20 November 2019

Governance News

Mark Standen

Partner

Email Mark

Siobhan Doherty

Partner

Email Siobhan

Kate Hilder

Consultant

Email Kate

T +61 2 9921 4902 | **M** +61 412 104 902

T +61 2 9921 4339 | **M** +61 413 187 544

T +61 2 9921 8785 |

For queries or to subscribe/unsubscribe to Governance News updates, please contact: kate.hilder@minterellison.com

Contents

Diversity

Waiting until 2052 to reach board gender parity? A Deloitte report has found women are still largely under-represented on corporate boards globally, and that progress towards change continues to be slow

Deloitte has released a report — Women in the Boardroom A Global Perspective (6th ed) — presenting statistics on global boardroom diversity in 66 countries (including Australia, Canada, The US and the UK).

Overall the report found that despite efforts to improve diversity, progress remains slow with women largely under-represented on corporate boards globally.

- Women hold 16.9% of board seats worldwide (a 1.9% increase since the last report).
- Women hold 5.3% of board chair positions and 4.4% of CEO roles globally.
- Women hold 12.7% of CFO roles globally.

In his introduction to the report, Deloitte Global Corporate Governance Leader Dan Konigsburg commented that despite the slight uptick in the global average from 15% in 2016 to nearly 17% today, the statistics are 'hardly encouraging for those who believe in the value of board diversity. At this rate, we – or our children and grandchildren – will have to wait until 2052 to reach anything close to parity'.

How does Australia compare?

Overall, the report ranks Australia 10th in terms of female board representation (with 25.4% of board positions held by women) after Germany (26.2%), South Africa (26.4%), Italy (29.3%), Belgium (30.5%), New Zealand (31.5%), Finland (31.9%), Sweden (33.3%), France (37.2%) and Norway (41%).

Quotas may need to be considered? Commenting in the study, Chair of the 30% Club Australia Nicola Wakefield Evans said that her view on gender quotas is evolving. 'If we can't move faster on gender diversity in the next 10 years we will have no choice but to bring in quotas'.

[Sources: Deloitte media release; Women in the boardroom: A global perspective (6th ed)]

Remuneration

An alternative to APRA's proposed pay reforms? The case for looking back to DuPont and General Motors in the 1920s for guidance on executive pay design

Writing in The AFR, UNSW Professor of economics Richard Holden puts forward an alternative to the Australian Prudential Regulation Authority's (APRA's) proposed remuneration changes, suggesting that the 'original' management incentive schemes developed by US companies DuPont and General Motors in the 1920s provide a potential blueprint for executive pay in the present.

[Note: APRA released a discussion paper and new draft Prudential Standard (CPS 511) proposing stronger and more prescriptive prudential requirements for remuneration across all APRA-regulated entities in the banking, insurance and superannuation sectors in July and consultation closed on 23 October. The proposed new standard aims to address the remuneration-related recommendations made by the Financial Services Royal Commission (Recommendations 5.1, 5.2 and 5.3) as well as insights gained from the Prudential Inquiry into the Commonwealth Bank of Australia (CBA), APRA's Review of Remuneration Practices at Large Financial Institutions and its summary of industry self-assessments of governance, accountability and culture. For a summary of APRA's proposals see: Governance News 24/07/2019.]

[Note: APRA Chair Wayne Byres recently gave a speech — Remuneration: Reactions and Responses — in giving an update on the consultation. He outlined and responded to some of the concerns raised about APRA's proposed approach that were raised during the consultation and flagged that the regulator is yet to finalise its stance on remuneration guidance. For a summary of Byres' speech see: Governance News 14/11/2019]

The plans in question, he explains, used the stock price as a holistic, market-based performance measure, and required executives to buy into the plans, exposing them to both upside and downside risks. This served to align the interests of management/executives with the long term interests of shareholders he argues.

'It's important to get executive pay right, and corporate Australia does not have a perfect track record on this front. APRA has rightly identified the danger of overly specific KPIs as being "gameable" (a topic about which I wrote recently with Florian Ederer of Yale and Margaret Meyer of Oxford), and it is right to emphasise the importance of long-term incentives'.

'But rather than look to a corporate regulator for tips on how to get incentives right, boards would be better served by looking to the original incentive schemes of a century ago, and the modern schemes enacted by private equity funds' Professor Holden writes.

[Source: [registration required] The AFR 18/11/2019]

'Too prescriptive'? BlackRock has reportedly raised concerns about APRA's proposed remuneration reforms

Following Australian Prudential Regulation Authority (APRA) Chair Wayne Byres' recent update on the status of the consultation on proposed remuneration reforms (see: Governance News 14/11/2019), The Australian reports that BlackRock's submission to the consultation raises a number of concerns.

These reportedly include the following.

APRA's proposal to cap financial metrics in incentive plans: BlackRock's submission to the consultation reportedly states: 'APRA's recommendation that financial performance measures make up no more than 50 per cent of the weighting of total performance criteria used to determine variable remuneration measurement can be viewed as overly prescriptive and limiting in its definition. Companies should have flexibility to determine the metric split that is appropriate for the sustainable long-term objectives of the company.' The submission reportedly references BlackRock's own voting guidelines in Britain, in which it recommends performance measures are majority financial and at least 60% based on quantitative criteria.

Reportedly, BlackRock's preferred approach is for APRA to take a less prescriptive approach, ie that APRA not stipulate particular proportions around the composition of bonus payments. 'We favour a more flexible approach that allows companies and shareholders to recognise the unique features of each company and select the right weighting between financial and non-financial measures' the submission reportedly said. 'Under this approach, companies should explain the rationale for selecting the weighting between financial and non-financial metrics as well as explain how these metrics reflect the long-term sustainable strategic objectives of the company.'

[Note: In his recent update on the status of the consultation, APRA Chair Wayne Byres' noted that some submissions to the consultation had called for APRA to take a less prescriptive approach. Mr Byres also said (among other things) that APRA is not wedded to the 50% threshold if a workable alternative can be identified. For a summary of Mr Byres' speech see: Governance News 14/11/2019.]

On clawing back of pay and bonuses, BlackRock reportedly made the observation that effective clawback mechanisms could be 'difficult and costly' to enforce.

[Source: [registration required] The Australian 15/11/2019]

The Australian Financial Review's annual CEO pay survey released: remuneration for top 50 CEOs increased by 4% on average (as compared to general wage growth at 2.2%)

The AFR has reported on the findings of its latest annual CEO pay report which ranks Australia's 50 highest paid CEOs.

The AFR says that the figures are based on total statutory pay reported in the latest annual reports (including the accounting value of shares and options in the year they are granted), as distinct from realised pay which includes the actual value of shares/options which have vested in that year.

Some Key Points

- Total remuneration for top 50 CEOs increased by 4% on average, compared to general wage growth at 2.2%.
- Only five CEOs were paid more than $10m.
- Twenty of the top 50 CEOs (40%) reported a pay cut, though this decrease could be due, The AFR suggests, to an increase in long-term incentives. Also, the AFR notes that bank CEO pay (in some cases) trended downwards in the wake of the Financial Services Royal Commission, while mining, property and healthcare CEO pay trended upwards.
- Macquarie CEO Shemara Wikramanayake was ranked Australia's highest paid CEO (the first time a women has been in this position). Otherwise four other female CEOs were included in the top 50
- Fortescue Metals CEO Elizabeth Gaines was named 'best-performing CEO', based on shareholder returns over the past financial year.

[Sources: [registration required] The AFR 18/11/2019; 18/11/2019]

In Brief | The pay gap persists after 50 years: The latest WGEA data has found men still out-earn women in Australia on average, by 20.8% (or $25,679 per year). Further WGEA found that pay gaps persist across every industry, occupation and manager category. Commenting on the findings, WGEA CEO Libby Lyons said that 'a drop of only 0.5 percentage points is slow progress by anyone's measure'

[Sources: 2018-2019 data snapshot; WGEA media release 19/11/2019; [registration required] The AFR 19/11/2019]

Boards and Directors

Change of leadership at BHP announced

BHP has announced the appointment of Mike Henry as the next CEO of BHP effective 1 January 2020. Andrew Mackenzie will step down as CEO, a member of the Executive Leadership Team and an Executive Director of the Company on 31 December 2019, and will retire from the Group on 30 June 2020.

The Business Council of Australia and Minerals Council of Australia have issued separate statements welcoming the appointment.

The Australasian Centre of Corporate Responsibility (ACCR) (the group that coordinated recent shareholder proposals seeking that BHP review its membership of industry groups see: Governance News 14/11/2019) issued a statement expressing the view that Mr Henry is unlikely to be a 'climate champion'.

Separately, The Australian reports that Mr Henry has backfilled his own current role by appointing internal candidate Edgar Basto to the position.

