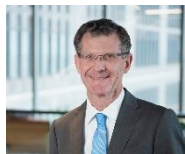


Governance News

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Boards and Directors

The Renault board has announced a new leadership team and flagged governance changes at the company

The Renault board has released a statement confirming the resignation of Carlos Ghosn as Chair and CEO of the company, outlining various governance changes, and announcing the appointment of Jean Dominique Senard as the new Chair and Thierry Bolloré as the new CEO.

Further details

- The role of CEO and Chair has been split.
- The new Chair (Mr Senard) will evaluate and if necessary propose changes to the governance structure at Renault. The proposed changes will then be presented to the Board ahead of the next General Shareholders' Meeting.
- Mr Senard will also have 'full responsibility' for managing the 'Alliance' with Nissan on behalf Renault in liaison with the new CEO (Mr Bolloré). Mr Senard will also propose any new agreement he considers 'useful for Renault's future' to the board.
- The new CEO will coordinate the Alliance's activities in the operational field under the authority of the Chairman.

The New York Times opines that the 'quick transition' is intended to rebuild ties between Renault and Nissan in the wake of Mr Ghosn's recent arrest in Japan.

[Sources: Renault media release 24/01/2019; [registration required] The AFR 24/01/2019; The New York Times 24/01/2019; CNN 24/01/2019; The New York Times 24/01/2019]

Diversity

No need for gender quotas? The 30% female board representation target has almost been reached with women accounting for 29.7% of board positions on ASX200 boards according to AICD figures

According to the Australian Institute of Company Directors (AICD), as at 31 December 2018:

- The 30% target for female board representation across the ASX200 had almost been reached with women accounting for 29.7% of ASX200 board positions. This represents an increase in female board representation of 10% since 2015 when the 30% target was implemented.
- The 30% target was achieved across the larger companies (ASX20, 50 and 100) by May of 2018.
- Four ASX200 boards have zero women on their boards.

AICD Managing Director and CEO Angus Armour commented that Australia is the first country in the world to achieve 30% gender diversity in top 100 boardrooms without regulatory intervention or quotas demonstrating that voluntary targets can be effective. He added that '30% remains the floor and not the ceiling for gender diversity. We intend to continue advocating for gender parity on Australian boards.'

Too early to set broader diversity targets? The ABC quotes Mr Armour as commenting that future targets could also take into account companies beyond the ASX 200 but that it is 'probably too early' to set targets for cultural diversity at this stage.

A new 40% target? According to media reports, Chair of the 30% Club Australia — which advocates 30% female board representation on ASX200 boards — Nicola Wakefield Evans, has plans to announce a more ambitious target next month. She has previously called on members to support a 40% target.

[Sources: Australian Institute of Company Directors media release 30/01/2019; The SMH 30/01/2019; The ABC 29/01/2019]



United States | (Gender) diversity remains an issue on US boards? An Equilar study into gender diversity on Russell 3000 boards has found the average number of female directors is less than two

In a recent study, Equilar looked into female representation on Russell 3000 companies' boards in each US state to identify trends and variations between regions.

According to Equilar:

- The overall average number of female directors is less than two and the average percentage of female directors is 17.4%.
- California (which recently enacted legislation mandating gender board quotas) only has an average of 1.5 female directors per board at Russell 3000 companies, meaning that the average company in California will have to add at least one more female director by 2021 (to avoid being fined under new gender quota requirements).
- Only eleven states have an average of two or more female directors on boards.
- The two states with the least gender diverse boards (on average) are Utah and Wyoming which have an average of one female director per board.
- The Midwest (as a region) has the highest average number of female directors at 1.9 per board, while the West and South, at 1.5 females per board, have the lowest average number of female directors.

Equilar comments that although companies with all male boards outside California will not face fines for lack of board diversity, they may face pressure from proxy advisory on the issue given the increased levels of concern. For example, Institutional Shareholder Services Inc (ISS) recently announced a new voting policy that will penalise boards with no female directors starting on 1 February 2020 (after a one year grace period). February 1st, 2020 after a one-year grace period.

[Source: Equilar 15/01/2019]

World Economic Forum | A long way to go on (gender) diversity? There is reportedly a measure of consensus on the need to accelerate progress on the issue, but less agreement on how that can best be achieved The AFR reports

The AFR reports that CEO of the advocacy group, The Female Quotient, Shelly Zalis, has called on World Economic Forum delegates to take immediate action to address the lack of women in leadership positions, observing that the lack of female WEF delegates (22% of WEF delegates were women) highlighted the need for change. 'If you're looking for CEOs and country leaders, which is what the WEF is, you're never going to go beyond 22% because women just aren't in those positions' she is quoted as saying.

According to The AFR, Ms Zalis identified four steps every company 'should' be taking to accelerate change.

1. Pay parity: Companies should conduct a pay audit and then ensure that all people doing the same work earn the same pay.
2. Mandatory parental leave: Making parental leave mandatory, will mean women are less likely to 'disproportionately' disadvantaged
3. Accountability: Include gender equality key performance indicators (KPIs) into financial performance metrics.
4. Leadership commitment: Ensure leaders have a conscious mindset and commitment to achieving equality.

Reportedly, there appeared to be support among delegates that change is needed. However, the article notes there were a range of views expressed on how progress could best be achieved. For example, there was no consensus on the issues of the imposition of quotas or affirmative action measures.

