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Contents

Remuneration

Westpac has said it will rethink the way in which it calculates executive remuneration ahead of the upcoming AGM

- **Changes to executive remuneration:** Westpac Chair Lindsay Maxsted has written to shareholders to advise that the bank will rethink the way in which it calculates executive remuneration in response to last year's 'substantial vote' against the remuneration report. More particularly, Mr Maxsted said that he recognised that the 'risk and reputation matters that emerged across the sector combined with a flat financial performance in 2018 meant that many shareholders believed the board did not apply enough downward discretion to short term variable remuneration outcomes'. In light of this, he said that the bank expects to make further changes this year, including 'more effectively capturing non-financial risk elements of performance in executive remuneration, improving the transparency of remuneration decisions and applying discretion where circumstances warrant'. Details will be released in the 2019 Annual Report which will be published in November.

- **Australian Prudential Regulation Authority (APRA) self-assessment:** Mr Maxsted said the internal inquiry carried out in response to APRA's request that the bank complete a self-assessment, had shown that Westpac needed to improve its approach to managing non-financial risks, and that a detailed program of work is already underway on this front. 'While our culture, governance and accountability settings in their totality generally support the sound management of non-financial risks, our approach is less mature than our approach to managing financial risks' Mr Maxsted said. The letter adds that 'At the same time, the report confirmed that we have an analytical and consultative culture that can slow down decision making, create undue complexity and dilute accountability'. The letter goes on to say that Westpac is waiting for direct feedback from APRA and will incorporate this, once received, into its planned actions.

[Note: APRA recently released an information paper presenting its own analysis of the self-assessments undertaken by 36 financial institutions (banks, insurers and superannuation funds) in response to the regulator's request that they assess whether the weaknesses uncovered by the CBA Prudential Inquiry also exist in their own organisations. Overall, APRA found that the weaknesses identified in the Final Report of the Prudential Inquiry are not unique to CBA, but are, 'by and large, also apparent in other institutions'. See: Governance News 28/05/2019]

[Source: Westpac ASX Announcement: 24/06/2019; [registration required] The AFR 24/06/2019; [registration required] The Age 25/06/2019; 25/06/2019; Investor Daily 25/06/2019; The Australian 25/06/2019]

Leadership changes announced at IOOF: New CEO will receive zero short term incentives

- **Appointment of Renato Mota as CEO and Managing Director:** Following the departure of Chris Kelaher, Acting CEO Renato Mota has been appointed CEO and Managing Director of IOOF with immediate effect. IOOF Chairman Allan Griffiths said that the 'after a thorough executive search and rigorous interview process involving external and internal candidates, it became clear that Renato is the right person to refocus IOOF and restore trust with our stakeholders' given his strong track record.

- **Cultural change:** Mr Griffiths said that Mr Mota's 'mandate will be to continue the change program he commenced as acting CEO, to reshape our business and adapt our culture and capability to suit the evolving wealth management environment'.

- **CEO Remuneration — zero short term incentives:**
  - Mr Mota will be on a fixed salary of $1.2 million including superannuation. His remuneration package will include zero short term incentives.
  - Mr Mota's long-term incentive is set at 100% of his salary, and will vest four years from the date of grant, subject to meeting 'financial and non-financial metrics'.
  - Mr Mota will be eligible to participate in IOOF's future LTI arrangements on terms decided by the Board and subject to shareholder approval as appropriate. Entitlements to any LTI on cessation of employment will be determined in accordance with the relevant plan rules.

- **The board will also appoint Andrew Bloore as an independent non-executive director.** Mr Bloore has been an independent non-executive director on the boards of three IOOF subsidiaries. Mr Blooree will commence his directorship on 2 September 2019 and shareholders will be asked to consider his appointment at the upcoming AGM in November 2019.
- **Board refreshment to continue:** IOOF states that its board renewal plan is continuing and it plans to appoint further non-executive directors 'in the near future'.

[Sources: IOOF ASX Announcement 25/06/2019; [registration required] The AFR 25/06/2019; 25/06/2019]

In Brief | The AFR reports that data from a global banking standards body reportedly shows oversight of Australian banker pay is out of step with global standards

[Sources: [registration required] The AFR 25/06/2019; FSB report: Implementing the FSB Principles for Sound Compensation Practices and their Implementation Standards, Sixth progress report 17/06/2019; FSB media release 17/06/2019]

Diversity

United States | Board diversity trends in 2019: The US is experiencing a significant shift in the composition of corporate boards, in line with changing market expectations/shifting environment according to ISS

Institutional Shareholder Services (ISS) has published a short post on Harvard Law School Forum identifying five trends in new director appointments on US boards, based on a review of 19,791 directorships in the Russell 3000.

Overall Conclusions: ISS found that the US is experiencing a significant shift in the composition of corporate boards, in line with changing market expectations/shifting environment. More particularly, ISS found that there is an uptick in board refreshment, and an increased emphasis on diversity (ie diversity in terms of skills, experience, gender, ethnicity) as investors 'focus on board quality and governance as a foremost measure for protecting their investments and managing risk for sustainable growth'. Given this focus, ISS suggests that the trends identified (outlined below) are likely to continue.

Five major trends identified

1. **Board Renewal — slight increase on 2018:** ISS found that board renewal rates have continued to increase over the past few years, with the percentage of companies introducing at least one new board member increased from 34.3% in 2018 to 35.6% in 2019.

   What's behind it? ISS attributes the uptick in new director appointments to a greater emphasis on board gender diversity and board refreshment by many investors and companies.

2. **Gender Diversity — upward trend continues:** The percentage of women joining boards has reached a record high with 45% of new Russell 3000 board seats filled by women in 2019 (compared to only 12% in 2008) and this has contributed, ISS writes, to the jump in overall gender diversity on S&P 500 boards. Overall, it's likely, ISS writes, that the 30% female board representation target will be reached earlier than predicted. ISS also found that unlike previous years, when the percentage of new female directors was higher at large-capitalisation companies, the high rate of new female directors is consistent across all market segments.

   What's driving it? The shift is attributed to pressure not only from asset owners/asset managers and proxy advisers but to the impact (and potential impact) of regulation. In particular, the new regulation in California mandating minimum female board quotas is credited with driving progress, especially as other states may follow suit.

3. **Ethnic Diversity — slow increase:** Ethnic diversity is increasing, but at a slower pace than gender diversity. According to ISS, 15% of new directors are ethnically diverse and approximately 10% of Russell 3000 directors overall belong to an ethnic minority group. This is highest proportion recorded, but is still only a 2% increase on 2008. ISS comments that the figures are well below the proportion of the non-White population in the US of approximately 40%.

4. **Age Diversity — board members are older on average:** During the past twelve years, the average director age in the Russell 3000 has increased from 59.7 years in 2008 to 62.1 years in 2019. The number of directors over 67 years is now at 31.6%, compared to 22.1% in 2008. One reason for this, is that younger directors (under 45 years) are being appointed less frequently than they were in the past with only 7.2% of new directorships filled by directors younger than 45 years, compared to 11.5% percent of new directors in 2008.

   What's behind it? ISS suggests that the decline in the percentage of younger directors over the course of the last decade could be explained by increased emphasis on relevant experience and qualifications.

5. **Skills Diversity — non financial skillsets are on the increase:** ISS found evidence of an increased focus on non-financial skillsets in new director appointments. The rate of disclosure of skills is generally higher for new directors compared to directors who have served on boards for five years or more. Relative to tenured directors, ISS observed an increase in the percentage of new directors with expertise in technology (10%), sales (8%), international experience (8%), and strategic planning (6%). In addition, ISS observed a decrease in some traditional skills, such as financial expertise, audit expertise, and CEO experience. ISS comments that as sustainability and corporate culture become focus items for many investors and companies, it expects this trend to continue.

[Source: Harvard Law School Forum on Corporate Governance and Financial Regulation 18/06/2019]

Switzerland | 30% target? Bloomberg reports that Swiss lawmakers have voted in favour of introducing a 'guideline' for the boards of listed companies to include 30% women

Bloomberg reports that Swiss lawmakers in parliament's upper house have voted in favour of a measure to increase gender diversity on the boards of large listed companies. Reportedly, the lower house of parliament already voted in favour of the change late last year. However, the change is part of a larger review of the corporate legal code which has not been finalised.

Details: Reportedly, the draft law includes a guideline for corporate boards to include 30% women and for executive committees to include 20% women. Companies that don't meet the guideline will be required to provide an explanation for the shortfall in their annual compensation report and present a plan for improvement.

[Source: Bloomberg 20/06/2019]

Malaysia | Evidence of the effectiveness of gender targets? Bloomberg analysis has found Malaysian banks are leading their Southeast Asian peers on board (gender) diversity

- **Malaysia's largest banks leading on gender diversity:** Bloomberg reports that based on its own analysis of information on the three largest banks in each country, Malaysia's large banks have the highest board representation for women across the Southeast Asian region with women accounting for 30+% of the boards of top Malaysian lenders, outpacing peers in Singapore (13%), the Philippines (9%), Indonesia (<20%) and Thailand (<20%).

- **Benefits of diverse boards:** Citing a recent study — Gender Diversity on Bank Board of Directors and Performance — published by the US Federal Reserve in support, Bloomberg comments that banks with more women on their boards tend to perform better in measures including return on assets when female participation reaches a 'critical level' of between 13% and 17% (provided the banks are well capitalised).

- **Is some form of target necessary to achieve progress?** Boston-based head of impact and screening research at MSCI Inc Meggin Thwing Eastman is quoted as saying that the outperformance of Malaysian banks (by comparison with peer organisations) is likely attributable to Malaysia's corporate governance code, which requires that women hold at least 30% of board seats at local firms. Bloomberg appears to query this, noting that of all the 15 banks surveyed, the best performer Bangkok-based Kasikornbank (which has seven female directors, or almost 40% of the 18-member board) where there is no similar requirement in place.

[Sources: Bloomberg 18/06/2019; US Board of Governors of the Federal System, Gender Diversity on Bank Board of Directors and Performance 12/02/2019]

Japan | General shift towards the appointment of outside directors?

The AFR reports that Australian businesswoman Melanie Brock has been appointed as a non-executive director of Tokyo listed firm Sega Sammy Holdings becoming the second Australian (and only Australian woman) to become a director of a Japanese listed company.

Australia's former ambassador to Tokyo Bruce Miller is quoted as saying that the appointment of Ms Brock is an indication of a broader shift towards including 'genuinely independent' people on company boards in Japan. More particularly, Mr Miller is quoted as stating that the push for the inclusion of more foreign directors is a reflection of stricter corporate governance rules introduced by Prime Minister Shinzo Abe in 2015 and of the 'latest wave of Japanese outbound investment'. Firms are seeking, experienced individuals with an understanding of both Japan and the 'wider world' he is quoted as stating.

