Rules for consultation in the first quarter of 2019. The ACCC also notes that the Rules Outline reflects the revised commencement schedule as outlined by the Treasurer (see above) with 1 July 2019 being the date for product reference (generic) data being made publicly available and 1 February 2020 the date by which the remaining obligations to share the first tranche of consumer data will commence.

[Sources: ACCC media release 21/12/2018; ACCC Newsletter: Consumer Data Rights updates 21/12/2018; Consumer Data Right Rules Outline 21/12/2018]

- **Technical Standards:** Data61 has published a working draft of proposed technical standards that banks will be required to meet for the sharing of data with consumers. Consultation on the working draft will close on 18 January.

[Source: CSIRO Christmas 2018 Working draft: media release]

- **Draft Privacy Impact Assessment released for consultation:** On 21 December 2018, the Treasury released the first version of the Privacy Impact Assessment (PIA) for the Open Banking Laws for consultation. Consultation will close on 18 January.

[Sources: Treasury media release: Draft Privacy Impact Assessment 21/12/2018]

ASIC Report 604 released: Lenders have committed to improving credit card practices, ASIC has flagged it will monitor lenders over the next two years to ensure consumer outcomes are improving

The Australian Securities and Investments Commission (ASIC) released *Report 604 Credit card lending in Australia – An update* on 18 December 2018 setting out the changes being made by the ten largest credit providers (that were part of ASIC's review) — American Express, ANZ, Bendigo and Adelaide Bank, Citigroup, CBA, HSBC, Latitude, Macquarie, NAB and Westpac — to assist consumers with credit card debt.

ASIC writes that though the commitments are not required by law, they are 'important in ensuring that the credit card market works for consumers, including vulnerable consumers'.

Changes being implemented by lenders include the following:

- 9 large credit providers have committed to taking proactive steps to help consumers with problematic credit card debt;
- 9 credit providers have committed to lower the amount by which consumers can exceed their credit limit; and
- 4 large credit providers have committed to 'fairer approaches for balance transfers';

In addition, ASIC states that 'many' lenders are trialling measures — such as tailored communications and/or structured payment arrangements — to help consumers with potentially problematic credit card debt or who are failing to repay balance transfers.

According to ASIC, Macquarie, CBA and HSBC are the most progressed with implementing changes around credit card lending. Although American Express has committed to some changes, other lenders have proposed more comprehensive measures.

The release of ASIC's report follows *Report 580 Credit Card Lending in Australia* which identified, among other things, that 18.5% of consumers are struggling with credit card debt. In that report, ASIC committed to conduct a follow-up review to see if there is an improvement in outcomes for consumers.

ASIC to monitor lenders over the next two years to ensure consumer outcomes are improving in the credit card market

ASIC Commissioner Sean Hughes commented that the regulator 'expects that all credit card lenders will address the issues' raised in ASIC Report 580 adding that ASIC will monitor lenders over the next two years to ensure that they have 'taken action to address our concerns, and to ensure that consumer outcomes are improving in the credit card market.'

[Source: ASIC media release 18/12/2018]

Additional regulation of the buy now pay later sector? Ahead of upcoming senate committee hearings and the release of the final report, The AFR suggests that ZipPay and Afterpay have differing views on the need for the extension of responsible lending requirements.

On 17 October 2018, the senate referred an inquiry into the *Credit and financial services targeted at Australians at risk of financial hardship* to the Senate Economics References Committee for inquiry and report by 22 February 2019. The committee is investigating the impact of payday lenders, debt management firms and buy now, pay later businesses on vulnerable consumers.

The next public hearing will be on 22 January and though the program for the hearing has not yet been released, The AFR reports that both ZipPay and Afterpay representatives will give evidence. Ahead of this, The AFR reports that ZipPay has expressed support for the extension of some responsible lending measures to the sector and that Afterpay has reportedly questioned the need to do so.

According to The AFR, ZipPay is supportive of the imposition of certain additional responsible lending checks and caps on late fees to the buy now pay later sector. More particularly, Zippay's co-founder and COO Peter Gray reportedly said the organisation would be open to the introduction of requirements verify income and identity and to check credit history. The AFR notes that the organisation has been checking customers' credit history and identity since it was founded in 2013.