[Source: [registration required] The AFR 25/01/2019]



Shareholder Activism

Recent developments in activist campaigns: Elliott and Starboard at eBay, Third Point at Nestle

- **Activist Third Point at Nestle:** Reuters reports that activist Third Point LLC (run by Daniel Loeb) has called on Nestle (in which it holds a \$3bn stake) to split up its businesses to optimise shareholder returns. Reportedly Nestle Chair Paul Bulcke is resisting the pressure stating that he will not jeopardise the long-term prospects of the company in pursuit of short term gains. 'If the capacity of delivering is there, we should. If it jeopardizes my future thinking, and if it compromises my future success, we should not do this' he is quoted as saying.

[Sources: Reuters 25/01/2019; Yahoo!Finance 25/01/2019]

- **Activists Starboard Value and Elliott Management at eBay:** Reportedly both Elliott and Starboard Value, both of which hold 'significant stakes' in eBay and which reportedly hold similar views on how to optimise shareholder returns, are pressuring eBay to split up its business (sell StubHub and its classifieds business). Elliott has reportedly taken the step of issuing a five step plan outlining how it believes change can best be achieved. According to media reports, eBay CEO Devin Wenig has made changes at the company to differentiate it from its competitor Amazon and drive growth, though to date, the plan has not delivered the increased returns investors are looking for. Media reports have also commented that the sale of PayPal was successful. The CEO of Smead Capital Management Inc (which has a 2.5% stake in eBay) is quoted as commenting: 'We have been a very loyal EBay shareholder and we have gotten wealthy owning this' but went on to say 'It certainly didn't hurt a thing the last time they spun out a business.'

[Sources: Bloomberg 23/01/2019; [registration required] The AFR 23/01/2019; The Motley Fool 28/01/2019]

Meetings and Proxy Advisers

Top Story | Key Trends to emerge from the 2016-2018 AGM Seasons

MinterEllison has released snapshot of key trends to emerge from the AGMs of Australia's largest public companies (ASX 100) over the course of three years from 2016 to 2018.

Consistent with previous years, the 2018 AGM season saw shareholders continue to voice concerns about executive pay, while the constitutional barrier, coupled with a lack of board support for environmental social and governance (ESG) resolutions appear to be hampering institutional investors' efforts to improve climate risk disclosure through the AGM forum.

The snapshot can be accessed on the MinterEllison website [here](#).

[Source: MinterEllison: Governance News Insight 29/01/2019]

Regulators

APRA has released an information paper outlining its own assessment of various measures it implemented to lift home lending standards: 'Overall, APRA views the measures as having achieved their objectives without undue unintended consequences' though they did 'also involved trade-offs for the community' APRA writes.

The Australian Prudential Regulation Authority (APRA) has released an information paper summarising the measures it took to strengthen banking sector resilience and address 'heightened risks in the operating environment' in the period 2014-2018. These include what APRA describes as 'tactical, temporary constraints' namely, supervisory benchmarks for Authorised Deposit taking Institutions (ADIs) on lending to property investors and on an interest only basis as well as APRA reviews of ADI lending practices and additional prudential guidance on its expectations.

The paper also provides the regulator's assessment of the effectiveness of these measures in achieving their objectives.



Measures were effective: Overall, APRA writes that it considers that 'the prudential measures taken in the residential mortgage lending sector have been effective in meeting the objectives of strengthening resilience at both an ADI and financial system level'. The regulator cites a number of examples in support of this view including (among others) improvements to the quality of lending standards across the industry.

APRA adds that in its assessment, had it not taken these steps, 'it is likely that higher risk forms of mortgage lending would have continued to outpace more traditional mortgage borrowing as well as household income growth. This concentration would have left the banking sector increasingly vulnerable to future adverse developments, and would have allowed imbalances in the housing market to escalate'.

Some 'trade-offs': APRA also observes that the reduction in risk has come with 'some trade-offs'. For example, the shift to improve and more consistent lending standards, in addition to the expectation that ADIs constrain their investor and interest-only lending within APRA's growth benchmarks, 'involved some uncertainty and disruption for borrowers and lenders, as well as other parties such as mortgage brokers, as new lending policies and processes were put in place'. However, in APRA's assessment, the 'operational impacts' on mortgage lending were as significant as they were due to the 'deterioration in lending standards that have previously occurred' as well as inconsistencies in industry practice and the poor quality of data maintained by ADIs on their mortgage portfolio. APRA also notes that many ADIs ultimately decided to 'resort to pricing changes to manage volumes of higher risk loans in line with APRA's expectations'.

APRA states that it will continue to monitor risks in residential mortgage lending and 'could look to use similar or different methods in the future to drive appropriate prudential outcomes'.

Commenting that the release of the information paper by APRA is 'unusual' for the regulator, the AFR opines that the information paper:

- Constitutes a 'rejection' of 'attacks' by the Productivity Commission (PC) and the Australian Competition and Consumer Commission (ACCC) on the imposition of its 'controversial' benchmarks.
- May have been prompted by/in response to the PC recommendation that APRA should conduct post implementation evaluations of its material interventions (see: Productivity Commission Report into Competition in the Australian Financial System 03/08/2018; Governance News 06/08/2018).
- Is calculated to 'assuage' concerns that its actions restricted credit.
- May have pre-empted the Financial Services Royal Commission's questioning of whether banks are conducting sufficient assessments of borrowers, to satisfy their duties under credit laws.

Related News: APRA information paper: Countercyclical capital buffer released

Separately, APRA also released an information paper outlining its reasoning in leaving the countercyclical capital buffer for ADIs on hold at zero per cent.