[Sources: BHP media release 14/11/2019; BCA media release 14/11/2019; MCA media release 14/11/2019; ACCR media release 14/11/2019; [registration required] The Australian 19/11/2019]

Meetings and Proxy Advisers

Should Australia consider following the US on proxy engagement? The AICD has reportedly called consideration to be given to changing how proxy recommendations are prepared

The AFR reports that the Australian Institute of Company Directors (AICD) has suggested that consideration should be given to changing the way in which proxy recommendations are prepared.

More particularly, AICD CEO Angus Armour has reportedly suggested that introducing a new requirement for proxy advisers — as is being considered by the US Securities and Exchange Commission (SEC) — to give companies an opportunity to review and respond to their draft proxy advice before it is distributed to shareholders would increase the 'transparency and accuracy of the proxy voting system'. 'Given the influence of proxy advisers, it is vital that their advice is transparent and accurate' Mr Armour reportedly said.

According to The AFR, Ownership Matters has raised concerns about the AICD's proposal. Dean Paatsch, co-founder of Ownership Matters, reportedly drew a distinction between the US and Australian markets, noting that in Australia, proxy advisers are already subject to Australian Financial Services Licence (AFSL) requirements. Mr Paatsch is quoted as saying that he considers the Australian market to be 'totally capable of sorting out good research from bad'.

Vas Kolesnikoff, head of research at Institutional Shareholder Services (ISS) also reportedly raised concerns, reportedly saying complaints from company directors about errors in work often amounted to little more than a legitimate difference of opinion. This is not, he reportedly said, good reason to 'silence the disagreeing voice' Mr Kolesnikoff reportedly said.

Context: The US Securities and Exchange Commission (SEC) proposed amendments to 'improve the accuracy and transparency of proxy voting advice' on 5 November.

Briefly, SEC proposes to amend Exchange Act Rule 14a-2(b) (which provides exemptions from the proxy rules' filing and information requirements for certain kinds of solicitations) to require: 1) enhanced disclosure of material conflicts of interest; 2) a standardised opportunity for registrants and other soliciting persons to review/provide feedback on proxy voting advice; and (3) an 'improved means for investors to be informed about differing views on the advice'. In addition, SEC says that the proposed changes would codify recent Commission guidance by amending the definition of 'solicitation' in Exchange Act Rule 14a-1(l) to include proxy voting advice, with certain exceptions, and provide additional illustrative examples to Exchange Act Rule 14a-9, the proxy rules' antifraud provision. The proposals is subject to a 60 day public comment period.

In addition, SEC has proposed amendments to 'improve the accuracy and transparency' of the shareholder proposal rule. Reportedly SEC voted 3-2 to put the proposals out for public comment. (For a summary of the proposed changes see: Governance News 06/11/2019 at p8)

ASIC's previous review into proxy engagement practices

A review by the Australian Securities and Investments Commission (ASIC) into proxy adviser engagement practices — Report 578, ASIC review of proxy adviser engagement practices (REP 578) (for a summary of the report findings see: Governance News 02/07/2018 at p5) — recommended among other things, that proxy advisers endeavour to provide sufficient time for companies to respond to requests for clarification/fact checking of reports, be transparent in their reports about engagement with companies and consider feedback in relation to factual errors in reports and also that companies constructively engage with proxy advisers.

[Source: [registration required] The AFR 19/11/2019]

Recent AGM results: Ramsay Health, Coles, Wesfarmers

The **Ramsay Health AGM** was held on 14 November. All resolutions were carried.

- **Remuneration report:** 70.77% of shareholders voted in favour of adopting the remuneration report, 29.23% voted against it constituting a first 'strike'. Resolutions granting performance rights to the managing director each passed with over 97% support.

  Reportedly, The Australian Shareholders Association voted against the resolution to adopt the remuneration report, and Ownership Matters also advised voting against it. CGI Glass Lewis reportedly advised to vote in favour.

  According to The AFR Ramsay had been working with KPMG to review its remuneration structures ahead of the AGM, and had made a number of changes eg simplifying the short term incentive structure, introducing a clawback provision and a minimum shareholding requirement).

  The AFR quotes Ramsay Chair Michael Siddle as saying 'We recognise there is still some concerns and unfortunately this is reflected in the against vote this year'. Reportedly, Mr Siddle also expressed the view that 'proper remuneration has been lost in a lot of the science by the proxy advisers' and that he considers it necessary to 'properly' compensate executives given the work they do. 'They [executives] work bloody hard as far as I'm concerned, and we want to keep them and the way you keep them is remunerate them properly' Mr Siddle reportedly said.

- **Election of directors:** Two directors Catriona Alison Deans and James Malcolm Mc Murdo were elected as non-executive directors, receiving 96.97% and 99.68% support respectively.

[Sources: Ramsay Health Care Limited - Results of the 2019 Annual General Meeting 14/11/2019; [registration required] The AFR 14/11/2019]

The **Coles AGM** was held on 13 November. All board supported resolutions were carried. Two shareholder resolutions (not supported by the board) failed to pass.

- **Remuneration report**: The resolution to adopt the remuneration report received 96.85% support (3.15% votes against). The resolution to grant performance rights to the managing director/CEO received 98.14% support (1.86% votes against).

- **Re-election of director**: The two directors standing for re-election, James Graham and Jacqueline Chow were re-elected with 98.03% and 99.53% support respectively.

- **Shareholder (modern slavery in supply chains) resolution**: The Australasian Centre for Corporate Responsibility (ACCR), industry super fund LUCRF Super, US-based asset manager Mercy Investments, and Catholic society Columban Mission, filed two resolutions:

    1. **Special resolution to amend the company's constitution:** a binding resolution to amend the constitution to allow for the submission of non-binding advisory shareholder resolutions. The resolution was not carried, receiving 3.36% of votes in support (96.64% votes against).

    2. **Ordinary (supply chains) resolution:** This resolution called for Coles to align its ethical sourcing policies and supplier requirements across its domestic fresh food supply chains with industry 'best-practice'. According to the ACCR, the resolution is the 'first resolution on modern slavery filed with a company in Australian corporate history'. As this resolution was contingent on the passage of the constitutional amendment, so it was not put to the meeting. It received 12.79% proxy support ahead of the meeting.

The shareholder resolutions were not supported by the board.

The board recommended that shareholders vote against the constitutional amendment on the basis that making decisions that affect the business/affairs of the company in the best interests of the 'company as a whole' should properly sit with the board.

The board recommended shareholders vote against the supply chain resolution because 'Coles already has a well-established Ethical Sourcing Program that aligns with global best-practice and which is updated and adapted to reflect market developments and changing industry practice' and for this reason the board considers that the advisory resolution to be unnecessary.

[Note: The full text of the resolutions and ACCR's explanatory notes are available here or here. The Notice of Meeting is available here.]

Questions at the meeting: According to media reports there were a number of questions from shareholders concerning: Coles' membership of the Business Council of Australia (BCA) (due to the BCA's climate stance) and the company's ethical sourcing policy.

[Sources: Results of Coles Group Limited 2019 Annual General Meeting 13/11/2019; ACCR media release 13/11/2019; The Guardian 13/11/2019; The SMH 13/11/2019]

The **Wesfarmers AGM** was held on 14 November. All resolutions were carried.

- **Remuneration report:** The resolution to adopt the remuneration report received 75.55% support (21.45% voted against). The resolution to grant of performance shares/restricted shares to the Group Managing director received 95.47% support (4.53% voted against).

    In his address to shareholders, Chair Michael Chaney, described remuneration (not the process of designing pay systems but the need to satisfy the 'divergent demands of external stakeholders') as an 'extremely frustrating issue and one which takes up a large amount of director time'. He added that the incentive plans had been designed with the aim of focusing 'executives' minds on achieving shareholder returns over the 'long-term'.

Mr Chaney also expressed disappointment that there would be 'quite significant vote against our remuneration report' given the steps taken to engage on the issue. Noting the decision to reduce pay for key executives by 26% despite the 'company achieved outstanding shareholder returns', Mr Chaney went on to say that ahead of the meeting, four out of five proxy advisors recommended a vote in favour of the Remuneration Report and that there had been a positive response to the Remuneration Report in interactions with shareholders. He added that Australian institutional shareholders voted 'overwhelmingly' in favour of the report.

Finally, he commented 'Of course, every board has to guard against setting targets that are too soft but at the end of the day, investors have to rely on the judgement of the directors they have elected. For our part, we do believe that the remuneration structures we have devised will serve shareholders well in the long run. That has certainly been the case over the 35 years since Wesfarmers listed on the ASX when it has outperformed the ASX5 index by over 1,000 per cent. And that outperformance has continued over more recent periods, with our shareholders receiving a superior return, compared with the market, over the last ten, five and three years'. Mr Chaney concluded his comments on remuneration by saying that 'none of this is to suggest that we do not listen to concern raised by our shareholders' and that the board would look at how these concerns can be addressed going forward without compromising the firm's long-term focus.

- **Election/Re-election of directors**: Mike Roche and Sharon Warburton were elected to the board with 99.72% and 94.56% support respectively. Vanessa Wallace (board member since 2010) and Jennifer Westacott were re-elected with 99.18% and 99.02% support respectively.