[Source: [registration required] The AFR 21/06/2019]

Meetings and Proxy Advisers

Alphabet shareholder meeting result: As expected? A raft of shareholder proposals failed to pass despite employee concerns

Alphabet, the parent company of Google, has reportedly failed to pass several shareholder proposals (none of which were supported by management) on a range of issues including (among others) increasing the company's accountability, equality and transparency, despite hundreds of employees protesting outside the event.

Reportedly employees challenged management during the meeting on a number of issues including the company's handling of sexual harassment allegations, its employment practices, and work on a censored search engine for China.

Media reports comment that the result is not unexpected given the unequal voting structure — Google's co-founders control a majority of voting power.

[Sources: The Guardian 20/06/2019; Fortune 19/06/2019]

Disclosure and Reporting

ASIC has announced that it has commenced proceedings against Murray Goulburn executives

The Australian Securities and Investments Commission (ASIC) has announced that it has commenced proceedings in the Federal Court against the former managing director of Murray Goulburn Co-operative Co Limited (MG) and MG Responsible Entity Limited (MGRE), Mr Gary Helou, and the former CFO of MG and MGRE, Mr Bradley Hingle, over their alleged involvement in MGRE's 'failure to disclose to the Australian Securities Exchange (ASX) market sensitive information in a timely manner'.

More particularly, the proceedings relate to announcements released by MGRE to the ASX on 29 February 2016 forecasting: an Available Weighted Average Southern Milk Region Farmgate Milk Price (FMP) for the financial year ending 30 June 2016 of $5.60 per kgms; and a full year net profit after tax (NPAT) for the financial year ending 30 June 2016 of approximately $63 million (February Earnings Guidance).

Among other things, ASIC alleges that the executives breached their duties as directors and officers to act with reasonable care and diligence by: a) failing to adequately monitor the financial position and performance of MG and MGRE against the February Earnings Guidance; b) failing to inform the Board before 26 April 2016 of information which indicated the February Earnings Guidance was unlikely to be achieved; c) causing or otherwise permitting MG and MGRE to make misleading statements in the February Announcement; and; d) causing or otherwise permitting MG and MGRE to breach their continuous disclosure obligations.

ASIC also alleges that Mr Helou engaged in misleading or deceptive conduct by approving the February Announcement.

ASIC is seeking that both Mr Hingle and Helou be disqualified from managing a corporation for a period to be determined by the Court and for declarations of the alleged contraventions.

Commissioner Cathie Armour said, 'ASIC will take action to disqualify directors and officers who cause a company to contravene its market disclosure obligations, or are involved in the company's contravention.'

[Sources: ASIC media release 25/06/2019; [registration required] The AFR 25/06/2019]

Corporate Social Responsibility and Sustainability

250 Australian listed companies to be included in FTSE Russell's ESG coverage

Global index FTSE Russell has reportedly expanded its ESG data analysis to include small-cap firms, providing a coverage boost to 250 Australian listed companies, as they will now be included in FTSE Russell's ESG coverage.

David Harris, head of sustainable investment at FTSE Russell, is quoted as saying 'We are pleased to expand our coverage in the Australian market where sustainable investment is a priority for many customers. By providing access to detailed, structured and transparent information on the ESG priorities and performance of Australian companies, [we can] help support investor stewardship and ESG integration into active and passive strategies.'

The article comments that 'Australia has been one of the most vociferous markets' in the region about the need to integrate ESG into investment practice, with 129 asset owners and asset managers signed up to the United Nations Principles for Responsible Investment.

[Source: IR Magazine 19/06/2019]

Mastercard has launched the True Names initiative: 'Our vision is that every card should be for everyone'

Mastercard is launching a new program called the 'True Name' program which will enable people to use the name that reflects their true identify and their presentation (rather than their birth identity) on their credit, debit, or prepaid cards without requiring a legal name change.

Mastercard writes that the purpose in launching the initiative is to 'ease a major pain point for transgender and non-binary people'. More particularly, Mastercard notes that nearly one-third (32%) of individuals who have shown IDs with a name or gender that did not match their presentation reported negative experiences, such as being harassed, denied services, and/or attacked. It also can serve, Mastercard states, as 'source of sensitivity, misrepresenting their true identity when shopping and going about daily life'. The initiatives aims to help address this.

Mastercard has called on the industry more broadly to apply these standards for everyone, ensuring a way for people's financial products to reflect their true identity.

[Source: Mastercard media release 17/06/2019]

Financial Services

ASIC Commissioner John Price has provided an update on ASIC's new enforcement and supervisory approach

The Australian Securities and Investments Commission (ASIC) has released Commissioner John Price's comments to the Governance and Risk Management Forum. Mr Price covered two areas: key areas of focus for the regulator coming out of the Financial Services Final Report and (briefly) the significance of new design and distribution and product intervention powers.

Firms need to take responsibility

Mr Price prefaced his comments by emphasising that the 'primary obligation' to address the issues identified over the course of the Financial Services Royal Commission lies not with the regulator but with the 'firms we regulate' and that the starting point for supporting improved conduct is cultural change and 'better governance'. He added that though ASIC 'cannot regulate culture', the concept of 'fairness', the question of whether the 'the culture of your firm promote[s] fair treatment of consumers and investors' should be central.

'When you are dealing with other people's money, be they consumers or investors, the concept of fairness is critical – not just from a compliance or conduct perspective but also for the prospects of the company itself. We have seen stark examples of so-called "non-financial" risks, such as conduct and compliance risks, turn into very material financial and reputational issues for many firms' he said.

ASIC's enhanced enforcement and supervisory approach

- **ASIC's new enforcement approach:** Mr Price described ASIC's new 'why not litigate?' approach to enforcement, emphasising that the regulator is looking to 'use the full extent of our new penalties and powers'. He clarified that the new approach does not mean 'litigate first' or 'litigate everything' but rather means 'that once ASIC is satisfied that breaches of the law are more likely than not, and it is evident from the facts of the case that the pursuit of the matter would be in the public interest, then we will actively ask ourselves: why not litigate this matter?'. He added that the approach does not mean that court enforcement action will become 'the sole item in our regulatory toolkit. But it does mean we have adopted a rigorous approach to deciding which tool is the right one'.

- **Evidence of the regulator's 'accelerated action':** Mr Price said that from February 2018 to March 2019: there has been a 15% increase in the number of ASIC enforcement investigations, a 65% increase in enforcement investigations involving large financial firms (or their officers or subsidiary companies), and a 129% increase in wealth management investigations.

- **Supervision:** Mr Price described and provided brief updates on the work of the Close and Continuous Monitoring program and the Corporate Governance Taskforce.

  - He said that under our Close and Continuous monitoring program ASIC has already conducted around 200 onsite interviews with banking staff at all levels to gain first hand insights into systems, practices and culture and is already providing feedback to CEOs and boards on concerns identified in their management, reporting and control systems.

  - Mr Price said that the Corporate Governance Taskforce is looking at practices in large financial and non-financial entities**.** Key areas of work in this taskforce are: a) looking at governance processes and practices around the oversight of non-financial risk; and b) practices regarding payment of variable remuneration to key management personnel. Mr Price said that ASIC will be issuing a series of reports starting later this year, as well as providing specific feedback on its concerns to the companies involved.

New design and distribution obligations and ASIC's new product intervention power

Mr Price said that the regulator is working on implementing the government's package of reforms and its new obligations and responsibilities in response to the Financial Services Royal Commission, including ASIC's role as conduct regulator in superannuation. In addition, ASIC is working on measures for enhanced consumer and retail investor protection; a design and distribution obligation for financial services firms; and a product intervention power for ASIC.

Mr Price said that the reforms are an 'implicit recognition that in some cases disclosure is not an adequate answer to consumer protection' and that they place the onus on product issuers to take a customer focused approach. 'These reforms are a further embodiment in the law of a concept that I mentioned at the start – that is the fundamental importance of fair treatment of consumers and retail investors' he said.

[Source: Keynote panel discussion by John Price, Commissioner, Australian Securities and Investments Commission at the Governance and Risk Management Forum, (Melbourne, Australia) 20/06/2019]

ASIC red tape report: ASIC has released a report providing an overview of its decisions on relief applications

Report Overview | ASIC REP 620 Overview of decisions on relief applications (Oct 2018 to March 2019)

The Australian Securities and Investments Commission (ASIC) has released a report providing an overview of decisions on relief applications for the period 1 October 2018 to 31 March 2019. The report also identifies publications released by ASIC during the period that may be relevant to prospective applicants for relief and gives examples where ASIC has exercised, or refused to exercise, its exemption and modification powers under the Corporations Act and the licensing and responsible lending provisions of the National Credit Act. The purpose of the report is to 'provide transparency' about ASIC's decision making and to 'better inform businesses' about the circumstances in which ASIC grants relief.

Some Key Points

- **Outcomes of all relief applications received:** During the report period, ASIC received 709 applications and determined 941 relief applications (including some applications received before the reporting period). Overall, across all categories of relief applications received: 82% were approved, 6% were refused, 13% were withdrawn.
- **Outcomes of AFS licensing relief applications**: Of all applications received for relief under Ch 7 of the Corporations Act 2001 (Cth) from Australian Financial Services licensing requirements, 68% of applications were approved, 25% were withdrawn and 7% were refused.
- **Outcomes of disclosure relief applications:** Of all applications received for relief from the requirements in Ch 6D to provide prospectuses and other disclosure documents; and the Ch 7 requirements to provide Product Disclosure Statements (PDSs) and Financial Services Guides (FSGs) 71% were approved, 27% were withdrawn and 2% were refused.
- **Outcomes of managed investment applications:** Of all applications received for relief from the provisions of Ch 5C, 79% of applications were approved, 6% were refused and 15% were withdrawn.
- **Outcomes of mergers and acquisitions relief applications:** Of all applications received for relief from the provisions of Ch 6, 91% were approved, 8% were withdrawn and 1% were refused.
- **Outcome of conduct relief applications:** Of all applications received for relief from the conduct obligations imposed by Chs 2D, 2G, 2M and 7, 69% were approved, 15% were refused and 16% were withdrawn.
- **Outcome of credit relief applications:** Of all applications received for relief under the National Credit Act 75% were approved, 6% were withdrawn and 19% were refused.