[Sources: APRA media release 29/01/2019; APRA information paper: Review of APRA's prudential measures for residential mortgage lending risks 29/01/2019; APRA information paper Countercyclical capital buffer 29/01/2019; [registration required] The AFR 29/01/2019; 29/01/2019]

United Kingdom | The Financial Conduct Authority is consulting on proposed guidance on crypto-assets and the circumstances in which crypto-assets fall within the FCA's regulatory remit

The Financial Conduct Authority (FCA) is consulting on proposed guidance on crypto-assets, including guidance on whether cryptoasset activities fall under FCA regulation, whether they need to be authorised and whether they are compliant with FCA requirements.

According to the guidance, cryptocurrencies (eg Bitcoin, Litecoin or equivalents) and utility tokens (which can be redeemed for access to a specific product or service that is typically provided using a distributed ledger technology (DLT) platform) usually fall outside the remit of the FCA.

The consultation was launched both in response to industry request for greater clarity, and to the Cryptoasset Taskforce's recommendation that the FCA provide additional guidance on the existing regulatory perimeter.



Christopher Woolard, executive director of Strategy and Competition at the FCA, commented that though the cryptoasset market remains relatively small, consumer participation continues to grow and in light of this, that consumer protection remains a key area of focus.

The deadline for submissions is 5 April.

Does the FCA require a broader regulatory remit in this area? Further consultation flagged.

The draft guidance on cryptoassets flags that UK Treasury (HMT) will be publishing a consultation paper in early 2019 on 'exploring legislative change to potentially broaden the FCA's regulatory remit to bring in further types of cryptoassets'.

Mr Woolard also flagged that the FCA will consult later in 2019 on banning the sale of derivatives linked to certain types of cryptoassets to retail investors.

[Sources: Financial Conduct Authority media release 23/01/2019; CP19/3 Consultation paper; [registration required] The FT 23/01/2019]

In Brief | The Australian Securities and Investments Commission (ASIC) has reportedly been found (based on a record of the gifts it has received from 2014-2017) to be accepting a range of gifts from the institutions it regulates. Reportedly the regulator has declined to release the gift register for 2018 and has said it is undertaking a review of its policy in relation to gifts

[Sources: Independent Financial Adviser 29/01/2019; [registration required] The AFR 24/01/2019; The SMH 22/01/2019]

Financial Services

Timing confirmed: The Financial Services Royal Commission final report will be publicly released 4:10pm on Monday 4 February

Treasurer Josh Frydenberg has issued a statement confirming that the government will publicly release the final report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry at 4:10pm on Monday 4 February following the close of trading on the ASX. Following its release, the Treasurer will hold a press conference at Parliament House.

The government will receive the report on Friday 1 February 2019. A lock-up will be held for relevant stakeholders and media from 1.00pm on Monday 4 February 2019 in Canberra.

[Note: Shadow Treasurer Chris Bowen has previously called for the immediate public release of the report ie on 1 February. See: Shadow Treasurer Chris Bowen media release 21/01/2019]


[Source: Treasurer Josh Frydenberg media release 29/01/2019;

Open Banking update | 'Safety of customer's data should be a key priority' in Open Banking: The Australian Banking Association's (ABA) advocates a stronger focus on privacy protections

The Australian Banking Association (ABA) has released its submission to Treasury on the Privacy Impact Assessment (PIA) which assesses the risks to privacy associated with the Consumer Data Right (CDR) (Open Banking) (see: Governance News 16/01/2019).

Some Key Points

- **Privacy risk should be a focus of the pilot program:** The submission recommends that the terms of reference for the pilot program should specifically include an assessment of privacy risks. 'The pilot program to commence on 1 July 2019 will provide a useful opportunity to test these settings [ie privacy protections] and the industry has asked for the protection of privacy to be a key focus for the pilot' the ABA said in a statement.
- **Risk levels should be upgraded in some instances:** The submission identifies a number of instances in which it suggests that the risk likelihood of certain potential privacy risks (following the application of risk mitigation strategies) is higher than that assessed under the PIA eg the risk of



cybercriminals posing as data recipients to steal consumer data and a range of risks associated with third party misuse of data.

- **Additional measures:** Among other things, the submissions recommends the inclusion of measures to mitigate against the risk of authorised third party use of data and hacking. The submission also seeks clarification around who is board by the privacy safeguards.

Potential delays?

ITNews comments that the ABA submissions does not raise the question of what role government issued digital identify credentials (GovPass), which is currently under development by the Digital Transformation Agency, might play in the context of Open Banking, adding that it is also unclear what the future of such credentials might be given Labor's position is as yet unclear. In addition, the report questions whether the proposed timeline for implementation of the Open Banking Regime may be delayed given that the Bill has not yet been introduced.

[Note: For a status update on progress on the implementation of Open Banking see: Governance News 16/01/2019].

[Sources: Australian Banking Association media release 24/01/2019; Submission to Treasury Privacy Impact Assessment – Consumer Data Right – December 2018 18/01/2019 [publicly released 24/01/2019]; ITNews 24/01/2019]

The Financial Services Council has extended the consultation deadline on the FSC Life Insurance Code of Practice to 31 January

On 12 November, the Financial Services Council (FSC) released proposed changes to the Life Insurance Code of Practice (Code) for consultation. In response to industry requests, the consultation has been extended to 31 January to enable additional time for organisations to make submissions.

Application and enforcement: The (Code) is mandatory for all FSC member life insurers.

The Code is enforced by the independent Life Code Compliance Committee (which is administered by the Australian Financial Complaints Authority (AFCA)).

