

# Governance News

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## Diversity

### United Kingdom | FTSE 350 urged to keep up the pace to meet women on boards target

The UK Department for Business, Energy and Industrial Strategy and Kelly Tolhurst MP have released a statement announcing that according to the latest figures, the FTSE 250 could meet the 33% target for women in senior leadership positions (set by the Hampton Alexander Review) if current progress is maintained.

- **33% female representation target:** Launched in 2016, the UK government-backed independent Hampton-Alexander Review set FTSE 350 businesses a target of having 33% of all board and senior leadership positions held by women by the end of 2020; a 33% target for women on FTSE 350 Executive Committees and Direct Reports to the Executive Committee on a combined basis by 2020; and for FTSE 350 companies to increase number of women in roles of Chair, Senior Independent Director and into Executive Director positions on their boards.
- **Progress — FTSE 100 on track to meet the target:** According to the latest figures: 32.1% of FTSE 100 board positions are held by women (up from 12.5% in 2011) and in the FTSE250 the percentage is 27.5% (up from 24.9%). If progress matches the same gains made over the last 3 years, then FTSE 100 companies are on track to meet the 2020 gender diversity target.
- **One and done?** In March 2019, the Investment Association (IA) and the Hampton-Alexander Review jointly wrote to 69 companies in the FTSE 350 with one woman or less on their board, outlining concerns about the lack of gender diversity. Companies were asked to set out what actions the board is taking to ensure progress is made to meet the 2020 target of 33% female representation. More than half of respondents recognised the benefits of board diversity and confirmed they are committed to achieving the target either by 2020 or in the near future. 14 companies (named in the media release) did not respond. According to the latest figures, 14 FTSE 350 companies named in the statement have one woman or less on their board and four have zero women.

**'Good progress' expected:** The statement quotes Sir Philip Hampton, Chair of the Hampton-Alexander Review as commenting that 'The FTSE 250 is working hard to catch up but still too many boards have only one woman and remarkably today there are four all male boards in the FTSE 250.' He went on to say that he expects to see good progress in the number of women appointed to senior leadership appointments this year.

**Reporting open:** The progress update was released to coincide with the opening of the reporting period for FTSE 350 companies to submit their senior leadership gender representation data to the Hampton-Alexander Review. Companies have until 31 July to lodge the gender split of their Executive Committee, and the Direct Reports to the Executive Committee via the portal. The 2019 Hampton-Alexander Report will be published on the 13 November 2019.

*[Sources: Department for Business, Energy and Industrial Strategy and Kelly Tolhurst MP media release 01/07/2019; Telegraph UK 01/07/2019]*


## Remuneration

### Expanded focus for renamed remuneration committee at CBA

- **Expanded focus for renamed remco:** CBA has announced that it has renamed its Remuneration Committee, the People and Remuneration Committee to reflect the 'additional focus to be given to people and remuneration strategies, talent management, diversity & inclusion and organisational culture'. In addition, CBA said that Paul O'Malley has been appointed as the Committee Chair, effective from 1 January 2020, following Sir David Higgin's retirement effective 31 December 2019. Mr O'Malley is also a Nominations Committee member.

*[Source: CBA media release 01/07/2019]*

- **New leadership to allow extra focus on community and customer engagement:** Following the retirement of Anna Lenahan, Group General Counsel and Group Executive Group Corporate Affairs, on 30 June 2019, the bank decided to separate the role. In addition to a Group General Counsel and



Governance, it is creating a new Group Executive Marketing and Corporate Affairs role. Announcing the changes, CBA CEO Matt Comyn said that the new role will 'allow for greater focus on how we engage with our customers, stakeholders, and the broader community. Both roles will report directly to me.' Mr Comyn said that following a global search, Priscilla Sims Brown has been appointed to the role of Group Executive Marketing and Corporate Affairs effective 1 August 2019, subject to regulatory and all other necessary approvals.

[Source: CBA media release 28/06/2019]

## United Kingdom | Pay transparency is failing to curb excessive executive pay?

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According to analysis of the Investment Association's list of public register of executive pay data, and data provided by Proxy Insight, the number of shareholder 'pay revolts' (20% or more of shareholders lodging a protest vote) has barely fallen in the two years since the government's 'crackdown' on excessive pay.

Reportedly, in the past 12 months, 57 FTSE-listed companies were subjected to a shareholder pay revolt, compared with 60 in the same period up to June 2018. In addition, 100 FTSE firms were found to have faced a pay revolt two years running, and some have faced pay revolts over multiple years.

**The Investment Association stands behind the public register?** The article quotes Andrew Ninian, the Investment Association's director of stewardship and corporate governance, as saying that the Public Register is a 'valuable tool to hold companies to account' and that in his assessment, firms are now reacting more readily to shareholder pay revolts. He added: 'Since it was introduced we have seen a dramatic improvement in companies acknowledging shareholder dissent and committing to respond to it.'

[Source: This is Money 30/06/2019]

## Markets and Exchanges

### Blockchain project update | ASX update on the project to replace the CHESS system

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In an interview, Peter Hiom, Deputy CEO of the ASX has given an update on the ASX's project to replace the aging CHESS system — the CHESS system performs the processes of clearing, settlement, asset registration, and some other post-trade services — with a new blockchain (distributed ledger technology or DLT) system.

Mr Hiom outlined: the background of the project; key challenges DLT will address; the advantages and disadvantages compared to CHESS; initial challenges and how they were overcome; benefits the ASX and its customers can expect from Blockchain and steps taken to ensure data integrity.

#### Some Key Points

- Though CHESS continues to be 'stable and perform well', after 25 years, it needs to be replaced with a more modern solution. A number of solutions were considered, and a DLT or blockchain system was considered the best of them.
- Mr Hiom said that the decision to adopt the new technology was grounded in its ability to help address a number of significant challenges for customers including: competition driven by technology, increased regulation, legacy systems and manual processes. Mr Hiom said that ASX considers DLT 'to be a potential game-changer'.
- Mr Hiom said that Digital Asset was chosen to develop DLT in January 2016 after a global search. The company was chosen because of its deep expertise in DLT and financial markets and because it is already working with some of the world's largest financial institutions on implementing DLT solutions. In addition, Mr Hiom said that Digital Asset was one of the first DLT providers to recognise the importance of data segregation and privacy when designing the ledger component of the solution and also



developed the Digital Asset Modelling Language (DAML) which is an open source smart contracting language built for financial markets. 'We believe that DAML will become one of the de facto standards for building applications that operate on top of DLT systems' Mr Hiom said.

- Mr Hiom said that in comparison to the CHES system, the DLT system has a number of advantages. These include:
  - **additional new functionality** (including 35 new functional specifications requested by market users), with the added option of taking a DLT node which will allow customers to access permissioned, real-time source-of-truth data
  - **cost savings** for customers (through standardisation which will deliver efficiency gains) and the ability to create new revenue opportunities (through creation of new products/services): 'By providing an infrastructure where all users have the same database structures, the same workflow process, and a common programming language to build applications, you provide significant efficiencies in the rapid development and deployment of applications across many customers – in other words, an application built to work for one customer will work for everyone' Hiom said. He added that it was not possible to estimate the total efficiency gain but he suggested that even a 1% efficiency gain would be 'adding significant value to the industry'.
  - **error reduction:** 'Sharing of data that everyone knows to be true and correct enables the reduction of errors and the costs associated with resolving them. This is very important to the industry as we seek to remove legacy systems and processes' Mr Hiom said.
- **Progress?** Mr Hiom said that ASX is still in the 'build and test phase' of CHES replacement, and that there is still a 'way to go' before the system is implemented in March/April 2021.

*[Source: APAC Blockchain Conference, Q&A: Peter Hiom, Deputy CEO ASX]*


## **ASIC is consulting on proposed market integrity rules for 'technical and operational resilience'**

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The Australian Securities and Investments Commission (ASIC) has released a consultation paper — CP 314 *Market integrity rules for technological and operational resilience* (CP 314) and *draft market integrity rules* — seeking feedback on its proposals to address risks associated with the increasingly automated and interconnected nature of markets. More particularly, the paper proposes new market integrity rules for securities and futures market operators and market participants aimed at promoting the resilience of their critical systems.

### **Details**

- **Application:** The proposals apply to futures and securities market operators of the ASX, ASX 24, Chi-X, NSX and SSX and participants of those markets.
- **Why ASIC is proposing the rules:** ASIC says that with the growing reliance on technology, formalised baseline obligations are needed to ensure that market operators' and participants' systems and controls are adequate for their operations in order to protect clients and to maintain the integrity of the market.
- **Purpose of the proposed rules:** The proposed rules are intended to ensure the resilience of market operators' and market participants' critical systems, which include functions, infrastructure, processes, and technological and other systems.
- **Proposed rules** address the following areas.
  - **change management in relation to implementing new critical systems or changing existing critical systems:** for example, ASIC proposes to (among other things): a) introduce rules defining 'critical systems'; b) require market operators and market participants to have adequate arrangements in place to ensure the 'resilience, reliability, integrity and security of their



critical systems'; c) put certain arrangements in place with respect to critical systems including a requirement to document critical systems and changes to those systems as well as a requirement to conduct reviews.