Reportedly Afterpay, has expressed support for new product intervention powers for the Australian Securities and Investments Commission (ASIC), but is not supportive of additional responsible lending checks to the sector on the basis that the administration costs of running these checks would potentially exceed the value of the goods being purchased by customers (given an average transaction value is only $150).

[Note: *The Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018* currently before parliament, proposes to enable ASIC to issue a 'product intervention order' if it is satisfied that a financial product or a credit product 'has resulted in or will, or is likely to, result in significant detriment' to consumers. The Bill has progressed to second reading stage in the House of Representatives and is yet to pass the Senate. The Senate Economics Legislation Committee report, recommended that the Bill be passed. Labor Senators have indicated their intention to introduce amendments to 'strengthen ASIC's remit so that conduct in the industry can be elevated, which will ensure that we have a sector that consumers can engage with and place their trust in'. This includes extending design and distribution obligations and product intervention powers to 'all financial products specified in the *ASIC Act*', and more particularly 'amending the bill such that design and distribution obligations apply to credit products defined in the *National Consumer Credit Protection Act*' and 'so that ASIC be given standing under the design and distribution obligation regime to seek compensation on behalf of affected consumers who are non-parties to the legal proceedings'. Separately, *ASIC Report 600 Review of buy now pay later arrangements* (ASIC's first review of buy now pay later industry released) raised questions about the adequacy of consumer protections and called, among other things, for the extension of the (proposed) product intervention power to all credit facilities regulated under the *Australian Securities and Investments Commission Act 2001 (ASIC Act),* which includes buy now pay later arrangements. See: Governance News 03/12/2018]

Australian Banking Association (ABA) is supportive of extending responsible lending obligations to the buy now pay later sector? The ABA submission to the senate committee suggests several changes to the existing regulatory regime to improve consumer protections. These include (among others): the imposition of a requirement for all participants in the financial services sector to be signatories to a relevant and ASIC approved code of practice and the application of responsible lending obligations to providers offering alternative forms of credit.

[Sources: [registration required] The AFR 07/01/2019; ABA submission to the Senate Inquiry into credit and financial services targeted at Australians at risk of financial hardship 14/11/2018; The SMH 08/01/2018]

ASIC 'best interests' action against Westpac subsidiaries WSAL and BT Funds Management, ASIC to review Federal Court's decision

In December 2016, the Australian Securities and Investments Commission (ASIC) commenced civil penalty proceedings alleging that Westpac Securities Administration Limited (WSAL) and BT Funds Management Limited (BT) breached the 'best interests duty' by conducting a telephone sales campaign recommending that customers roll out of their superannuation funds into their Westpac-related superannuation accounts, without undertaking a proper comparison of the superannuation funds.

ASIC also alleged that BT Funds and WSAL provided, contrary to the terms of Australian financial services licences (AFSLs) held by each of WSAL and BTFM, 'financial product advice' that was 'personal advice' within the meaning of s 766B(3) of the *Corporations Act 2001 (Cth)* (the Act).

Westpac denied any contravention of the Act.

The Federal Court, found that WSAL and BT Funds breached section 912A(1)(a) of the *Corporations Act 2001 (Cth)* (the Act) which states that AFSLs must 'do all things necessary to ensure that the financial services covered by their licences were provided honestly, efficiently and fairly' but that ASIC failed to make out its case that the entities provided personal advice in breach of 912A(1)(b) of the Act.

'The "financial product advice" was not "personal advice" within the meaning of s 766B(3)(a) of the Act because the callers did not consider one or more of the objectives, financial situation and needs of the customers to whom the advice was given' the judgment states. 'Further, the "financial product advice" was not given in circumstances where a reasonable person might expect the provider of that advice to have considered the financial situation of the customer.

The judgement goes on to say that given the 'financial product advice' was not 'personal advice' within the meaning of s 766B(3)(b), 'It follows that ASIC has failed to demonstrate the alleged contraventions of s 912A(1)(b) of the Act, being that WSAL and BTFM breached the conditions of their respective AFSLs by providing personal financial product advice. Similarly, ASIC has failed to demonstrate the alleged contraventions of s 946A and 961B of the Act, both of which depended upon proving that Westpac had provided "personal advice"'.

In a statement, ASIC said it will review the decision. The matter will return to the Federal Court on 7 February.

MoneyManagement suggests that ASIC's decision to review the court's decision, indicates the degree to which the regulator now appears prepared to pursue litigation.