Proposed changes

The proposed changes to the Code are designed to lift standards in product design, sales, underwriting, customer service, complaints and claims handling. The proposed changes include:

- Banning pressure selling of products and coercive retention tactics.
- Banning medical disclosure checking without reasonable grounds.
- Ensuring customers are no better or worse off at claim time (excluding fraud).
- Increased protections for people taking out funeral insurance.
- Separating Consumer Credit Insurance (CCI) from credit product sales.
- Various measures to give 'greater support' to people with a mental health condition.

Among other things, the FSC seeks feedback on the following:

- **Funeral Insurance:** Feedback is sought on whether the additional protections in the draft Code in relation to funeral insurance go far enough and whether the Code should include minimum age requirements (ie funeral insurance could not be sold to people below the minimum age limit) and on whether funeral insurance should only be available with level premiums.
- **'Anti-hawking provisions':** The draft introduces additional protections, but feedback is sought on whether further restrictions should apply to outbound unsolicited calls.

[Sources: FSC media release 21/01/2019; Draft Life Insurance Code of Practice 12/11/2018; Financial Standard 24/01/2019]



Buy now pay later update | The Australian reports that ASIC is of the view that proposed product intervention powers may be sufficient to address the risk of consumer detriment in the sector (at least for now)

Appearing before the senate committee inquiry into the extension of credit to vulnerable Australians, Australian Securities and Investment Commission (ASIC) senior executive Michael Saadat has reportedly said that the proposed new product intervention powers for ASIC may offer sufficient protection to consumers in the buy now pay later context and should be tested before further reform (eg the extension of responsible lending obligations) is considered. 'The industry is relatively new. It's growing very quickly, admittedly, but we think product intervention powers will enable us to respond quickly to emerging issues' he is quoted as saying.

[Note: *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018* proposes to introduce design and distribution obligations in relation to financial products and to introduce a product intervention power for ASIC to prevent or respond to significant consumer detriment. The Bill was introduced into the House of Representatives on 20 September 2018 and has reached second reading stage. The Senate Economics Legislation Committee report, released on 19 November, recommended the Bill be passed. However the scrutiny committee notes some concerns about the Bill, commenting that it 'leaves to the Senate as a whole the appropriateness of allowing ASIC by delegated legislation to modify and exempt persons and financial products from the operation of proposed Part 7.8A of the *Corporations Act 2001 (Cth)*. See: Scrutiny Digest 12 of 2018]

[Source: registration required] *The Australian* 25/01/2019]

In Brief | Rice Warner has questioned the evidential basis of certain recommendations in the Productivity Commission's superannuation report. 'The link between the PC's recommendations and its earlier analysis has become increasingly tenuous as the inquiry progressed' Rice Warner writes

[Sources: Rice Warner media release 24/01/2019; *Investment Magazine* 24/01/2019]

In Brief | AUSTRAC guidance for the superannuation sector: In response to requests from the superannuation sector, AUSTRAC recently released industry specific guidance on compliance with obligations under the AML/CTF legislation. The guidance focuses on specific risks and potential scenarios relating to money laundering (ML) and terrorism financing (TF) and financial crime specific to superannuation entities. It also gives examples of methods that can be used to mitigate these risks and combat criminal threats

[Sources: AUSTRAC media release 14/12/2018; *Specific Guidance: Superannuation sector*]

Accounting and Audit

ASIC audit inspection findings 2017-2018 released: A focus on culture and talent will be required to accomplish 'sustainable improvements' in audit quality ASIC writes

Overview: ASIC Report 607 Audit inspection program report for 2017-2018

ASIC has released the findings from its audit inspection report for 2017-18. The regulator found that though efforts had been made by audit firms to improve audit quality, further improvements are required.

Some Key Findings

- ASIC's review of the audit files at the 6 largest firms for the period 1 January 2017 to 30 June 2018 found that in 20% of the key audit areas, auditors did not obtain reasonable assurance that the financial report was free from material misstatement. ASIC observes that this is an improvement on the previous 18 month period (23% in the previous 18-month period, ended 31 December 2016).
- ASIC's review of the 98 firms of all sizes found that the auditors did not, in its view, obtain reasonable assurance that the financial report was free from material misstatement in 24% of the total 347 key audit areas. ASIC notes that this represents a slight improvement on the previous period (down from 25% of 390 key audit areas in the previous period).

- Many of the findings related to accounting estimates (such as impairment of assets) and accounting policy choices (such as revenue recognition).

ASIC cautions against generalising the results across the entire market, noting that its inspections focused on higher risk audit areas. 'We do not select areas of audit files for review in our inspections where known reporting or audit issues have already been identified in our financial reporting surveillance program, in our investigations, or by other means' ASIC writes.

Areas for improvement: a focus on culture and talent required

ASIC observes that while there has been improvement in the level of findings audit firms need to continue to work on improving audit quality and the consistency of audit execution adding that 'sustainable improvements in audit quality require a focus on culture and talent by firms'.

Areas of future focus

ASIC states that the top areas of focus for future inspections will be on the following:

- Recognition of the need to improve: 'all partners and staff should embrace the need to improve audit quality and the consistency of audit execution';
- Accountability for conducting audits: partners and staff should understand and be accountable for their roles in conducting audits; and
- Leadership: 'firm leadership should give strong, genuine and consistent messages to partners and staff that audit quality is not negotiable, and this should be supported by holding individuals to account for inadequate audit work'.

In addition, ASIC suggests that audit engagement partners should spend 'significant time' at the audited entities to understand the business and risks; work directly with the audit team on risk areas to ensure timely and quality audit work, apply their knowledge and experience throughout the audit process, and upskill staff; and undertake comprehensive reviews of the audit files at the premises of audited entities, focusing on possible risk areas.

