Governance News

10 July 2019

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Diversity

On track to meet 50% target for female workers by 2025? The Australian reports that BHP has said it's on track to meet its workforce gender equality quota

The Australian reports that BHP has said it is on track to meet its 2025 workforce gender equality target, for women to make up 50% of its workforce by 2025.

Reportedly, BHP's executive team reached gender balance earlier this year under CEO Andrew Mackenzie, and female representation in its broader workforce now reportedly stands at 22.4% (up from 17.6% when the policy was set in 2016).

Reportedly, the company is now focused on creating and sustaining an inclusive work environment.

[Source: [registration required] The Australian 03/07/2019]

Shareholder Activism

In Brief | Woolworths will combine its liquor and hospitality businesses before divesting them in the next financial year. The AFR reports that views on the change are diverse. The Alliance for gambling reform, which has pushed for Woolworths to exit the pubs/gambling business has welcomed the announcement and called for other businesses to follow suit

[Note: The SMH reported that Woolworths' third largest shareholder, Perpetual Investments, has been exerting pressure on the Woolworths' board to exit its pubs/slot machine business. See: Governance News 29/05/2019]

[Sources: Woolworths ASX Announcement 03/07/2019; Alliance for gambling reform media release 03/07/2019;The ABC 03/07/2019; [registration required] The AFR 04/07/2019; 05/07/2019; News.com.au 03/07/2019]

Other Shareholder News

Time to act on dual-class share structures? ISS research has found (among other things) that dual class companies appear more likely than other companies to face governance challenges

Institutional Shareholder Services (ISS) has released a review some of the key trends in dual-class share structures in the US and examined the links between dual-class share structures with corporate governance and company performance.

Some Key Findings

1. **Differential voting rights are becoming slightly more common**, with the proportion of companies in the Russell 3000 with differential voting rights up one percentage point over the last decade. The increase is primarily among small companies, and is highly concentrated in certain industry groups, such as the media and entertainment sector (which includes large technology giants Facebook and Alphabet)
2. **Investors overwhelmingly favor the one-share, one-vote capital structure**, and they express this preference through their voting at general meetings of companies when given the opportunity. ISS observes that shareholder proponents have recently revamped campaigns to remove dual-class share structures, with 77 such proposals appearing on general meeting ballots during the past nine years. According to ISS, though the proposals are rarely successful, support rates appear to be high among minority shareholders — ISS estimates support rates for these proposals at 60% of votes cast and suggests that it could be higher.
3. **Companies with dual-class share structures face more governance challenges compared to other companies,** as they are more likely to exhibit more problematic corporate governance practices. For example, ISS found that dual-class companies are:

- likely to lack independent board leadership (52% of controlled, dual-class companies do not have an independent lead director nor an independent chair on their board, compared to only 12% of one-share, one-vote, non-controlled firms);
- more likely to exhibit related-party transactions involving the CEO, which may raise concerns about potential conflicts of interest
- less likely to disclose their director evaluation process, which may serve as an indicator of poor board accountability, renewal, and diligence
- more likely to face environmental or social controversies

ISS also found that directors of dual-class companies are more likely to miss board meetings, which many investors consider a minimum measure of directors' fulfillment of their fiduciary duty to shareholders.

4. **Dual-class share structures do not necessarily offer better performance**, as the results appear inconclusive. According to ISS' analysis, dual-class companies appear more profitable than their peers, but they fail to show significant improvement in performance compared to their counterparts.

Time to respond to these issues: In the context of recent calls to regulate the technology sector in light of concerns about data privacy, content control, taxation and market competition (among other issues) and the need to ensure robust governance and accountability, ISS argues 'that dual-class shares are now a major policy issue for the investment community with potentially broader implications for multiple stakeholders'.

Support for the introduction of 'sunset provisions': ISS also expresses support for the Council of Institutional Investors proposal to introduce time-based sunset provisions, which automatically convert the dual class to one share within a reasonable timeframe (typically three to seven years). 'That approach may indeed be a viable way to address the concerns of the investment community' ISS writes.

[Source: Harvard Law School Forum on Corporate Governance and Financial Regulation 28/06/2019]

Corpoate Social Responsibility and Sustainability

RIAA's annual responsible investment report has found the responsible investment market continues to grow in Australia

The Responsible Investment Association Australasia (RIAA) recently released its annual report into the size, growth, competition and performance of responsible investment in Australia over the 12 months to 31 December 2018.

Overall, the report found that Australia's responsible investment (RI) market continued to grow in 2018, with $980 billion in assets under management (AUM), a rise of 13% on the previous year.

RIAA CEO Simon O'Connor commented that the findings indicate that 'consideration of environmental, social, governance and ethical factors is becoming the expected minimum standard of good investment practice, with a majority of Australian managers stating a commitment to responsible investment.

Context: What is responsible investing? Responsible investing, also called ethical investing or sustainable investing, considers a broad range of risks and value drivers as part of the investment decision-making process, beyond and in addition to reported financial risk. It is a systematic approach that takes environmental, social and governance (ESG) considerations and ethical issues into account throughout the process of researching, analysing, selecting and monitoring investments. It acknowledges that these factors can be critical in understanding the full value of an investment.

Some Key Points

1. **The responsible investment market continues to grow in Australia with associated AUM up 13% over the course of 2018 to $980 billion.** This represents 44% of total professionally managed assets under management (AUM) which now sits at $2.24 trillion according to the Australian Bureau of Statistics (ABS). RIAA comments that the growth in responsible investment in Australia reflects offshore trends, with global responsible investment assets reaching $US30.7 trillion at the start of 2018 (a 43% increase from 2016), according to data from the Global Sustainable Investment Alliance.

2. **Responsible investment funds outperformed mainstream funds over most time frames and asset classes.** Australian RI share funds outperformed mainstream Australian share fund benchmarks for all periods except the three-year term. International RI share funds outperformed the Morningstar average mainstream international share fund over every time horizon, as did responsibly managed multi-sector funds against the mainstream multi-sector growth fund average. Commenting on this, RIAA CEO Simon O'Connor said that the findings 'refute any misconception that investing responsibly comes at a cost in terms of performance, and contributes to the mounting body of evidence showing that responsible and ethical investing leads to better investment outcomes, alongside benefiting people and the planet'.

3. **The dominant responsible investment strategy is ESG integration**, which represents 45% of AUM when taking both primary and secondary strategies into account. Corporate advocacy and shareholder action is the second most popular RI strategy. Negative screening is the third most popular strategy with Australian investors compared with globally where it ranks first.

4. **The number of investment managers applying leading practice ESG integration is on the rise, but the overall number remains small.** Of the 120 investment managers assessed, 34 (28%) are applying a leading approach to ESG integration (score >80%). The number of leading ESG integration practitioners has risen from 24 last year, with several employing other responsible investment strategies as their primary strategy.

5. **Negative screening is gaining traction as a strategy, but the exclusions applied by investment managers are not always aligned with what's important to consumers.** More particularly, the report found that consumers demonstrate most interest in funds that avoided investment in fossil fuels and human rights violations, but the most prevalent negative screens being conducted by investment managers are for weapons and tobacco, followed by fossil fuels and human rights.

[Sources: RIAA media release 03/07/2019; RIAA report: Responsible Investment Benchmark Report 2019 Australia; RIAA fact sheet; InvestorDaily 03/07/2019]

Institutional Shareholders and Stewardship

Commitment to increased transparency and accountability: TelstraSuper has signed on to the Australian Asset owner Stewardship Code

TelstraSuper announced that it has signed on to the Australian Asset Owner Stewardship Code (Code).