[Sources: ASIC media release 03/01/2019; Australian Securities and Investments Commission v Westpac Securities Administration Limited, in the matter of Westpac Securities Administration Ltd in the matter of Westpac Securities Administration Ltd [2018] FCA 2078; Independent Financial Adviser 04/01/2019; Money Management 07/01/2019; MoneyManagement 07/01/2019]

In Brief | APRA has removed the interest-only benchmark for residential mortgage lending. The Australian Banking Association (ABA) has welcomed the announcement on the basis that it will increase competition in the sector, and therefore increase choice for home loan customers. 'Increased competition across the industry will mean customers have more ability to shop around for the best deal for them when looking at an interest-only home loan' ABA CEO Anna Bligh said.

[Sources: APRA media release 19/12/2018; Letter: Residential Mortgage Lending Interest-only Benchmarks; [registration required] The AFR 19/12/2018; ABA media release 19/12/2018; [registration required] The Australian 19/12/2018]

Accounting and Audit

Top Story | UK Audit sector update: The Kingman Review has recommended (among other things) that the UK audit regulator be replaced

Some Key Points

- **Independent 'root and branch review' of the UK audit regulator completed:** The Kingman Review found that reform is required, stating that 'the FRC has tended, overall, to take an excessively consensual approach to its work. The FRC's approach to its own governance has also not been consistent with either its public importance, or its role in championing governance in the corporate world'. The Review makes 83 recommendations, including that the UK audit regulator be replaced by a new: Audit, Reporting and Governance Authority.
- **CMA seeking feedback on proposals to improve competitiveness of the UK audit sector:** The CMA is seeking feedback on a number proposals to improve competitiveness in the audit sector including the introduction of a market share cap on the Big Four firms, introducing mandatory joint audits and requiring the full structural or operation split between audit and non-audit services. The update stops short of proposing the break up of the Big Four.
- **Brydon Review announced:** A review of the sector (the Brydon Review) has been announced by the government. It will 'build on the findings' of the Kingman Review and the CMA market study and consider, among other things, the question of 'how to manage any residual gap between what audit can and should deliver'.

Introduction

The independent review of the UK audit regulator, the Financial Reporting Council (the Kingman Review) was released at the end of 2018. Among other things, the review recommends that the regulator be replaced with a new body with stronger powers and a new approach.

In addition, the UK Competition and Markets Authority (CMA) has delivered an update on its market study seeking feedback on proposed changes and a further review of the audit sector has been announced by the government (the Brydon Review).

A high level overview of these developments is below.

Completion of the Kingman Review

The 'root and branch' independent review of the UK audit regulator, the Financial Reporting Council (FRC) led by Sir John Kingman (the Kingman Review) was completed in December 2018 (see: Governance News 20/04/2018).

Reform is required

The Review identifies a number of constraints on the FRC in performing its role and a number of concerns around the regulator's current approach including that its work does not 'command the same credibility' as the equivalent US body, the Public Companies Accounting Oversight Board (PCAOB).

Having said this, the Review also identifies a number of strengths in the regulator's current approach including, among other things, that it has been an 'effective custodian of the UK Corporate Governance Code' though it considers that 'The Stewardship Code, whilst a major and well-intentioned intervention, is not effective in practice'.

Overall the Review concludes that though 'some of the FRC's critics overstate their case' there is a case for reform on the basis that 'the FRC has tended, overall, to take an excessively consensual approach to its work. The FRC's approach to its own governance has also not been consistent with either its public importance, or its role in championing governance in the corporate world'.

Some Key Recommendations

Replacement of the Financial Reporting Council (FRC)

- **The FRC should be replaced 'as soon as possible' with a new independent regulator with clear statutory powers and objectives.** The new entity should be named the Audit, Reporting and Governance Authority.