Comments on the purpose of the company: In his address, the Chair spoke briefly about the role of the company in light of the 'continued debate and commentary in Australia and around the world' on the issue. He said: 'On the role of a company, we have always been crystal clear: it is to provide good returns to its owners. We have always unashamedly declared that a company's primary purpose is a financial one; but you will never achieve good long-term returns unless you take care of all stakeholders, from employees to customers to suppliers, and by investing in our communities and caring for the environment'.

[Source: Wesfarmers ASX announcement Results of 2019 AGM;; Wesfarmers Chair's Address and Managing Director's address to the AGM 14/11/2019; [registration required] The Age 16/11/2019]

Corporate Social Responsibility and Sustainability

In Brief | Voting rights for 'stakeholders'? Reportedly Dutch Finance Minister, Wopke Hoekstra, has said he would like to explore granting voting rights to the stakeholders of a future privatised De Volksbank, among a number of corporate governance options to emphasise the 'social character' of the currently state-owned bank

[Source: [registration required] Responsible Investor 20/11/2019]

In Brief | The AFR reports that Sweden's central bank has sold off Australian and Canadian bonds because it considers greenhouse gas emissions in both countries to be too high. The Australian suggests the move may represent the 'thin end of the wedge' given the broader shift towards incorporating ESG concerns (in particular climate risk) into investment decision making

[Source: [registration required] The AFR 14/11/2019; [registration required] The Australian 18/11/2019]

Regulators

Top Story | Scaling up: APRA has outlined its new and more intensive approach to governance, culture, remuneration and accountability risk

Overview | APRA Information paper: Transforming governance, culture, remuneration and accountability: APRA's approach

Key Takeouts

- The information paper sets out APRA's 'intensified approach to the supervision' of governance, culture, remuneration and accountability (GCRA) risk within regulated entities. The new approach is aimed at addressing/preventing issues that have undermined public confidence in the financial sector.
- Context: The new approach builds on an existing program of work, including APRA's thematic reviews of risk culture and remuneration, the Prudential Inquiry into the Commonwealth Bank of Australia and the results of the subsequent self-assessments of a range of large financial institutions. It also responds to recommendations from the Financial Services Royal Commission and the APRA Capability Review. In addition, APRA's revised approach takes into account 'leading international practices' in managing GCRA risk. Among other things, APRA says that it is considering the benefits associated with observing board meetings (consistent with leading international practices).
- Broadly speaking APRA's strategy is underpinned by commitments to: 1) strengthen the prudential framework to lift minimum GCRA standards; 2) intensify the supervisory focus on GCRA through 'refreshing existing practices' and integrating supervision of GCRA into day to day supervision of entities; and 3) greater transparency: APRA will share insights and GCRA best practices publicly.
- The paper includes Governance, Culture, Remuneration and Accountability roadmaps setting out APRA's proposed actions to strengthen its supervision in each area – actions under each are outlined below.
- The paper also outlines how APRA and ASIC will cooperate on GCRA issues going forward, and includes a table setting out their respective responsibilities.

Overview

In response to the recommendations of both the Financial Services Royal Commission and the APRA Capability Review, The Australian Prudential Regulation Authority (APRA) has released an information paper outlining the regulator's, 'stronger, more transparent' regulatory approach to governance, culture, remuneration and accountability (GCRA) risk.

The aim is to build resilience and restore trust

APRA says that the revised and more intensive approach is intended to 'strengthen the resilience of financial institutions, including addressing, and ideally preventing, issues such as poor risk governance, misaligned incentives and misconduct that have undermined public confidence in the financial sector over recent years'.

Ultimate responsibility lies with the board, but APRA will act where necessary

APRA states that it considers that 'the board is ultimately accountable, together with senior management, for the management of risk, whether financial or non-financial and the outcomes that result from it' and that this continues to be the basis of APRA's 'supervisory philosophy'.

Having said this, APRA states that 'where a regulated entity fails to address poor GCRA practices, APRA is prepared to use its regulatory powers to compel the entity to take action. This is essential for both strengthening the resilience of regulated entities and restoring community trust in the financial system as a whole'.

The three planks underpinning APRA's new approach

Broadly speaking APRA's strategy is underpinned by three commitments: 1) strengthening the prudential framework to lift minimum GCRA standards; 2) intensifying the supervisory focus on GCRA through 'refreshing existing practices' and integrating supervision of GCRA into day to day supervision of entities; and 3) disclosure: sharing insights and GCRA best practices publicly.

Details: How APRA plans to transform GCRA practices

Governance roadmap

- **Update CPS 510/220:** APRA will amend the prudential standards to incorporate 'the lessons from the [Financial Services] Royal Commission and self-assessments', and ensure they remain fit for purpose. Areas for review will include the effectiveness of board obligations in relation to risk culture, the relative emphasis on financial and non-financial risks, and the 'clear need to strengthen the requirements in relation to compliance and audit functions'.

- **Incorporation of CGRA declarations and self-assessments into CPS 220:** APRA says it intends to incorporate GCRA declarations and self-assessments into the supervision framework, building on the existing process of risk management declarations under CPS 220. Subject to consultation on the exact nature of the new requirements, APRA says this could involve: a) annual GCRA declarations from the boards of regulated entities, similar to the declarations provided for risk management under CPS 220; b) periodic GCRA self-assessments, as well as independent reviews, to support annual declarations; c) engagement with independent experts to assist with APRA's assessment of entities' self-assessments, including benchmarking segments of the industry to highlight good and bad GCRA practices; d) follow-up actions from these assessments incorporated into APRA's ongoing supervision; and e) more formal supervisory actions applied to entities that fail to make sufficient progress in rectifying deficiencies. APRA says that it will consult with industry about how these expectations will be included in the prudential framework and seek feedback about how the process can best be integrated with existing declaration and review requirements in CPS 220.
- **Self-assessment follow up:** APRA has been undertaking 'targeted' prudential engagements with entities that completed a self-assessment to assess the progress of remediation plans since June 2019. The information paper indicates that this work is expected to be continuing.
- **Phased thematic review to identify drivers of effective governance practices:** APRA has already commenced, and will continue work on, a phased thematic review into the drivers of effective governance practices. The review includes consideration of various issues including for example, the processes supporting the CPS 220 risk management declaration and the effectiveness/role of board committees and processes undertaken to assess board effectiveness. This work is expected to be completed after July 2021 (see: Figure 6 at p14).
- **'Deep dive' prudential reviews of the major banks' compliance functions.** APRA indicates that one 'onsite compliance review' commenced after June 2019 and is expected to be completed by June 2020. (see: Figure 6 at p14).

Risk culture roadmap

- **APRA will conduct three 'deep dive risk culture reviews'** per year from 2020 onwards. One review is expected to be completed in 2019.
- **Develop and establish an industry-wide tool(s) to benchmark risk** culture across industry sectors and cohorts of entities. A prototype is to be created before December 2020. APRA says that it used a version of the tool for the Prudential Inquiry and will seek to adapt it for industry wide use. Ahead of the wider roll out, APRA says it will test the tool by undertaking an initial survey of a small sample of entities in 2020, with a view to including a broader sample of entities in subsequent surveys.
- **Update CPS 220:** APRA says it will review the effectiveness of board obligations in CPS 220 (from a risk culture perspective) to ensure it remains fit for purpose. In terms of timing, APRA appears to indicate that the consultation package will be released after June 2020 and be completed after June 2021 (see: Figure 7 at p15).
- **APRA says it will uplift the internal capability** of APRA supervisors through 'baseline training'.

Remuneration roadmap

- **Implementing 'more prescriptive remuneration requirements':** APRA plans to respond to the feedback received in response to proposed remuneration reforms/finalise the draft standard in 'early 2020'. The report appears to indicate that this will occur before June 2020 (see: Figure 8 at p16).

[Note: APRA released a discussion paper and new draft Prudential Standard (CPS 511) proposing stronger and more prescriptive prudential requirements for remuneration across all APRA-regulated entities in the banking, insurance and superannuation sectors in July. The deadline for submissions was the 23 October. The proposed new standard aims to address the remuneration-related recommendations made by the Financial Services Royal Commission (Recommendations 5.1, 5.2 and 5.3) as well as insights gained from the Prudential Inquiry into the Commonwealth Bank of Australia (CBA), APRA's Review of Remuneration

Practices at Large Financial Institutions and its summary of industry self-assessments of governance, accountability and culture. For a summary of APRA's proposals see: Governance News 24/07/2019]

[Note: APRA In a recent speech providing an update on the consultation, APRA Chair Wayne Byres said that APRA is working through the submissions received in response and is yet to finalise its approach. See: Governance News 13/11/2019]

'Proactive approach to industry consultation': APRA comments that given the extent of change proposed, APRA undertook an extensive consultative process including holding industry webinars and individuals meetings. APRA says that it intends to continue this 'active consultation approach for upcoming releases of the draft remuneration prudential practice guide and remuneration disclosure and reporting requirements'.