Finally, ASIC states that audit firms should continue to focus on: the audit of asset values (particularly impairment of non-financial assets); the audit of revenue and maintaining a strong culture of audit quality; the sufficiency and appropriateness of audit evidence obtained by the auditor; the level of professional scepticism exercised by auditors; and the appropriate use of the work of experts and other auditors.

Should ASIC name firms in audit reports? Writing in The AFR, UTS professor of accounting Stephen Taylor suggests that ASIC's reports would be more useful if the link between observed 'deficiencies' and the audit failure rate was more transparent for investors. Naming firms would assist in this, he argues. 'Name firms, clients. Only then can we appreciate what the link is between observed deficiencies, possible audit failure, and unacceptably low financial reporting quality. The link between the "identified deficiencies" and possible audit failure could be made much clearer through more transparency' he writes. Professor Taylor goes on to express concern that 'non-transparent indicators of allegedly low audit quality' could be used to justify further regulation of the audit market as is occurring in the UK and to call for a more 'rigorous discussion' about 'actual and perceived' audit quality issues.

About the report: ASIC inspected 20 audit firms of different sizes (6 largest firms, 8 national and network firms and 6 smaller firms) in the 18 months to 30 June 2018, covering financial reports for years ended 31 March 2016 to 31 December 2017. These firms, in aggregate, audit 97% of listed entities by market capitalisation.

[Sources: REP 607 Audit inspection program report for 2017–18; [registration required] The AFR 24/01/2019; 24/01/2019; 24/01/2019; 29/01/2019; [registration required] The Australian 25/01/2019; 26/01/2019; Accountants Daily 25/01/2019]

ASIC has announced the findings from 30 June 2018 Financial Reports: 'ASIC's concerns continue to relate to impairment of non-financial assets and inappropriate accounting treatments'

ASIC has announced the results from a review of the 30 June 2018 financial reports of 215 listed and other public interest entities.

- ASIC states that it made inquiries of 55 entities on 79 matters, seeking explanations of accounting treatments as a result of the review. The five areas that received the highest number of inquiries were: Impairment and other asset values (28); revenue recognition (18); 'Other Matters'; Tax accounting (11) and consolidation accounting (4).
- Material changes were made to 4% of the financial reports of public interest entities reviewed by ASIC. The main changes related to impairment of assets, revenue recognition and expense deferral.

ASIC Commissioner John Price said: 'ASIC's concerns continue to relate to impairment of non-financial assets and inappropriate accounting treatments. Directors and auditors should focus on values of assets and accounting policy choices in preparing their December 2018 financial reports.'

[Source: ASIC media release 25/01/2019]

United Kingdom | Broader implications? The Chair of the BEIS committee has said that the recent collapse of Patisserie Valerie raises questions about the effectiveness of current regulatory settings for the audit sector

The BBC reports that UK cafe chain Patisserie Valerie has gone into administration. The chain will reportedly close 70 outlets immediately, and the remaining 121 will continue trading while a buyer is found. According to the BBC, up to 900 of the company's 3,000 employees could lose their jobs in this process.

According to a statement released by Patisserie Valerie, since the company's announcement in October concerning evidence of fraud, forensic accountants have discovered that 'the misstatement of its accounts was extensive, involving very significant manipulation of the balance sheet and profit and loss accounts.'

The statement continues: 'The initial indications from the work carried out to date is that the cash flow and profitability of the business has been overstated in the past and is materially below that announced in the trading update on 12 October 2018, which was based on limited work carried out over a 48-hour period'.

Reportedly, Patisserie Finance director Chris Marsh was arrested after having been suspended by the company when the financial irregularities were uncovered. Auditors (Grant Thornton) are also reportedly under investigation by the Financial Reporting Council.

Chair of the Commons Business Energy and Industrial Strategy Committee, Rachel Reeves, commented: 'The extraordinary black-hole in Patisserie Valerie's accounts which has led to this administration raises grave corporate governance concerns and poses serious questions regarding the effectiveness of the auditor and the current arrangements for regulation. The BEIS Committee will be picking up these issues in the context of our current inquiry on the future of audit'.

[Sources: Rachel Reeves MP, Chair of the Business, Energy and Industrial Strategy Committee media release 23/01/2019; Patisserie Valerie media releases 16/01/2019; 22/01/2019; 22/01/2019; BBC 22/01/2019]

Risk Management

Supply Chain Risk

United Kingdom | Review of the UK Modern Slavery legislation has recommended the government legislate penalties to drive compliance

Introduction

In July 2018, the UK Home Secretary announced an independent review of the *Modern Slavery Act 2015 (UK)* (the Act). On 22 January, the second interim report was released. The report considers the effectiveness of existing measures to promote transparency in supply chains and whether additional measures are needed. It recommends, among other things, the imposition of a range of penalties and monitoring/enforcement measures as well as the extension of the regime to apply to the public sector.

Reuters reports that the UK Home Office has indicated at this stage, that it will consider the findings.



Change is needed

Among other things, the report found that:

- the impact of reporting requirements under s54 of the Act section has been limited to date
- there is 'general agreement between businesses and civil society that a lack of enforcement and penalties, as well as confusion surrounding reporting obligations, are core reasons for poor-quality statements and the estimated lack of compliance from over a third of eligible firms'
- given the current regime is 'not sufficient', the report suggests that it is 'time for the government to take tougher action to ensure companies are taking seriously their responsibilities to eradicate modern slavery from their supply chains'
- the report comments that the Australian Federal Act (*Modern Slavery Act 2018 (Cth)*) has 'gone much further in respect of transparency of supply chains' than the current UK Act.

Review Recommendations

Review recommendations include the following (among others).