[Sources: ASIC media release 21/06/2019; REP 620 Overview of decisions on relief applications (October 2018 to March 2019)]

Add-on insurance refunds now total over $130 million: ASIC has announced significant, additional refund programs by insurers for the sale of add-on insurance by car dealers

The Australian Securities and Investments Commission (ASIC) has announced 'additional significant refund programs' by six insurers for the sale of add-on insurance by car dealers. More than 30,000 additional consumers will be compensated for the sale of these insurance products, bringing the total to over 245,400 consumers.

Details

ASIC's concerns: ASIC states that the refund programs address its concerns with respect to Guaranteed Asset Protection (GAP) Insurance, Consumer Credit Insurance (CCI), and Mechanical Breakdown Insurance (also known as Extended Warranty). Concerns include sales where:

- customers were unlikely to need GAP insurance, especially where they paid a large deposit for their vehicle
- customers who paid their loan off early did not receive a rebate on their GAP insurance policy, even though cover under the policy had ended
- over insurance ie where customers were sold more expensive cover than they needed
- customers were sold policies they were ineligible to claim on
- young people were sold life cover under a CCI policy even though they were unlikely to need it

- customers were sold mechanical breakdown insurance when cover would start in seven years' time after the manufacturer's warranty expired, or where cover would expire shortly as the warranty was sold when the kilometre limit was close to expiring

Under the additional refund programs:

- Aioi Nissay Dowa Insurance Company Australia Pty Ltd (ADICA) is refunding $7.2 million to 16,596 customers. ADICA sells insurance products under the Toyota brand
- Eric Insurance Limited (formerly AVEA Insurance) will offer refunds of $3.37 million to 5,232 customers
- Sovereign Insurance Australia Pty Ltd has offered refunds of $1.37 million to 1,858 customers
- Virginia Surety Company, Inc. (Virginia Surety) will refund $1.7 million to 4,026 customers
- LFI Group Pty Ltd (insurer for Liberty Finance) has offered refunds of approximately $951,700 to 2,001 customers, and
- NM Insurance Pty Ltd, an underwriting agency, and three insurers — The Hollard Insurance Company Pty Ltd, AAI Limited (a member of the Suncorp Group) and AIG Australia Limited — will collectively refund $143,700 to 287 customers.

Consumers should check their loan contracts: ASIC says that consumers should check their car or motorcycle loan contracts to see if they held add-on insurance with these providers. ASIC also encourages customers of previously announced refund programs from Allianz, Swann, Suncorp, QBE, Virginia Surety and National Warranty Company to contact their insurer – they can still request their refund to be paid.

The issues highlighted demonstrate the need for new design and distribution obligations

ASIC said it has worked to secure improvements to the design and sale of add-on insurance products to help prevent unfair sales by car dealerships in future and adds that some insurers have stopped operating in the add-on insurance market altogether.

ASIC Commissioner Sean Hughes said that 'The failures highlighted by these insurers demonstrate why new design and distribution obligations - passed by the Parliament in March 2019 - are so important. ASIC will continue to monitor this sector to make sure the unfair practices of the past do not return; however, the industry has a key role to play in this too.'

[Note: Mr Hughes appears to be referring to The *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018* received Assent on 5 April 2019 as Act No 50 of 2019 Among other things, the legislation introduces design and distribution obligations in relation to financial products and provides the Australian Securities and Investments Commission (ASIC) with a product intervention power (see: Governance News 05/04/2019). ASIC's product intervention power commenced on 6 April 2019. The design and distribution obligations will be phased in over 2 years.]

[Source: ASIC media release 19/06/2019]

ASIC has amended fees and cost disclosure requirements to align with Protecting Your Super reforms

The Australian Securities and Investments Commission (ASIC) has amended Class Order 14/1252 to ensure it is consistent with the *Treasury Laws Amendment (Protecting Your Super Package) Act 2019* and Regulations, which ban exit fees from 1 July 2019.

Technical change only: ASIC states that the amendment is 'technical only' and applies to disclosure concerning superannuation products.

CO 14/1252 modifies the *Corporations Act 2001 (Cth)* and *Corporations Regulations 2001 (Cth)* to set out requirements for the disclosure of fees and costs in Product Disclosure Statements (PDSs) for superannuation and managed investment products. It reflects the ban on exit fees for these products by eliminating the line allowing for disclosure of exit fees. The amendment does not otherwise make any change to the requirements set out in CO 14/1252.

Reminder to product issuers — Product Disclosure Statements should reflect the protecting your super reforms: ASIC reminds product issuers that they need to take care that from 1 July 2019, product disclosure statements do not suggest that exit fees will be charged on superannuation products and implement any changes necessary to ensure that no exit fees are charged in practice. 'We understand that some issuers may have difficulty implementing changes to delete the line about exit fees from their template by 1 July (although it will be blank) and encourage them to make this change as soon as possible' ASIC states.

Update on ASIC's broader reviews of the fees and costs disclosure regime for managed investment schemes: On 8 January ASIC released a consultation paper: CP 308 RG97: Disclosing fees and costs in PDSs and periodic statements, outlining proposed changes to the fees and costs disclosure regime (see: Governance News 16/01/2019). ASIC states that the review is continuing and will not affect the requirement to comply with the protecting your super amendments and CO 14/1252.

ASIC adds that it will take the protecting your super changes into account in the finalisation of its response to proposals outlined in CP 308 and expects to provide a report addressing its final position on the consultation proposals in the second half of 2019.

[Sources: ASIC media release 21/06/2019; Class Order 14/1252]

The meaning of statutory unconscionability: A majority of the High Court has found the 'book up' system is not unconscionable prompting Financial Counselling Australia and the Consumer Action Legal Centre to call for law reform

Overview | Australian Securities and Investments Commission v Kobelt [2019] HCA 18

In a 4:3 decision, a majority of the High Court of Australia dismissed an appeal by the Australian Securities and Investments Commission (ASIC), finding that a general store owner's informal 'book-up' system did not contravene the prohibition on unconscionable conduct in s 12CB(1) of the *Australian Securities and Investments Commission Act 2001 (Cth)*.

Facts

Mr Kobelt provided a system of book up to customers of his general store, most of whom were Aboriginal residents of the APY Lands (Anangu people), which allowed them to, purchase goods and second hand motor vehicles.

Under the system, Mr Kobelt was given access to his customers' accounts (eg access to their debit cards and PINs) which he used to withdraw all/nearly all of wages/Centrelink payments shortly after the money was credited to the customers' accounts. In exchange, customers were given credit to use at his store/to purchase second hand vehicles.

Not unconscionable within the meaning of s12CB(1)

Four Judges of the High Court (Kiefel CJ, Bell, Keane and Gageler JJ) found that Mr Kobelt's book up system was not unconscionable.

- **No 'unconscientious advantage' to Mr Kobelt**: In their joint judgment Kiefel CJ and Bell J found that 'determinative of the appeal is the absence of unconscientious advantage obtained by Mr Kobelt from the supply of credit to his Anangu customers under his book-up system'. They went on to say that 'Mr Kobelt was not required to act in an altruistic or disinterested way in his dealings with his customers. Nor was Mr Kobelt required to devise an alternative, superior form of book-up credit. The statutory proscription is on engaging in unconscionable conduct. The difficulty with ASIC's system case of statutory unconscionability lies in identifying any advantage that Mr Kobelt obtained from the supply of book-up credit that can fairly be said to be against conscience.'
- **Not a 'lower standard' of conduct than applies to the supply of credit to mainstream customers:** Kiefel CJ and Bell J also found that 'contrary to the tenor of ASIC's submission', the Full Court's conclusions that Mr Kobelt's conduct was not unconscionable does not posit a different, lower standard of conscionable conduct in the supply of credit to Anangu consumers than applies to the supply of credit to consumers in mainstream Australian society. It is a conclusion that takes into account, correctly, all of the circumstances including the evidence of the cultural norms and practices of the Anangu residents of the APY Lands.'
- **No exploitation:** Kiefel CJ and Bell J found that the customers understood the 'basic elements' of the long-standing system and entered into it because it enabled them to purchase goods which they may

otherwise not have been able to purchase. They also found that the terms on which book up credit was supplied were 'perceived by Anangu customers to be appropriate. This perception was not the product of the Anangu Customers' lack of financial literacy: it reflected aspects of Anangu culture that are not found in mainstream Austrlaian society.'

Both Keane J and Gaegler J also found that there was no exploitation. Keane J found that ASIC 'did not establish that the respondent exploited his customers' socio-economic vulnerability in order to extract financial advantage from them'.

Gageler J found that the customers were not exploited on the basis that they had a choice to enter into the contracts and their continued participation in the system 'suited the interests of them and their families having regard to their own preferences and distinctive cultural practices.'

The remaining three Judges (Nettle, Gordon and Edelman JJ) dissented.

The finding of the Federal Court that Mr Kobelt engaged in unlicensed credit activity stands.

[Source: Australian Securities and Investments Commission v Kobelt [2019] HCA 18; ASIC media release 12/06/2019; [registration required] The AFR 12/06/2019; The SMH 12/06/2019; The ABC 12/06/2019]

ASIC's response

In a statement, ASIC said that it 'will continue to work collaboratively on book up law reform and to educate book up providers and consumers on fair and legal ways in which book up can be provided'.

[Source: ASIC media release 12/06/2019]

'Unconscionable' is too high a bar?

In separate statements, Financial Counselling Australia and the Consumer Action Legal Centre have argued that the decision indicates that there is a need for law reform.

Financial Counselling Australia (FCA): In a statement, Financial Counselling Australia (FCA) said that though it 'respects the recent decision by the High Court in *ASIC v Kobelt* we want to place on record our disappointment. We also want to commend ASIC in pursuing this important case and note that it reinforces the need for urgent law reform'. The FCA's view is that the prohibition on unconscionable conduct is intended to protect vulnerable people from predatory and exploitative business practices and as such, 'it is disappointing that the prohibition does not offer the level of protection expected by the community'

The FCA argues that the court's decision demonstrates that there is a need 'for a law that prohibits clearly unfair practices — a law that is focused on fairness and better reflects community expectations. Such a law would tackle the harm cause by legal business. It is not about scams, or frauds, but about businesses that exploit customers'.

[Source: Financial Counselling Australia media release 16/06/2019]

Consumer Action Legal Centre: The Consumer Action Law Centre (Consumer Action) argues that the decision indicates that Australia needs an economy-wide prohibition on unfair trading. More particularly, Consumer Action argues that the split decision on the meaning of 'unconscionable conduct tells us the law is not working to support fair trading'. It Consumer Action's view that a prohibition on unfair trading would enable 'greater consideration of the impact of trading behaviour on vulnerable consumers, rather than the morality of the business's conduct.'