TelstraSuper writes that becoming a Code signatory will not change its approach to responsible investing but rather 'means we're committing to more transparency and accountability about the work we do. So, keep an eye out for improvements to the way we make disclosures about things like carbon exposure and proxy voting. We also hope to influence the greater investment industry to follow suit'.

By signing on to the Code, TelstraSuper will be joining 10 other superannuation funds (including Australian Super, Care Super, Cbus, First State and HESTA) in leading the way to better disclosure.

[Note: The voluntary Australian Asset Owner Stewardship Code was developed by the Australian Council of Superannuation Investors (ACSI) in 2018 as a way to increase the transparency and accountability of stewardship activities in Australia. See: Governance News 18/05/2019; 08/05/2019]

[Sources: Telstra Super media release 01/07/2019; Super Review 04/07/2019]

Regulators

United States | SEC will hold a roundtable on short term/long term management of public companies, periodic reporting and regulatory requirements on 18 July

The US Securities and Exchange Commission (SEC) has announced that it will hold a roundtable on 18 July to hear from investors, issuers and other market participants about the impact of short-termism on capital markets and whether the reporting system, or other aspects of regulations, should be modified to address these concerns.

Agenda

1. **Impact of a Short-Term Focus on US Capital Markets:** The panel will explore the causes and impact of a short-term focus on US capital markets, and seek to identify potential market practices and regulatory changes that could encourage long-term thinking and investment.

2. **The periodic reporting system's role in fostering a long-term focus:** the panel discussion will focus on what specific regulatory changes to the current periodic reporting system could be implemented to foster a longer-term focus.

SEC writes that members of the public wishing to provide views on these issues, are able to do so electronically/on paper.

[Source: SEC media release 02/07/2019]

In Brief | SEC to offer companies facing enforcement action the option of a 'package deal'? Recognizing that a segregated process for considering contemporaneous settlement offers and waiver requests may not produce the best outcome for investors in all circumstances, I believe it is appropriate to make it clear that a settling entity can request that the Commission consider an offer of settlement that simultaneously addresses both the underlying enforcement action and any related collateral disqualifications…The Commission is, of course, under no obligation to accept any settlement offer and may determine not to accept a simultaneous offer of settlement and waiver request on the basis of form alone' SEC Chair Jay Clayton writes

[Sources: Harvard Law School Forum on Corporate Governance and Financial Regulation 03/07/2019; [registration required] The WSJ 03/07/2019]

In Brief | Treasurer Josh Frydenberg has announced that Stephen Ridgeway has been appointed as a Commissioner of the Australian Competition and Consumer Commission (ACCC) for a term of five years from June 2019. Mr Ridgeway replaces Roger Featherston, who stepped down this month after five years at the ACCC

[Sources: ACCC media release 04/07/2019; Treasurer Josh Frydenberg media release 03/07/2019]

Financial Services

Top Story | Targeting short term lenders: ASIC is consulting on the first proposed use of its new product intervention power

Overview | ASIC Consultation Paper: CP 316 Using the product intervention power: Short term credit

Key Takeouts

- ASIC proposes intervening in a specific lending model that it claims causes 'significant consumer detriment' to vulnerable customers
- ASIC's preferred approach is to impose an industry wide product intervention order banning (certain) lending models which benefit from the short term credit exemption
- Before ASIC can take action it is required to consult on its proposed intervention. Consultation will end on 30 July
- The AFR reports that the Financial Rights Legal Centre has welcomed ASIC's proposed intervention saying that it is 'well overdue'

The Australian Securities and Investments Commission (ASIC) has released a consultation paper setting out its proposal for using its product intervention power under Pt 7.9A of the Corporations Act 2001 (Cth) to address the significant consumer detriment caused by specific short term lending models.

ASIC proposes to target a specific short term lending model

The model being targeted by the regulator is used by a short term credit provider and its associate — Cigno Pty Ltd and Gold-Silver Standard Finance Pty Ltd. The model operates by:

- offering short term credit to consumers, mostly for small amounts up to $1,000. The application process is advertised as taking about two week
- an associate of the short term credit provider offers collateral services under a separate services agreement for a 'fast track application' if the consumer wants the money immediately. The fees for the collateral services are very high relative to the amount borrowed — total fees and repayments can amount to up to 990% of the loan amount
- the money must be repaid within a maximum term of 62 days and sometimes a shorter period of time, increasing the risk of default as repayments are based on the term of the credit rather than being based on capacity to repay

Significant consumer detriment?

The product intervention power allows ASIC to intervene where financial and credit products have resulted in or are likely to result in, significant consumer detriment.

The model being targeted falls under the credit exemption: ASIC notes the short term credit/collateral services provided by both entities fall under the short term credit exemption and in consequence, consumers do not have a number of rights/protections which they would otherwise have (for example, the right not to be obliged to repay more than double the amount borrowed in the event of a default and the right to rely on the various other protections and provisions of the National Credit Act and Code among others).

ASIC considers that the model does cause significant consumer detriment: ASIC considers that the model, which is designed to provide short term credit at high cost to vulnerable consumers eg those on low incomes/in financial difficulty 'can and, on the evidence available to ASIC, does cause significant consumer detriment' because:

- it targets vulnerable consumers: the target market is consumers in urgent need of relatively small amounts of money, indicating the vulnerability of the target market
- costs are uncapped: the total cost payable under the credit contract and services agreement is significantly higher than the maximum charges permitted by the National Credit Act, which imposes caps on costs payable for short term and small amount lending
- there is no adequate assessment of a consumer's capacity to meet repayments and defaulters are charged high fees: ASIC cites as an example, the fact that both GSSF/Cigno have provided credit to many consumers who were likely to default. Consumers who default are charged high fees, in excess of the maximum amount that can be charged for loans regulated by the National Credit Act
- there are high levels of repeat use, so that some consumers who use the short term lending model end up in a high cost debt spiral.

The consultation paper includes a number of case studies, based on real examples of consumers who have obtained credit and show the detriment they have suffered in consequence.

ASIC Commissioner Sean Hughes said that ASIC have 'already seen too many examples of significant harm affecting particularly vulnerable members of our community through the use of this short term lending model. Consumers and their representatives have brought many instances of the impacts of this type of lending model to us. Given we only recently received this additional power, then it is both timely and vital that we consult on our use of this tool to protect consumers from significant harms which arise from this type of product.'

ASIC's preferred action: an industry wide ban

The consultation paper outlines three proposals: 1) Prohibiting specific short term lending models which benefit from the short term credit exemption (ASIC's preferred option); 2) Encouraging the use of alternative products or action through warning messages; or 3) No change.

ASIC's preferred option is to make an industry-wide product intervention order by legislative instrument prohibiting credit providers and their associates from providing short term credit and collateral services except in accordance with a condition which limits the total fees that can be charged. In addition, should a new model emerge which seeks to circumvent the industry-wide product intervention order, ASIC will amend the existing order or introduce a new order to address the new model. The draft instrument is available on the ASIC website here

ASIC considers that this approach will produce the best outcomes for consumers on the basis that it will both prohibit the use of short term lending models which allow credit providers and their associates to charge fees or other charges in excess of the cost restrictions under the short term credit exemption and protect vulnerable consumers from the significant detriment caused from the use of the short term lending model.

Timeframe?

- ASIC seeks the public's input on the proposed intervention order by 30 July 2019.
- ASIC anticipates making a decision on whether to make a product intervention order in relation to short term credit during the course of August 2019.