- Clarification of the companies in scope of the reporting requirements.
- Measures to improve the quality of modern slavery statements including requiring use of a template to report on each of the six areas (among other measures).
- Measures to embed modern slavery reporting into business culture including:
 - requiring businesses to designate and name a board member to be personally accountable for the production of the Modern Slavery Statement; and
 - making failure to fulfil modern slavery reporting requirements or failing to act when instances of slavery are found offences under the *Company Directors Disqualification Act 1986 (UK)*.
- Measures to increase transparency including for example, requiring statements to be dated and to clearly indicate which 12 month period they cover, and the creation of a publicly accessible, central government-run digital repository to house the statements.
- Measures to strengthen monitoring and enforcement of the reporting requirements including the following measures.
 - Escalating penalties should be legislated such as initial warnings, fines (as a percentage of turnover), court summons and directors' disqualification. Sanctions should be introduced gradually over the next few years so as to give companies time to adapt to changes in the legislative requirements.
 - An enforcement body to impose sanctions on non-compliant companies. Fines levied for non-compliance could be used to fund the enforcement body.
 - The Independent Anti-Slavery Commissioner should monitor compliance.
- Requirements should be extended to the public sector.

Timeline for completion of the review and next steps: The Terms of Reference provide that the review will 'aim' to report to the Home Secretary before the end of March 2019. On completion, the review is to be compiled into a report, including recommendations, to be presented to the Home Secretary for approval. Following approval, the Home Secretary will lay the report in Parliament.

[Note: The Australian legislation is due to be reviewed after three years to assess whether amendments, including civil penalties, are required. See: *Governance News 03/12/2018.*]

[Sources: *Modern Slavery Act 2015 Review: second interim report 22/01/2019; Review Terms of Reference; Reuters 23/01/2019*]



Brexit

(Possible) no-deal Brexit impact? A number of UK based businesses have reportedly cautioned lawmakers that a 'no deal' Brexit could result in UK job losses, disruption to food supply and the relocation of businesses

- **Sony to relocate its headquarters to Netherlands to avoid Brexit disruption?** Sony has reportedly said that it will relocate its European headquarters from the UK to the Netherlands in order to avoid Brexit disruptions. Reportedly, the company has said that UK based operations and personnel will be largely unaffected by the planned move (as they will remain in the UK).
- **Airbus may relocate?** Airbus CEO Tom Enders has reportedly cautioned lawmakers not to take the continued presence of the company in the UK for granted. 'Please don't listen to the Brexiteers' madness which asserts that, because we have huge plants here, we will not move and we will always be here. They are wrong... If there's a no-deal Brexit, we at Airbus will have to make potentially very harmful decisions for the UK' he is quoted as stating.
- **Tesco has reportedly said that a no-deal Brexit will result in loss of UK jobs:** The AFR reports that Tesco has said that a no-deal Brexit will result in the termination of 9000 employees across the UK. In addition, a 'cooperative' of UK food retailers (including Marks and Spencer, Lidl and Waitrose supermarkets) has reportedly cautioned parliamentarians that a no-deal Brexit could result in significant disruption to UK food supply given one third of food eaten in the UK is sourced from the EU.
- **Dyson to relocate its headquarters (but it's not about Brexit)?** UK based company, Dyson, has reportedly said that it will relocate its headquarters to Singapore for commercial reasons but that the shift is unrelated to either Brexit and/or tax considerations. Media reports have commented that Dyson founder, Sir James Dyson, has been a prominent Brexit supporter and has previously said that leaving the EU would open 'fantastic' opportunities in the rest of the world.

[Sources: Bloomberg 23/01/2019; [registration required] The FT 24/01/2019; 24/01/2019; The BBC 23/01/2019; Fortune 24/01/2019; [registration required] The AFR 29/01/2019]


Cybersecurity and Privacy

Recent developments: data privacy, data stewardship and the need (or not) for increased regulation of technology and large technology companies

- **World Economic Forum at Davos: Data privacy vs access to the benefits of big data were key themes** according to media reports. Fortune comments that there was no consensus reached on the question of data stewardship, though there was plenty of debate. On the one hand, some businesses (eg Alibaba) appear keen to persuade lawmakers against overregulation on the basis that it risks restricting innovation and the benefits (profits) attaching to it. On the other, 'the fast-and-loose practices feeding today's algorithmic models threaten to undermine the autonomy of consumers and citizens everywhere' and compromise public trust. The AFR adds that 'there was talk' at the forum, that if divisions between the US, Europe and China on these issues and the best way to manage them cannot be resolved, the legitimacy of the World Trade Organisation could be called into question. However, according to The AFR agreement appears a distant prospect. European Parliamentarian Marietje Schaake is quoted as commenting: 'Those who have lived under dictatorships say, "Please don't give me a ministry of truth", and I agree with that fully. But is it acceptable that Mark Zuckerberg is the minister of truth? Facebook and private companies determine so much about what is acceptable and not acceptable [regarding what can and is done with citizen's data]'.

[Sources: [registration required] The FT 23/01/2019; Fortune 26/01/2019; : [registration required] The AFR 24/01/2019]

- **Google to challenge its €50m GDPR fine?** Reportedly Google has said that it intends to appeal the €50 million fine recently issued by the French data protection authority (the CNIL) for alleged violation of EU privacy rules (see: Governance News 23/01/2019). Google is quoted as stating: 'We've worked hard to create a GDPR consent process for personalized ads that is as transparent



and straightforward as possible, based on regulatory guidance and user experience testing. We're also concerned about the impact of this ruling on publishers, original content creators and tech companies in Europe and beyond. For all these reasons, we've now decided to appeal'. Reportedly the fine, is the first major financial penalty on a large technology company since the EU's General Data Protection Regulation (GDPR) came into force. Media reports comment that Google's challenge could further define/clarify how the tech sector should interpret requirements on consent under the GDPR.