[Source: Consumer Action Legal Centre 13/06/2019]

Failing to put fairness first? AFCA Chair David Locke has reportedly expressed frustration in the failure of firms to shift their approach to resolving complaints

The AFR reports that speaking as part of a panel discussion at the Governance Institute of Australia Conference, Australian Financial Complaints Authority (AFCA) Chair David Locke expressed frustration at the failure of financial institutions to amend their approach to customer complaints, suggesting it is an indication of their broader failure to learn the lessons of the Financial Services Royal Commission. 'We are seeing a range of conduct even now, post-Hayne, that is frankly unacceptable and must change' he is quoted as saying.

According to The AFR, Mr Locke said that:

- AFCA on track to receive 80,000 complaints in its first full year of operation
- issues are not limited to a specific sector but are continuing to emerge in credit, superannuation, life insurance and general insurance
- Mr Locke said AFCA had so far identified and referred 83 examples of systemic issues and a further 20 serious contraventions for further investigation and is working with the Australian Securities and Investments Commission (ASIC) and the Australian Prudential Regulation Authority (APRA) to ensure there is approach regulatory action taken.
- Mr Locke gave a number of examples of weaknesses in the way firms approach complaints including: a) firms adopting an overly legal approach to dispute resolution 'rather than actually addressing the substantive issue of unfairness'; b) failure to adequately resource complaints handling functions; and c) failure to respond/manage complaints quickly enough. Mr Locke is quoted as commenting that 'A well articulated, well reasoned black letter law argument will not stand if it is delivering what is a fundamentally an unfair outcome.'
- Commenting on the extension of AFCA's remit to include legacy cases, and the potential difficulty associated with resolving long-standing complaints (going back as far as 1 January 2008) Mr Locke said that it would be 'challenging particularly for smaller members who may not have kept records beyond seven years' but made it clear that larger firms are expected to have kept records. 'The large firms have been put on notice by Hayne not to destroy documents and we would expect documents to exist'. 'Having gone through a 13-month royal commission everybody is on notice about what the issues are and we expect prompt action to be taken, we expect them to address concerns when they come forward and provide appropriate remediation when wrongdoing has happened.'

[Source: [registration required] The AFR 20/06/2019]

ASIC has urged superannuation trustees to prioritise member interests when handling insurance claims and complaints

Writing in Superfunds magazine, Australian Securities and Exchange Commission (ASIC) Senior Executive Leader for Superannuation, Jane Eccleston has urged superannuation trustees to prioritise member interests when handling insurance claims and complaints and to address 'common failures' in current processes (as identified in ASIC Report 591 Insurance in Superannuation (see: Governance News 10/09/2018).

Some Key Points

- **Change is required:** 'It is unreasonable for trustees to expect members to be able to navigate the unfamiliar and potentially confusing process of lodging a claim without assistance' Ms Eccleston writes. Ultimately, a process tailored to members' needs will both reduce the likelihood of a valid claim being withdrawn or declined because members didn't fully understand the requirements and 'help reduce the number of member complaints'.
- **Acting in members' best interests:** Ms Eccleston writes that 'ASIC considers that super trustees' approach to IDR [internal dispute resolution] provides a meaningful measure of the way trustees treat their members and whether they act in their members' best interests'.
- **Complaints handling is an ongoing area of focus for ASIC**, Ms Eccleston writes and ASIC looks forward to feedback from industry on proposals in Consultation Paper 311 (see: Governance News 22/05/2019)
- **Roadmap to improvement?** Ms Eccleston highlighted the findings in ASIC Report 603 (see: Governance News 17/12/2018) as a 'roadmap for how providers can improve the way they handle complaints' and said that ASIC would 'continue to meet with super trustees to gain further insights into the implementation of the Insurance in Superannuation Code of Practice'.

[Source: Lifting the Bar, Superfunds June 2019]

APRA consultation on proposed changes to ownership of RSE licensees

The Australian Prudential Regulation Authority (APRA) has released for a two week consultation period, a draft change of control application form and accompanying instruction guide for applications to acquire a controlling stake in a registrable superannuation entity (RSE) licensee.

Details

Following the passage of *Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No 1) Act 2019*, from 5 July, any party seeking to acquire greater than a 15% stake in an RSE licensee must apply to APRA for approval.

Before granting approval to a new applicant, APRA must be satisfied the revised ownership structure will not impede the ability of the RSE licensee to meet its obligations under the *Superannuation Industry (Supervision) Act 1993*, including by prioritising the best interests of members. As such, the draft Change of Control application form seeks information about the applicant including their motivation in seeking to acquire a stake in the RSE licensee.

APRA also notes that the new process is in alignment with APRA's ownership powers in the banking and insurance sectors.

Applications will be subject to 'rigorous regulatory scrutiny: Commenting on the change Deputy Chair Helen Rowell said APRA actively sought these powers to 'better protect the interests of superannuation members'. Mrs Rowell said that the regulator has 'held longstanding concerns' with respect to the ability of parties to gain control of an RSE without meeting the requirements of a 'stringent approval process' and that these concerns increased after this issue contributed to the collapse of Trio Capital in 2009. 'The closure of this legislative gap will ensure anyone seeking to acquire a substantial stake in an APRA-regulated superannuation licensee is subject to rigorous regulatory scrutiny' she said.

Timeline: The deadline for submissions is 5 July 2019

[Sources: APRA media release 24/06/2019; Letter: New application form - Approval to own or control an RSE licensee; Draft application form - Approval to own or control an RSE licensee; Draft Instruction Guide: Approval to own or control an RSE licensee 24/06/2019; [registration required] The Australian 25/06/2019]

Update | Planned superannuation reform in response to the Financial Services Royal Commission and the Productivity Commission's recommendations

In her first speech as Assistant Minister for Superannuation, Financial Services and Financial Technology Jane Hume provided an update on the government's planned superannuation reform agenda in light of the Productivity Commission's report recommendations and the recommendations of the Financial Services Royal Commission.

Some Key Points

- **Improving member outcomes is a priority for the government:** Ms Hume said that the government's 'first obligation must be to deliver better member outcomes – more money in retirement. So our focus must be on improving the efficiency of the system, lowering costs and promoting informed member choice and competition…And for that reason, it is incumbent on the Government to make sure the compulsory system — where nearly $1 in $10 is quarantined for as much as 40 years — is working in the best interests of members — first and foremost'.
- **Financial Services Royal Commission Recommendations — update on the government's response:** Ms Hume reiterated the government's commitment to actioning all 76 of the Financial Services Royal Commission's recommendations including 15 recommendations, and one additional measure, specifically related to the superannuation industry. Ms Hume then provided a brief progress update on the government's actions.
    - Ms Hume said that so far the government has passed legislation to 'fully enact' two superannuation recommendations.

[Note: This appears to be a reference to the passage of *Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 1) Act 2019* which enacts recommendations 3.6 and 3.7 of the Financial Services Royal Commission's Final Report. See: Governance News 10/04/2019]

- In addition, Ms Hume reiterated that the government has consulted with industry on the merits of universal terms for insurance in MySuper products.

[Note: Recommendation 4.13 of the Financial Services Royal Commission's Final Report recommended that Treasury, in consultation with industry, should determine the practicability and likely pricing effects of legislating universal key definitions, terms and exclusions for default MySuper group life policies. Treasury consulted on implementing recommendation 4.13 between 28 March and 26 April 2019. See: Governance News 05/04/2019.]

- Ms Hume said that the government has also followed the Royal Commission's recommendation and progressed consultation with Aboriginal and Torres Strait Islanders across the country on difficulties they face when making binding death benefit nominations.

[Note: Though Commissioner Hayne did not make a formal recommendation, he does 'urge consultation with relevant Aboriginal and Torres Strait Islander peoples about whether they, as the relevant users of the system, see difficulties about binding death benefit nominations that should be met.' See: Financial Services Royal Commission Final Report, Volume 1 at 2.6.2 p288. The action referred to by Ms Hume was identified as an 'additional measure' in response to the Financial Services Royal Commission's final report in the government's initial response.

- Ms Hume said that the government is 'continuing to address the remaining recommendations and will be consulting with relevant regulators and industry throughout the year'.

- **Cross over with the Productivity Commission Inquiry Report into Superannuation:** Referencing the Productivity Commission's review of the superannuation sector — Superannuation: Assessing Efficiency and Competitiveness Inquiry Report (see: Governance News 16/01/2019) **—** Ms Hume said that the government is prioritising actioning recommendations that overlap with those of the Financial Services Royal Commission eg the government has accepted the recommendations to realign the roles of the superannuation regulators and to make ASIC the lead conduct regulator in superannuation, and the recommendation that people should only have one default account. Ms Hume added that the government is 'also considering the PC recommendations for improving outcomes for default members'.

- **Progressing plans to implement the putting members' interests first Bill:** Ms Hume said that 'consistent' with the Productivity Commission's recommendation, the government remains committed to the changes contained in the Putting Members Interests First Bill. She said that the Bill will require superannuation funds to only offer insurance on an opt-in basis in relation to accounts of new members who are 25 years old, or accounts that have balances below $6,000.

[Note: The Bill referenced appears to be *Treasury Laws Amendment (Putting Members' Interests First) Bill 2019* which proposed (among other things) to prevent trustees from providing insurance on an opt out basis to members who are under 25 years old and to members who hold products with balances below $6000. The Bill progressed to second reading stage in the House of Representatives but lapsed at the dissolution of the last parliament on 11 April. See: Governance News 27/02/2019]

- **Consumer voice:** To give consumers a 'stronger voice', Ms Hume said that the intends to establish a superannuation consumer advocate and will be consulting on the scope of its activities, funding and governance arrangements.

[Note: On 2 April, then Assistant Treasurer Stuart Robert announced the government's plans to establish a superannuation consumer advocate. See: Governance News 05/04/2019.]

- **APRA capability review and a review of the 'retirement income system':**
  - Ms Hume said that the capability review of the Australian Prudential Regulation Authority (APRA) is now 'nearly complete'.

- In addition Ms Hume said that the government is 'positively disposed to a review of the retirement income system as recommended by the Productivity Commission.' The Government will provide further information about the Review in due course.

Best in Show Recommendation? The AFR reports that asked about the Productivity Commission's 'Best in Show' recommendation, Ms Hume said that 'It's a good idea and nobody has come up with anything better at this stage…It's certainly worth considering but I think we need to put all the options on the table.'