- **The regulator should have an 'overarching duty to promote the interests of consumers of financial information, not producers'** the Review states. It should also have a duty to promote competition; a duty to promote innovation; and a duty to apply proportionality to all its work.
- **Recommendations 4 and 5 set out the suggested strategic objective and duties that should be placed on the new regulator.** It's suggested that the new regulator's strategic objective should be: 'To protect the interests of users of financial information and the wider public interest by setting high standards of statutory audit, corporate reporting and corporate governance, and by holding to account the companies and professional advisers responsible for meeting those standards'. Recommendation 6 outlines the 'core functions on audit and corporate reporting' that the new regulator should perform.
- **The regulator's corporate reporting work should be extended from its current limited scope to cover the entire annual report including corporate governance reporting**. It should be given stronger powers to require documents and other relevant information in order to conduct that review work. The regulator should be given the power to require restatements promptly (rather than requiring a Court Order).
- **The new body should be accountable to parliament**, with the Chair and CEO subject to a pre-approval hearing with the BEIS Select Committee, and appearing annually in front of the Select Committee.
- **The regulator should not be funded on a voluntary basis.** BEIS should put in place a statutory levy

New approach

- **The current self-regulatory model for the largest audit firms should end.** The Review recommends that the new Audit Firm Monitory Approach (APFMA) which involves enhanced monitoring of the six largest audit firms, should not be carried out on a voluntary basis but instead that the regulator should be given statutory power to carry out this work.
- **The government should review the UK's definition of a Public Interest Entity (PIE)** which the report states is 'too narrowly drawn' and 'may exclude entities whose audit arrangements are a matter of public interest'. The definition of a PIE is set by EU audit legislation and requires those entities and their auditors to adhere to requirements for auditor rotation, capping the provision of non-audit work, and the prohibition of some forms of non-audit work (which do not apply to non-PIE entities).
- **The new regulator should work towards a position where individual audit quality inspection reports, including gradings, are published in full** upon completion of Audit Quality Reviews (AQRs).
- **The new regulator should be more 'sparing and disciplined than the FRC in promulgating guidance and discussion documents'.** Only where the utility of such documents 'clearly exceeds the considerable costs they impose through users having to read and check them' should the regulator issue them, the report states.

Governance changes at the regulator

- **A new board should be appointed.** This should have some, but limited, continuity with the existing board. This is necessary, the report states to 'rebuild the respect of those it regulates and other stakeholders'. The report also specifies that the new board should be 'significantly smaller' than the FRC's current 14 member board and should not aim to be 'representative' of stakeholder interests but instead should comprise a 'mix of the skills, experience and knowledge needed to ensure strategic direction and effective constructive challenge to the executive'.
- **All board appointments should be public appointments** approved by the Secretary of State for BEIS and all appointments to both the board and committees of the new regulator should be advertised, and head hunters used in the process. In addition, the report recommends that the posts of Chair and CEO should be subject to confirmation hearings with the BEIS Select Committee 'if the

committee wishes'. The report also recommends that the simplification of the FRC's sub-board structure.

- **Independence from the sector and management of conflicts of interest:** 'The FRC has previously applied an inconsistent and incomplete approach to managing conflicts of interest' the report states. For the 'foreseeable future', the new regulator should not allow staff, or board or committee members ever to work on any regulatory functions relating to a past employer, removing themselves and/or delegating to others as necessary (in order, the Review explains, to rebuild the regulator's credibility.

Consideration should be given to abolishing the Stewardship Code (if the planned review of the Code does not go far enough)

The Review found that the 'Stewardship Code, whilst a major and well-intentioned intervention, is not effective in practice' and that a 'fundamental shift in approach' is needed to ensure that the revised Stewardship Code more clearly 'differentiates excellence in stewardship' with a focus on 'outcomes and effectiveness, not on policy statements'. The Review states that 'If this cannot be achieved, and the Code remains simply a driver of boilerplate reporting, serious consideration should be given to its abolition'.

[Note: The FT reports that the Financial Reporting Council is expected to open consultation on a revised Stewardship Code from 30 January. See: [registration required] The FT 05/01/2019]

The case for changing the way in which auditors are appointed: There is a case 'for at least considering radical change' writes Sir John Kingman

In addition to releasing the Review, a letter from Sir John Kingman to the Secretary of State for Business, Energy and Industrial Strategy (BEIS) setting out Sir John's view on whether there is a case for fundamental change in who appoints company auditors was also released.

Sir John writes that in his view, there is a 'principled case for at least considering radical change' and adds that Sir John is unconvinced that 'all the arguments for the status quo are fully persuasive'. He suggests that consideration should be given to granting the new regulator the right to appoint an auditor, in the case of PIEs, in certain circumstances. In addition, he suggests that consideration should be given to granting the new regulator the right, again in the case of PIEs, to approve audit fees, 'where it sees a case for doing so in the interests of quality'.