- **Post-implementation review:** APRA says that it plans to assess implementation plans from a sample of regulated entities (once the final standard is released) and publish an information paper based on the findings, to reinforce APRA's expectations on implementation to the broader industry. The process will both give APRA an opportunity 'take pre-emptive action to address any shortfalls' in implementation, and provide insights into emerging market practice APRA states.
- **'Deep dive' effectiveness reviews:** APRA says it will carry out 'deep dive' effectiveness reviews once the final standard is implemented that will focus on the design, implementation and outcomes of remuneration frameworks. APRA will 'scope' these 'deep dive' reviews from June 2021.
- **Uplift the internal capability of APRA supervisors** through 'baseline training'

Accountability roadmap

- **Develop an accountability regime for all APRA regulated entities:** APRA says it plans to work with government and Treasury, and with ASIC to develop an accountability regime for all APRA regulated entities. No firm timeframe is given. APRA says, is 'a matter for government'.

[Note: The government's roadmap for implementing the Financial Services Royal Commission's recommendations indicates that it legislation to implement this measure will be consulted on and introduced by the end of 2020. See: Governance News 21/08/2019]

- **On-site reviews of BEAR implementation:** Finally, APRA will assess the outcomes of the implementation of the banking executive accountability regime legislation (BEAR) through conducting on-site reviews at large ADIs commencing 'in the second half of 2019' and concluding by June 2020. Assessing actions taken by large ADIs to embed the regime, and cascade accountability through the entity will be a key are of focus.
- **Lift internal capability:** APRA says it will lift its internal capability to assess regulated entities' approach to the implementation of the Accountability Regime through ongoing training.

Prepared to name names: APRA's approach to GCRA-related disclosure

APRA says that a 'key pillar' of its new strategy is to share GCRA insights and practices publicly.

APRA notes that determining what GCRA information should be disclosed requires the regulator to 'balance a range of considerations' including (for example): whether disclosure could adversely impact the financial stability of an individual entity and/or the strategic position of an entity. However, APRA said that notwithstanding these considerations, it considers that 'there is scope' to increase the extent of information about APRA's GCRA activities and findings, including in relation to individual entities.

In addition, APRA suggests that there is 'potentially scope for entities to self-disclose a greater range of information'.

Accordingly, under APRA's revised supervisory approach APRA plans to publicly disclose: GCRA investigations and prudential inquiries (subject in some cases to the approval of the Attorney General), GCRA 'deep dives' and thematic reviews (including entity specific findings of better or poorer practice), GCRA related self-assessments and GCRA self-disclosures.

In the case of GCRA related self-assessments regulated entities will be informed at the commencement of the processes of the extent and nature of APRA's requirements in respect of public disclosure.

[Note: Figure 10 at p19 of the paper sets out APRA's future approach to GCRA-related disclosure.]

Release of GCRA information papers

APRA says it plans to release four information papers on culture, governance accountability and remuneration from next year.

[Note: Figure 11 at p20 sets out a timeline/provides some detail on what will be included in each of the papers.]

Use of CBA-style prudential inquiries?

Recommendation 4.2 of the Capability Review recommended that APRA embed CBA-style prudential inquiries and entity self-assessments into its supervisory toolkit.

In response, APRA says that it will both include CBA style prudential inquiries 'as part of its supervisory toolkit' and publicly disclose the outcomes.

However, the report also states that APRA considers 'a full scale Prudential Inquiry similar to that conducted for CBA as being at the highest intensity end of the scale for addressing CGRA issues'.

As such, APRA says that 'they are most likely to be targeted at cases where issues have been identified that are serious, complex and potentially indicative of systemic GCRA problems within the regulated entity that have, or could, diminish the prudential standing of the entity'.

Given this, APRA says that though 'they will be an important tool that APRA can utilise when circumstances warrant such an approach', where a CBA-style inquiry is not warranted, ASIC has the option to utilise a program of 'more targeted "deep dive" prudential reviews'.

These 'deep dive' reviews will deploy some of the tools and elements used in the Prudential Inquiry, such as interviews with directors and senior managers, staff surveys, and analysis of case studies.

Insights from these activities will be used to inform the structure and design of the self-assessment process that APRA is considering rolling out across the sector, as well as the focus of thematic reviews.

APRA/ASIC cooperation

The paper states that APRA and ASIC will cooperate on GCRA issues as part of a broader refresh of the cooperation arrangements between the two entities and accordingly, both entities have committed to a number of actions to strengthen collaboration between them including among other things, by enhancing inter-agency information sharing on GCRA and other regulatory matters.

[Note: Figure 12 at p21 sets out APRA and ASIC's respective roles with respect to management of each GCRA component.]

Context

- The new approach builds on an existing program of work, including APRA's thematic reviews of risk culture and remuneration, the Prudential Inquiry into the Commonwealth Bank of Australia (for a summary see: Governance News 04/05/2018), and the results of the subsequent self-assessments of a range of large financial institutions (for a summary see: Governance News 28/05/2019).
- It also responds to recommendations from the Financial Services Royal Commission and the APRA Capability Review.

[Note: Appendix A at p27 explains how APRA's new approach responds to the Financial Services Royal Commission recommendations (5.1 and 5.2 (supervision of remuneration), 5.3 (revised prudential standards and guidance) and 5.7 (supervision of culture/governance). Appendix B at p29 explains how the new approach responds to the recommendations of the APRA Capability Review.]

- In addition, APRA's revised approach takes into account 'leading international practices' in managing GCRA risk. Among other things, APRA says that it is considering the benefits associated with observing board meetings (consistent with leading international practices).

[Note: Figure 3 at p11 of the paper maps APRA's approach against international leading practice in managing GCRA risk.]

[Sources: APRA media release 19/11/2019; APRA information paper: Transforming governance, culture, remuneration and accountability: APRA's approach]

APRA Chair John Lonsdale has given an update on APRA's shift towards using transparency as a tool to drive better prudential outcomes

In a speech entitled, 'APRA's move towards greater transparency' Australian Prudential Regulation Authority (APRA) Chair John Lonsdale spoke about the ways in transparency will be deployed going forward by the regulator, as a means of driving better prudential outcomes.

Transparency is being harnessed as a tool to drive better prudential outcomes

'Rather than viewing openness as a potential obstacle to fulfilling our mandate, transparency is now being harnessed by APRA as a tool to achieve better prudential outcomes on behalf of the Australian community. Over the next 12 months, APRA will increasingly open up on its actions, decisions and assessments of entities as a means of informing our stakeholders, influencing behaviour and driving accountability – both for ourselves and the entities we regulate' Mr Lonsdale said.

Having said this, he said that transparency 'necessarily has its limits'. 'APRA knows that it cannot operate solely "behind closed doors", but nor can we fling our doors open in a manner that may inadvertently harm community interests' Ms Lonsdale said. Rather it is a question of finding 'an appropriate balance between candour and confidentiality'.

More transparent about enforcement actions

Mr Lonsdale said that 'the clearest evidence to date' of APRA's new approach, is the area of enforcement. Consistent APRA's Enforcement Approach, he said, the regulator's stated preference is to publish enforcement decisions unless 'we believe that doing so creates risks to the interests of an institution's beneficiaries, or to broader financial stability'.

Mr Lonsdale said that APRA is in the process of 'developing an overarching philosophy for our entire approach to industry supervision', including the way in which APRA will use transparency to lift industry standards. He said that the document will be released 'early next year'. He said that the 'precise framework' is yet to be finalised by it will have three key objectives: 1) to inform: explaining to industry, government, investors and the general public our overall supervisory approach, methodology and intensity; 2) to influence: using clear communication to convey messages, deter misconduct, promote better practice and enhance public confidence in the financial system; and 3) to drive accountability: using tactical messaging to hold both entities and individuals to account.

Increased transparency around GCRA

Mr Lonsdale said that another area where APRA will publish more information about regulated entities concerns industry's efforts to improve their approach to governance, culture, remuneration and accountability (GCRA).

Mr Lonsdale said that this week, 'APRA will release a new information paper outlining our future approach to regulating, supervising and enforcing GCRA issues among our regulated population. That approach will involve a greater use of both CBA-style prudential inquiries and deep dive thematic reviews. Going forward, under the terms for conducting these reviews, we will generally be making the findings public and releasing GCRA self-assessments as an additional tool to deter poor behaviour, promote better practice and enhance accountability. We will have more to say when we release the paper, but what I can tell you now is that the level of public disclosure we envisage is at the forefront of international best practice among our peer regulators'.

[Note: The information paper — Transforming governance, culture, remuneration and accountability: APRA's approach — has since been released and is summarised in a separate post in this issue of Governance News.]

MySuper heatmaps

Mr Lonsdale said that APRA is also going to be transparent about its own assessment of entities' performance. He cited the MySuper heatmaps as an example of this. 'Publicising our view of which MySuper funds and products are underperforming — and where they need to improve — turns up the heat on those trustees to lift their games or reassess whether they should exit the industry. Making it easier to assess and compare fund performance also empowers other important stakeholders, including members and employers, to ask hard questions and make better informed superannuation decisions' Mr Lonsdale said.