[Note: Among other things, the Productivity Commission's final report into the superannuation sector included a recommendation that a single 'best in show' shortlist of up to 10 superannuation products be developed by an independent panel and presented to all members who are new to the workforce (or do not have a superannuation account), from which they can choose a product. See: Governance News 16/01/2019.]

[Sources: Assistant Minister for Superannuation, Financial Services and Financial Technology Jane Hume, speech to the Bloomberg Buy Side Forum 20/06/2019; [registration required] The AFR 21/06/2019]

Time to act on RG97? Inconsistency in the way in which superannuation funds disclose administration fees is hindering members' ability to compare funds The AFR reports

The AFR reports that inconsistency in the way in which superannuation funds currently report administration fees is making comparison between funds difficult for members. According to The AFR, though the regulator, The Australian Securities and Investments Commission (ASIC), requires superannuation funds to disclose their administration fee as a gross figure (ie without discounting for any tax benefits) some industry and corporate funds use figures that are net of tax (which makes these products appear cheaper).

Clean up RG97? The AFR reports that there are a range of industry views on the best approach to fee disclosure. For example Industry Super Australia is reportedly of the view that the best approach is a figure discounted for the benefit of any tax deductions the fund is able to claim for administration costs (net return disclosure model). The Financial Services Council and Chant West are reportedly of the view that consistency of approach, to facilitate comparison between funds, is ultimately the most important consideration.

The AFR notes that disclosure of administration fees is part of a 'long and ongoing review' of Regulatory Guide 97 by the Australian Securities and Investments Commission (ASIC).

[Note: ASIC released consultation paper 308: Review of RG 97 Disclosing fees and costs in PDSs and periodic statements on 8 January following the release of report 581 Review of ASIC regulatory Guide 97: Disclosing fees and costs in PDSs and periodic statements. Consultation closed on 2 April. See: Governance News 16/01/2019]

[Source: [registration required] The AFR 24/06/2019]

Does ban on charging fees to inactive accounts include 'fixed term' accounts? The Australian suggests uncertainty over this issue may be a roadblock to PYSP implementation

Context: The recent passage through Parliament of *Treasury Laws Amendment (Protecting Your Superannuation Package) Act 2019* (the PYSP) will require all Registrable Superannuation Entities (RSEs) to implement a number of reforms to address account erosion due to excessive fees or unnecessary insurance, including ending charging fees on inactive accounts from the start of July. More particularly, starting on 1 July 2019, superannuation funds will cancel the insurance on inactive accounts (ie accounts that have not received any contributions for at least 16 months) unless the member elects to continue the cover. In addition, inactive accounts with balances under $6,000 will be transferred to the ATO.

Does the ban include 'fixed term' policies? The Australian suggests that new laws have 'hit a potential roadblock' as some wealth managers including Netwealth, are yet to receive confirmation from the regulator — the Australian Prudential Regulation Authority — with respect to their proposed approach to 'fixed term' policies, which they view as exempt from the new inactive account provisions. Reportedly, Netwealth has written twice to the regulator seeking clarification on this point and is 'currently awaiting APRA's response'.

At this stage, The Australian reports that Netwealth has reportedly written to members advising 'If you wish to retain your current insurance and continue paying the premiums from your superannuation account, you do not need to take any further action…However, if your account remains inactive, we will continue to send you notices like this one unless you complete the attached notice and return it to us.'

The Australian adds that Netwealth has reportedly notified advisers that it may need to change this position.

[Source: [registration required] The Australian 24/06/2019]

APRA has updated measurement of capital frequently asked questions

The Australian Prudential Regulation Authority (APRA) has updated its Measurement of Capital frequently asked questions (FAQs) to provide further information on the requirements for Additional Tier 1 Capital instruments, Tier 2 Capital instruments, and Mutual Equity Interests (MEIs). The additional information is intended to assist in the interpretation of APS 111 Capital Adequacy: Measurement of Capital; GPS 112 Capital Adequacy: Measurement of Capital; and LPS 112 Capital Adequacy: Measurement of Capital.

Some Key Points

APRA states that in assessing the eligibility of an existing or proposed capital instrument, APRA will seek to review a complete set of relevant documents for that capital instrument including: a statement of compliance; the prospectus or information memorandum; the deed poll and terms and conditions; the term sheet and/or pricing supplement; relevant opinions (eg accounting, tax and legal), rulings, advices and waivers; and any ancillary and supporting agreements (eg agency agreement, dealer agreement).

APRA states that its assessment will be facilitated if:

- all documentation for a proposed capital instrument is 'is in the form of well-developed and consistent drafts
- where amendments have been made to a base document over time, it will assist if APRA is provided with a consolidated copy of the current draft document, with new clauses/content identified'
- an explanation of the rationale behind the insertion of new clauses/content or innovative features and how they are consistent with the prudential requirements will also facilitate APRA's assessment.

APRA adds that drafting errors or lack of adequate explanation of the rationale behind changes will 'inevitably lead to delays in APRA's assessment process' as the errors will need to be fixed and the documents resubmitted with an explanation of the changes provided.

[Source: APRA media release 25/06/2019]

Improving member outcomes requires a rethink of the superannuation sector?

The Australian reports that recent criticisms of the inefficiency and complexity of the current superannuation system made by two Nobel Prize winning economists, Eugene Fama and Richard Thaler is increasing pressure for significant reform of the sector. 'There's no magic number but having over 200 funds that can be blended into a mind-boggling combination of options seems excessive, especially in the absence of a well-designed default fund for those who do not want to be do-it-yourself portfolio managers' Professor Thaler is quoted as saying.

[Source: [registration required] The Australian 24/06/2019]

Has anything changed? The AFR reports that Graeme Samuel has questioned an expert panel on changes made in response to the lessons from the Financial Services Royal Commission

The AFR has reported on a panel discussion at the Australian National University's Crawford Leaders Forum. The panel reportedly included NAB outgoing Chair Ken Henry, Woolworths CEO Brad Banducci, Australian Securities and Investments Commission (ASIC) Chair James Shipton and Bank of Melbourne's advisory board Chair Elizabeth Proust and was moderated by Graeme Samuel.

Some Key Points

- According to the AFR Mr Samuel questioned why the issues identified by the Financial Services Royal Commission were so widespread, how they were allowed to occur and why they occurred. Reportedly he suggested if another Financial Services Royal Commission were called, it would likely find the same behaviour. 'We have had the royal commission into financial services covering 650 organisations and now we have the royal commission into aged care. Both have produced horrific examples about behaviour and misconduct. What the hell is going on? It's a very serious question. How is it that all these organisations have engaged in this sort of conduct and disobeyed the law? They are giving James Shipton a lot of work to do. And I think if we had another royal commission into another industry we would probably find the same level of misconduct' Mr Samuel is quoted as saying.

- Reportedly, Mr Shipton said that good behaviour is primarily the responsibility of businesses not the regulator. 'Our regulatory system in corporate Australia was not built as a police state. The first responsibility sits with entities themselves. It has been in my observation a failure of corporate Australia to live up to its responsibilities' Mr Shipton is quoted as saying. Reportedly, outgoing NAB Chair Ken Henry agreed with Mr Shipton's statement.
- Bank of Melbourne's advisory board chairman Elizabeth Proust, is quoted as saying that her view is that boards may have been suffering from hubris. 'There has been a fair amount of hubris on corporate governance that there was no reason to improve it' Ms Proust reportedly said.
- Mr Henry reportedly said there should be a greater acknowledgement that the two-strikes policy for companies at annual meetings extended beyond just dissatisfaction with remuneration. 'The big stick can be wielded not just to express dissatisfaction with remuneration but also with dividends and the tarnishing of a company's reputation' he is quoted as saying.
- Reportedly, Mr Samuel said that in his view, changes to executive remuneration are necessary to drive a shift in behaviour. More particularly, he reportedly said that a shift from financial performance incentives to one with a mixture of both financial and reputation performance incentives is necessary to address the issue.

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

Related News: Separately The Age reports (possibly at the same panel discussion – though this is not specified in the report) that NAB Chair Ken Henry called on business leaders to take personal responsibility for the failures of their firms to meet community expectations/misconduct issues identified in the wake of the Financial Services Royal Commission.

Dr Henry is quoted as saying: 'The popular view in Australia today is that businesses have been biased in their activities heavily in favour of shareholders at the expense of customers. It's certainly true that there have been too many cases of companies not treating customers well. It's also true that National Australia Bank is one of those companies. That's why I took the decision to step down from the role of chairman of NAB to take accountability for that'.

[Source: [registration required] The Age 25/06/2019]

Banks need to deliver on farm management deposit offsets

Minister for Rural Finance David Littleproud issued a statement calling on banks to deliver on their promise to allow farmers to use their Farm Management Deposits as an offset account to provide certainty to farmers.

'As we come up to the end of the financial year, farmers are making important decisions and we need to know what products are on offer and how the offsets will work….Some banks have come out with offers, which is fantastic, and some have not. For the farmers out there who have had a reasonable season, and for those who are suffering during drought and will draw down on their deposits, this is crucial information. Farmers need to know what these offers are now so they can plan for the coming year' he said.

[Source: Minister for rural finance Davie Littleproud media release 20/06/2019]

6.5% drop in bank fees is a direct result of banks listening to community concerns says ABA CEO Anna Bligh

The Australian Banking Association (ABA) has issued a statement announcing that bank fees have dropped 6.5% over the last 12 months due largely to the abolition of ATM withdrawal fees, a reduction in home loan and deposit account fees and reducing overdrawn/dishonour fees.

ABA CEO Anna Bligh said that 'The drop in fees is a direct result of banks listening to community concerns and abolishing many fees which were out of step with community expectations'. Ms Bligh added that 'Banks continue to work hard to earn back the trust of the Australian public, through abolishing fees that are seen as out of step with the community and other initiatives such as the new Banking Code of Practice which will deliver new rights and protections for customers when it goes live on July 1 this year'.

[Source: ABA media release 20/06/2019]

Related News: ITNews reports that according to Reserve Bank of Australia data, it appears that banks have replaced the lost income (from ATM withdrawal fees) with higher 'tap and go' fees charged to small businesses.

[Source: ITNews 24/06/2019]

Competition and technology adoption in the financial services sector will continue to be prioritised: The Prime Minister has outlined the government's immediate areas of focus including boosting competition and technology adoption in the financial services sector

Speaking to the WA Chamber of Commerce and Industry, Prime Minister Scott Morrison outlined the government's immediate priorities. Among other things, Mr Morrison said that government would continue to focus on boosting competition and technology adoption in the financial services sector.