[Note: On 26 June, ASIC released a consultation paper outlining its proposed approach to administering its new product intervention powers: CP 313 Product intervention power. The consultation will end on 7 August. See: Governance News 03/07/2019]

'Well overdue'?

In a statement, The Australian Financial Rights Legal Centre welcomed ASIC's proposed action stating that it considers that it is 'well overdue'.

'We regularly see shocking examples of people who have used these services being charged ridiculous fees. We have seen examples where these companies have demanded between 146% and 952% of the original amount borrowed. A large proportion of our clients owe 400% of the amount they originally borrowed or more. A small loan of $150 turns into hundreds of dollars within a very short time. This exploitation is way outside of the boundaries of acceptable behaviour. Many of the people we speak to end up being directed to these pay day lenders because they are struggling with other debts (like electricity or phone bills) and are unable to access credit from mainstream sources. A significant proportion are referred to these lenders after being rejected for other pay day loans because it is clear they cannot afford to repay them. Many of our clients have illnesses, disabilities or addictions. These business models blatantly exploit vulnerability and financial hardship for profit' the statement reads.

[Source: ASIC media release 09/07/2019; ASIC consultation paper: CP 316 Using the product intervention power: Short term credit; Draft instrument; Financial Rights Legal Centre media release 09/07/2019; ABC 09/07/2019; [registration required] The AFR 09/07/2019]

Top Story | Licensing relief proposed for foreign fund providers

The Australian Securities and Investments Commission (ASIC) has released a consultation paper — Consultation Paper 315 Foreign financial services providers: Further consultation — setting out ASIC's proposals to provide licensing relief for foreign fund providers.

MinterEllison's Richard Batten has prepared a summary of the proposed changes which can be accessed on the MinterEllison website here: https://www.minterellison.com/articles/asic-release-on-foreign-financial-service-providers

Top Story | Roadblocks and Roundabouts: A Review of car insurance claim investigations

The Australian Securities and Investments Commission (ASIC) has released a report presenting the findings of its review into how general insurers investigate comprehensive car insurance claims in cases of suspected fraud: ASIC Report 621 Roadblocks and roundabouts: A review of car insurance claim investigation

MinterEllison's Richard Batten has prepared an expert summary of the report, the full text of which is available on the MinterEllison website here: https://www.minterellison.com/articles/a-review-of-car-insurance-claim-investigations

ASIC's review of car insurance claim investigation practices has found heavy handed investigations are leading to poor consumer outcomes

Report Overview | ASIC Report 621 Roadblocks and roundabouts: A review of car insurance claim investigation

Key Takeouts

- **Heavy handed claims investigation is causing consumer harm:** ASIC reviewed how general insurers investigate comprehensive car insurance claims where fraud is suspected. The regulator found 'that insurers are investigating some claims in ways that are causing significant consumer harm, eroding trust in insurance and without fair process'.
- **Further improvements to the industry code are required:** ASIC has said that further improvements to the General Insurance Code of Practice are required to address the issues identified in the review
- **Immediate change in investigation practices is expected:** The report sets out ASIC's expectations for insurers' claim investigations to address the issues identified in the report. ASIC states that its expectation is that insurers to 'implement these better practice standards immediately' (ie without waiting for the changes to be incorporated into the Code)
- **ASIC will take action where necessary:** ASIC has said that with significant civil penalties now available for breaches of the duty of utmost good faith, it will take action against insurers if conduct that breaches existing laws is identified.

The Australian Securities and Investments Commission (ASIC) has released a report presenting the findings of its review into how general insurers investigate comprehensive car insurance claims in cases of suspected fraud. Overall, the regulator found that insurers are investigating claims in ways that are causing 'significant consumer harm, eroding trust in insurance and without fair process'.

The report provides detail around these findings, and also sets out ASIC's expectations of insurers with respect to claims handling. A high level overview is below.

[Note: MinterEllison's Richard Batten has prepared an expert summary of the report. The full text can be accessed on the MinterEllison website here: https://www.minterellison.com/articles/a-review-of-car-insurance-claim-investigations.]

Review context

Report 621 is part of ASIC's response to recommendations made by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Financial Services Royal Commission).

Scope of the Review

The review considered aggregated data on 1.6 million claims from September 2016 to September 2017, consumer research with 52 consumers whose claims were both investigated and paid, and a review of insurers' investigation policies and procedures.

The insurers reviewed were: Allianz Australia Insurance Limited (Allianz), Auto & General Services Pty Ltd (A&G), Insurance Australia Group Limited (IAG), AAI Limited (Suncorp), and Youi Pty Ltd (Youi).

Some Key Points

- **ASIC found that insurers' investigations into suspected fraud targeted mostly valid claims:** According to ASIC's analysis of the claims that insurers investigated: over 71% were paid; 4% were declined for fraud and 10% were declined for some other reason. In addition, ASIC found that 15% of claims were withdrawn by consumers (and 30% of all claims that took longer than 6 months to finalise were withdrawn by the consumer). Given this, ASIC calls on insurers to reconsider the process they use to select claims for investigation.

- **Causing 'significant consumer harm':** ASIC found that insurers are investigating some claims in ways that are 'causing significant consumer harm, eroding trust in insurance and without fair process'. For example consumers whose claims were investigated and eventually paid reported experiencing:

  - accusatory behaviour that made them feel 'like criminals' eg by conducting interviews at the consumer's home like a police investigation

  - difficulty contacting their insurer/investigator: eg needing to phone their insurer or investigator multiple times to connect to someone, receiving calls at inappropriate times, and re-explaining their claim to a different representative each time they called

  - difficulty receiving updates on the progress of their claim: some consumers who asked for an update on their claim reported being told each time that their claim was ‘still being considered’

  - onerous and unexplained information requests: Consumers were frequently required to produce an onerous volume of documents, for example: criminal record checks, social media histories, birth certificates, telephone and text message records, financial statements for each of their bank and loan accounts and information about family members and friends. ASIC comments that the limited communication to consumers, together with the scale and perceived irrelevance of these information requests, led some consumers to believe that their investigator was ‘fishing’ for a reason to decline it

  - inadequate support for additional needs: eg consumers who had limited English literacy did not recall being offered an interpreter, and a Torres Strait Islander consumer was interrupted against his wishes during ‘Sorry business’, a traditional mourning period with several ceremonial and cultural obligations

  - some consumers also reported difficult in accommodating the needs of their family, attending work/engaging in day to day activities while they waited for their claim to be finalised

  - Several claims were paid only after the consumer complained to their insurer or external dispute resolution scheme, sought legal advice, or threatened to do so

  ASIC found that these consumers felt 'angry, frustrated, confused, overwhelmed and helpless during investigations'.

- **The review also identified limitations in insurers’ ability to provide timely and accurate data on the claims** that they flagged or investigated for suspected fraud.

- **'Punishing innocent consumers'?** Some consumers reported that their insurer had declined to provide them with further insurance after their claim was investigated and paid. ASIC comments that consumers who are declined insurance from one insurer can find it difficult to obtain insurance form other insurers as it's necessary that they disclose that insurance has been declined when applying for new insurance, which can increase premiums or lead those insurers to decline their application.

Industry self-regulation — improvements needed

In light of the issues identified, ASIC's view is that further improvements to the industry Code (the General Insurance Code of Practice (Code)) are required to ensure a fair process for investigating claims. In addition, ASIC called on industry to reconsider how claims are selected for investigation. 'The ICA should prioritise this work to ensure that the Code provides adequate consumer protection' ASIC states.