- **outsourcing of critical systems:** ASIC proposes to introduce new rules with respect to outsourcing including (among other things): a) defining an outsourcing arrangements; b) requiring market operators and market participants to conduct due diligence prior to entering into an outsourcing arrangement to ensure the provider has the ability to provide the services effectively; c) requiring market participants and market operators to ensure that an outsourcing arrangement is covered by a legally binding contract; and d) introducing a requirement for a market operator to give written notice to ASIC before entering into an outsourcing arrangement.
  - **incident management and business continuity planning:** ASIC proposes to (among other things): a) introduce new rules to define an 'incident' and a major event; b) require market operators and market participants to establish, maintain and implement plans for dealing with incidents (incident management plans) and major events (business continuity plans); c) require market operators and market participants to have adequate arrangements to ensure they can carry out incident management or business continuity plans for any outsourced critical systems; and d) introduce new reporting requirements (market participants would be required to notify ASIC within seven days of becoming aware of a major event and to provide ASIC with a report detailing the circumstances of the major events and steps taken to manage it).
  - **governance arrangements and adequate resourcing:** ASIC proposes to (among other things): a) introduce a rule that requires market operators and market participants to have governance arrangements and adequate financial, technological and human resources to comply with all the obligations in the proposed rules; and b) to have arrangements for their board and senior management to have oversight of the establishment, maintenance, implementation, review, testing and documentation of their incident management plans and business continuity plans.
  - **fair access to markets and trading controls:** ASIC proposes to introduce a rule for market operators only, requiring them to provide access to their market and to their associated products, data and services on reasonable commercial terms and on a non-discriminatory basis.
- **Timing:** Submissions are due by 9 August 2019. ASIC plans to release a consultation response and final rules in November-December 2019.

*[Sources: ASIC media release 27/06/2019; CP 314 Market integrity rules for technological and operational resilience]*

## Regulators

**ASIC's seven strategic priorities for the next 12 months: In his keynote address to the Committee for Economic Development of Australia, ASIC Chair James Shipton identified protection of vulnerable customers among ASIC's top priorities**

In his keynote address to the Committee for Economic Development of Australia, Australian Securities and Investments Commission (ASIC) Chair James Shipton gave an update on ASIC's strategic change program and priorities for the next 12 months; an update on implementation of the Financial Services Royal Commission's recommendations and described ASIC's new enforcement and supervisory approaches.

### Key Takeouts

- **ASIC's seven strategic priorities for the next 12 months** are: 1) effective and efficient enforcement action (ASIC will focus on cases with a high deterrence value and where there has been egregious harm); 2) addressing the Hayne Commission's recommendations and referrals; 3) establishing ASIC as conduct regulator for superannuation; 4) addressing harms in insurance; 5) improving governance and accountability (eg enforcement action against individuals and enhanced supervision/monitoring programs); 6) protecting vulnerable consumers (eg responsible lending changes); and 7) addressing poor financial advice outcomes (improving the professionalism of financial advisers)



- **Public hearings on responsible lending:** Mr Shipton noted that for the first time, as part of the consultation on proposed changes to responsible lending guidance, ASIC will hold public hearing to 'robustly test' some of the issues/views raised in submissions.

### ASIC's strategic change program and seven key strategic priorities for the next 12 months

Ahead of the release of ASIC's Corporate Plan in August, Mr Shipton outlined ASIC's seven strategic goals and priorities for the coming financial year. Mr Shipton added that the priorities are 'by no means an exhaustive list' but 'represent the most significant ways to achieve' the strategic goals of: a) effectively addressing consumer harm; b) influencing culture and behaviour (including through promoting the ideas of fairness and professionalism across the industry); and c) applying new regulatory tools, or new combinations of tools, to achieve this.

#### Seven strategic priorities

The seven strategic priorities are as follows.

1. **Effective and efficient enforcement action:** In recognition of the fact that deterrence is a 'key regulatory tool in changing behaviours', Mr Shipton said that ASIC will 'give particular focus to cases with a high deterrence value and where there has been egregious harm (such as those impacting vulnerable consumers)'.
2. **Addressing the Financial Services Royal Commission's (FSRC's) recommendations and referrals:** Mr Shipton said that ASIC stands ready to support key law reforms to implement the recommendations of the Royal Commission and that ASIC is prioritising the Commission's enforcement referrals.
3. **Establishing ASIC as conduct regulator for superannuation:** Mr Shipton said that ASIC will aim to improve outcomes in superannuation through: a) taking decisive action, including enforcement action to address and deter misconduct; b) enhancing supervision and surveillance of superannuation trustees to ensure they act in the best interest of members and treat them fairly; and c) implementing the FSRC's and other government recommendations on superannuation.
4. **Addressing harms in insurance:** Mr Shipton said that ASIC will: a) review insurance product features and industry practices that raise concern for the regulator; b) look to take enforcement action against entities and individuals who engage in the mis-selling of insurance products, particularly to vulnerable consumers; and c) 'further support and implement the government's proposed insurance law reforms' (including with respect to unfair contract terms in insurance contracts and acting against unfair practices in claims handling). Mr Shipton added that ASIC will also commence data collection to establish baseline evidence for future regulatory work and to support the reforms when adopted.
5. **Improving governance and accountability:** Mr Shipton said that ASIC is: a) prioritising enforcement cases which hold individuals accountable for governance failures in financial institutions and superannuation trustees; b) conducting enhanced and intensive supervision of entities the regulator considers to be crucial to the financial system (eg through ASIC's close and continuous monitoring (CCM) program that monitors the big four banks and AMP as well through the work of the Corporate Governance Taskforce which is reviewing the corporate governance practices of 21 large listed companies); c) supportive of the proposed expansion of the conduct accountability regime – BEAR for conduct – when legislated; d) supporting the government's initiatives to combat illegal phoenix activities (including the Phoenix Taskforce and the Serious Financial Crime Taskforce); and e) supporting the proposed phoenix reforms to deter company directors and practitioners facilitating phoenixing.
6. **Protecting vulnerable consumers (responsible lending):** Mr Shipton said that ASIC's proposed changes to guidance on responsible lending (on which ASIC is consulting) are intended to provide more certainty for mortgage brokers and lenders and encourage consistent practice across the industry, while retaining flexibility for licensees to appropriately tailor lending processes to the circumstances of borrowers.

[Note: This appears to be a reference to the consultation paper released by ASIC for consultation on 14 February 2019: CP 309 Update to RG 209: Credit licensing: Responsible lending conduct. Consultation closed on 20 May (See: Governance News 20/02/2019). Since Mr Shipton's speech, ASIC has released



submissions received in response to the consultation paper and announced that public hearings will be held on responsible lending guidance. This announcement is covered in a separate post in this issue of Governance News.]

**Public hearings on responsible lending:** Mr Shipton noted that for the first time, as part of the consultation, ASIC will hold public hearing to 'robustly test' some of the issues/views raised in submissions. Mr Shipton went on to say that ASIC considers responsible provision of credit to be critical to the long term sustainability of the economy and a 'cornerstone of consumer protection' regardless of the economic cycle. This, he said is why the requirements exist and why ASIC is consulting on proposed changes 'to update our expectations on them'.


7. **Addressing poor financial advice outcomes:** Improving the professionalism of financial advisers, particularly given the shift towards the use of general advice models, is a focus for ASIC Mr Shipton said. He then outlined a number of actions aimed at achieving this. These include: a) enhancing the Financial Adviser Register to incorporate training and professionalism reforms; b) testing more appropriate labels and descriptors for 'general advice' with consumers; c) examining financial advisers; compliance with fee disclosure and opt-in requirements and monitoring the remediation programs of large financial institutions for fee for no service breaches; and d) monitoring any potential structural impact on the industry and consumers as a result of larger institutions exiting from the advice sector.

### Implementation of Financial Services Royal Commission Recommendations and Referrals

- **Progress Update on Financial Services Royal Commission Referrals:** Mr Shipton said that ASIC is continuing to progress the investigation and, where appropriate, litigation arising from the 13 Royal Commission referrals and 30 case studies. 'While we do not ordinarily comment on actual or potential investigations, we are prioritising these matters and will continue to provide public updates on actions when appropriate' Mr Shipton said.
- **Accelerating court-based enforcement matters:** Commenting more generally, Mr Shipton said that . from February 2018 to June 2019: there has been a 21% increase in the number of ASIC enforcement investigations, a 74% increase in enforcement investigations involving the big six (or their officers or subsidiary companies), and a 166% increase in wealth management investigations. Mr Shipton added that since the last public update, penalty and regulatory tools available to the regulator have been strengthened (eg increased penalties for offences and the creation of design and distribution obligations and the granting of design and distribution obligations). He added ASIC's new Office of Enforcement (once established) will enhance ASIC's investigation and enforcement approach.
- **Other Measures:** Mr Shipton said that ASIC is also actively pursuing measures that can be implemented, in whole or in part, without requiring new legislation. For example: ASIC is working to commence monitoring and reporting on the extent to which product issuers are preparing to end the grandfathering of conflicted remuneration by 2021 and working closely with APRA to formalise and enhance information sharing arrangements and to update its Memorandum of Understanding to reflect its closer working relationship. In addition, the regulator is 'working closer than ever' with AUSTRAC, AFCA, the New Zealand Financial Markets Authority and other international and domestic regulators.