Mr Morrison said that priorities include: a) the introduction of Open Banking through a new Consumer Data Right and the roll out to 'multiple sectors'; b) encouraging wider uptake of the New Payments Platform across the economy; c) the establishment of a mandatory comprehensive credit reporting system; and d) finalising a digital trade benchmark agreement with Singapore by the end of the year.

Mr Morrison said that with 'greater information, new entrants and small lenders, including innovative FinTech firms, will be encouraged to compete for small business and retail customers' and that in addition, competition will be boosted through the impact of legislation (passed before the Federal Election) lifting restrictions on the ability of mutuals to raise capital.

[Note: This appears to be a reference to Treasury Laws Amendment (Mutual Reforms) Bill 2019 which was passed by both Houses on 4 April and received assent 5 April. See: Governance News 20/02/2019; 05/04/2019]

[Sources: Prime Minister Scott Morrison, WA Chamber of Commerce and Industry Address 24/06/2019; InnovationAus.com 24/06/2019]

Fintechs to be household names in five years? Assistant Minister for Superannuation and Australia's first fintech minister, Jane Hume has given an interview in which she said that her main goals in the first 100 days are to pass the comprehensive credit report and consumer data right laws and prepare for the beginning of open banking

The AFR reports that Assistant Minister for Superannuation and Australia's first fintech minister, Jane Hume has given an interview in which she said that her main goals in the first 100 days are: 1) to pass the comprehensive credit report and consumer data right laws, and 2) prepare for the beginning of open banking.

Ms Hume also reportedly committed to holding a series of roundtables with the fintech sector and is open to hearing concerns on issues more closely connected to industry and technology minister Karen Andrews' portfolio, such as the cuts to the research and development tax incentives and the anti-encryption (Assistance and Access) laws which were passed last year.

Commenting on the delay to the commencement of the Open Banking regime, Ms Hume reportedly said that the scheme was delayed in response to concerns raised by the big four banks who said that they needed additional time to prepare. 'The big four banks have to start the ball rolling and they had an awful lot on their plates. The reforms in the banking sector have been significant and disruptive and we wanted to make sure there weren't any unintended consequence' Ms Hume said.

Commenting on the inclusion of derived data, Ms Hume said that the government wanted to be 'clear about derived data and know what data they are sharing and if there is a level of intellectual property that comes with the sharing of that data. That's not just a big four to smaller player issue, it's reciprocal. We don't want to unintentionally ruin the business model of fintechs either.'

Ms Hume added that many members of the public are as yet unaware of the open banking regime and that this will need to change. Reportedly, Ms Hume hopes that in five years some of today's small fintechs will become household names, and that consumers will be more willing to shop around for their financial needs. 'Wouldn't it be terrific if people were comfortable using different services and different providers and didn't feel like it was inconvenient to do so?' Ms Hume is quoted as saying.

[Source: [registration required] The AFR 24/06/2019]

Bank for International Settlements Annual Economic Report released: entry of large technology firms could make the financial services sector more efficient and increase access to services, but services such as payments, savings and credit also introduce new risks

According to the Bank for International Settlements (BIS) latest Annual Economic Report, the entry of large technology firms ('big techs') such as Alibaba, Amazon, Facebook, Google and Tencent into financial services, including payments, savings and credit, could make the sector more efficient and increase access to these services, but also introduces new risks.

Risks include issues of financial stability and consumer protection as well as new risks associated with big techs' access to data from their existing platforms. BIS cautions that this 'could spark rapid change in the financial system through the emergence of dominant players that could ultimately reduce competition'.

BIS states that role of big techs in the financial sector 'raises issues that go beyond traditional financial risks' and that addressing them requires 'striking a balance between financial stability, competition and data protection'. More particularly, creating a level playing field will require regulators to take into account big techs' wide customer bases and particular business models.

As big techs' move into financial services accelerates, expanding beyond regulatory perimeters and geographical borders, policymakers will need institutional mechanisms to help them work and learn together. Coordination among authorities - national and international - is crucial to sharpening and expanding their regulatory tools.

[Sources: BIS media release 23/06/2019; The SMH 24/06/2019]

Facebook to launch a digital currency, Libra

Facebook's Libra announcement: Facebook has announced plans to establish its own cryptocurrency called Libra a payments system powered by blockchain and a digital wallet (which will provide users with a way to store and spend Libra). Among other things, the statement outlines Facebook's commitment to protect user privacy and guard against fraud.

Governance? The new global digital currency will be backed by a 'basket of bank deposits' and government securities to provide price stability to the new currency. This Reserve will be administered by the Libra Association, an independent not for profit membership organisations headquartered in Switzerland the purpose of which is to 'coordinate and provide a framework for governance for the network and reserve and lead social impact grant-making in support of financial inclusion'. Members of the Libra Association will consist of 'geographically distributed and diverse businesses, nonprofit and multilateral organisations, and academic institutions' including: Mastercard, PayPal, Visa, Ebay, Facebook, Vodafone, Coinbase and Women's World Banking (among others). The aim is to have 'approximately 100 members of the Libra Association by the target launch in the first half of 2020'.

Too much financial power in the hands of Facebook (and partners)? According to media reports, a number of concerns have been raised. These include concerns about Facebook's credibility given recent scandals/concerns about the way in which the company engages with regulators, the way in which Facebook may use/not use targeted advertising and/or the way in which Facebook protects the privacy of users. Concerns have also reportedly been raised that should the plan go ahead, it could potentially threaten, central banks' control of monetary policy, transferring it instead to Facebook (and other partner companies). Governor of the Bank of England, has reportedly made it clear that the potential systemic risks in a system like Libra will require it to be subjected to the highest levels of scrutiny.

Opportunity to bring cryptocurrency into the mainstream? Reportedly, it's also been suggested that given the size of Facebook's user base, the project could bring cryptocurrencies into the mainstream and provide a platform for a new generation of financial services to build on.

No certainty that Libra will succeed: Writing in The Conversation, Assistant professor John Hawkins questions whether concerns are premature, given there is no guarantee that Libra will even proceed or if launched that it will be a success. 'Many similar cryptocurrencies have come and gone' he writes and Facebook's previous attempts to move into a similar area have been abandoned. On this basis, he suggests that it is unsurprising that the Reserve Bank of Australia 'see little likelihood of a material take up' of cryptocurrencies in Australia in the foreseeable future.

[Sources: Facebook media release 18/06/2019; Libra White Paper; The Inquisition 20/06/2019; Fortune 20/06/2019; ITNews 20/06/2019; Australian Banking Daily 19/07/2019; [registration required] The AFR 20/06/2019; 20/06/2019; [registration required] The SMH 19/06/2019; 20/06/2019; [registration required] The Australian 20/06/2019; 20/06/2019; Business Insider 19/06/2019; Investor Daily 19/06/2019; The Conversation 19/06/2019; 19/06/2019; [Sources: Fortune 20/06/2019; [registration required] The WSJ 19/06/2019; The Conversation 25/06/2019; [registration required] The AFR 19/06/2019; 25/06/2019]

The mortgage broker channel has recorded the highest ever market share

The Mortgage and Finance Association (MFAA) has released a statement announcing that according mortgage brokers settled 59.7% of all residential home loans during the January to March 2019 quarter. This is 4.4% higher than the equivalent 2018 quarter, 6.1% higher than the equivalent 2017 quarter and the highest ever residential home loan market share result.

MFAA CEO Mike Felton said the result is a strong indication of the value consumers place on the service brokers provide, adding that the result is particularly notable given it coincided with the release of the Hayne Royal Commission final report and a period of tough market conditions.

[Source: MFAA media release 20/06/2019]

New Zealand | NZ RBA has ordered independent reviews of ANZ's capital and statements signed by its directors

The Reserve Bank of New Zealand (RBNZ) has released a statement announcing that it has requested two reports from ANZ New Zealand 'to provide assurance it is operating in a prudent manner'.

Details

1. The first report will cover ANZ New Zealand's compliance with the Reserve Bank's current and historic capital adequacy requirements.
2. The second report will assess the effectiveness of ANZ New Zealand's Director's Attestation and Assurance framework, focussing on internal governance, risk management and internal controls.

Under section 95 of *the Reserve Bank of New Zealand Act 1989*, RBNZ has the power to require a bank to provide a report by a RBNZ-approved, independent person. These reviews can investigate such issues as risk management, corporate or financial matters, and operational systems.

Reserve Bank Governor Adrian Orr said 'We continue to engage constructively with ANZ New Zealand's board, and they remain focussed on these important issues. These formal reviews will allow us to work with the bank to ensure the public, and we as regulator, can have continued confidence in the bank and that it is operating in a prudent manner'. He added that 'ANZ remains sound and well capitalised'.

The AFR quotes ANZ New Zealand Chair and former Prime Minister Sir John Key as saying that the bank has already commenced a review of both areas and would accommodate the RBNZ's requests.

[Sources: Reserve Bank of New Zealand media release 24/036/2019; [registration required] The AFR 24/06/2019]

In Brief | APRA has issued a response to the January 2019 consultation on proposed changes to prudential and reporting standards resulting from the Economic and Financial Statistics data collection implementation

[Source: APRA media release 19/06/2019]

In Brief | Australia Post has reported nominated AustralianSuper as the new default superannuation fund provider for new Australia Post employees. Reportedly, over the financial year through to the end of May almost $15bn flowed into AustralianSuper. It's suggested that this is indicative of a broader trend towards switching away from retail to industry funds following the Financial Services Royal Commission

[Source: [registration required] The Australian 25/06/2019]

In Brief | Looking beyond major banks? COBA says APRA's data shows customers are looking beyond the major banks for home loans, with data released by APRA showing the value of mortgages in the customer owned banking sector grew 8% over the past 12 months

[Source: [registration required] The Australian 20/06/2019]

Risk Management

Climate Risk

Top Story | Act now or risk a 'Kodak moment': APRA has released Geoff Summerhayes' latest speech on climate risk

Overview | Speech to the International Insurance Society Global Insurance Forum, 'Buy now or pay later'

In speech entitled 'Buy Now or Pay Later', Australian Prudential Regulation Authority's (APRA's) Geoff Summerhayes warned that failure to take sufficient action on climate change now will lead to higher economic costs in the long term.