Enforceable provisions?

ASIC states that it will support implementation of the government response to Financial Services Royal Commission recommendations to address limitations to self-regulation under the Code. The Financial Services Royal Commission recommended reform to provide for enforceable provisions in the Code.

In addition, ASIC suggests that other accountability mechanisms should be 'further considered to provide adequate assurance that insurers are accountable for their conduct in relation to the Code'.

ASIC's Expectations

The report sets out ASIC's expectations for insurers' claim investigations, and indicates which are already present, partly present or not included in the current industry Code. ASIC states that its expectation is that insurers to 'implement these better practice standards immediately'.

A table setting out ASIC's expectations is included at p13 of the report. A summary is below.

Safeguards for consumers	New requirement: Insurers must adequately collect and evaluate data on conduct risks and outcomes for investigated claims. Extension of change already proposed for inclusion in the Code: ▪ Insurers should regularly review fraud investigation indicators to ensure that they are relevant and do not discriminate against particular types of consumers ▪ Before investigating a claim, insurers should consider if an interpreter or support person should be offered Existing proposal for inclusion in the Code: ▪ Insurers must actively identify and penalise poor behaviour by investigators. ▪ When an investigation starts, insurers should give written information about the purpose, scope, and expected timeframe of the investigation, what it may involve, and how the consumer can complain. ▪ Interviews should be immediately suspended until appropriate support is available if a need is identified.
Fair and efficient interviews	New requirements: ▪ Consumers should be asked to participate in an interview only if it has been scheduled in advance for a time that is suitable for the consumer. ▪ Insurers should offer consumers several possible convenient interview locations, in addition to their home, and allow the consumer to choose a reasonable location Extension of change already proposed for inclusion in the Code: ▪ Consumers should not be interviewed excessively. This means that they should be advised of the expected duration of the interview before it commences, given a break every thirty minutes during the interview; interviewed for no longer than 90 minutes in any one sitting and no longer than four hours in total unless the insurer has given written approval with reasons why this would be justified. ▪ Interview transcripts should be provided to consumers by default.
Investigating claims professionally	New requirements: ▪ All claims, including investigated claims, should be decided within four months. ▪ Consumers whose claims are paid should not be declined further insurance unless compelling and exceptional reasons exist.

	▪ Insurers should request information only if it is strictly relevant to the claim, avoid multiple requests, and clearly communicate why each item of information is necessary and relevant ▪ Face-to-face interviews should only occur if the information cannot be obtained in a less intrusive way. Extension of change already proposed for inclusion in the Code: ▪ Insurers and investigators should treat consumers respectfully, approach investigations with an open mind, and avoid acting in ways that are likely to intimidate or unduly pressure consumers.

[Sources: ASIC media release 04/07/2019; ASIC Report 621 Roadbloacks and roundabouts: A review of car insurance claim investigation; [registration required] The AFR 04/07/2019]

Insurance Council of Australia (ICA) response: The AFR reports that the ICA has said insures believe most investigations are conducted 'fairly and transparently' but acknowledges that a 'small number of consumers should have received better customer service'. Reportedly the ICA said that it is confident that new investigation standards in an updated Code of Practice will address key concerns raised in the report. The revised Code is due to be released towards the end of the year.

[Source: [registration required] The AFR 04/07/2019]

Nimble to exit payday lending? Nimble has reportedly said it aspires to be a branchless digital bank

Reportedly, payday lender Nimble has said it plans to transition out of the high interest, short-term loan segment this year, but plans to launch of a series of new and adjacent finance products.

These reportedly include: a new unsecured loan product to be launched by the end of July which will allow customers to access between $5000 and $25,000; a new line of credit products which could be offered to new and existing customers at more competitive rates than its current short term finance products.

Aspirations to be a branchless digital bank: Nimble Chairman, Ben Edney is quoted as saying that 'the business recognised that its expertise and experience in the digital lending and banking arenas could be applied to successfully launch other complementary products, and so redefined the vision, strategy and purpose of the company. Nimble now has aspirations to become a full service and branchless digital bank with the planned new products representing the first step in this strategy. We are also in the process of completing due diligence around applying for a restricted banking licence'.

Reportedly Nimble expects to make more announcements around new product launches over the coming months.

[Source: Australian Fintech 09/07/2019]

APRA has loosened lending restrictions: APRA has finalised amendments to guidance on residential mortgage lending

Following consultation, The Australian Prudential Regulation Authority (APRA) has written to authorised deposit taking institutions (ADIs) to advise that it will proceed with proposed revisions to its guidance on the buffer and floor rates used in borrower serviceability assessments set out in Prudential Practice Guide APG 223 Residential Mortgage Lending.

Key Takeouts

- APRA confirmed its updated guidance on residential mortgage lending will no longer expect ADIs to assess home loan applications using a minimum interest rate of at least 7%
- ADIs will be able to review and set their own minimum interest rate floor for use in serviceability assessments and utilise a revised interest rate buffer of at least 2.5% over the loan's interest rate

- The new guidance takes effect immediately. The revised prudential practice guide is available on the APRA website here
- APRA Chair Wayne Byres commented that the 'changes being finalised today are not intended to signal any lessening in the importance APRA places on the maintenance of sound lending standards'.

APRA's response to consultation: APRA says it received 26 submissions after commencing a consultation in May on proposed amendments to Prudential Practice Guide APG 223 Residential Mortgage Lending (APG 223). The majority of submissions supported the direction of APRA's proposals, although some respondents requested that APRA provide new or additional guidance on how floor rates should be set and applied.

Having considered the submissions, APRA Chair Wayne Byres said APRA believes its amendments are appropriately calibrated. 'In the prevailing environment, a serviceability floor of more than seven per cent is higher than necessary for ADIs to maintain sound lending standards. Additionally, the widespread use of differential pricing for different types of loans has challenged the merit of a uniform interest rate floor across all mortgage products' Mr Byres said.

[Sources: APRA media release 05/07/2019; APRA Prudential Practice Guide APG 223 Residential Mortgage Lending July 2019; [registration required] The AFR 05/07/2019]

APRA will require the major banks to lift Total Capital by three percentage points of RWA (rather than the proposed four to five percentage points) by 1 January 2024

Key Takeouts

- APRA will require the major banks to lift Total Capital by three percentage points of RWA [risk weighted assets] by 1 January 2024 (instead of the 4-5 percentage points originally proposed). The approach is intended to 'meaningfully lift the loss-absorbing capacity of the four major banks'.
- The new requirements address a recommendation from the landmark 2014 Financial System Inquiry that APRA implement a framework to ensure additional capital safeguards are in place to protect against a bank failure.
- APRA amended its initial proposal in response to concerns raised in a number of submissions about a lack of sufficient market capacity to absorb an extra 4-5% of RWA in Tier 2 issuance and the potential to excessively increase bank funding costs.
- APRA states that its overall long term target of an additional four to five percentage points of loss absorbing capacity 'remains unchanged'. 'Over the next four years, APRA will consider the most feasible alternative method of sourcing the remaining one to two percentage points, taking into account the particular characteristics of the Australian financial system' APRA states.

Context: The Australian Prudential Regulation Authority (APRA) released a discussion paper in November 2018 — Increasing the loss-absorbing capacity of ADIs to support orderly resolution — outlining its proposed changes to the application of the capital adequacy framework for authorised deposit-taking institutions (ADIs) to support orderly resolution in the unlikely event of failure. APRA proposed that the four major Australian banks be required to increase their Total Capital by four to five percentage points of risk weighted assets (RWA) over four years. APRA expected the banks would meet the bulk of this requirement by raising additional Tier 2 capital.