### Enforcement approach

- **Objectives of ASIC's new enforcement approach:** Mr Shipton said that 'ASIC's enforcement work has a core focus on deterrence, public denunciation and punishment of wrongdoing by way of litigation'. He went on to describe the regulator's new 'Why not litigate?' approach to enforcement, reiterating that it does not mean 'litigate everything' or 'litigate first' but rather that where ASIC is satisfied breaches of the law are more likely than not and the facts of the case show pursuing the matter would be in the public interest, then it will actively ask: why not litigate this matter? 'The approach does not suggest ASIC will take every matter to court as the default option, or that we will pursue litigation where it would be inappropriate, or not in the public interest, to do so. We will, in asking ourselves 'why not litigate?', consider a number of key factors including our model litigant obligations and the likelihood of achieving regulatory outcomes' Mr Shipton said.
- **Objective of ASIC's supervisory approach:** Mr Shipton said ASIC's new supervisory approaches (eg the close and continuous monitoring (CCM) program and the work of the Corporate Governance Taskforce) are focused on the early identification of deficient practices in specific areas inside entities



and are also aimed at promoting improved corporate governance and corporate culture over the long term. This also adds a focus 'beyond current known non-compliance to look at things that create a significant risk of future breaches' he said. Mr Shipton said that as part of this work, ASIC has been providing, detailed and targeted feedback to CEOs, Chairs and other business leaders on the regulator's concerns/observations. Mr Shipton added, that though the objective is 'preventative in nature' is ASIC should identify illegal behaviour during the course of its work 'we will actively consider the appropriate regulatory response, including enforcement'. Mr Shipton said that ultimately, the 'first line' compliance responsibilities sit with licensees and that its supervisory work is aimed at improving financial firms' ability to 'fulfil that cornerstone responsibility'.

- Update on CCM work: ASIC staff have been onsite in one or more of the CCM institutions for a total of 119 days since launching the program in October 2018 and has held meetings with more than 425 banking staff at all levels, and reviewed thousands of documents.
- Update on the progress of the corporate governance review: ASIC has reviewed 21 entities, received and reviewed over 43,000 documents; and ASIC staff have completed 97 interviews - with CEOs, Chairs, Board Risk Committee Chairs, Chief Risk Officers, Internal Auditors and Company Secretaries.
- Mr Shipton said that the regulator plans to provide 'further commentary' on the findings of its CCM and corporate governance work in due course.

*[Source: Keynote address by ASIC Chair, James Shipton at Committee for Economic Development of Australia (CEDA) event, Melbourne, 27 June 2019 27/06/2019]*

### ASIC cost recovery statement released: Industry claims some fees are excessive?

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The Australian Securities and Investments Commission (ASIC) has released its Cost Recovery Implementation Statement (CRIS), which sets out the estimated industry sector levies for 2018-19, as well as details on how ASIC allocated its regulatory costs in 2017-18.

ASIC says that the indicative levies published in the final CRIS can be used by entities for planning purposes, to assist in determining their industry funding invoice amount, but cautions that final invoice amounts will in many cases depend heavily on data that ASIC is yet to collect from entities (and therefore may change).

#### Details


The CRIS includes:

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| <ul style="list-style-type: none"><li>▪ a forecast of ASIC's regulatory costs and indicative levies for each subsector in 2018–19</li><li>▪ the work undertaken by ASIC for each subsector in 2018-19</li><li>▪ an explanation of the cost recovery model, including the business process, outputs and how we allocate costs to calculate the levies and fees for service</li><li>▪ the actual expenses ASIC incurred in 2017–18 for each subsector and the variance</li></ul> | <p>between actual expenses and the estimated costs in last year's CRIS. Where there is a material variance, the CRIS explains the variance</p> <ul style="list-style-type: none"><li>▪ an explanation of the amendments to the levies and fees for service models since the release of last year's CRIS</li><li>▪ an assessment of the risks associated with the industry funding model and how those risks have been managed</li></ul> |
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ASIC writes that this version of the CRIS takes into account stakeholder feedback on the version published for comment in March 2019.

**Concerns about the increased costs:** ASIC also released a number of submissions, some of which raise concerns about the increasing costs. For example:

- **Chartered Accountants Australia and New Zealand's (CAANZ's)** submission raises concerns about the 'significant increases' in some of the costs associated with listed entities and financial service providers, and is also critical of the design of the system. 'The figures set out in the CRIS fortify our



belief that the model does not represent a true 'user pays' system'. In almost every area of ASIC's operations, enforcement actions are the largest component of the ASIC's costs. CAANZ is of the opinion that the majority of enforcements costs should be borne by the entities and individuals who are the subject of the actions, not by the sector as a whole' CAANZ writes.

- **The Governance Institute of Australia's** submission also raises concerns about the ongoing sustainability of the increasing costs. 'Our members have expressed considerable concern over the rapidly rising costs of the industry levies...We expect that ASIC's more intensive regulatory activity and its new 'why not' litigate approach to enforcement will cause the costs of regulation to continue to increase. We consider that the current rate of cost increase is unsustainable for those required to pay the costs' the submission states.

Media reports have also noted the steep increases to costs (as compared with last year), as a result of ASIC's new approach to enforcement/supervision.

*[Sources: ASIC media release 26/06/2019; Investor Daily 27/06/2019; [registration required] The Australian 27/06/2019]*

## Financial Services

### Top Story | APRA consults on its proposed approach implementing executive product responsibility under BEAR

#### APRA Consultation: Implementation of FSRC Recommendation 1.17 — Executive product responsibility under BEAR

The Australian Prudential Regulation Authority (APRA) has outlined its proposed approach to implementing the Financial Services Royal Commission recommendation on product responsibility for authorised deposit-taking institutions (ADIs) under the Banking Executive Accountability Regime (BEAR).

#### Key Takeouts

- **APRA seeks feedback on four key aspects of implementation:** 1) the scope of accountability (APRA proposes a broad scope including issues such as customer remediation, links to IT systems and data quality, outsourcing and incentive arrangements); 2) product coverage (APRA proposes that executive responsibility should apply to all products offered by an ADI not just retail products); 3) the structure of the legal mechanism; and 4) the application of joint responsibility.
- **Not the CEO:** APRA states that it does not consider it appropriate for the CEO to hold end-to-end accountability for all of its products, except for smaller/less complex ADIs.
- **Broader relevance?** Though the new requirements only apply directly to locally incorporated ADIs, APRA suggests that the consultation has broader relevance for all ADIs, for insurers and for superannuation trustees given the government's plans to extend BEAR.
- **Timeframe:** Consultation closes on 23 August. Following further consultation later in the year, APRA expects to implement the new requirement by 1 July 2020

On 28 June 2019, the Australian Prudential Regulation Authority (APRA) released a consultation letter outlining its proposed approach to implementing Financial Services Royal Commission Recommendation 1.17, end-to-end product accountability under the Banking Executive Accountability Regime (BEAR).

APRA proposes requiring ADIs to identify and register an accountable person to hold end-to-end product responsibility for each product the ADI offers to its customers, including retail, business and institutional customers.

The consultation closes on 23 August 2019.

#### Request for feedback on proposed implementation



APRA seeks feedback on four key considerations relating to implementing the following proposed product responsibility requirements.

1. **The scope of accountability:** APRA proposes a broad interpretation of what is in scope of end-to-end accountability, including not only all steps in the design, delivery and maintenance of all products offered to customers by an ADI or ADI group but also extending to issues such as customer remediation, linkages to IT systems and data quality, outsourcing, and incentive arrangements. APRA says that this goes beyond 'an explicit consideration of processing and administrative errors, and including but not limited to expansion to customer experience and outcomes'.
2. **Product coverage — the new accountability should apply to all products:** APRA proposes that a single-point accountability for a given product would be required for all products offered by an ADI or ADI group, rather than just retail products, as both retail and other products have the potential to impact the prudential standing and prudential reputation of an ADI. This would include but not limited to products, services, white-label or other-branded products.
3. **The structure of the legal mechanism:** APRA proposes that for the purposes of paragraph 37BA(2)(b)(ii) of the Banking Act 1959 (Meaning of accountable person), a new particular responsibility should include senior executive responsibility for end-to-end product management of a product or product group offered by the ADI (or the relevant group of bodies corporate that is constituted by the ADI and its subsidiaries), including but not limiting to all steps in the design, delivery, maintenance and any necessary remediation of customers in respect of any such product/product group. An ADI would be expected to reflect this responsibility for a given product or product group in the individual accountable person's accountability statement and also to have it clearly delineated in the institution's accountability map.
4. **The application of joint accountability within ADIs and ADI groups:** APRA proposes that, where more than one accountable person is identified as accountable for a given product or product group, joint accountability is applied to the accountable persons involved to ensure 'no gaps or dilution in the end-to-end accountability' ie all relevant accountable persons will be equally accountable for that given product or product group. APRA adds that this joint accountability should not be taken to apply automatically across different identified products or product groups.

**Other matters:** In addition, the letter requests feedback on how many products/product groups ADIs would be likely to have and how many accountable persons would be likely to hold the proposed end to end product responsibility within ADIs as well as feedback generally on 'any area' that may impact the objective of achieving 'heightened and clarified end-to-end accountability for each product',

#### **Not the CEO?**

APRA writes that as the core objective of the changes is to deliver 'heightened and clarified end to end product accountability among senior executives for their products', APRA does not consider it appropriate for the CEO to hold end-to-end accountability for all of its products, except for smaller/less complex ADIs.