Noting that the heatmaps do not presently cover the choice sector, Mr Lonsdale said that work is underway to enable this to occur. He went on to say that the Superannuation Data Transformation will deliver 'the most accurate picture yet of an industry that manages assets worth 1.5 times Australia's annual GDP'.

'Consistent with our commitment to greater transparency, we intend to publish as much of that data as possible. Indeed, one issue the consultation will examine is a proposal to determine that all superannuation data we collect is non-confidential, and therefore able to be publicly disclosed'.

Data Modernisation Program

Mr Lonsdale said that central to enabling this increased transparency/scrutiny of APRA regulated entities is APRA's data modernisation program.

'The increased functionality of the new Data Collection Solution, due to come online next year, will support initiatives to enhance the quality, consistency, reliability and variety of industry data we collect. Other aspects of the program are aimed at increasing the scope and accessibility of what we make available. We are mindful of the increasing interest in our data publications, which are aimed at industry rather than the general public. Consequently, we are examining how to present data in more accessible and flexible ways that enable greater usability by a much broader audience of stakeholders' he said.

Increased transparency could enhance financial stability

Mr Lonsdale concluded by saying that APRA's approach could enhance financial stability.

'Greater transparency, conducted carefully and strategically, can enhance financial stability. APRA's direction will no doubt create some discomfort for some of the entities we regulate. But by informing, influencing and driving accountability, APRA will harness transparency as a tool to promote better practice and deter poor conduct in the entities we regulate. Importantly, opening up on APRA's actions and decisions will help to restore public confidence that Australia's banks, insurers and superannuation trustees are being held to account for their performance and the outcomes they deliver' he said.

[Sources: APRA Chair John Lonsdale Speech to FINSIA's the regulators event, 'APRA's move towards greater transparency' 15/11/2019]

'Fairness and transparency' are the 'alloy across our regulatory priorities' says ASIC Deputy Chair Karen Chester

In her opening address at FINSIA: The regulators 2019, Australian Securities and Investments Commission (ASIC) Deputy Chair Karen Chester spoke about the regulator's focus on 'fairness and transparency' describing them as the 'alloy across our [ASIC's seven strategic] regulatory priorities'.

[Note: ASIC's latest Corporate Plan — ASIC's Corporate Plan 2019-2023 — sets out seven strategic priorities for addressing harms to consumers/market and key regulatory priorities/activities for the regulator over the next four years. For a summary see: Governance News 04/09/2019 at p16]

Fairness: 'doing the right thing is a legal must have'

- **Nothing new – it is a 'legal must have':** Ms Chester said that 'fairness imperative' is not new, but is already 'embedded' in the Corporations Law, with the obligation for financial services licenses to act efficiently, honestly and fairly (s912A) existing since it was introduced by the Financial Services Reform Act 200. Rather, she said 'we are just seeing a demonstrable restatement of it'. As such, she said it is a 'legal must have'.

- **Why the increased focus?** Ms Chester explained that 's912A is now front and centre on ASIC's "why not litigate" radar, as distinct to the enforceable undertaking territory of the past. And why? Before 13 March 2019 a breach of this provision would attract a penalty of zero. Today it attracts maximum civil penalties of up to $1.05 million for an individual, or up to $525 million for a corporation'.

Ms Chester went on to observe that the relevant jurisprudence 'heightens the fairness factor amongst the "legislative three" – efficiently, honestly and fairly – suggesting it's the outcome that matters most and need not always be read as a compound to be breached'.

[Note: The recent Federal Court decision in Australian Securities and Investment Commission v Westpac Securities Administration Limited [2019] FCAFC 187 includes discussion of the interpretation of s912A(1)(a): the requirement that financial services licensees do all things necessary to ensure that financial services are provided efficiently, honestly and fairly. For a summary of the decision and MinterEllison's insights into the implications for industry see: Governance News 30/10/2019]

- **Fairness has a commercial value (and there are commercial consequences for failing to behave fairly):** Ms Chester said that 'Fairness – doing the right thing – can and should be seen to create commercial value. Intangible assets such as reputation, IP and customer base today account for over 80 per cent of total corporate value as compared to under 20 per cent 40 years ago. And doing the right thing – asking Commissioner Hayne's "should we" – especially in managing non-financial risks, is proving today more than ever before to be a commercial "must have". Look no further than the current tally for remediation provisioning now well above $10 billion'.
- **ASIC will publish guidance?** Ms Chester said that ASIC plans to publish 'work on what we think fairness in the provision of financial services and products should look like … and not look like'. No timeline was given.

Using transparency as a regulatory tool

- **Ms Chester also spoke about the way in which ASIC is using transparency as a regulatory tool**: 'Sharing pertinent information and findings publicly allows firms to better understand our conduct expectations, drives improved industry behaviour, encourages more effective competition. Ultimately, to improve consumer outcomes' Ms Chester said. She went on to give various examples of ASIC's recent use of transparency including: 'naming names' in recent reports and using mechanisms such as public hearings say that, as ASIC has done in certain recent reports and use of public hearings as part of the recent responsible lending consultation.
- **ASIC 'summer reading list':** Given this focus, Ms Chester said, it's 'no accident' that ASIC's latest Corporate Plan includes the release of 40 reports/reviews over the next twelve months. In particular, she flagged the release of four reports in early 2020 as her 'top four (ASIC summer reading list)': 1) the second report of the Corporate Governance Taskforce on board oversight of variable remuneration of key management personnel; 2) a report on advice by superannuation funds, examining the advice services offered and testing the quality of that advice; 3) a review on how lenders are responding to consumers experiencing financial difficulty; and 4) a review of travel insurance distribution channels and assessing the outcomes for consumers, including product value.
- **The limitations of disclosure:** Ms Chester also spoke about the limitations of disclosure. Referencing the recent report Disclosure: Why it shouldn't be the default (see: Governance News 16/10/2019 at p16) Ms Chester said 'It's time to call time on disclosure as the default 'go to' for consumer protection. Perhaps one of the fundamental shifts in regulatory policy, is the move to a world beyond disclosure. The evidence now unavoidably reveals that disclosure is not the 'silver bullet' it was once thought to be for consumer protection'. Ms Chester added that 'The report is a must read. For financial services firms wanting to better manage non-financial risk, wanting to be consumer centric and wanting to meet their future design and distribution obligations'.
- **Design and distribution obligations – draft guidance (ideally) by the end of the year?** Ms Chester said that both the product intervention power (PIP) and upcoming design and distribution obligations (DDO) — which do not take effect until 6 April 2021 — are examples of going beyond disclosure. Commenting specifically on the upcoming design and distribution obligations, Ms Chester said that they 'are a business game changer and should prove the legislative nudge to better prioritise consumer needs'.

  Ms Chester said firms 'should view meeting these obligations as an investment in commercial value, not a regulatory burden. It's also an insurance policy against a loss of commercial value…For the one universal truth across all the Commission case studies – they would have scored a fail on design and distribution obligations'.

Ms Chester added that draft guidance on DDO will be released 'in the not too distant future, ideally by the end of this year'. Ms Chester said that ASIC is also undertaking some targeted consultation in preparing the draft guidance; along with our close engagement with the UK FCA, where DDO-like obligations have been up and running for a number of years.

- **Time to prepare:** Despite the fact that the DDO do not take effect until 2021, Ms Chester encouraged firms to start to prepare. 'Their very nature requires firms to ensure they have the systems and processes in place by that date' she said.

  Ms Chester encouraged firms to ask: Are we getting ready for DDO? Do we have the data we need to ask and answer some fundamental business questions? Do we know our target market for this product? Is this product of value and not of surprise value to that target market? Do our distribution controls, included our chosen distribution channels, mean it's getting to our target market? Would we know if it wasn't?

  She added that the obligations will also require appropriate systems and processes to be in place to ensure data is available/accessible. 'ASIC has recently identified where there was much room for improvement on the data and systems. From our CCM work on complaints handling. From our CGTF review [Corporate Governance Taskforce Review review] of the oversight of non-financial risk. From our recent TPD insurance review where we found critical absences of data – without which insurers cannot identify the value of their products to consumers. And could not identify the problem points in their claims handling' Ms Chester observed.

Why not litigate and ASIC's enforcement approach: Ms Chester also responded commentator's characterisation of ASIC as being entirely focused on enforcement and/or mischaracterisation of ASIC's approach to enforcement as 'litigate first' (rather than 'Why not litigate'?). Ms Chester dismissed both claims on the basis that 'nothing could be further from the regulatory logic or indeed the evidence'.