APRA's response to consultation: On 9 July, APRA released its response to submissions on its proposed approach. APRA said that it will require the major banks to lift Total Capital by three percentage points of RWA (rather than the proposed four to five percentage points originally proposed) by 1 January 2024.

In announcing its decision, APRA made clear that its 'overall long term target of an additional four to five percentage points of loss absorbing capacity remains unchanged'. APRA said it will consider the most feasible alternative method of sourcing the remaining one to two percentage points, taking into account the particular characteristics of the Australian financial system.

Why the change in approach? APRA says that it amended its initial approach in response to concerns raised in a number of submissions about a lack of sufficient market capacity to absorb an extra four to five per cent of RWA in Tier 2 issuance and the potential to excessively increase bank funding costs. APRA adds that it expects the issuance of an additional three percent of RWA in Tier 2 instruments can be achieved in an orderly manner, and be maintained through varied markets conditions.

APRA Deputy Chair John Lonsdale said the measures were an important step in minimising the risks to depositors and taxpayers should Australia experience a future bank failure. Mr Lonsdale added that although APRA's proposal may increase funding costs for Tier 2 instruments issued by major banks, overall he expects funding cost increases to remain small. 'Having taken into account feedback on market capacity, increasing Total Capital requirements by three percentage points by 2024 (instead of the four to five originally proposed) will be easier for the market to absorb and reduce the risk of unintended market consequences' Mr Lonsdale added.

[Sources: APRA media release 09/07/2019; APRA letter to ADIs: Response to submissions – Loss absorbing capacity 09/07/2019; [registration required] The AFR 09/07/2019; [registration required] The Australian 10/07/2019]

ASIC has not caused a credit squeeze says ASIC Commissioner Sean Hughes

Writing in the Australian, ASIC Commissioner Sean Hughes rejected the idea that ASIC's review of its responsible lending guidance has led to a tightening of access to credit, arguing instead that the regulator is only taking the opportunity to check that existing requirements remain relevant. 'We are taking this opportunity to make sure our guiding principles remain relevant, clear and appropriate. Importantly, this is not about increasing requirements, but rather clarifying and updating our guidance' Mr Hughes writes.

He went on to clarify that 'despite what you may hear or read, ASIC has never expected or proposed that lenders scrutinise every discretionary expense that a consumer might incur. And we know that in reality many consumers adjust their living expenses after obtaining a mortgage. Nor have we ever suggested that lenders cannot use benchmarks, like the HEM, to assist them meet their responsible lending obligations'.

[Note: In February 2019, ASIC released a Consultation Paper setting out ASIC's proposed approach to updating its guidance on responsible lending. Written submissions were due on 20 May 2019. (see: Consultation papers - CP 309; Update to RG 209: Credit licensing: Responsible lending conduct; Governance News 20/02/2019)]

Mr Hughes also argued that responsible lending benefits everyone, including consumers and rejected the idea that ASIC's public hearings on responsible lending (to be held in August) (see: Governance News 03/07/2019) are anything more than an information gathering exercise.

[Sources: [registration required] The Australian 08/07/2019' [registration required] The Australian 08/07/2019; registration required] The AFR 08/07/2019]

ASIC has imposed additional requirements on AFSL applicants

Overview | ASIC Information Sheet 240 AFS licensing – Requirements for certain applicants to provide further information (INFO 240)

The Australian Securities and Investments Commission (ASIC) has released new guidance on the additional information the regulator now requires from Australian Financial Services License applicants to assist in the application assessment process.

Details

ASIC will now require certain applicants (applications that are a body corporate; applicants that are Australian Prudential Regulation Authority (APRA) regulated bodies; and applicants that are proposing to offer certain financial services or to operate in specific circumstances), to provide additional information and documents as part of their application.

The additional information ASIC now requires includes for example:

- For body corporate applicants: the full names of the applicant's responsible officers and a national criminal history check and bankruptcy check for each responsible officer

- For APRA regulated body applicants: the applicant's responsible managers must provide a national criminal history check that is no more than 12 months old; a bankruptcy check that is no more than 12 months old and two business references that are no more than 12 months old

ASIC says that the additional information will enable it to ascertain whether it has reason to believe an applicant is likely to contravene its legislative obligations, including to deliver financial services 'efficiently, honestly and fairly' and to ensure that the responsible officers of a body corporate applicant are of good fame or character.

Commenting on the changes, ASIC Executive Director - Assessment & Intelligence Warren Day said, 'ASIC has reviewed the AFS licence assessment processes and has streamlined its assessment processes in some limited respects. This is designed to avoid unnecessary delays that may arise when ASIC seeks additional information during an assessment.'

[Sources: ASIC media release 05/07/2019; ASIC information sheet 240: AFS licensing – Requirements for certain applicants to provide further information]

Bill to scrap default insurance for young people and low balance accounts introduced: Treasury Laws Amendment (Putting Members' Interests First) Bill 2019

Treasury Laws Amendment (Putting Members' Interests First) Bill 2019 was introduced into the House of Representatives on 4 July 2019 and referred to the Senate Economics Legislation Committee for report by 18 October.

[Note: Following the passage of the *Treasury Laws Amendment (Protecting Your Superannuation Package) Bill 2018* (see: Governance News 20/02/2019), the government introduced *Treasury Laws Amendment (Putting Members' Interests First) Bill 2019* into the House of Representatives on 20 February (see: Governance News 27/02/2019). However, the Bill lapsed when Federal Parliament was prorogued for the Federal election.]

Context: Since 1 July 2019 superannuation trustees have had to stop providing insurance on an opt out basis to members who have had a product that has been inactive for 16 months or more, unless the member has directed the trustee to continue providing insurance (see: Governance News 20/02/2019).

Schedule 1 to *Treasury Laws Amendment (Putting Members' Interests First) Bill 2019* proposes to provide additional circumstances when a trustee must not offer or maintain default insurance cover for members unless the member has elected to obtain or maintain the insurance provided.

Some Key Points

- Schedule 1 to the Bill prevents trustees from providing insurance on an opt out basis to members who are under 25 years old and begin to hold a new product on or after 1 October 2019 and to members who hold products with balances below $6,000 low balance accounts ie account balances less than $6,000
- Trustees are obliged to notify members who have insurance arrangements in place before 1 October 2019 and who might be affected by the new measure to provide these members with an opportunity to elect for their insurance to continue.
- Members will still be able to opt in to insurance offered by the trustee by making a direction to the trustee.
- The proposed changes apply to both choice and MySuper products
- The proposed date of effect for the changes is 1 October 2019

In his second reading speech, Assistant Treasurer and Minister for Housing Michael Sukkar said that the Bill is aimed at ensuring that people's 'hard earned savings are not unnecessarily eroded by inappropriate insurance arrangements.'

Commenting on the proposed timeframe, Mr Sukkar said that the 1 October start date is intended to provide funds time to take action and notify members prior to the changes taking effect.

'Too blunt and the timeframe is too short'? The AFR reports that industry have raised concerns about the proposed start date, arguing that it Is too soon to enable them to be ready for the changes. Australian Institute of Superannuation Trustees (AIST) head of advocacy Ailsa Goodwin is quoted as saying that though the AIST supports the intent of the legislation, it is 'too blunt and the timeframe is too short'.