#### **Broader relevance?**

APRA says that though the requirements are directly applied to locally incorporated ADIs, APRA 'strongly encourages all ADIs to consider elements of strengthened product accountability as they relate to their accountable persons, and accountability statements and map'.

APRA adds that given the government's plans to extend the BEAR regime to the insurance and superannuation sectors, 'all APRA-regulated entities may have an interest in providing feedback on the proposed approach'.

#### **Timeframe**

- Consultation will close on 23 August 2019.
- APRA aims to release a draft schedule with the proposed product responsibility requirements for further consultation in October 2019, and the final legislative instrument in December 2019.
- APRA expects to implement the new requirements by 1 July 2020.



[Sources: APRA Media release 28/06/2019; Letter: The Banking Executive Accountability Regime - Consultation on product responsibility]

## Top Story | ASIC is consulting on how it plans to administer the new product intervention regime

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### Overview ASIC Consultation | CP 313 Product intervention power

The Australian Securities and Investments Commission (ASIC) has released a consultation paper — CP 313 Product Intervention Power — and draft regulatory guide setting out how it plans to administer the new product intervention regime introduced in the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019.

#### Key Takeouts

- Under the product intervention power, ASIC can intervene and take temporary action where financial and credit products have resulted in, or are likely to result in, significant consumer detriment. These actions include: banning a product or product feature, imposing sale restrictions and amending product information or choice architecture (ie design features of a product and its distribution that present choices and processes to consumers that influence their take-up and use of the product).
- The proposed regulatory guide sets out the scope of the product intervention power, how ASIC will use it and how an intervention order will be made.
- Timing: ASIC is seeking public input on the product intervention power consultation documents by 7 August 2019 and aims to release its final regulatory guide in September 2019. ASIC will conduct a further separate consultation on proposed guidance on the design and distribution obligations later this year.
- ASIC to exercise its product intervention powers from the close of consultation: ASIC states that though the product intervention power is available for the regulator to use now, it does not plan to exercise it before the close of consultation.

The Australian Securities and Investments Commission (ASIC) has released a consultation paper and draft regulatory guide setting out the regulator's proposed guidance on exercising the product intervention power introduced in the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019.

#### An 'incredibly important addition to ASIC's regulatory toolkit'

ASIC comments that the power is unique in its focus on reducing significant detriment to consumers, rather than stepping in only after a breach of the law. ASIC adds that it can also use the power on a market-wide basis to address industry-wide problems.

Announcing the consultation ASIC Deputy Chair Karen Chester said, 'The product intervention power is an incredibly important addition to ASIC's regulatory toolkit. ASIC can now step in and respond to significant consumer detriment in a targeted and timely way. But there are also important checks and balances – it is a temporary intervention power and we must consult before each and every use.'

#### Scope of the consultation

The consultation covers ASIC's proposed guidance on the product intervention power, including with respect to the following.

#### 'Significant consumer detriment'

ASIC can make a product intervention order when it is satisfied that a product (or class of product) has resulted, will result or is likely to result in significant consumer detriment. ASIC proposes to provide high-level guidance on: the meaning of consumer detriment and how it can arise and the factors it will take into account in considering whether a product has resulted/will result/is likely to result in significant consumer detriment.

#### Details



- The meaning of 'significant consumer detriment':
  - **When is consumer detriment significant?** The term 'significant' is not defined in the Corporations Act or the National Credit Act. ASIC states that whether consumer detriment (or likely detriment) is significant will depend on the individual circumstances of the matter.
  - **What can cause significant detriment to consumers?** ASIC states that significant detriment to consumers can emerge at any point in the lifecycle of a product and can be caused by intentional, reckless or inadvertent industry conduct. ASIC gives a number of examples of this including: products that are not fit for purpose, sales or marketing techniques that prioritise commercial interests over consumer interests, and 'shrouding key features of a product, including fees and how they are charged'.
- **Factors to be taken into account:** In considering whether a product has resulted, will result or is likely to result in significant consumer detriment ASIC will take into account relevant factors including: the nature and extent of the detriment; the actual or potential financial loss to consumers resulting from the product; the impact that the detriment has had, will have or is likely to have on consumer; any other matter prescribed by regulations.
- **When ASIC will be likely to intervene?** ASIC states that the 'product intervention power is not directed towards eliminating all risk from the financial markets' adding that it will not exercise the power 'solely on the basis that a particular investment product has reduced in value and resulted in losses to consumers'. ASIC writes that it is more likely to intervene when significant consumer detriment has resulted, will result or is likely to result from such a product, and it: has been designed poorly without consumer needs in mind; or is being distributed to, or targeted at, consumers who are unaware of the product's risk and whose objectives are inconsistent with that product offering.
- **No benchmarks:** ASIC notes that it does not propose to set benchmarks or thresholds as to when it will exercise the product intervention power because to do so would 'unduly limit the scope of the power, which is intended to be able to address a broad range of harm or damage that may flow from a product'.

#### The types of interventions ASIC can make

- **ASIC is able to make two types of product intervention orders under the product intervention power:** 1) an individual product intervention order, which applies to a specified person, or specified persons, in relation to a product; or 2) a market-wide product intervention order, which applies to a person, in relation to a class of products. ASIC states that it may be more likely to 'intervene on an individual basis (eg for a specific product issued by a named firm) if the problem is specific to a particular entity or person.'
- **An order may comprise 'multiple elements':** ASIC gives a number of examples of the interventions in relation to a product (or class of products) that it could take, noting that a product intervention order may comprise 'multiple elements'. These include: 1) ordering that a product (or class of products) only be offered by way of issue to specific classes of consumers; 2) ordering that a product (or class of products) only be offered by way of issue in specific circumstances (eg through personal advice or through a deferred sales model); 3) ordering the amendment, restriction or banning of marketing, 'choice architecture', promotional and disclosure material relating to a product (or class of products); 4) ordering that a product (or class of products) not be distributed without prescribed improvements to the information provided to consumers; 5) ordering the amendment or banning of remuneration arrangements that are conditional on the achievement of objectives directly related to the product (or class of products) (eg when remuneration is linked to product distribution); and 6) ordering the banning of the issue of a product (or class of products).

#### Limitations on the power

ASIC sets out a number of limitations on the use of the power. For example: an order cannot impose requirements in relation to a person's remuneration, other than so much of the remuneration as is conditional on the achievement of objectives directly related to the product interventions.

ASIC comments in relation to this that it considers that the limitation on dealing with remuneration 'does not prevent us from intervening in relation to remuneration that is linked to the distribution of the product'.



## Consultation with affected persons

Before making a product intervention order, ASIC must consult persons who are 'reasonably likely' to be affected by the order.

ASIC proposes that as part of its formal consultation process it will: a) identify the product and its availability to retail clients; b) describe the significant consumer detriment that has occurred/will occur or is likely to occur, and set out its reasons for making this assessment; c) set out its proposed intervention or a description of our proposed intervention; and in certain circumstances, present a range of options for intervening.

ASIC states that the aim of the consultation process is to 'seek feedback on our proposal to intervene'. Accordingly, ASIC will publish a consultation document on its website for public consultation for both market wide and individual orders. ASIC writes that it will seek broad feedback, including in relation to the significant consumer detriment we have identified. 'However, we will expect submissions to be supported by evidence and data'. With respect to the time required for consultation ASIC states that 'the time we provide for responding to consultation will depend on the circumstances of the significant consumer detriment'.

**Too long?** Some media reports have expressed criticism of the time the consultation period is likely to take. The AFR suggests that the consultation process will take several months, raising the possibility that more consumers could be harmed in the period between identifying the problem, starting the consultation and taking action.

## When a product intervention order will commence

ASIC is able to specify when the product intervention order will come into force. ASIC notes that this allows it to set a later commencement date if it considers it appropriate in the circumstances.

The duration of a product intervention order will depend on the circumstances of the case. ASIC can make an initial order for up to 18 months from the date it comes into force, which can be extended or made permanent with the approval of the Minister.

## The consequences of breaching an intervention order

If a person or firm contravenes a product intervention order, or related obligation under Pt 7.9A of the Corporations Act or Pt 6-7A of the National Credit Act, ASIC may take enforcement action through civil penalty proceedings or criminal prosecution.

## Case studies

To assist consultation, the paper includes case studies of past products and practices — automatic rollover of term deposits and the practice of 'flex commissions' — to illustrate the circumstances in which ASIC may have contemplated using the product intervention power (had it been available) to address consumer detriment identified at the time.

ASIC comments that the 'case studies are intended to be illustrative only and do not indicate a current intention by ASIC to exercise the product intervention power in relation to term deposits or flex commissions'.

## ASIC to exercise its product intervention powers from the close of consultation

The product intervention power is available for the regulator to use now. However, ASIC states that it does not plan to exercise the power before the close of consultation. ASIC states that it 'may begin consulting on particular uses of the product intervention power before finalising and publishing the regulatory guide. However we will not make a final decision on exercising the power before the close of consultation on the regulatory guide'.

## Timing

- The deadline for submissions on the proposed guidance is 7 August.
- ASIC plans to release a regulatory guide in final form in September.
- ASIC will consult separately on its approach to the design and distribution obligations, 'towards the end of the year'.