[Sources: Independent Review of the Financial Reporting Council December 2018; Letter to the Rt Hon Greg Clark MP December 2018]

Competition and Market Authority (CMA) Market Study: update released seeking feedback on proposed changes

Separately, the CMA also released an update paper on 18 December, as part of its market study of the statutory audit market (see: Governance News 15/10/2018) which seeks feedback on a number of proposed changes to the sector aimed at fostering competition.

These include:

- enhancing regulatory scrutiny of audit committees
- introducing mandatory joint audits
- introducing a market share cap on the Big Four firms so that a given proportion of the market is reserved for challenger firms
- creating a 'market oversight and resilience regime' to protect against the 'negative effects' of further concentration in the audit market
- requiring full structural or operational split between audit and non-audit services

The review does not, however, appear to suggest that the big four audit forms be broken up.

The deadline for submissions on the proposed changes is 21 January 2019.

[Sources: CMA media release 18/12/2018; Update Paper: 18/12/2018]

Further review (Brydon Review) of the sector announced

Following the release of the two reports, the UK government has announced that Donald Brydon (outgoing Chair of the London Stock Exchange Group), will lead a review (Brydon Review) of the quality and effectiveness of the UK audit market.

The terms of reference are yet to be released, however the government's statement says that it will make recommendations about 'what more can be done to ensure audits meet public, shareholder and investor expectations'.

More particularly, the review is expected to 'build on the findings' of the Kingman Review and the CMA market study and consider: a) how far audit can and should evolve to meet the needs of investors and other stakeholders; b) how auditors verify information they are signing off; c) how to manage any residual gap between what audit can and should deliver; and d) identify the public's expectations from audit.

The Review will also test the current model and ask whether it can be made more effective as well as looking at how audit should be developed to better serve the public interest in the future, taking account of changing business models and new technology.

Commenting on the Review, Business Secretary Greg Clark said: 'I'm delighted that Donald Brydon will be leading this review, following the important work of Sir John Kingman and the CMA, and his work should help us improve and restore confidence in the quality and rigour of audit companies. Audit companies need to learn the recent lessons from high profile audit failures and reform to regain public confidence, or they will be forced to do it.'

[Sources: BEIS media release 18/12/2018; [registration required] The FT 05/01/2019]

Risk Management

United States | SEC has charged multiple defendants with breaching federal securities antifraud laws and related SEC antifraud rules in connection with the (previously disclosed) EDGAR system hack and also flagged that the US Attorney's Office for the District of New Jersey has announced related criminal charges

The US Securities and Exchange Commission (SEC) has announced charges against nine defendants (a Ukrainian hacker, six individual traders in California, Ukraine, and Russia, and two entities) for participating in a scheme to hack into the SEC's EDGAR system and extract nonpublic information to use for illegal trading. SEC comments that the hacker and some of the traders were also involved in a similar scheme to hack into newswire services and trade on information that had not yet been released to the public, for which they were charged in 2015.

SEC alleges that:

- The Ukrainian hacker gained access to the EDGAR system in 2016 and extracted EDGAR files containing non-public earning results.
- This information was then allegedly passed to individuals who used it to trade in the narrow window between when the files were extracted from SEC systems and when the companies released the information to the public generating 'at least' $4.1m in illegal profits

The SEC's complaint charges each of the defendants with 'violating the federal securities antifraud laws and related SEC antifraud rules' and seeks a final judgment ordering the them to pay penalties, return their ill-gotten gains with prejudgment interest, and enjoining them from committing future violations of the antifraud laws. The SEC also named and is seeking relief from four relief defendants who allegedly profited from the scheme when defendants used the relief defendants' brokerage accounts to place illicit trades.

In a parallel action, the US Attorney's Office for the District of New Jersey today announced related criminal charges.

[Source: SEC media release 15/01/2019]

United Kingdom | Heightened awareness of cybersecurity issues? Whistleblower reports concerning privacy and cybersecurity have almost tripled after the introduction of the GDPR in May 2018 The FT reports.

The FT reports that the numbers of UK whistleblowers submitting confidential reports concerning alleged undisclosed data breaches to the Information Commissioner's Office (ICO) has risen considerably over the three months to the end of August 2018. Reportedly, 82 people sent in reports to the ICO about potentially undisclosed breaches in the three months to the end of August, compared with 31 reports in the three months to the end of April. The FT attributes the rise in the number of reports to increased security awareness following the introduction of the General Data Protection Regulation (GDPR) in May 2018 and to a 'series' of cybersecurity scandals over the course of the year.