Key Takeouts

- **That climate change is a financial risk is now 'orthodox economic thinking'** as evidenced by the fact that Australian regulators (the Reserve Bank, the Australian Prudential Regulation Authority and the Australian Securities and Investments Commission) view it as such, but how to address it remains a challenge
- **Global insurers as risk experts need to play a leadership role:** Mr Summerhayes called the global insurance to play leadership role in addressing the 'data deficit' on the costs of climate action. 'By developing more sophisticated tools and models, and especially through enhanced disclosure of climate-related financial risks, insurers can help business and community leaders make decisions in the best interests of both environmental and economic sustainability' he said
- **Acting now, or acting later entail an inevitable cost**, but 'Taking strong, effective action now to promote an early, orderly economic transition is essential to minimising those costs and optimising the benefits. Those unwilling to buy into the need to do so will find they pay a far greater price in the long run'
- **Act now to avoid a 'Kodak moment'**: Mr Summerhayes cautioned that 'companies that delay or avoid adjusting to new economic realities, no matter how famous or successful, can quickly find themselves on the verge of a Kodak moment'
- **APRA's heightened expectations**: 'We intend to probe the entities we regulate on their risk identification, measurement and mitigation strategies. We expect to see continuous improvement in how entities are preparing for the transition to the low-carbon economy. Additionally, in line with my earlier

comments around the importance of broadening the pool of available knowledge, we are strongly encouraging entities to adopt the TCFD recommendations around disclosure'.

In a speech to the International Insurance Society Global Insurance Forum entitled 'Buy now or pay later' Australian Prudential Regulation Authority (APRA) Executive Board Member Geoff Summerhayes addressed the global debate about the financial impact of taking strong action to address climate change, warning that failing to take sufficient action now will lead to much higher economic costs in the long-term.

Some Key Points

- **Action on climate change remains a contentious issue in Australia and more broadly:** For the past 15 years, climate change and the 'tension between' the environmental necessity of taking decisive action to limit global warming on the one hand, and the economic impacts of doing so on the other, has been a topic of vigorous debate in Australia and more globally.
- **Now 'orthodox economic thinking' that climate risk is a financial risk:** Mr Summerhayes observed that APRA first flagged climate risks as financial risks in 2017, and since then the idea that climate risk poses a financial risk has become widely accepted including by Australian regulators the Reserve Bank of Australia (RBA) and the Australian Securities and Investments Commission (ASIC). 'When a central bank, a prudential regulator and a conduct regulator, with barely a hipster beard or hemp shirt between them, start warning that climate change is a financial risk, it's clear that position is now orthodox economic thinking' he said.
- **Inevitable cost — but failure to take sufficient action could lead to higher economic costs in the long term:** Mr Summerhayes said that whether action was taken now, or in the future, there is a cost involved. 'Climate risk is both an environmental problem and an economic one….In reality, we pay something now or we pay a lot more later. Either way, there is a cost'. Mr Summerhayes added that 'Taking strong, effective action now to promote an early, orderly economic transition is essential to minimising those costs and optimising the benefits. Those unwilling to buy into the need to do so will find they pay a far greater price in the long-run'.
- **The global insurance industry, as risk experts, should play a leadership role:** Mr Summerhayes said that lack of reliable data on what the costs are and how they will evolve is hampering informed debate on the issue. He suggested that 'as experts in risk management, the global insurance industry can – and must – play a leadership role in addressing this data deficit. By developing more sophisticated tools and models, and especially through enhanced disclosure of climate-related financial risks, insurers can help business and community leaders make decisions in the best interests of both environmental and economic sustainability'.
- **Translating acceptance of the risk into action 'remains challenging':** Mr Summerhayes said that despite acceptance of the risk, 'translating that conviction on the need for stronger action into a consensus on how best to act remains challenging'. He added that this is especially the case in Australia given iron ore, coal, natural gas, aluminium ores and crude petroleum among its top ten national export earners.
- **The case for taking action?** Mr Summerhayes said that by disclosing their climate risks and how they are addressing them in line with the Task Force on Climate-related Financial Disclosures (TCFD) recommendations, insurers, banks and superannuation funds 'put themselves in the best position to adjust to the new economic reality. More importantly, the availability of more timely, reliable and granular data will help all businesses, investors and regulators to better understand the transition-physical risk trade-off, and the reality that there is no avoiding the costs of adjusting to a low-carbon future'. He added that 'companies that delay or avoid adjusting to new economic realities, no matter how famous or successful, can quickly find themselves on the verge of a Kodak moment'.
- **APRA's heightened expectations:** Referencing the findings of APRA's recent survey of 38 of Australia's financial institutions (see: Governance News 27/03/2019) which called on institutions to translate awareness of the risk into action, Mr Summerhayes said that APRA is 'embedding the assessment of climate risk into our ongoing supervisory activities'. More particularly, he said that APRA intends to We 'probe the entities we regulate on their risk identification, measurement and mitigation strategies. We expect to see continuous improvement in how entities are preparing for the transition to the low-carbon

economy'. Mr Summerhayes said that though APRA is not 'mandating' that entities adopt the TCFD recommendations, it is 'strongly encouraging entities' to do so'.

- **Mr Summerhayes said that APRA has no plans to introduce a specific climate-related prudential standard 'at this time', but 'global regulatory community is steadily moving in this direction** which is yet another reason why prescient business leaders should be taking steps now to get ahead of the curve'.

[Note: For expert insights into the regulators' heightened expectations with respect to climate risk disclosure see: Heightened expectations of climate-related disclosure and assurance, 15/05/2019]

[Source: Buy now or pay later, Speech by Geoff Summerhayes, APRA Executive Board Member - International Insurance Society Global Insurance Forum, Singapore 21/06/2019]

The City of Sydney has officially declared a climate emergency

Reportedly the city of Sydney has officially declared a climate emergency, with the city's councillors voting that climate change poses a serious risk to the people of Sydney and the rest of Australia.

Ahead of the vote, City of Sydney Lord Mayor Clover Moore issued a statement, calling on councillors to vote in favour of the proposal a proposal. She also asked the Council to call on the Federal Government to respond urgently to the national climate emergency, by reintroducing a price on carbon to meet the Paris Agreement emissions reduction targets, and establishing a Just Transition Authority to ensure Australians employed in fossil fuel industries find appropriate alternate employment.

Ms Moore also outlined the City of Sydney's action on climate change since 2008, and commitment to accelerate this work in the development of its strategic plan till 2050.

[Sources: Lord Mayor of Sydney media release 21/06/2019; 25/06/2019]

In Brief | A report by CSIRO, NAB and 20 other organisations, has found that Australia faces a 'slow decline' if it fails to act on significant economic, social and environmental challenges. However, if these challenges are addressed, it could mean high GDP per capita, 'net zero' GHG emissions by 2050, strong economic growth and energy affordability and more liveable major cities

[Source: Australian National Outlook 2019]

Cybersecurity and Privacy

Updated guidance on managing information security risks including cybercrime: APRA has finalised updated guidance on information security to accompany CPS 234 ahead of its 1 July commencement date

The Australian Prudential Regulation Authority (APRA) has released updated prudential guidance — Prudential Practice Guide CPG 234 Information Security — to all APRA-regulated entities on managing information security risks, including cyber-crime.

New guidance issued ahead of 1 July commencement date for CPS 234

The updated guide replaces CPG 234 Management of Security Risk in Information and Information Technology and is intended to assist regulated entities to 'embed and comply' with the requirements of APRA's new cross industry prudential standard: CPS 234 Information Security, which will commence on 1 July.

[Note: For an overview of the requirements under CPS 234 see: Prudential Standard CPS 234 to impose new information security requirements 12/04/2019]

The new requirements 'materially raise the bar'

Commenting on the new requirements APRA Executive Board Member Geoff Summerhayes said that:

- It is 'only a matter of time until an Australian financial institution suffers a material information security breach of the kind we've seen overseas, so they must be prepared'. He added that that the new standard and accompanying guide would assist in this.
- Though many institutions are 'well advanced', the new requirements 'materially raise the bar across the entire industry and will take time to be fully effective. We expect to see continuous improvement'.
- APRA expects that if entities determine that may not be 'able to fully comply with the new standard from 1 July, it should immediately advise its APRA supervisor'

Response to consultation

As well as releasing the final prudential practice guide, APRA released a letter to industry responding to submissions on the draft CPG 234 released for consultation in March (see: Governance News 27/03/2019). APRA states that five submissions were received in response to the consultation and that generally they were supportive, though they did seek clarification on aspects of the guidance.

APRA expects entities to assess the information security capability of <u>ALL third parties:</u> APRA states that two submissions queried the need for an APRA regulated entity to assess the information security capability of a third party where the third party is either an APRA regulated entity or subject to another regulator's requirements.

The letter emphasises the need to maintain appropriate oversight of **all** third parties that manage information security on an entity's behalf, including entities subject to existing regulatory oversight and service providers engaged by third party entities. 'APRA does not consider it sufficient for a regulated entity to rely on the fact that a third party may be subject to some form of regulatory oversight as being an indicator that the information security capability of that third party is automatically commensurate with the size and extent of threats to an entity's information assets, and would therefore enable the continued sound operation of the entity'.

Assessing information security capability of downstream service providers: In response to the submission querying APRA's expectations around this issue, APRA states that its expectation is that an APRA regulated entity 'would take reasonable steps to satisfy itself that the third party has sufficient information security capability to manage the additional threats and vulnerabilities resulting from such arrangements'. APRA adds that it will 'further consider this matter more broadly as part of the upcoming review of Prudential Standard CPS 231 Outsourcing'.

Assessment of classification of information assets: APRA clarified its expectation of the timing of classification of information security assets in CPG 234 stating that in order to maintain the classification of its information assets, an APRA-regulated entity 'would benefit from implementing a process which identifies where the classification of information assets requires change as well as allowing for the classification of new information assets'. APRA writes that 'this would normally be undertaken at least annually, or when there is a material change to the regulated entity's information assets or business environment'.

[Source: APRA media release 25/06/2019; Prudential Practice Guide CPG 234 Information Security June 2019; APRA Response to Submissions – Prudential Practice Guide CPG 234 Information Security 25/06/2019]

ASIC's focus on 'technology-enabled offending': ASIC has announced that a computer hacker has been sentenced to three years gaol having pleaded guilty to 11 charges of insider trading and unauthorised access

The Australian Securities and Investments Commission (ASIC) has announced that a computer hacker (Steven Oakes) has been sentenced to a total effective sentence of three years imprisonment having pleaded guilty to 11 charges of insider trading, unauthorised access to data with the intention to commit a serious offence (insider trading) and the alteration of electronic devices required by ASIC.

Details:

- Between January 2012 and February 2016, Mr Oakes hacked into the private computer network of Melbourne-based financial publisher, Port Phillip Publishing (PPP)

- He accessed buy recommendations for shares in particular ASX listed companies from unpublished PPP stock recommendation reports. The publication of a buy recommendation by PPP for a particular company typically caused an increase in that company's share price.