[Sources: ASIC media release 26/06/2019; CP 313 Product intervention power; Attachment 1 to CP 313: Draft regulatory guide; [registration required] The AFR 26/06/2019; 27/06/2019]

## **ASIC to hold public hearings on responsible lending | ASIC will hold public hearings on responsible lending in August to 'robustly test' some of the issues/views raised in submissions in response to ASIC's consultation on proposed guidance**

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The Australian Securities and Investments Commission (ASIC) has announced that it will hold public hearings as part of the wider public consultation on its guidance on the responsible lending obligations.

**Context:** 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).

**Submissions released:** ASIC received 72 submissions in response to the consultation and these have been released via the ASIC website. Submissions were received from a wide range of stakeholders representing different parts of the broad credit industry and consumer advocates, as well as a number of academic and legal adviser groups. Of these submissions, 64 non-confidential submissions have been published on ASIC's website. They are available [here](#).

### **Public hearings will be held in August to test stakeholder views**

- ASIC says that the hearings, which will be live streamed online, are aimed at testing the views of stakeholders and providing greater understanding of business operations.
- The stakeholders invited to participate will be drawn from the groups or individuals who provided a written submission to ASIC on the responsible lending guidance.
- The public hearings will take place during August. No specific dates were given.
- ASIC states that the hearings will be held in Melbourne and Sydney, but may involve participants from other parts of Australia.

ASIC Commissioner Sean Hughes commented that 'The responsible provision of credit is critical to the Australian economy...We are taking this opportunity to test views to make sure our guidance remains relevant, clear and timely. Public hearings will provide a robust and transparent way to air issues and views raised in written submissions.'

[Sources: ASIC media release 01/07/2019; [registration required] The AFR 01/07/2019]

## **Related News — Will use of benchmarks become obsolete with the introduction of Open Banking anyway?**

The AFR observes that fintechs are already using consumer data to make lending decisions, ahead of the official start of the open banking regime. This suggests the AFR suggests, that statistical tools (including benchmarks eg the household expenditure measure (HEM)) may become increasingly irrelevant in future as banks will be able to use consumers' real data to make lending and pricing decisions.

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

## **Open Banking | The ACCC says that 'several' of the big four banks have commenced voluntary publication of product reference data (PRD)**

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The Australian Competition and Consumer Commission (ACCC) has released a statement announcing that 'several' of the big four banks have commenced voluntary publication of product reference data (PRD) which the ACCC says is an important 'first step in the implementation of the consumer data right (CDR) in the banking sector and the delivery of benefits to consumers'.



**What is PRD and why is it important?** The ACCC says publication of PRD will be of particular benefit as an aid to comparison services as it provides information about the features and descriptions of bank products, including interest rates, fees and charges, and eligibility criteria.

The ACCC says that it expects that banks will progressively enhance their PRD over the coming months and anticipates that the data coverage will not be complete immediately. The ACCC adds that until CDR legislation, rules and standards are in place, publication of PRD will remain voluntary.

**GitHub update:** The ACCC is consulting on the design and implementation of the register of CDR participants (CDR Register) via the GitHub website. The regulator is seeking comments on register design relating to client registration, with static client registration and cache refresh metadata request as the preferred option.

The ACCC says that it expects to soon publish for consultation concepts relating to the CDR Register including: business and technical design principles; Security Profile and Certificate Management; versioning; and register availability.

*[Source: Consumer Data Right Updates 01/07/2019]*

### **Related News: Australia could take the lead on open banking?**

Gavin Littlejohn, Chair of the Financial Data and Technology Association (a British-based trade association coordinating the global campaign for the delivery of open banking) has written an opinion piece in The AFR putting forward the view that the Australian Financial services industry is well placed to be a 'global leader on the road to open banking'. Australia has learned from the 'mistakes' made in the UK, and improved on the US experience he writes.

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

### **New ABA Banking Code of Conduct commenced 1 July 2019: ASIC still considering whether to approve further changes**

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The Australian Securities and Investments Commission (ASIC) has approved an updated version of the Australian Banking Association's (ABA's) new Banking Code of Practice (the Code). The updated Code (incorporating these changes), commenced on 1 July 2019.

All ABA member banks will be required to subscribe to the Code as a condition of their ABA membership and the relevant protections in the Code will form part of the banks' contractual relationships with their banking customers.

#### **Changes**

Since ASIC approved the Code in August 2018 (see: [Governance News 06/08/2018](#)) the ABA applied to ASIC for approval of a number of changes to the Code. ASIC has approved a number of changes including the following.

1. new provisions that put beyond doubt that a bank will not charge fees for services to deceased customers, where services are no longer being provided to that customer's estate
2. changes to the commitments around provision of valuations to small business customers
3. changes to reflect ASIC's implementation of law reforms to credit card responsible lending
4. minor and technical corrections throughout the Code.

ASIC approved the above changes on 25 June 2019 by issuing an approval of a new Code. The approval is contained in [ASIC Corporations \(Approval of Banking Code of Practice\) Instrument 2019/663](#).

The ABA published the new Code on its website on 24 June 2019.

#### **Further changes under consideration by ASIC**



ASIC says that it is yet to reach a decision on approving further changes (second stage changes) to the Code. The second stage of changes are designed to:

- address recommendations of the Financial Services Royal Commission (including improvements to the provisions dealing with accessibility to banking products and services for vulnerable customers and commitments regarding the charging of default interest on agricultural loans in the event of natural disasters)
- to address stakeholder feedback relating to various small business protections.

### Timing?

- The ABA proposes that these changes will commence from 1 March 2020.
- ASIC says that it is aiming to decide on these proposed changes 'later in 2019' following engagement with key stakeholders to ensure that the proposed revisions 'an appropriate level of commitment by banks to consumer and small business protections'.

*[Source: ASIC media release 28/06/2019]*

### **ABA says customers can expect to see an 'immediate change to banking services and products'**

In a statement, ABA CEO Anna Bligh said that customers can expect to see an immediate change to banking services and products. 'We've completely rewritten the rule book for Australia's banks. The Banking Code of practice has strong protections for customers, serious consequences for breaches and strong independent enforcement. Banks understand they need to change their behaviour and this new rule book represents an important step in earning back the trust of the Australian public.'

The statement adds that banks have trained more than 130,000 staff on the new requirements in the Code so it can begin operation from 1 July.

Writing in The Australian, Ms Bligh added that the introduction of the new Code is a sign that 'banks have got the Hayne message'.


[Note: The ABA's statement makes no reference to the concerns raised by the Mortgage Brokers Financial Planning Association (MFAA) (covered in a separate post in this issue of Governance News) with respect to new vulnerable customer requirements to calls from the MFAA to delay and conduct further consultation on the implementation of the new requirements for brokers.]

*[Sources: ABA media release 30/06/2019; [registration required] The Australian 01/07/2019]*

### **Industry has reportedly welcomed the new Code**

Reportedly industry has welcomed the new Code:

- The Australian quotes ANZ CEO Shayne Elliott as commenting that the new Code is an important step towards rebuilding trust with customers. 'The code sets down in plain language the standards of practice and service our consumer and small business customers can expect...It also improves customer protections and sets higher standards ... in relation to things like account services and lending -applications.'
- Reportedly, Westpac CEO Brian Hartzer also said that the new Code is a 'big step towards earning back trust in the community', adding that 'Westpac fully supports the new banking code, which is one part of how we are strengthening transparency, accountability and relationships with our customers.'
- Commonwealth Bank also welcomed the new code. In a statement, the CBA said that it 'provides strong, enforceable, and more customer focused standards for banks to deliver and aligns with CBA's commitment to improve the financial wellbeing of our customers and communities'.
- Financial Counselling Australia CEO Fiona Guthrie said the code was a major step up in the protections for customers, particularly the most vulnerable, and was an important milestone in restoring community trust. 'Codes like this really can make a difference because they go beyond black letter law and instead reflect the standards that an industry voluntarily commits to...The banking industry released its first



version of the banking code over 25 years ago and it is really pleasing to see that each version — and this is the fourth major revision — contains advances in consumer protection.'

The AFR reports that certain customers have reacted with scepticism, suggesting that in order to make a difference, penalties need to be greater and without stronger enforcement/tougher penalties, 'it's just nice words'.

*[Sources: [registration required] The Australian 01/07/2019; [registration required] The AFR 01/07/2019; CBA media release 30/06/2019; [registration required] The Canberra Times 02/07/2019]*

### **Mortgage and Financial Association of Australia have called for a delay in implementing new obligations for mortgage brokers under the new Banking Code of Practice to allow for 'several issues' to be worked through**

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The Mortgage and Financial Association of Australia (MFAA) has released a statement calling for a delay in implementing new obligations for mortgage brokers with respect to protecting vulnerable customers under the new Banking Code of Practice (Code), to enable 'several issues' to be 'worked through'.

Under the Code which commenced on 1 July, mortgage brokers are being required by banks to assist in meeting their obligations under the Code, most notably with regard to vulnerable customers, co-borrowers and guarantors. The MFAA is concerned that under new rules imposed by some lenders, brokers will be required to conduct an assessment of a customer's potential vulnerability, and in some instances, sign a declaration on the broker disclosure that there are no signs of financial abuse.

The MFAA argues that this raises a number of issues including the following.