Reportedly the Federal Labor party has said that it is concerned that the legislation could see young workers in dangerous jobs left without insurance or permanent disability assistance.

[Sources: Treasury Laws Amendment (Putting Members' Interests First) Bill 2019; Second reading speech:: Assistant Treasurer and Minister for Housing 04/07/2019; [registration required] The AFR 04/07/2019]

Enhanced FinTech sandbox Bill introduced: Treasury Laws Amendment (2018 Measures No 2) Bill 2019

On 4 July, *Treasury Laws Amendment (2018 Measures No 2) Bill 2019* was introduced into the House of Representatives and has progressed to second reading stage.

Context: The Australian Securities and Investments Commission (ASIC) has provided for a regulatory sandbox framework (ASIC regulatory sandbox) since December 2016. This Bill proposes to, among other things, enhance the existing regulatory sandbox to allow more businesses to test a wider range of new financial and credit products and services without a licence from ASIC for a longer time. A 2018 Bill of the same name lapsed when Federal Parliament was prorogued for the Federal election.

Some Key Points

- **FinTech Sandbox Regulatory Licensing Exceptions:** Schedule 1 to the Bill proposes to extend the regulation-making powers in the Corporations Act and Credit Act to allow regulations to provide conditional exemptions from the Australian Financial Services Licence (AFSL) and Australian Credit Licence (ACL) requirements for the purposes of testing financial and credit products and services. As a result of the proposed amendments, eligible entities will be able to test certain services in relation to certain products without AFSL or ACL under conditions set out in the regulations. It's proposed that if an entity fails to meet any of the prescribed conditions, the regulator can cancel the entity's exemption or apply to the court for an order requiring the entity to comply in a particular way.
  - **New 12 month review requirement:** One difference between the 2018 Bill and the 2019 version appears to be that the 2019 version includes a requirement for an independent review of the operation of Schedule 1 changes in twelve months' time.
- **'Innovation measures':** Schedule 2 proposes to amend the Income Tax Assessment Act (ITAA) venture capital and early stage investor tax concession provisions to make minor changes to ensure that the provisions operate as intended.

In his second reading speech, Assistant Treasurer Michael Sukkar said that the 'enhanced regulatory sandbox' will allow 'for trial and error in a controlled environment, giving firms a chance to confirm their concept through initial testing with their clients. In simple terms, this will help Australians and Australian businesses to access cheaper financing and better financial products so that they can grow and invest. The productivity benefits that will flow from this will be huge. Most investment of course equals more jobs and better wages'.

[Sources: Treasury Laws Amendment (2018 Measures No. 2) Bill 2019; Second Reading speech; explanatory memorandum]

Open Banking | Delay likely? The Australian reports that the Federal Labor party is unlikely to support the requisite CDR legislation (when introduced) unless additional privacy protections are included

The Australian reports that the planned commencement of Open Banking in February 2020 may be delayed after the Federal Labor party reportedly indicated that, due to privacy concerns, it is unlikely to support the requisite legislation.

According to The Australian, Assistant Minister for Financial Services Jane Hume has said that the Consumer Data Right Bill will need to be passed by the end of the month (before parliament rises for the winter break) in order to allow sufficient time for sector to implement the changes.

[Note: The Treasury Laws Amendment (Consumer Data Right) Bill 2019 was introduced into the House of Representatives on 13 February but lapsed at dissolution on 11 April. The Bill was scrutinised by the Senate Standing Committee on Economics, which ultimately recommended that the Bill be passed.]

Reportedly, in order for the Federal Labor Party to support the legislation, additional privacy protections would need to be included. In particular, the Federal Labor party is reportedly seeking the inclusion of a provision for data to be erased or 'de-identified' after 12 months.

[Source: [registration required] The Australian 04/07/2019]

Blockchain pilot launched to digitise bank guarantees for retail property leases

ANZ, Commonwealth Bank of Australia, IBM, Scentre Group and Westpac have jointly launched a live pilot of a new digital platform. The blockchain based platform has been developed to replace and modernise the traditionally manual processes used by businesses obtain and manage bank guarantees that are often required as part of a retail property lease.

According to ANZ's media release announcing the project, initial findings suggest that the platform will deliver a number of advantages including quicker processing time for issuing bank guarantees (it should reduce the time it takes to issue a bank guarantee from up to a month to on/around the same day) and increased transparency and increased security.

The eight week pilot program will involve lease holders with retail outlets in some of Scentre Group's Westfield centres across Australia after which, it will be expanded.

[Sources: ANZ media release 04/07/2019; [registration required] The Australian 05/07/2019]

New Zealand | The Reserve Bank of New Zealand should have acted earlier? A report commissioned last year by the RBNZ in its role as the prudential regulator has recommended regulatory oversight of insurers be strengthened

The Reserve Bank of New Zealand released the independent review it commissioned into its supervision of CBL Insurance Limited (CBL) following the liquidation of CBL in November 2018. The review relates to the Bank as regulator and supervisor of licensed insurers.

Purpose of the Review: The purpose of the review was to provide an independent and expert perspective on how best to strengthen the regulatory and supervisory framework for the future, and in particular to: a) identify any shortcomings/positives in the RBNZ's supervisory practices and its critical judgements; b) identify any constraints or areas for enhancement in the legislative and regulatory framework in which the RBNZ was operating; and c) assist understanding by key stakeholders and the wider public on the RBNZ's and activities as a prudential supervisor.

Some Key Recommendations

Recommendations include the following (among others).

RBNZ should strengthen its supervision of insurance businesses

- RBNZ should adopt a 'pre-emptive stance', and be ready to act 'on doubts and suspicions of lack of financial soundness, rather than waiting for certainty or advisory confirmation of financial risk'
- RBNZ should act forcefully, making full use of the powers available to it, when in doubt about a company’s financial soundness. The report found that had RBNZ intervened earlier in the case of CBL the 'scope and complexity of the CBL liquidation would have been much reduced'
- RBNZ should interact more extensively with boards, senior management and appointed actuaries, including meetings aimed at identifying any activities or behaviours that are contrary to prudent conduct of the business, rather than relying on the written word where insurers have high risk ratings or are under increased surveillance
- RBNZ should strengthen the governance obligations of insurers through greater scrutiny and accountability of boards, management and Appointed Actuaries
- RBNZ should examine any expert reports in depth for a full understanding of the messages they might contain and ensure solvency assessments take full account of business plans and recognise the significance of pricing and future profitability as well as balance sheet integrity.

- RBNZ should increase resources to the supervisory team and the policy team to a level consistent with the its goals, priorities and risk appetite

Changes to strengthen the regulatory framework

Modify the Solvency Standard and, if necessary, seek to modify the Insurance (Prudential Supervision) Act 2010 to strengthen the capital management and solvency framework for licensed insurers

RBNZ accepts the report findings and recommendations

In a statement, RBNZ said that it accepts all findings and recommendations for itself and the insurance regulatory regime.

Commenting on the findings and recommendations, Deputy Governor, Geoff Bascand said that RBNZ is 'encouraged that our licensing decision and process were found to be sound, and that our actions leading to CBL being placed into liquidation were assessed to be appropriate. We acknowledge the review's finding that our supervision was overly-lenient towards CBL and should have addressed concerns about its reserving and management more urgently'.

Mr Bascand also said that RBNZ is 'reviewing key regulatory requirements to boost the resilience of our banking and insurance sectors, and we are intensifying our supervision of financial institutions. In short, we are recalibrating the rules and our enforcement of them'.