- Mr Oakes used this inside information on 70 occasions to buy shares in 52 different companies, before the reports with the buy recommendations were published. He made profits from selling the shares soon after the publication of the reports

Traders should be aware of ASIC's continued focus on cyber-related offending: ASIC Commissioner Cathie Armour said that 'technology-enabled offending' has been a priority for ASIC's enforcement teams and that 'despite the sophistication of cyber criminals, ASIC can identify and investigate suspicious market activity connected to computer hacking activities, as it did in the case against Mr Oakes. Traders should be aware that ASIC continues to focus on cyber-related offending'.

[Sources: ASIC media release 25/06/2019; ASIC podcast Episode 49: ASIC's case against hacker Steven Oakes 25/06/2019]

IOSCO cyber task force: Final report released

The International Organisation of Securities Commissions (IOSCO) Cyber Task Force has released its final report into how member jurisdictions have applied IOSCO cybersecurity standards.

More particularly, the report examines how IOSCO member jurisdictions have applied three prominent and internationally recognised Cyber frameworks — 1) the CPM-IOSCO Guidance on cyber Resilience for Financial Market Infrastructures; 2) the National Institute of Standards and Technology Framework for improving Critical Infrastructure Cybersecurity; and 3) the International Organization for Standardization 27000 series standards — and the ways in which these existing frameworks could help address any gaps identified in members' current regimes.

The report also provides a series of 15 questions for firms and regulators intended to promote awareness of good practice and guide the review of existing practices. The purpose of the report, IOSCO states is to 'serve as a resource for financial market regulators and firms to raise awareness of existing international Cyber guidance, and to encourage the adoption of good practices among the IOSCO community'.

Some Key Findings

- **Rating Cyber Risk**: With respect to estimating the importance of cyber risk to financial firms operating in IOSCO jurisdictions, 81% of survey respondents indicated that they consider it to be at least one of the most important risks, the most important risk, or a major risk faced by regulated firms in their jurisdiction. A minority of respondents (19%) either consider it to be a risk like any other or are unsure of its relative standing compared to other risks.

  The responses also indicate, IOSCO states, that cyber risk is perceived as a greater risk in jurisdictions with higher GDP per capita (GDP per capita over $30,000) and that jurisdictions with higher GDP per capita were more likely to have already adopted a cybersecurity framework at both a national or financial services sector level than jurisdictions with a mid-range or lower GDP per capita.

- **Updating and Improving Cyber Regimes:** Over one third of survey respondents reported that they have publicly declared plans to issue, within the next year, new regulations, guidance or supervisory practices that address Cybersecurity for all or part of their financial sector

- **Express Reference to the Core Standards:** 49% of respondents indicated that they are flexible and not prescriptive with respect to which cyber standards (Core Standards or otherwise) firms may utilise to comply with applicable regulations. This suggests, IOSCO argues, that among the respondent jurisdictions, 'most seem to acknowledge there is no one-size-fits-all approach to cybersecurity regulation and instead adopt a principles-based approach'.

- **Consistency with the Core Standards?** 59% of survey respondents indicated that their domestic regulations, guidance, and/or supervisory practices were either 'generally consistent' or 'entirely consistent' with one of the core standards. The survey data also suggests that authorities are influenced by a variety of standards, rather than any single one. For example, 31% of survey respondents reported that their cyber approaches are generally consistent with NIST, 39% reported that their approaches are generally consistent with ISO, and 31% reported their Cyber approaches were generally consistent with CPMI-IOSCO. IOSCO concludes from this, that though the principles underlying the core standards have 'gained considerable influence' no one Core Standard predominates.

- **Consistency across National Cyber Security Frameworks:** IOSCO found that despite jurisdictional differences the cybersecurity frameworks of most respondents shared certain common elements. These include:
  - a national agency promoting cybersecurity policies and initiatives and the capability to deliver support to critical infrastructure through, typically, a national Computer Emergency Response Team (CERT)
  - of those that had cybersecurity strategies, policies or frameworks, about 30% included policies and initiatives for critical infrastructure protection
  - enhancing cyber resilience of government agencies, critical infrastructure and investing in research to build cybersecurity capabilities
  - establishing and/or adopting cybersecurity standards and implementing certification and accreditation schemes for cybersecurity professionals and service providers, respectively
  - collaboration between government and industry on cybersecurity initiatives and ecosystem development, in particular treating cybersecurity as an enabler to economic growth
  - encouraging organisations to establish risk management frameworks of their own with cybersecurity policies along with action plans to monitor implementation of cybersecurity measures such as cyber incident management
  - educating the public on cyber safe practices and raising the awareness of the public on cybersecurity threats
  - international cooperation between governments to fight cyber-crime.
- **Potential gaps in the application of the core standards include the following:**
  - A minority of survey respondents either do not view cyber risk as a major risk or are unsure of its severity. This could mean that these survey respondents do not yet fully appreciate the serious nature of cyber Risks.
  - A minority of survey respondents indicated that their cyber regimes are not at least 'generally consistent' with the Core Standards.
  - As the Core Standards have been widely adopted, jurisdictions that have regimes which differ significantly from the Core Standards such that their approach is not generally consistent with the Core Standards may find it useful to ascertain where there are material gaps between their cyber regimes and the Core Standards.

[Source: IOSCO Cyber Task Force Final Report FR09/2019 June 2019]

Other Developments

United States | US Senators consult on draft bipartisan AML Bill the ILLICIT CASH Act

A bipartisan group of US senators has draft legislation for public consultation, aimed at reforming and modernising several existing anti-money laundering (AML) rules. The group is seeking public feedback 19 July 2019.

Details

Among other things, the *Improving Laundering Laws and Increasing Comprehensive Information Tracking of Criminal Activity in Shell Holdings Act* (ILLICIT CASH Act) proposes to:

- Establish federal reporting requirements mandating that all beneficial ownership information be maintained in a comprehensive federal database, accessible by federal and local law enforcement

- Prevent foreign banks from obstructing money laundering or terrorist financing investigations by requiring these banks to produce records in a manner that establishes their authenticity and reliability for evidentiary purposes, and compel them to comply with subpoenas. The legislation would also authorise contempt sanctions for banks that fail to comply
- Ensure the inclusion of current and future payment systems in the AML-CFT regime by updating the definition of 'coins and currency' to include digital currency
- Require law enforcement to coordinate with financial regulators to provide periodic feedback to financial institutions on their suspicious activity reports
- Measures to strengthen the Financial Crimes Enforcement Network (FinCEN): Put FinCEN employees 'on a pay scale comparable to that of federal financial regulators'; create a hub of financial expert investigators at FinCEN to investigate potential AML-CFT activity in collaboration with federal government agencies; create a team of FinCEN technology experts to further the development of new and essential technologies to combat money laundering.
- Facilitate communications between Treasury and financial institutions by establishing a Treasury financial institution liaison to seek and receive comments regarding AML-CFT rules, regulations, and examinations
- Require the Department of Justice (DOJ) to provide the Treasury Department with metrics on the usefulness of AML-CFT data from financial institutions for law enforcement purposes, as well as data on trends identified by DOJ in the AML-CFT landscape

[Sources: Arkansas senator Tom Cotton media release 10/06/2019; Discussion draft: The Improving Laundering Laws and Increasing Comprehensive Information Tracking of Criminal Activity in Shell Holdings (ILLICIT CASH) Act; Full Text: ILLICIT CASH BILL SIL19671]

United Kingdom | UK Law Commission recommends reforms to the SARs regime to address poor quality over-reporting

The UK Law Commission has released a report: *Anti-Money Laundering: the SARs regime*, making recommendations to improve the quality of suspicious activity reports (SARs) and address issues with defensive over-reporting.

Some Key Findings

- Money laundering, is estimated to cost every household in the UK £255 a year and allows criminals to profit from their crimes.
- The number of SARs submitted has doubled over the last ten years and continues to rise. This has culminated in over 470,000 reports in 2018-19; a record number of reports received in a single year.
- However, under the current reporting regime, too many low-quality reports are submitted, undermining the entire process. More particularly, the Commission found that SARs are often of low quality and can contain 'limited, or even no, useful intelligence'.
- This is an issue for both reporters and law enforcement agencies as time and money is wasted by reporters generating these reports and they hinder law enforcement's ability to investigate and prosecute crime.'
- Enforcement agencies are struggling with a significant number of low-quality reports and criminals could be slipping through the net'.

Key proposals

To address weaknesses in the current reporting regime, the Commission recommends that the 'core of the current regime is retained but made more efficient and effective' by:

1. Establishing an advisory board: The board would include experts from the public and private sector – to ensure the continued effectiveness of the regime. A Board would oversee drafting of guidance and advise the Secretary of State on appropriate improvements and how best to respond to emerging threats.

2. Rethinking the reporting process: A new online SAR form designed through public and private sector collaboration which would make the reporting process easier to navigate and promote greater consistency in the information that is provided to UKFIU in an easy to read, accessible format.

3. Issuing new statutory guidance to reduce confusion and uncertainty around a number of key legal concepts and ensure reporters understand their legal obligations to report suspicious activity.

Next steps? The next step is for the government to review and consider the recommendations.

[Sources: UK Law Commission media release 18/06/2019; Report Summary; Full text of the report: Anti-money laundering: the SARs regime; [registration required] The WSJ 18/06/2019]

In Brief | Walmart Inc agreed to pay the US Department of Justice and Securities and Exchange Commission $282m to settle allegations it violated the Foreign Corrupt Practices Act by paying an intermediary in Brazil for help obtaining construction permits and having weak anti-corruption internal controls

[Sources: SEC media release 20/06/2019; The New York Times 20/06/2019; Law.com 22/06/2019]

Restructuring and Insolvency

Top Story | High Court delivers judgment in Amerind Appeal

On 19 June 2019, the High Court delivered its much anticipated decision in *Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth [2019] HCA 20*.

MinterEllison has provided a summary of the impact of the decision, the full text of which can be accessed on the MinterEllison website here: https://www.minterellison.com/articles/high-court-judgment-amerind-appeal

The decision provides certainty with respect to the operation of s433 of the Corporations Act: The AFR quotes MinterEllison's Michael Hughes as commenting that the decision is significant because it provides certainty 'about whether section 433 of the Corporations Act applies to trust assets in circumstances where the insolvent company is acting solely as trustee for a single trust. This is significant given the number of trading trusts in Australia and the material advantages given to priority employee creditors by the Corporations Act'.

[Source: [registration required] The AFR 24/06/2019]