- The MFAA has received legal advice that the requirement that brokers report suspected financial abuse to lenders could be a breach of the broker/customer relationship, and may raise privacy issues. The MFAA argues that given the standard imposed by the Code on lenders is that they may not know about financial vulnerability unless they are told by the customer themselves, 'it is inappropriate and impractical to impose a higher standard on brokers'.
- If a broker were to sign a declaration regarding whether there is abuse, it is likely that this activity would not fall within the occupation of a 'mortgage broker' and is therefore not covered under a broker's Professional Indemnity (PI) policy.
- There is a lack of standardisation in the way the requirement has been applied across industry — the new requirements are being 'interpreted and implemented in a piecemeal manner by different lenders, without broker consultation and with some lenders also requiring declarations or attestations to be signed by brokers'
- There is a lack of guidance documents on how brokers can reasonably meet the new requirements

**The MFAA advises brokers against complying with the new requirements:** 'Owing to the unclear requirements, the lack of training provided to brokers, and the fact that signing a declaration poses risks to the broker's PI cover, the MFAA is advising its broker members (as an interim solution) that they should not complete this part of the application process unless they feel adequately equipped to make an assessment and determination in relation to these issues for that individual customer'. The MFAA goes on to write that if brokers 'cannot do this (which is likely to be the case), they need to understand that they are at risk if they are to proceed and make an error, and that it is unlikely that their PI will cover them'.

**Next steps? Proposed delay in implementation:** MFAA CEO Mike Felton said that though 'strongly aligned with the objective of the Code, which is to create better customer outcomes' implementation of the new requirements would require a 'more careful approach'.

'We have been and will continue to work closely with the ABA on this issue. We are seeking for the implementation date on this element of the Code to be delayed, so that we have time to work through the legal issues and can help implement this in a sustainable, orderly manner' Mr Felton said. In particular Mr Felton said that the requirements for brokers need to be 'reasonable and 'standardised across the industry to the greatest extent possible' and that this would require consultation, the creation of appropriate guidance materials and an education program.



This implementation will also require an appropriate, an industry-wide education program for brokers, and a 'phased approach' to implementation.

Mr Felton said that the 'MFAA will update the industry, regulators and stakeholders on our progress on this issue.'

*[Sources: MFAA media release 25/06/2019; [registration required] The AFR 26/06/2019]*

## **APRA has updated FAQs on the implementation of Protecting Your Super reforms to reflect the government's planned changes to PYSP legislation**

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On 28 June, ahead of the 1 July commencement of the [Treasury Laws Amendment \(Protecting Your Superannuation Package\) Act 2019](#) (PYSP) changes, the Australian Prudential Regulation Authority (APRA) released updates to frequently asked questions.

APRA writes that the government has indicated it will pursue amendments to the Superannuation Industry (Supervision) Act 1993 (SIS Act) in line with the government's policy intent and to address feedback from industry.

APRA says the changes relate to the following.

1. **product level application:** the government plans to enact legislative requirements allowing for the aggregation of a members' interests in one or more products held within a superannuation account.
2. **clarification on the 'fixed term' insurance issue:** APRA writes that the government plans to implement amendments to clarify that the rights of members under fixed term insurance cover are not affected and insurance cover is not inappropriately removed. APRA states that this may affect 'conventional products where the switching off of cover would have a demonstrable adverse financial effect on the member, such as products that are already fully paid up or currently non-premium paying, whole of life and endowment products, and certain legacy products'.

APRA says that though the proposed changes will not be made before the legislation takes effect on 1 July, APRA 'supports trustees proceeding on the basis that the amendments will become law in due course'.

[Note: As previously reported Governance News, certain wealth managers had reportedly sought clarification from APRA with respect to their proposed approach to 'fixed term' policies ie whether fixed term policies were exempt from the new inactive account provisions. See: Governance News [26/06/2019](#)]

**Actions trustees should take if they are unable to comply by the 1 July commencement date:** APRA says that where a trustee determines that any breaches of the PYSP legislation relate to either the product level application or the 'fixed term' insurance issue the trustee should inform APRA and provide details of how it intends to apply the law, including whether it is taking into account future law changes that have been signalled by the government.

Where it determines that a significant breach has occurred or will occur, APRA says that the trustee must ensure it follows its standard breach assessment procedures and reports and relevant breaches to APRA within the required timeframe.

Where the breach may relate to future law changes 'a trustee may rely on identifying this matter in its breach report, subject to further advice from APRA regarding whether any additional action is required'. APRA states that the breach relates to 'any other matters other than the product level application or the "fixed term" insurance issue, the breach notification must contain a clear outline of the nature of the breach, its impact on members and the trustee's plan and timeframe for rectification and remediation'.

*[Source: APRA FAQs 28/06/2019]*

## **Top Story | ASIC proposes to prohibit stub equity structures in Australian control transactions**

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The Australian Securities and Investments Commission (ASIC) has released its consultation to effectively prohibit stub equity structures in control transactions.



MinterEllison has released an article explaining ASIC's consultation, its own position on the changes and suggesting how the market can respond.

The full text of the article can be accessed on the MinterEllison website here:

<https://www.minterellison.com/articles/asic-proposes-to-prohibit-stub-equity-structures-in-australian-control-transactions>

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### **Top Story | AFCA to commence 'Look Back' program from 1 July 2019**

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From 1 July 2019, Australian consumers and small businesses will be able to seek redress for eligible financial disputes dating back to 1 January 2008 by lodging a complaint with Australian Financial Complaints Authority (AFCA).

An article presenting expert insight into how this will work and next steps is available on the MinterEllison website here: <https://www.minterellison.com/articles/afca-to-commence-look-back-program-from-1-july-2019>

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### **NSW Regulator requires insurers to display previous year's premium on all renewal notices**

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From 1 July, insurers will be required by the NSW Emergency Services Levy Insurance Monitor, to include the price of the previous year's policy along with the new premium price for all home insurance renewals in NSW.

NSW Emergency Services Levy Insurance Monitor, Professor Allan Fels said that 'NSW is leading this important reform which will enable consumers to see at a glance what they paid last year, and how it compares with the renewal price being offered this year. People should be able to see any price increases easily, particularly given the practice by some insurers of charging higher premiums for renewing customers than for new one'. This will allow customers to 'shop around' and get the best price and avoid 'loyalty taxes'.

The directive requiring disclosure of last year's premium is based on the Monitor's legislative powers. All of the major insurers have indicated they will be in a position to fully comply by 1 July or shortly thereafter. Professor Fels said while the notice to disclose the previous year's price is mandatory in NSW, he understands that some insurers will implement it nationally.

*[Source: Emergency Services Levy Insurance Monitor media release 26/06/2019]*

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**In Brief | The Financial Services Council (FSC) has approved a moratorium, from 1 July, allowing Australians to get up to \$500,000 life insurance cover without disclosing any adverse genetic test results. The Moratorium will be included in the Life Insurance Code of Practice which is currently under review, meaning the Moratorium will have independent oversight by the life code compliance committee who will have the power to sanction members who do not comply**

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*[Source: FSC media release 26/06/2019]*

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**In Brief | Fraud volume has increased in globally (including in Australia) according to KPMG: A global KPMG survey into fraud has found that banks are experiencing an increase in fraudulent activity with over half of respondents reporting that they typically recover less than 25% of fraud losses; demonstrating that fraud prevention is key**

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*[Source: KPMG Global Banking Fraud Survey 2019; [registration required] The Australian 26/06/2019; InvestorDaily 27/06/2019]*

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**In Brief | ASIC reportedly has 66 open cases and is investigating a further 35 individuals? The Australian reports that in a brief for the incoming federal government, the Australian Securities and Investments Commission (ASIC) has provided an update on its current work program including providing an update on work flowing from the Hayne Commission**

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*[Source: [registration required] The Australian 29/06/2019]*

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**In Brief | APRA has granted Investec Bank Plc, a licence to operate as a foreign authorised deposit-taking institution under the Banking Act 1959 (Cth)**

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*[Source: APRA media release 01/07/2019]*



**In Brief | On 1 July 2019 the Reserve Bank of New Zealand published a summary of submissions, alongside redacted submissions, to its consultation paper on proposed changes to capital requirements for banks. The SMH reports that submissions from the NZ's banking sector have opposed the proposals for banks to keep more capital to ensure a safer banking system. RBNZ will publish a response, and final decisions on capital review proposals in November**

*[Sources: The SMH 01/07/2019; [registration required] The Australian 02/07/2019; [registration required] The AFR 01/07/2019; RBNZ Consultation: Review of the capital adequacy framework for registered banks: summary of submissions; individual submissions]*

## Risk Management

### Climate Risk

**477 investors called on the world's leaders to accelerate action to achieve the goals of the Paris Agreement ahead of the G20 Summit**

#### Key Takeouts

- 477 superannuation funds and investors with collectively US\$34tn in assets wrote to global leaders ahead of the G20 summit calling on them to take action to ensure the goals of the Paris Agreement are met.
- Broadly, the group called on leaders to take steps to: 1) achieve the Paris Agreement's goals (eg by updating and strengthening nationally-determined contributions to meet the emissions reduction goals by 2020); b) accelerate private sector investment into the low carbon transition (eg by phasing out thermal coal power worldwide by set deadlines and putting 'a meaningful price' on carbon); and 3) commit to improve climate-related financial reporting (eg by committing to implement the TCFD recommendations in their jurisdictions by 2020)
- Several Australian asset managers, retail and industry superannuation funds are signatories including Australian Super, First State Super, Cbus, Colonial First State Global Asset Management, HESTA, BT Financial Group, VicSuper, New Forests and IFM Investors

Ahead of the G20 Summit in Osaka, the Investor Group on Climate Change (IGCC) — a group of 477 investors with collectively USD \$34 trillion under management, including several Australian funds and asset managers — called on the world's leaders to take action to achieve the goals of the Paris Agreement.