The FT adds that the ICO has been encouraging whistleblowers to come forward in the wake of the Cambridge Analytica data usage scandal and that regulators have said that they intend to make a more 'active' approve to monitoring businesses.

[Source: [registration required] The FT 17/12/2018]

In Brief | The Parliamentary Joint Committee on Intelligence and Security has commenced a review of the *Telecommunication and Other Legislation Amendment (Assistance and Access) Act 2018.* The PJCIS is due to report by 3 April.

[Sources: Parliamentary Joint Committee on Intelligence and Security Review of the Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018; media release 17/12/2018]

In Brief | Alphabet shareholders are reportedly suing the Alphabet board over its role in approving the $90m exit package the company awarded to Android founder, Andy Rubin (in exchange for his resignation) after an investigation found he had sexually harassed an employee. Reportedly, shareholders are seeking damages as well as improved oversight of sexual harassment, the end of nondisclosure agreements for current and former employees, and improvements to corporate governance.

[Source: The New York Times 10/01/2019]

In Brief | The Massachusetts AG's investigation into whether Exxon Mobil concealed its knowledge of the role that fossil fuels play in climate change will proceed, following the US Supreme Court's decision to deny Exxon's appeal

[Sources: CNBC 08/01/2019; Climate Liability News 08/01/2019; Reuters 08/01/2019]

Corporate Misconduct and Liability

In Brief | The AFR reports that in anticipation of an increased number of corporate criminal cases being brought by ASIC against white collar criminals, the Attorney General's department is reportedly planning to transfer criminals corporate trials from the state supreme, district and county courts to a new criminal division in the Federal Court.

[Source: [registration required] The AFR 13/01/2019]

Other News

The Attorney General's Department has released guidance on the Foreign Influence Transparency Scheme which commenced on 10 December 2018

The Foreign Influence Transparency Scheme commenced on 10 December 2018. The Attorney General's Department writes that its purpose is to 'provide the public and government decision-makers with visibility of the nature, level and extent of foreign influence on Australia's government and political process'.

Some Key Points

- **The scheme introduces registration obligations for persons and entities** who have arrangements with, and undertake certain activities (eg parliamentary lobbying, general political lobbying, communications activity or disbursement activity) on behalf of, foreign principals (a foreign government, foreign political organisation, foreign government related entity or a foreign government related individual).
  - Whether a person or entity is required to register will depend on who the foreign principal is, the nature of the activities undertaken, the purpose for which the activities are undertaken, and in some cases, whether the person has held a senior public position in Australia.
  - Former Cabinet ministers and recent senior Commonwealth public officials have additional registration obligations because of the special nature of the positions they have held.
- **Establishes a public register:** The public register, accessible via the scheme's website, will show information about the activities of registrants and the foreign interests they represent, providing the government and the Australian public 'with an accurate picture of foreign influence in Australia'. Information published on the register will include: the registrant's full name (and other names they are known by); the date that the registrant entered into the relationship with the foreign principal or began undertaking each registrable activity; a description of the registrant's relationship with the foreign principal; the full name of the foreign principal; the foreign principal's country of origin or association; and (where relevant) the date registration ended or the date registration expired. The Attorney General's Department notes that information that is 'commercially sensitive, relates to national security or is not true will not be published'.
- **Establishes exemptions**, including for diplomatic and consular activities, activities related to the provision of legal advice or representation, religious activities, activities of registered charities, activities related to the arts, and activities for the purpose of providing humanitarian aid.
- **Establishes transparency notices,** which may be issued if the Secretary is satisfied that a person is a foreign government related entity, or a foreign government related individual.
- **Contains criminal offences** ranging from failing to comply with obligations under the scheme, through to failing to register in circumstances where a person is required to do so.

[Sources Attorney General's Department media release: Foreign Influence Transparency Scheme; Attorney General's website: Foreign Influence Transparency Scheme: Resources]

In Brief | Heading for a no deal Brexit? The Australian reports that UK Prime Minister Theresa May's Brexit Withdrawal Bill has been defeated 432 to 202.

[Source: [registration required] The Australian 16/01/2019]