[Sources: Politico 23/01/2019; ZDNet 24/01/2019]

- **No Google News in Europe if proposed 'link tax' goes ahead?** Reportedly Google is considering withdrawing Google News services from the EU if a law proposing to allow publishers to charge a fee when fragments of their articles appear in Google search results or are shared by users comes into effect.

[Source: Bloomberg 22/01/2019]

- **Microsoft CEO calls for GDPR style data privacy laws?** Reportedly, Microsoft CEO Satya Nadella has praised the European data regulation, the General Data Protection Regulation (GDPR) and has said that he'd like to see similar laws introduced into the US. 'My own point of view on GDPR is it's a fantastic start on really treating privacy as a human right' and 'I'm hopeful that in the United States we will have something that is along the same lines' he is quoted as stating. Business Insider comments that Apple CEO Tim Cook has also called for US Federal legislators enact similar legislation.

[Source: Business Insider 25/01/2019]

- **Google and Facebook's spending on lobbying efforts to combat the 'Techlash' at record levels?** In light of increased scrutiny and growing calls for increased regulation of large technology companies, both Google and Facebook have reportedly significantly increased their spending on lobbying efforts in the US in a bid, media reports suggest, to influence lawmakers. Reportedly, Google spent more than \$21m on lobbying efforts in Washington in 2018 (exceeding its previous 'record' of \$18m in 2017). Facebook reportedly spent nearly \$13m (as compared with \$11.5m in 2017).

[Sources: Bloomberg 23/01/2019; The Economic Times 23/01/2019]

- **Google has reportedly said it would 'untroubled' if GDPR style laws were introduced into Australia, but is reportedly less accepting of the need for increased monitoring of its algorithms:** Responding to some of the proposals in the Australian Competition and Consumer Commission's (ACCC's) preliminary report on the [Digital Platforms Inquiry](#) released in December 2018, and more to the need (or not) for increased oversight/regulation, The AFR reports that Google has said it would be 'untroubled' should Australia enact GDPR style privacy laws. However, the technology company has reportedly rejected proposals to increase oversight/scrutiny of its algorithms eg those governing news rankings and advertising placement on its products. '[Algorithm transparency] is an issue that we've had on the consumer side for the 20 years that we've [Google] been operating...As soon as you open up those sort of algorithms, the ability for bad actors to come in and manipulate those results is enormous' Google Australia and New Zealand Managing Director Mel Silva is quoted as saying. Rather, The AFR reports that Ms Silva has said that Google is looking to work with regulators on 'smart regulation'. 'We do understand that there's a need when there are problems for regulators to step in' Ms Silva reportedly said.

[Source: [registration required] The AFR 29/01/2019]

- **Facebook to create an external board to have oversight over content moderation decisions on the platform?** Fortune reports that Facebook plans to create an independent board, which will be a body of experts with power to veto or uphold the company's moderation decisions. Reportedly, the decisions of this new body will be 'transparently shared'. According to Fortune, Facebook plans to spend the next six months holding workshops in various countries to get feedback on how to best

shape the board, including how many members it should have and how long their terms should last. Facebook will reportedly share more details about the process in the next few weeks.

[Source: Fortune 28/01/2019]

- **Does Australia need an Artificial Intelligence (AI) ethics advisory body?** According to media reports, CSIRO Chair David Thodey and 3A institute director and ANU professor Genevieve Bell are among the signatories to an open letter calling for an 'organising body to guide and advance the development of ethical frameworks, policy and regulation' in the context of domestic artificial intelligence (AI) and technology policy (and regulatory) decisions. According to media reports, the letter highlights the fact that the law has failed to keep pace with the rate of change as a key issue: 'lack of a regulatory and ethical framework, as the pace of development of smart technology leaves the old, dumb law struggling to keep up' the letter is quoted as stating. The signatories to the letter (Stuart Fuller, James Mabbott, Ross Buckley, Nicole Gillespie, Toby Heap, Mike Foster, Ken Reid, Kate Marshall and Simon O'Dell, David Thodey and Genevieve Bell) have reportedly said they will hold an AI forum in Sydney on 7 February to debate issues around AI in Australia.

[Sources: [registration required] The AFR 25/01/2019; 28/01/2019; iTNews 25/01/2019; Computerworld.com 25/01/2019; Information Age 29/01/2019]

Other Developments

ALRC report calls for an inquiry into the laws underlying shareholder class actions

The Australian Law Reform Commission (ALRC) report: *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report 134, 2018) was tabled in Parliament on 24 January.

Recommendations include the following.

- A review of both the statutory enforcement regimes for regulators and federal statutory continuous disclosure obligations and those relating to misleading and deceptive conduct.
- The introduction of a limited percentage based fee model for solicitors.
- The introduction of a statutory presumption in favour of securities for cost, and greater court oversight of funding agreements which must indemnify the lead plaintiff against an adverse costs order.
- The introduction of new mechanisms for the Federal Court to more effectively deal with competing class actions.
- The introduction of a voluntary accreditation scheme for solicitors acting in class action proceedings.

The Australian quotes ALRC President Sarah Derrington as saying that the recommendations are aimed at promoting fairness and protecting litigants, and are 'designed to support the evolution, rather than revolution, of the class action regime'.