'As institutional investors with millions of beneficiaries around the world, we reiterate our full support for the Paris Agreement and strongly urge all governments to implement the actions that are needed to achieve the goals of the Agreement, with the utmost urgency' the investors wrote in a Global Investor Statement to Governments on Climate Change.

More particularly, the group called for leaders to enact policies to:

- **Achieve the Paris Agreement's goals** through: a) updating and strengthening nationally-determined contributions to meet the emissions reduction goals by 2020; b) formulating and communicating long term emissions reduction strategies; c) aligning all climate related policy frameworks with the goals of the Paris Agreement; and d) supporting a 'just transition' to a low carbon economy.
- **Accelerate private sector investment into the low carbon transition** through: a) incorporating Paris-aligned climate scenarios into all relevant policy frameworks and energy transition pathways; b) phasing out thermal coal power worldwide by set deadlines; c) putting 'a meaningful price' on carbon; and d) phasing out fossil fuel subsidies by set deadlines.
- **Commit to improve climate-related financial reporting** through: a) Publicly supporting the Financial Stability Board's Task Force on Climate-related Financial Disclosures (TCFD) recommendations and the extension of its term; b) committing to implement the TCFD recommendations in their jurisdictions by 2020; c) requesting the FSB incorporate the TCFD recommendations into its guidelines; and d) requesting international standard-setting bodies to incorporate the TCFD recommendations into their standards.



[Note: In a recent [speech](#), Australian Prudential Regulation Authority (APRA) executive board member Geoff Summerhayes flagged APRA's heightened expectations with respect to management and reporting of climate risk. With respect to reporting, he strongly encouraged, but stopped short of 'mandating' that firms report in line with the TCFD recommendations. See: [Governance News 26/06/2019](#)]

Commenting on the call, signatory First State Super CEO Deanne Stewart said that 'As one of Australia's largest industry superannuation funds, and a major institutional investor, we believe we have an important role to play in bringing about positive action on climate change to protect the retirement savings of our members. This aligns with the view of regulators in Australia, and internationally, who have identified climate change as a significant material and foreseeable risk and have called for immediate action. While we are responding on behalf of our members, this issue will require a coordinated, collective and collaborate response from governments, business and investors to ensure that critical changes are made now for the long-term interests of our members and the community.'

**BlackRock and Vanguard not signatories?** The AFR comments that the world's two largest asset managers are not signatories to the letter. Reportedly, neither gave a specific reason for not supporting the call.

[Source: [Investor Group on Climate Change media release 26/06/2019](#); [Global Investor Statement to government's on climate Change](#); [Open Letter to Governments 26/06/2019](#); [registration required] [The AFR 26/06/2019](#); [The Guardian 26/06/2019](#); [registration required] [The Australian 26/06/2019](#)]

**United Kingdom | Business leaders ready to lead on climate change? On the back of research showing business leaders are committed to playing a role in meeting climate targets, the IoD and CMI have called on the UK government to release 'practical' guidance on how businesses can contribute**

#### Key Takeouts

- **Business supports action on climate change:** The IoD and CMI have released the findings of a joint survey into attitudes to climate risk among business leaders which has found that the majority of respondents support/are committed to business playing a role in meeting the government's climate change target
- **Time for the government to release guidance:** The bodies have called on the UK government to produce and promote practical guidance for all companies on how they can contribute to meeting the climate target (net zero emissions by 2050)

The UK Institute of Directors (IoD) and the Chartered Management Institute (CMI) jointly released a statement, ahead of the G20 summit, presenting the findings of a joint survey of almost 1000 company directors and managers which found that the 'vast majority' of business leaders are already committed to the essential role that businesses will play in tackling climate change.

#### Some Key Points

According to the statement:

- 9 out of 10 survey respondents believe that business leaders should be taking action to mitigate climate change
- 4 out of 5 survey respondents indicated that their business is already taking action on climate change
- The top three actions already taken to tackle climate change are: 1) reducing the amount of waste produced; 2) introducing energy saving initiatives across the business; and 3) reducing the amount of travel undertaken

Both bodies called on the UK government to produce and promote practical guidance for all companies, regardless of size or industry, on how they can contribute to the net zero carbon emissions by 2050 target.

[Source: [IoD media release 28/06/2019](#)]



## First US insurer to phase out its coal investments and insurance policies? Chubb has issued a statement outlining its new policy on coal underwriting and investment

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Chubb has issued a media release outlining its new policy on coal underwriting and investment.

### Key Points

- Chubb will not make new debt or equity investments in companies that generate more than 30% of revenues from thermal coal mining or energy production from coal
- Chubb will no longer underwrite the construction and operation of new coal-fired plants or new risks for companies that generate more than 30% of their revenues from coal mining or energy production from coal
- Insurance coverage for existing coal-plant risks that exceed the 30% threshold will be phased out by 2022, and for utilities beginning in 2022.

Chair and CEO of Chubb Evan G Greenberg said that 'Chubb recognises the reality of climate change and the substantial impact of human activity on our planet...Making the transition to a low carbon economy involves planning and action by policy makers, investors, businesses and citizens alike. The policy we are implementing today reflects Chubb's commitment to do our part as a steward of the Earth'.

**Response to activist pressure?** The AFR reports that a group of activist investors, The Insure Our Future Campaign, has been pressuring Chubb to pull back from exposure to coal and oil sands companies for nine months.

In a statement, Insure Our Future welcomed the action taken by Chubb and suggested it may increase pressure on other companies to follow suit. The statement goes on to say that since the launch of a global Unfriend Coal campaign two years ago (of which Insure Our Future is a part), 14 European insurers, and one Australian insurer, have released policies to address climate change. Eight of the policies were announced in the last six months with the scope of policies continuing to expand.

*[Sources: Chubb media release 01/07/2019; Chubb's Corporate Environmental Program; Insure Our Future media release 01/04/2019; Unfriend Coal media release 01/07/2019; [registration required] The AFR 02/07/2019]*

## The AFR reports that Norges bank has reversed its stance on Rio Tinto

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The AFR reports that Norwegian sovereign wealth fund Norges Bank, has reportedly confirmed that Rio Tinto, Nutrien, Walmart, Grupo Carso and General Dynamics will no longer be excluded from investment, after a merits review by the fund's 'council on ethics'.

Norges Bank is quoted as saying that 'Rio Tinto Ltd and Rio Tinto Plc were excluded in 2008 based on an assessment of the risk of severe environmental damage related to the Grasberg mine in Indonesia. The company has made it clear for the Council on Ethics that it has signed an agreement to sell its interest in the mine'.

The AFR comments that Norge Bank's decision on Rio Tinto comes as many Australian resources companies face potentially losing the fund as an investor after it tightened its investment criteria on several occasions in recent years.

Reportedly, the Norwegian parliament has recommended that Norges Bank tighten its stance against investing in oil and gas, in a move that may have future ramifications for its existing investments in Australian companies such as BHP Group, Woodside, Oil Search and Santos. According to The AFR Norges Bank had \$19.37 billion invested in Australian equities and \$11.7 billion invested in Australian fixed-income products as of December 31, 2018.

*[Source: [registration required] The AFR 25/06/2019]*



**In Brief | Policies are proving ineffective in stopping deforestation, land grabs and human rights violations? In a new report, Friends of the Earth Australia has called on ANZ, Westpac, Commonwealth Bank of Australia and National Australia Bank to cut their financial ties with the palm oil sector and to withdraw from it completely as soon as possible**

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*[Sources: Friends of the Earth media release 26/06/2019; Friends of the Earth Report: Draw the Line: A black book about the shady investments of Australian banks in palm oil; [registration required] The Age 26/06/2019]*

**In Brief | UK regulators have welcomed the government's green finance strategy: In a joint statement, the FRC, the PRA, the FCA and the TPR have welcomed the release of the strategy. 'Climate change is one of the defining issues of our time. We recognise it presents far-reaching financial risks relevant to our mandates...Companies should consider the likely consequence of climate change on their business decisions, in addition to meeting their responsibility to consider the company's impact on the environment'**

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*[Sources: FRC media release 02/07/2019; UK Policy Paper: Green Finance Strategy]*

## Workplace issues

**ASX100 companies are failing to provide adequate disclosure of workforce risks? According to ACCR's analysis of ASX100 reporting, companies are providing minimal information on workforce issues despite pressure from investors and shareholders**

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The Australasian Centre for Corporate Responsibility (ACCR) has released a statement presenting the results of its own analysis of ASX 100's reporting.

According to the ACCR, despite pressure from shareholders and investors for companies to improve transparency around management of risks associated with workforce management, minimal information is being provided by most companies on five key workforce issues: 1) employee remuneration; 2) turnover and new hires; 3) workforce composition (diversity and equal opportunity); 4) workforce composition (contractors and labour-hire); and 5) occupational health and safety.