[Source: Opening remarks by ASIC Deputy Chair Karen Chester at The Regulators 2019, FINSIA: The Regulators, 15/11/2019]

In Brief | Writing in Governance Directions, ASIC Chair James Shipton provides an overview of the findings in ASIC's Corporate Governance Taskforce report and explains the importance of non-financial risk for organisations and for ASIC. He also suggests a range of questions for boards to consider in their oversight function

[Note: The Australian Securities and Investments Commission (ASIC) released ASIC Report 631: Corporate Governance Taskforce — Director and officer oversight of non-financial risk report in October. The report made four key findings: 1) board oversight of non-financial risk is 'immature' and less developed than ASIC hoped to find – 'all too often, management was operating outside of board approved risk appetites' due to insufficient board oversight; 2) reporting against risk appetite often did not effectively communicate the company's risk position (ie risk appetite statements were not utilised well — the quality and content of the statements is only 'developing' with the articulation of risk and metrics 'nowhere near as mature or effective as those for financial risk'; 3) reporting to boards on nonfinancial risk is ineffective (because material information about non-financial risk is often buried in voluminous and dense reports); and 4) ASIC considers that board risk committees are underutilised with the time spent/frequency of meetings 'modest'. ASIC called on all boards generally, not just those in the financial services sector, to review governance practices and accountability structures in light of the findings. For a summary see: Governance News 16/10/2019 at p38]

[Source: Governance Directions Vol 7 Number 10 What is non-financial risk and why does it matter to ASIC? ASIC Chair James Shipton]

Financial Services

Strengthening protections to ensure vulnerable customers are protected: The ABA has released a new guideline on the sale on unsecured debt

The Australian Banking Association (ABA) has released a new, voluntary industry guideline — Industry Guideline: Sale of unsecured debt — for Australian banks.

The new guideline which is intended to be read in conjunction with the Banking Code orf Practice and the ABA industry Guideline on financial abuse and family/domestic violence, outlines the process banks must follow before they sell any debt and also what happens once that debt is sold. The purpose is to strengthen safeguards to 'ensure vulnerable customers are protected'.

New measures include requirements for banks to:

- proactively contact a customer to find other solutions before a debt is sold
- not sell any debt that is in the process of being disputed by a customer
- not sell a debt where a customer has an ongoing vulnerability and there is no reasonable prospect of the debt being repaid
- only contract debt collectors that follow all regulatory codes and a bank's own policies for supporting customers in hardship
- conduct regular auditing of all contracted debt collectors to ensure they meet the high standard set by the new guidelines
- requiring a debt collector to consult with a bank before bankruptcy is initiated, giving the bank an opportunity to repurchase the debt if a vulnerability is identified

Implementation? The Guideline will commence operation from 1 March 2020.

Commenting on the new guideline, CEO of the Australian Banking Association Anna Bligh said 'Banks are stepping up to the plate to ensure vulnerable customers are protected and supported when struggling with unsecured debt such as credit cards and personal loans…Under the new guidelines banks will rigorously audit debt collectors to ensure customers are being treated fairly and with appropriate care, they'll have the option to buy back debt before any bankruptcy proceedings begin and other significant increases in customer protections'.

Request review of $5000 bankruptcy threshold

As part of the new guidelines the Australian Banking Association, with consumer groups the Consumer Action Law Centre, Financial Counselling Australia and the Financial Rights Legal Centre, the ABA has written to Federal Attorney General Christian Porter requesting a review of the $5,000 threshold for forced bankruptcy.

As an interim step before a government review, each bank will also assess the bankruptcy threshold and determine an appropriate level (for competition reasons the industry as a whole cannot set its own level).

The new measures to support vulnerable customers and the proposed review of the bankruptcy threshold are supported by Financial Counselling Australia, the Consumer Action Law Centre and the Financial Rights Legal Centre.

Debt collectors peak body has reportedly welcomed the new measures: The AFR quotes Alan Harries, CEO of the Australian Collectors and Debt Buyers Association as welcoming the measures. 'We are supportive of it and we welcome it…No-one wants to see anyone made bankrupt. The guidance statement reflects current practices and I think it will be useful for banks and debt buyers to assist people in financial difficulty' he reportedly said.

Banks are reportedly in the process of reviewing engagement practices with debt collectors? According to The AFR, following the Financial Services Royal Commission, banks have been reviewing their engagement with debt collection agencies and in some instances, have determined to no longer sell debt to certain agencies as a result.

[Sources: ABA media release 19/11/2019; Industry Guideline: Sale of unsecured debt; [registration required] The AFR 19/11/2019; The ABC 19/11/2019]

'Galvanising' super funds into action (to lift performance or merge)? APRA has released details of how the MySuper heatmaps will work

Ahead of the release of MySuper heatmaps next month, The Australian Prudential Regulation Authority (APRA) has released an Information Paper explaining how the MySuper heatmaps will work and a sample superannuation heatmap (with mock data).

The Information Paper and sample heatmap are available on APRA's website at: https://www.apra.gov.au/mysuper-product-heatmap

Purpose of the heatmaps — 'the heatmap is designed to emphasise underperformance' and drive improved member outcomes

APRA says that the heatmaps are intended to facilitate comparison of MySuper product performance across three key areas — investment performance, fees and costs, and sustainability of member outcomes — with a view, ultimately, to driving improved member outcomes.

Unveiling the sample heatmap at the Association of Superannuation Funds of Australia (ASFA) 2019 Conference, APRA Deputy Chair Helen Rowell commented that the heatmaps do not use a 'traditional traffic light system' but rather a graduating colour scheme from dark red to white. She explained that the decision to depict the information in this way is deliberate, and 'designed to emphasise underperformance' .

'It's not meant to give a pat on the back to better performing MySuper products, or be seen as a peer ranking mechanism. Any product that is performing above a determined benchmark for each investment performance or fee metric is coloured white. Products that are performing below that benchmark are presented on a continuous coloured gradient from pale yellow to dark red' Ms Rowell explained.

'Unlike a sea of numbers on a spreadsheet, a row of red across the heatmap sends a message so clear and strong it nearly jumps off the screen. That message is hard to ignore, and exactly what we're counting on. As much as transparency is important, the ultimate purpose of the heatmap is – to be blunt – to galvanise the trustees of underperforming products into action' Ms Rowell said.

Ms Rowell added that Importantly, there is no overall assessment of product performance. Rather, each MySuper product is assessed against each metric. 'So it is entirely possible for a product to be white for some investment performance metrics, yellow for others and red for fees and costs' Ms Rowell explained.

Ms Rowell went on to say that the heatmap will inform APRA's supervision priorities and that 'trustees can expect APRA's supervision intensity to reflect the intensity of the colour shading on the heatmap.'

Information paper: The information paper explains how APRA selected the metrics, benchmarks and methodology to take into account the different investment strategies and asset allocations. APRA says that it expects RSE licensees to be the primary users of the heatmaps but they will also provide insights for policymakers, advisers and employers.

Next steps:

- The full heatmap will be published on the APRA website by mid-December.
- Ms Rowell said that APRA will be holding industry webinars on the heatmaps over the next few weeks and that over the same period, APRA supervision teams will undertake 'targeted engagement' with 'the trustees of MySuper products that the heat map will clearly identify as the poorest performers, to make sure they will deliver on action plans to address this. The more crimson the heatmap, the more trustees can expect to see a similarly calibrated increase in supervision intensity' she said.

  Ms Rowell added 'If trustees don't fix these issues within a timeframe that is acceptable to APRA, we will be requiring them to consider other options, including a merger or exit from the industry in some cases'.

[Sources: APRA Deputy Chair Helen Rowell, Speech to the 2019 ASFA Conference 15/11/2019; MySuper Heatmap media release 15/11/2019; 15/11/2019; Sample MySuper heatmap (with mock data); Information Paper — Heatmap — MySuper products 15/11/2019]

Industry response to the release of the sample MySuper heatmaps

- **Financial Services Council (FSC):** In a statement the FSC 'urged caution' in relation to the use of APRA's proposed heatmapping for the purposes of comparing funds. Responding to the release of APRA's Information Paper: Heatmap - MySuper products, FSC CEO Sally Loane said that APRA has clearly worked hard to present information in a fair and impartial way and acknowledged the potential value in the analysis APRA is undertaking, but cautioned against the information being viewed in isolation. 'Particular care should be taken by commentators in interpreting the heatmaps into simplistic league tables,' Ms Loane said.
- **Super Consumers Australia (CHOICE): In** a statement, Super Consumers Australia welcomed APRA's announcement saying that the heatmaps will provide 'credible metrics to assess and compare how well

super funds are delivering to their members, in terms of sustainability, investment performance and fees and costs for the first time'.

- **Industry Super Australia:** In a statement, Industry Super Australia CEO Bernie Dean welcomed APRA's outline of the new heatmap system on the basis that it will make it easier for consumers to identify underperforming products and in line with industry super funds' 'longstanding position that underperformance must be dealt with'. However, he cautioned that the approach must be applied consistently across all sectors on the basis that 'underperformance is not limited to just MySuper products – in fact, it is more prevalent in the Choice sector'.

- **Shadow Assistant Treasurer Stephen Jones** also welcomed the release of APRA's super fund performance heat map. 'For the first time there will be an independent assessment of fund performance across a range of measures putting power in the hands of fund members to take control of their funds growth and placing underperforming funds on notice…Bringing the performance of the bottom performing funds into line with the top performers would net members and additional $1.2 billion a year' he said.