The Australian suggests that any move to 'soften' continuous disclosure obligations for listed companies would be controversial, noting however that Attorney-General Christian Porter has downplayed the significance in the context of the report recommendations overall. 'Change in that area [ie continuous disclosure] is just not a high priority...The core of this is how plaintiffs have fair, reasonable processes that allow them access to outcomes in a reasonable way ... To me, that's the main game here' Mr Porter is quoted as stating.

[Sources: Australian Law Reform Commission media release 25/01/2019; Inquiry into Class Action Proceedings Final Report 25/01/2019; [registration required] The Australian 25/01/2019]



The US Department of Justice has announced it has brought criminal charges against Huawei and others for (alleged) financial fraud

According to a statement issued by the US Department of Justice (DOJ) Chinese telecommunications group Huawei and Huawei CFO Ms Wanzhou Meng have been charged with (alleged) financial fraud in connection with a scheme to mislead authorities (and others) about Huawei's relationship with its subsidiaries for the purposes of conducting business in Iran (in violation of US sanctions). Huawei Device USA Inc and Huawei's Iranian Subsidiary Skycom were also named as defendants.

- Huawei and Skycom have been charged with bank fraud and conspiracy to commit bank fraud, wire fraud and conspiracy to commit wire fraud, violations of the International Emergency Economic Powers Act (IEEPA) and conspiracy to violate IEEPA, and conspiracy to commit money laundering.
- Huawei and Huawei USA are charged with conspiracy to obstruct justice related to the grand jury investigation in the Eastern District of New York.
- Huawei CFO Wanzhou Meng is charged with bank fraud, wire fraud, and conspiracies to commit bank and wire fraud. Reportedly, Ms Meng has denied the charges and is resisting extradition to the US from Canada (where she has reportedly been detained at the request of the US government).

According to media reports, China has said that the charges are 'unfair and immoral' and the country has asked the US to withdraw its extradition request. The Chinese foreign minister is quoted as stating: 'We strongly urge the US to stop the unreasonable suppression of Chinese companies including Huawei'.

Separately, IT News reports that the DOJ has also brought charges against two Huawei subsidiaries, alleging ten counts of stealing trade secrets, wire fraud and obstructing justice for allegedly stealing robotic technology from T-Mobile US Inc. Reportedly, Huawei has said the allegations of trade secret theft had already been settled in a civil case with T-Mobile, which found neither damages nor wilful and malicious conduct.

[Sources: ITNews 29/01/2019; US Department of Justice media release 28/01/2019; The SMH 29/01/2019; Associated Press (Twitter) 29/01/2019; Reuters 29/01/2019]

In Brief | AUSTRAC has issued a reminder that the deadline for submission of annual compliance reports (on how entities have met their anti-money laundering and counter-terrorism financing obligations over the 2018 calendar year) is 31 March.

[Source: AUSTRAC media release 02/01/2019]

Other News


Plans to strengthen UCT protections for SMEs? If elected, The Federal Labor party plans to make unfair contract terms illegal, to introduce penalties and increase the number of small businesses eligible for protection

The Federal Labor Party has announced that if elected, it will make 'unfair contract terms illegal, introduce penalties of up to \$10 million for contracts that contain unfair contract terms, and increase the number of small businesses eligible for protection from such contract terms'. The announcement notes that the Australian Competition and Consumer Commission has previously called for current protections to be strengthened.

[Note: ACCC Chair Rod Sims has previously flagged the need to strengthen protections for small businesses, in particular highlighting the fact that unfair contract terms are not illegal, and the lack of pecuniary penalties as limitations of the current regime. See: Governance News 03/09/2019; Speech by ACCC Chair Rod Sims to COSBOA National Small Business Summit 31/08/2018.]

Further Detail

- **Proposed changes to the eligibility:**

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- **Turnover of up to \$10m OR 20 employees:** Labor proposes to introduce an additional size definition under which, businesses with a turnover of up to \$10m would be an eligible alternative to the 20 employee definition.
 - **Increase the contract size threshold:** Labor proposes to increase the contract size threshold to \$1 million for contracts up to 12 month (up from \$300,000) and \$5 million for contracts greater than 12 months (up from \$1 million)).
 - **Australian Competition and Consumer Commission (ACCC) to oversee compliance including seeking pecuniary penalties**
 - Labor proposes to make unfair contract terms illegal and subject to penalties.
 - It's proposed that the Australian Competition and Consumer Commission (ACCC) would be able to seek pecuniary penalties and issue infringement notices when a business is found to have imposed unfair contract terms.
 - The ACCC would also issue public guidance on the broader application of precedent-setting cases, and on contract terms likely to be found unfair.
 - **Commitment to 'consultation and review' of the definition of a standard form contract.**

[Note: Labor's announcement follows the recent review of Unfair Contract Term Protections for Small Business which concluded on 21 December 2018. Among other things, the Discussion Paper released for consultation sought views on the issue of thresholds (whether the current 20 employee threshold is appropriate and whether the value threshold covers contracts that warrant UC protections; what clarifications (if any) are required to determine whether a contract is a standard form contract; whether current exemptions remain appropriate; and whether the current regime provides an appropriate level of protections to small business overall. See: *Review of Unfair Contract Term Protections for Small Business Discussion Paper November 2018.*]

[Sources: Joint media release: Shadow Treasurer Chris Bowen, Shadow Minister for Consumer Affairs Madeleine King and Shadow Assistant Treasurer Andrew Leigh 25/01/2019; Labor Fact Sheet: Unfair Contract Terms 25/01/2019; The SMH 25/01/2019; 25/01/2019; MyBusiness 25/01/2019]