### Some Key findings

According to the ACCR's statement:

- 15 ASX 100 companies (named in the statement) do not provide numeric disclosures on any of the key indicators analysed
- 2 ASX 100 companies (Scentre Group and Telstra) provide numerical data for indicators under all 5 workforce areas examined by ACCR
- Zero companies in the ASX 100 report on the racial pay gap – which reflects limited reporting on race and cultural diversity overall.
- 30 companies report on their equal pay gap (ratio of male to female remuneration in similar roles)
- 3 companies (Rio Tinto, BHP, and National Australia Bank) report on their gender pay gap (ratio of median male to median female remuneration).

ACCR's Director of Workers' Rights, Dr Katie Hepworth said 'In recent years, there have been numerous workforce scandals, including over extreme wage theft and dodgy labour-hire providers...Given this, it is concerning that so many companies are failing to report on even basic information on their workforce...A lack of reporting hinders effective engagement by investors, who are unable to properly assess these company's management of their workforce.'

*[Sources: ACCR media release 01/07/2019; InvestoprDaily 02/07/2019]*



## Modern Slavery

### Uncertain future? NSW Modern Slavery Act to be referred to committee

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NSW Special Minister of State, Minister for the Public Service and Employee Relations, Aboriginal Affairs, and the Arts Don Harwin has said in response to a question in Parliament on 19 June, that the *NSW Modern Slavery Bill 2018*, which was passed by the NSW parliament of June last year, cannot 'commence operation as drafted'.

Mr Harwin said that the government has received advice from the Department of Premier and Cabinet that the legislation 'contains a number of defects requiring urgent attention' which if not addressed, would 'render some provisions of the Act inoperable' and in addition, that other provisions, as currently drafted, are 'open to the risk of a constitutional challenge'. 'The reality is that the Commonwealth legislation creates an inconsistency of laws in several respects, resulting in a section 109 problem with the Act. That is why it has to be amended and cannot proceed on 1 July' Mr Harwin said.

To address these matters, the legislation and proposed amendments have been referred to the Standing Committee on Social Issues for its inquiry and report. It will be open to the Committee to consider (among other things) whether it wishes to endorse any or all of the proposed amendments to the Bill, or to determine that given the passage of the Commonwealth legislation renders 'part of possibly all of the New South Wales Act unnecessary'.

A reporting date will be set by the committee, but Mr Harwin said that it 'should feel free to take whatever time it needs to come up with the best way forward on this important matter'.

*[Source: NSW Legislative Council Hansard 19 June 2019]*

## Whistleblowing

### New regime for corporate whistleblower protections commenced 1 July 2019

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In a statement, the Australian Securities and Investments Commission (ASIC) flagged that from 1 July a new corporate whistleblowing regime, with stronger rights and protections for whistleblowers came into effect.

#### Key Changes

Changes include the following.

- ASIC says that the protections now apply to a larger group of people — both current and former company employees, officers, and contractors, as well as their spouses and dependants, even where these people wish to remain anonymous — who may observe or be affected by corporate misconduct and face reprisals for reporting it.
- The protections will apply to whistleblower reports covering misconduct or an improper state of affairs or circumstances, not just breaches of the law.
- Whistleblowers can lodge a report with ASIC through our online misconduct reporting form.

#### Guidance for whistleblowers

To provide guidance to whistleblowers on the changes and on how ASIC will handle their reports, ASIC has updated information on its website and issued two information sheets:

- **Information Sheet 238 Whistleblower rights and protections (INFO 238):** This information sheet explains who is a whistleblower under the law, how a whistleblower can access legal rights and protections, what protections are available and when they are available.
- **Information Sheet 239 How ASIC handles whistleblower reports (INFO 239):** This information sheet explains (among other things) ASIC's role in relation to whistleblowers, how ASIC deals with information from whistleblowers including when ASIC will act on information and matters outside of its regulatory responsibilities, how ASIC will pursue alleged breaches of whistleblower protections, communication with whistleblowers and the role of ASIC's Office of the Whistleblower.



ASIC Commissioner John Price said that the regulators values 'the people from inside companies and organisations who come to ASIC with reports of potential misconduct or breaches of the law. Whistleblowers provide ASIC with important information and help us enforce the laws we administer to address and prevent harm to consumers. ASIC considers a strong and effective arrangement for handling reports from whistleblowers is a key component of corporate governance. We encourage companies to implement a strategy for dealing with whistleblower reports they may receive in line with the legislative requirements.'

**Consultation on regulatory guidance on new whistleblowing policy requirement 'in due course':**

Noting that the changes to the whistleblower protections also include a new requirement for public companies, large proprietary companies, and corporate trustees of registrable superannuation entities, to have a whistleblower policy from 1 January 2020, ASIC states that it will consult regulatory guidance on the requirement for a whistleblower policy 'in due course'.

[Note: For insights into the implications of the new whistleblower regime for employers, please see: [Workplace update: New whistleblower laws to take effect soon.](#)]

[Source: ASIC media release 01/07/2019]

## Cybersecurity and Privacy

### EU with OAIC: CBA has committed to upgrading its privacy policy and data governance following two data incidents

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Following inquiries by the Office of the Australian Information Commissioner (OAIC) into CBA's handling of personal information in relation to two 'data incidents' — the loss of magnetic storage tapes containing historical customer statements for up to 20 million bank customers by a third-party provider to CBA in May 2016 and inadequate internal access controls to customer data reported to the OAIC in August 2018 — the CBA has entered into an enforceable undertaking with OAIC requiring that it review its privacy policies, procedures and retention standards, and provide staff training to ensure compliance.

In addition, CBA must also assess its IT services and systems to make sure it takes appropriate steps to control access to customers' personal information.

The enforceable undertaking will be overseen by an independent external reviewer, who will consult with and report to the OAIC on CBA's compliance. The OAIC states that it may take court action at any stage if CBA does not fully comply with the terms of the undertaking.

**'Sharp reminder to all organisations':** Australian Information Commissioner and Privacy Commissioner Angelene Falk said 'This matter should send a sharp reminder to all organisations that data holdings must have a clearly defined retention period and should be securely destroyed or de-identified when no longer needed. Failing to do so can increase the risk that personal information will be compromised. Organisations are also responsible for enforcing these measures when outsourcing to contracted service providers.'

**CBA response:** In a statement, CBA said that the enforceable undertaking follows CBA's ongoing work to address the two incidents and that the EU underpins the execution of 'further enhancements to the management and retention of customer personal information within CBA and certain of its subsidiaries'.

Commonwealth Bank Group Chief Risk Officer, Nigel Williams, said: 'We have offered this EU as a demonstration of our continued commitment to appropriately managing the privacy of customer personal information, and addressing any concerns identified by the Commissioner. We continue to take action to address issues, earn trust and be a better bank for our customers. This includes proactively engaging with our regulators to ensure we continue to build better systems, processes and controls to manage the personal information of our customers'.

The statement also makes clear that CBA has found no evidence to date, that customers' personal information was compromised or that there have been any instances of unauthorised access by CBA employees or third parties.

[Sources: OAIC media release 27/06/2019; CBA media release 27/06/2016; [registration required] The AFR 27/06/2019]



## Restructuring and Insolvency

### Measures to deter businesses from engaging in the black economy: Assistant Treasurer Michael Sukkar released a statement outlining a number of measures came into effect on 1 July 2019

In a statement, Assistant Treasurer Michael Sukkar highlighted a number of measures designed to improve compliance with tax obligations and deter businesses from engaging in the black economy, that came into effect from 1 July.

Mr Sukkar said that the government is 'expanding the taxable payment reporting system to include more high-risk industries, we are denying deductions for undeclared cash-in-hand wages, and we are strengthening Government procurement processes.'

#### Details

- **Further expansion of taxable payments reporting:** Mr Sukkar said that the Black Economy Taskforce identified some industries as being at higher risk of not declaring their income. In response, he said that the government is extending the taxable payment reporting system (TPRS) to include the road freight transport, security and information technology industries. From 1 July 2019, businesses in these industries will have to report payments they make to contractors to the Australian Taxation Office (ATO). The TPRS first applied to the building and construction industry and, following announcement in the 2017-18 Budget, was extended to the courier and cleaning industries.
- **Denying deductions (eg payments to contractors/payment of wages) for non-compliant payments:** From 1 July 2019, businesses will no longer be able to claim deductions for certain payments — eg payment of wages and payments to contractors — if the business fails to comply with its obligations to withhold and report information to the Commissioner of Taxation. Mr Sukkar said that the disincentive created by denying the deduction will complement existing penalties for failure to withhold amounts under the PAYG system. He said that denying deductions in these cases provides a strong financial disincentive to engage in this behaviour and will send a message that black economy behaviours are not legitimate activities.
- **Stronger Commonwealth procurement processes:** To reduce black economy activity in supply chains, Mr Sukkar said that the 'government will lead by example in its procurement processes'. From 1 July 2019, businesses seeking to tender for Australian Government procurement contracts over \$4 million (including GST) will be required to provide a satisfactory statement of tax record (STR) from the ATO. The STR will indicate the business is generally compliant with their tax obligations. 'Increasing the integrity of Commonwealth Government Procurement processes promotes good tax behaviour and creates an even playing field for businesses that comply with their tax obligations' Mr Sukkar said.

*[Source: Assistant Treasurer Michael Sukkar media release 28/06/2019]*