[Sources: FSC Media release 15/11/2019; [registration required — accessed via LexisNexis Capital Monitor] Super Consumer Australia (CHOICE) media release 15/11/2019; [registration required — accessed via LexisNexis Capital Monitor] ISA media release 15/11/2019; Shadow Assistant Treasurer Stephen Jones media release [registration required — accessed via LexisNexis Capital Monitor] 15/11/2019; *[registration required] The AFR 15/11/2019]*

'Greasing the skids for mergers': Assistant Minister for Superannuation, Financial Services and Financial Technology Jane Hume's address to the ASFA conference largely focused on the topic of superannuation fund mergers

Assistant Minister for Superannuation, Financial Services and Financial Technology Jane Hume's address to the Association of Superannuation Funds of Australia (ASFA) 2019 Conference Assistant largely focused on the topic of superannuation fund mergers.

- **The release of the heatmaps is part of a broader reform agenda:** Ms Hume said that delivery of improved member outcomes remains a focus for the government, and that the release of the MySuper heatmaps is another step in the government's broader superannuation reform agenda. 'APRA's work with the heatmap, along with the legislated Member Outcomes reforms and APRA's shiny new set of teeth in the form of a directions power, will start to put real pressure on underperforming funds' she said.

- **Ms Hume reiterated that the purpose of the heatmaps is to drive improved member outcomes, including through mergers:** 'Not only will it help focus APRA's supervisory priorities but it will spur the trustees of funds to reflect on their own performance. Trustee directors will have no choice but to look each other squarely in the eye and ask – is our current business model really delivering the best outcomes for our members? And if their fund is not delivering the best outcomes for members, or if it stands at increasing risk of not doing so – it begs the question – should that fund merge? And increasingly regulators may come knocking to ask – why has that fund not yet merged?'

- **Consolidation is already occurring but there is more to do:** 'Many smaller funds — including those with high average expenses — have already exited the system. This is a good thing. But there remains a long tail of underperformers and many are subscale' Ms Hume said.

- **'Merger myths':** Ms Hume challenged a number of 'barriers' to mergers put forward to explain why there has not been more consolidation (especially at the smaller end of the market) ultimately arguing that 'Some are myth. Some are attributed to bad behaviour that won't be tolerated in the post-Hayne era. Some we have already taken action to address'. On the issue of

- **'Greasing the skids for mergers':** Ms Hume argued that 'Between legislated changes, and facilitation by regulators, the Government has done our part in greasing the skids for mergers'. She added that APRA is 'open' to assisting trustees to addressing any barriers to merging and that it is not 'over to industry to do your part'.

[Source: Assistant Minister for Superannuation, Financial Services and Financial Technology, Address to the Association of Superannuation Funds of Australia 15/11/2019]

The principles underpinning responsible lending provisions remain sound and the criticisms surrounding their application are 'misplaced and without foundation': ASIC Commissioner Sean

Hughes has given two speeches on responsible lending responding to issues/concerns raised by some commentators

Australian Securities and Investments Commission (ASIC) Commissioner Sean Hughes has given two similar speeches (to the ARCA national conference and ASF conference) on the topic of responsible lending, ahead of the release of ASIC's revised guidance 'in a few weeks' time.

Some Key Points

- **Mr Hughes reminded his audience that responsible lending laws were passed by parliament**. 'The obligations were not created nor manufactured by ASIC'. Mr Hughes said that he considers that the principles underpinning responsible lending provisions 'remain sound, even in the changed economic environment since 2010, and the criticisms surrounding their application are, in our view, both misplaced and without foundation'.

- **ASIC is updating its guidance to provide clarity (not to impede the flow of credit):** Mr Hughes said 'ASIC's guidance is just and only that, guidance. It does not have the force of law. The fact that we are updating our guidelines does not change the law which has been in place since 2010. However, what has been made abundantly clear to us in the course of our consultations, is that industry would welcome more assistance in interpreting how to meet responsible lending obligations. Put simply, this is what we are endeavouring to achieve. We are not, and never have sought to impede the flow of credit to the real economy, or to stop lenders from advancing credit to suitable applicants'.

- **Responsible lending guidance is not inhibiting lending to small business:** Responding to the 'genuine held belief in some quarters' that responsible lending rules are inhibiting lenders from providing credit to small business Mr Hughes said 'I want to assure you all that they do not. No lenders should refuse a small business a loan solely based on any perceived constraints imposed by the National Consumer Credit Act'.

- **Why ASIC is updating its guidance:** Mr Hughes said that since the introduction of the responsible lending laws, ASIC has regularly reviewed industry practices and identified a range of compliance issues as well as undertaking a number of enforcement actions to improve compliance. Given the guidance has not been updated since 2014, 'it is appropriate to conduct periodic reviews and updates of our guidance'.

- **The 'Wagyu and Shiraz' case:** Commenting briefly on ASIC's responsible lending test case against Westpac, Mr Hughes reiterated that ASIC is appealing the decision on the basis that it 'left too unclear what steps are required of a lender. We are seeking clarity by appealing. And we believe that doing so is in the best interests of both consumers and lenders. It is an important part of ASIC's mandate to clarify the law where there is uncertainty, and thereby support and guide industry to understand their obligations'.

  Mr Hughes went on to say that notwithstanding the outcome of the appeal, ASIC considers that it should still update its guidance. 'The updated RG209 will looks to build on the existing guidance, which we believe is fundamentally sound, and to bring those developments together in a single, instructive guide and to clarify and provide more certainty to industry in key areas where we can' he said.

[Note: The 'Wagyu and Shiraz' case is a reference to the decision in Australian Securities and Investments Commission v Westpac Banking Corporation (Liability Trial) [2019] FCA 1244. In the case, The Federal Court dismissed ASIC's responsible lending test case against Westpac and ordered the regulator to pay the bank's costs. Justice Perram found that a lender 'may do what it wants in the assessment process' and is not obliged under the NCCP Act to take into account a prospective borrower's actual/declared expenses when assessing whether a loan will be unsuitable to consumers. On 10 September, the ASIC announced that it has filed an appeal. For a summary of the decision see: Governance News 11/09/2019]

- **The revised guidance (when issued) will not create new obligations:** Mr Hughes said 'it is critical everyone is clear that our guidance does not, and the revised guidance will not, create new obligations. Simply because it cannot do that. Our regulatory guides are just that – guidance – about approaches that licensees can adopt to reduce the risk that they fail to comply with the responsible lending laws'.

- **Expectations of industry:** 'When we release the updated regulatory guide in a few weeks, we will be urging urge licensees to take the guidance on board and to compete with each other on the quality of products and services to consumers. We would be disappointed by a response from the market which focusses only on processes which merely seek to achieve a bare bones minimum level of black letter compliance' Mr Hughes said.

- **Four key takeaways for credit licensees:** Mr Hughes identified four 'key messages' for credit licensees: 1) a licensee must ensure that the inquiries and processes that are followed are appropriate for the individual customer who is applying for the loan; 2) licensees should focus on the outcome to be achieved from applying the responsible lending obligations, rather than ticking off a checklist of processes to be completed; 3) ASIC will not set minimum standards for compliance with responsible lending; and 4) licensees should think about the kinds of circumstances that increase or reduce the risk of consumer harm from a credit transaction. 'Licensees should be able to distinguish between situations where further information-gathering steps are warranted, and conversely have comfort about circumstances for which more streamlined processes are reasonable'.

[Sources: 'ASIC's Vision for a Fair, Strong and Efficient Financial System for all Australians', Keynote address by ASIC Commissioner Sean Hughes at the ARCA National Conference 14/11/2019; Keynote Address by ASIC Commissioner Sean Hughes at the ASF Conference: Interpreting responsible lending 18/11/2019; [registration required] The AFR 14/11/2019; [registration required] The SMH 18/11/2019; [registration required] The Australian 19/11/2019]

Product intervention power consultation update | ASIC says it is still working through submissions in response to its consultation on using its product intervention power to address 'significant detriment' to retail clients from trading over-the-counter (OTC) binary options and contracts for difference (CFDs)

The Australian Securities and Investments Commission's (ASIC) latest Market Integrity Update indicates that ASIC is 'currently considering the feedback' received in response to Consultation Paper 322 Product intervention: OTC binary options and CFDs (CP 322)

[Note: The deadline for submissions to the consultation was 1 October 2019. For a summary of ASIC's proposals see: Governance News 28/08/2019 at p20]

ASIC says it received 'over 400' responses to its proposals from product issuers, industry groups, consumer groups, consumers and other interested stakeholders and is currently considering feedback.

ASIC says it will continue to 'engage with respondents as necessary to aid our consideration. We'll also examine the likely regulatory and financial impact of each of our proposals, as well as alternative options that could meet our objective of reducing detriment to retail clients'.