[Sources: RBNZ media release 03/07/2019; InsuranceNews.com.au 03/07/2019]

Related News: The AFR suggests that there are lessons for Australian regulators in the RBNZ's failures to act

Drawing a parallel between the findings of the Financial Services Royal Commission and the findings in the RBNZ review, The AFR observed that like the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC), the RBNZ was found to 'have failed to bare its teeth, and to follow through with suitably strong supervision or harsh penalties'.

The AFR goes on to suggest that one 'regulatory gap' identified in the report — the failure of the RBNZ to understand the lack of regulatory oversight of CBL's overseas business (in this case its business in France) — may also be a similar blind spot for Australian regulators. According to The AFR, APRA declined to comment on the CBL case.

However, The AFR says that it was told that Australian-domiciled companies that, like CBL, operate overseas outside any regulatory regime are 'very rare', and those that do are regulated as insurance groups. This 'supposedly' protects against the risk of a CBL-type failure.

[Source: [registration required] The AFR 05/07/2019]

In Brief | According to media reports, Deutsche Bank's global restructuring plan will see the bank cut 18,000 jobs (including 50 in Australia) by 2022 and shift its focus to serving European companies and retail-banking customers. The AFR suggests that other banks are likely to follow suit

[Sources: [registration required] The WSJ 07/07/2019; [registration required] The AFR 08/07/2019; Investor Daily 08/07/2019; The SMH 09/07/2019; The ABC 09/07/20119]

In Brief | MicKinsey's 2019 Asia Pacific Banking Review suggests 'consolidation is looming on the horizon' for less efficient banks, as lenders look to unlock the potential of scale to boost productivity and pursue strategic growth

[Sources: McKinsey and Company, Asia Pacific Banking Review 2019; Investor Daily 09/07/2019]

In Brief | The UK Financial Conduct Authority has proposed banning the sale, marketing and distribution to all retail consumers of all derivatives and ETNs that reference unregulated transferable cryptoassets by firms acting in, or from, the UK on the basis that the products are ill suited to retail consumers who

cannot reliably assess their value and risks. The FCA estimates the potential benefit to retail consumers from banning these products to be in a range from £75 million to £234.3 million a year

[Source: FCA media release 03/07/2019]

Accounting and Audit

United Kingdom | Sanctions against Deloitte and Helen George in relation to the audit of Serco Geografix Limited

The UK Financial Reporting Council (FRC) has issued a statement announcing that it has imposed sanctions against Deloitte LLP in connection with an audit of the financial statements of Serco Geografix Ltd and against its audit engagement partner, Helen George following their admissions of misconduct.

Misconduct? According to the FRC's statement, Deloitte and Ms George 'failed to act in accordance with the Fundamental Principle of Professional Competence and Due Care'. The FRC notes that The Settlement Agreement and the Particulars of Fact and Acts of Misconduct have not been published 'at this time'.

Details of the sanctions

- Deloitte has been fined £6,500,000 (discounted for settlement to £4,225,000) and been severely reprimanded. The firm will also pay £300,000 towards the costs of the investigation. In addition, Deloitte audit staff will undertake an FRC approved training program
- Ms George has been fined £150,000 (discounted for settlement to £97,500) and been severely reprimanded

The terms of settlement were agreed by the FRC's Executive Counsel on 7 January 2019 and approved by a legal member of the independent Tribunal Panel.

[Source: FRC media release 04/07/2019]

Risk Management

Modern Slavery

Top Story | New insights into Modern Slavery legislation in Australia

Following an international conference on modern slavery: 'Implementing Australia's Modern Slavery Act – Know Your Supply Chains', MinterEllison has released an article sharing new insights and takeaways.

The full text of the article can be accessed on the MinterEllison website here: https://www.minterellison.com/articles/new-insights-into-modern-slavery-legislation-in-australia

Modern Slavery Reporting for Universities

MinterEllison has released an article, based on a presentation given by Julie Whitehead to the Australian Universities Procurement Network on modern slavery requirements for universities.

The article suggests that with the introduction of the Modern Slavery legislation in the Commonwealth and New South Wales, universities should consider tackling the issue of modern slavery and complying with reporting obligations collectively and collaboratively to become a 'gold standard' sector.

The full text of the article is available on the MinterEllison website here: https://www.minterellison.com/articles/modern-slavery-reporting-for-universities

Technology, cybersecurity and privacy

Directors' views on disruptive technology: EY research released

EY board matters has released the findings of a survey of 365 corporate directors on the topic of disruptive technology.

Some Key Findings

- **Boards are divided on whether they have the skills/competencies needed:** The report found that directors are divided on the question of whether their boards have the appropriate resources (skills and competencies) to move their companies forward in an era of 'digital disruption'. 52% of respondents said that their board did have the necessary resources, but 48% were either unsure, or said that they did not have the resources in place.
- **Boards are generally more confident in the ability of their management teams** with most respondents identifying management as their primary source for staying current on industry trends, emerging technologies and innovation. 57% of directors indicated that they primarily rely on briefings from management to stay current on business trends, emerging technologies and innovation. EY questions whether this apparent 'overreliance' on management briefings is the most efficacious means for boards to understand the opportunities new technologies may present for their organisations, 'such an insular approach could limit the board's awareness of opportunities and risks brought on by these technologies' EY states.
- **Talking about it regularly at board meetings would be the most helpful action?** When asked what they believe is the most important action they can take to help their companies navigate disruptive risks brought on by technology, 38% of surveyed directors chose incorporating the topic of disruption and innovation into the full board agenda, while 31% said the most helpful would be to include these topics in the risk management process. EY suggests that boards can help their organisations to mitigate risks brought on by disruptive technology by including the topic on the full board agenda and reviewing the organization's enterprise risk management framework.
- **Legacy systems are considered to be the biggest hurdle:** Boards consider that integrating new technologies and platforms to be the greatest challenge when adopting emerging technologies (27%), followed by hiring and re-skilling talent (18%). Cybersecurity and privacy considerations (5%) and data availability and quality concerns (1%) were the lowest ranked challenges.
- **Boards need to consider board refreshment:** EY says that the findings underscore the need for boards to 'verify they have the portfolio of skills and competencies necessary to serve as a strategic resource and guide for management'. More particularly, EY suggests that boards should seek to ensure ongoing refreshment as a way to bring new, diverse and relevant experience, skills, knowledge into the boardroom. This could involve: ongoing board training and education, challenging the quality of board materials, engaging outside experts, and verifying that the board's agenda and committee structure provide sufficient focus on emerging strategic issues and critical risks.

[Source: Harvard Law School Forum on Corporate Governance and Financial Regulation 01/07/2019]

United Kingdom | The ICO intends to fine British Airways a record £183.39m for infringements of the General Data Protection Regulation (GDPR)

Key Takeouts

- The UK Information Commissioner's Office (ICO) has issued a notice of its intention to fine British Airways £183.39m for infringements of the General Data Protection Regulation (GDPR) in connection with a 2018 cyber-attack in which the personal information of approximately 500,000 customers was stolen
- According to The BBC, the fine is the largest ever and represents 1.5% of British Airways' world turnover in 2017 — until now, the biggest penalty was £500,000, imposed on Facebook for its role in the Cambridge Analytica data scandal. The BBC comments that the fine is less than the maximum fine that could have been imposed (up to 4% of global turnover for data protection failures)
- British Airways will now have opportunity to make representations to the ICO as to the proposed findings and sanction. Reportedly, the company intends to 'defend the airline's position vigorously including making any necessary appeals'

Details: The proposed fine relates to a 2018 cyber-attack on the company's website which involved customer details being harvested by hackers by diverting them to a fraudulent site.

After what it describes as an 'extensive investigation', the ICO found that the personal data (including log in, payment card, and travel booking details as well name and address information) of approximately 500,000 customers was compromised due British Airways' poor security arrangements.

Information Commissioner Elizabeth Denham said: 'People's personal data is just that – personal. When an organisation fails to protect it from loss, damage or theft it is more than an inconvenience. That's why the law is clear – when you are entrusted with personal data you must look after it. Those that don't will face scrutiny from my office to check they have taken appropriate steps to protect fundamental privacy rights.'

Next steps? The ICO states that British Airways has cooperated with the ICO investigation and has made improvements to its security arrangements since the incident. The company will now have opportunity to make representations to the ICO as to the proposed findings and sanction.

The ICO will consider carefully the representations made by the company and the other concerned data protection authorities before taking a final decision. The ICO investigated the case as the lead supervisory authority on behalf of other EU Member State data protection authorities but under the GDPR the data protection authorities in the EU whose residents have been affected by the incident will also have the change to comment on the ICO's findings before it takes its final decision.

British Airways' response: The ABC quotes Chair and CEO of British Airways Alex Crus as saying that he is 'surprised and disappointed' by the ICO's initial finding given the company was quick to report the criminal act and the lack of evidence that the data has been used for fraudulent activity.

According to The ABC, British Airways will intends to take all appropriate steps to 'defend the airline's position vigorously including making any necessary appeals'.

[Note: In June, MinterEllison hosted a roundtable discussion with 16 senior privacy specialists in the financial services sector to consider some of the challenges and opportunities facing this industry. A summary of the key lessons on privacy, data protection and trust in financial services to emerge from the discussion is available on the MinterEllison website here]

[Sources: UK Information Commissioner's Office media release 08/07/2019; The ABC 08/07/2019; The BBC 08/07/2019; ITNews 09/07/2019; The Guardian 09/07/2019; The Verge 08/07/2019]

The National audit office has found that Australia Post has not effectively managed cyber risk and has recommended that it conduct risk assessments for all its critical assets and take immediate action to address any identified 'extreme risks' to those assets, supporting networks and databases

The Australian National Audit Office's audit of the effectiveness of the management of cyber security risks by Australia Post, ASC and the Reserve Bank has been released.

The audit assessed the effectiveness of cybersecurity management in each of the organisations against three broad criteria:

1. Have entities managed cyber security risks in line with their own risk arrangements?
2. Have entities managed cyber security risks in line with key aspects of the Information Security Manual?
3. Do entities have a culture of cyber security resilience?

Conclusions

- The report found that both the Reserve Bank and ASC have effectively managed cyber security risks.
- Australia Post has not effectively managed cyber security risks, and should continue to implement its cyber security improvement program and key controls across all its critical assets to enable cyber risks to be within its tolerance level.

Report Recommendation: The report makes one recommendation, namely that Australia Post conducts risk assessments for all its critical assets where it has not already done so, and takes immediate action to address any identified extreme risks to those assets and supporting networks and databases.

Response from Australia Post: The report includes responses from each of the three entities audited, including Australia Post.

Australia Post said that it agreed to the recommendation and has a 'program of work already underway to address' it. In addition, Australia Post notes that the report assessed it to be 'internally resilient under the grading scheme developed by the Australian National Audit Office and applied in the Report. In our view that determination reflects the significant volume of resources and effort Australia Post has already committed to developing its cyber resilience, but that there is still work to be done to move towards, and maintain, a high level of external resilience'.

Australia Post adds that it is not required to apply or comply with the 'Manual or its Top Four mitigation strategies, but has voluntarily chosen to incorporate aspects of the Manual into its cyber security framework – together with other industry-leading frameworks such as the National Institute of Standards and Technology Cybersecurity Framework – as a matter of best practice'.

[Sources: Auditor-General Report No.1 2019–20 Performance Audit: Cyber Resilience of Government Business Enterprises and Corporate Commonwealth Entities; Government News 09/07/2019]

Other Developments

New FATF guidance on assessing terrorist financing risk released

FATF Report Overview | Terrorist Financing Risk Assessment Guidance

The Financial Action Taskforce (FATF) issued the Terrorist Financing Risk Assessment Guidance on 5 July.

The report builds on the 2013 FATF guidance on national money laundering and terrorist financing risk assessments, and draws on inputs from over 35 jurisdictions from across the FATF Global Network on their extensive experience and lessons learnt in assessing terrorist financing risk.

It is intended to assist in assessing terrorist financing risk at the jurisdiction level by providing good approaches, relevant information sources and practical examples based on country experience.

Details: The guidance includes coverage of the following.

- Key considerations when determining the relevant scope and governance of a terrorist financing risk assessment. The guidance includes practical examples to overcome information sharing challenges related to terrorism and its financing.
- Examples of information sources when identifying terrorist financing threats and vulnerabilities, and considerations for specific country contexts (eg financial and trade centres, lower capacity jurisdictions, jurisdictions bordering a conflict zone etc).
- Relevant information sources for practitioners when identifying cross-border terrorist financing risks but also terrorist financing risks within the banking and money or value transfer sectors, and facing those non-profit organisations that fall within the FATF definition.
- Good approaches for maintaining an up-to-date assessment of risk, and areas for further focus going forward.

[Source: FATF media release 05/07/2019; Terrorist Financing Risk Assessment Guidance July 2019]

A new way to approach 'flexible' work arrangements? Digital marketing company Versa reportedly credits introducing a four day working week twelve months ago with tripling profitability

- Australian digital marketing company Versa, reportedly introduced a no-work Wednesday policy more than 12 months ago. Under the policy, employees aren't required to come in or do any work at home on Wednesdays as long as they can keep on top of their workload across the four remaining days.
- The policy is reportedly credited with increasing revenue by almost 50% and almost tripling profits over the past 12 months and also with increasing the quantity and quality of job applicants

- Reportedly Versa had tried flexible work arrangements before but ended up with an ad-hoc system where employees were out-of-office on different days. Introducing the no-work Wednesday policy was found to be more efficient.
- Business Insider quotes Versa CEO Kathryn Graham as saying that the policy will remain as long as the company keeps getting results.

[Source: Business Insider 04/07/2019]

Restructuring and Insolvency

Combatting illegal phoenixing Bill reintroduced

On 4 July, the government reintroduced Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 into the House of Representatives after the previous version of the Bill lapsed when the Federal Election was called.

The Bill appears to be similar to the previous version (see: Governance News 20/02/2019), except that the commencement dates have been altered and changes have been made to reflect the passage of related legislation.

Some Key Points

- The Bill proposes to give regulators additional enforcement and regulatory tools to better detect and address illegal phoenix activity and, importantly, to prosecute or penalise directors and others who facilitate this illegal activity, such as unscrupulous pre-insolvency advisers.
- The Bill proposes to make minor amendments to the government's already legislated insolvency reforms to ensure that they operate as intended.

In his second reading speech, Assistant Treasurer Michael Sukkar noted that the bill was considered by the Senate Economics Legislation Committee, which recommended that the bill be passed.

Funding for the Assetless Adminstration Fund: Mr Sukkar added that to increase ASIC's ability to fund liquidators and support the reforms, the government will provide an additional $8.7 million over four years from the 2018-19 financial year to increase funding for the Assetless Administration Fund.

[Sources: Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019; Explanatory memorandum, Second Reading Speech]