[Source: ASIC Market Integrity Update Issue 110 November 2019]

Refunds to around 30,000 customers are expected to exceed $12 million by the end of 2019: ASIC has announced that CommInsure is remediating customers affected by unfair telephone sales of life insurance

Context: On 4 October, the Australian Securities and Investments Commission (ASIC) announced that Colonial Mutual Life Insurance Society Ltd, trading as CommInsure, had been charged (following an ASIC investigation) with 87 counts of offering to sell insurance products in the course of 'non-compliant unsolicited telephone calls' contrary to s992A(3) of the Corporations Act ('hawking').

CommInsure has pleaded guilty to 87 counts of 'hawking': ASIC has announced that CommInsure pleaded guilty.

According to ASIC, between October and December 2014, CommInsure used a telemarketing firm Aegon Insights Australia Pty Ltd (Aegon) to sell life insurance policies known as Simple Life over the phone.

CommInsure provided customer contact details to Aegon from CBA's existing customer database. The CBA customers had not requested to be contacted for the sale of Simple Life by CommInsure, or persons on CommInsure's behalf, or to receive marketing information from CommInsure.

In all of the 87 calls charged, CommInsure did not comply with the requirement to offer the customer the option of having the information required to be included in the Product Disclosure Statement (PDS) for Simple Life read to them prior to the offer to issue or sell the product.

In 14 of the calls charged, CommInsure also failed to meet the requirements to: a) give the customer a PDS before becoming bound to acquire Simple Life; and b) clearly inform the customer of the importance of using the information in the PDS when making a decision to acquire Simple Life..

ASIC says that CommInsure will be sentenced at a later time.

Compensation program: Separately, ASIC announced that following concerns raised by ASIC about unfair telephone sales of life insurance, CommInsure has conducted a remediation program. The refunds are to policyholders who were CBA customers between 2010 and 2014 who were sold a range of life insurance products via telemarketing calls by Aegon.

ASIC writes that CommInsure has completed a majority of the remediation payments and expects to finalise the remediation program by the end of 2019, with refunds to around 30,000 customers expected to exceed $12 million.

ASIC notes that some of the customers subject to the charges described above will be compensated through this remediation program.

ASIC is considering feedback on a proposed total ban on direct telephone sales of life insurance and CCI

ASIC recently consulted — CP 317 Unsolicited Telephone sales of direct life insurance and consumer credit insurance — on a proposed a total ban on direct telephone sales of life insurance and consumer credit insurance in July. Consultation closed on 29 August. (For a summary of ASIC's proposal see: Governance News 24/07/2019 at p13).

ASIC has said it is considering the submissions received and has undertaken further targeted stakeholder consultation.

[Sources: ASIC media release 19/11/2019; 19/11/2019; [registration required] The AFR 19/11/2019; [registration required] The Australian 19/11/2019]

Stop Press | AUSTRAC has announced it has applied to the Federal Court of Australia for civil penalty orders against Westpac Banking Corporation (Westpac). AUSTRAC says that the civil penalty orders relate to (alleged) 'systemic non-compliance with the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (AML/CTF Act)'. AUSTRAC alleges Westpac 'contravened the AML/CTF Act on over 23 million occasions'

[Source: AUSTRAC media release 20/11/2019; Concise statement]

In Brief | The Australian Prudential Regulation Authority (APRA) has written to Responsible Superannuation Entity (RSE) licensees outlining new guidance for the implementation of the Treasury Laws Amendment (Putting Members' Interest First) Act 2019. The guidance includes details on the dangerous occupation exception election and withdrawal templates and answers to frequently asked questions

[Source: APRA media release 14/11/2019]

In Brief | APRA has released its response to submissions on the proposed modernised Economic and Financial Statistics (EFS) Reporting Standard ARS 722.0 Derivatives (ARS 722.0). The updated standard will be used to collect quarterly data on the derivatives activity of authorised deposit-taking institutions (ADIs) and registered financial corporations (RFCs)

[Source: APRA media release 18/11/2019]

In Brief | ASIC has granted a three-year exemption to all AFS licensees from the obligation in the Corporations Act to ensure that their financial advisers are covered by a compliance scheme and from the associated notification obligations

[Source: ASIC media release 14/11/2019]

In Brief | The US Federal Deposit Insurance Corporation (FDIC) has released three reports analysing changes in the US banking system since the 1950s, with a focus on changes that have occurred since the 2008 financial crisis. The reports focus on the growth of nonbank lending over the period including: the shift in some lending from banks to nonbanks; how corporate borrowing has moved between banks

and capital markets; and the migration of some home mortgage origination and servicing from banks to nonbanks

[Sources: FDIC media release 14/11/2019; FDIC Quarterly; Bank and Nonbank Lending Over the Past 70 Years; Leveraged Lending and Corporate Borrowing: Increased Reliance on Capital Markets, With Important Bank Links; Trends in Mortgage Origination and Servicing: Nonbanks in the Post-Crisis Period]

Markets and Exchanges

In Brief | ASX has released a consultation paper on the first of three tranches of operating rule amendments required to facilitate the implementation of the new system that will replace CHESS in April 2021. The consultation paper seeks feedback on the operation of the draft tranche 1 rule amendments, including any unintended consequences

[Sources: ASX media release 15/11/2019; CHESS replacement Tranche 1 Rule amendments consultation paper November 2019]

Corporate Misconduct and Liability

ALRC Review of Australia's Corporate Criminal Liability Regime: The ALRC seeks feedback on 23 proposed reforms

Following the release of the Final Report of the ASIC Enforcement Taskforce in December 2017, and more recently, the Financial Services Royal Commission's Final Report, the Australian Law Reform Commission (ALRC) was asked to undertake a comprehensive review of the corporate criminal responsibility regime, with a particular focus on the need for effective laws to hold corporations to account for criminal misconduct.

Terms of Reference

The Terms of Reference require the ALRC to consider:

- whether reforms are necessary/desirable to improve Australia's corporate criminal liability regime, specifically Part 2.5 of the Criminal Code Act 1995 (Cth) in addition to other relevant Commonwealth legislation regulating corporate behaviour
- the availability of other mechanisms for attributing corporate criminal responsibility including mechanisms that could be used to hold individuals, such as senior corporate officer holders, to account for corporate misconduct
- Commonwealth criminal procedure laws and rules as they apply to corporations, including the interaction between Commonwealth and state and territory criminal procedure laws with a particular focus on committal hearings in criminal matters.

The Inquiry is being alongside ongoing Commonwealth legislative reform concerning deferred prosecution agreements, foreign bribery offences and phoenix companies.

Discussion Paper released 15 November

The Discussion Paper — Corporate Criminal Responsibility: Discussion Paper 87 (DP 87) — addresses a number of aspects of corporate criminal liability, including: a) the principled division between criminal offences and civil penalty provisions; b) the method for attributing criminal liability to corporations; c) individual liability for corporate offences; d) deferred prosecution agreements (DPAs); e) penalties and the sentencing process; f) illegal phoenix activity (deliberate liquidation with the intent to avoid creditors and continue operations through a new entity); and g) the implications of the transnational nature of business and extraterritorial offences.

The ALRC outlines 23 proposed reforms and asks questions to assist in the preparation of final recommendations.

[Note: The proposals and questions explained at length in the discussion paper are available as a separate document on the ALRC website here.]

Some Key Points

Proposed reforms include the following.

Regulating corporations

- **The ALRC proposes a new model for corporate regulation that 'recognises that there is a need for a principled distinction between criminal and civil regulation'.** Proposal 1 proposes that Commonwealth legislation should be amended to recalibrate the regulation of corporations so that unlawful conduct is divided into three categories (in descending order of seriousness): a) criminal offences; b) civil penalty proceeding provisions; and c) civil penalty notice provisions.
- **The ALRC also proposes (proposal 2) that the primary form of regulation would be civil rather than criminal.** 'Criminalisation 'would be reserved for contraventions where denunciation and condemnation is required and where the deterrent effect of a civil penalty would be insufficient'.

Corporate criminal responsibility

The ALRC proposes that there should be a single method for attributing criminal (and civil) liability to a corporation for the contravention of Commonwealth laws, pursuant to which: a) the conduct and state of mind of persons (individual or corporate) acting on behalf of the corporation is attributable to the corporation; and b) a due diligence defence is available to the corporation.

Individual liability for corporate conduct

- **Streamline existing provisions:** The ALRC puts forward two proposals (proposals 9 and 10 below) which it says are intended to streamline and replace various provisions under the current law. 'Under such a model, liability would be based on capacity to influence the conduct of the corporation, and would focus on the senior or executive management team, rather than directors per se.' the ALRC writes.

  Proposal 9: The Corporations Act 2001 (Cth) should be amended to provide that, when a body corporate commits a relevant offence, or engages in conduct the subject of a relevant offence provision, any officer who was in a position to influence the conduct of the body corporate in relation to the contravention is subject to a civil penalty, unless the officer proves that the officer took reasonable measures to prevent the contravention.

  Proposal 10: The Corporations Act 2001 (Cth) should be amended to include an offence of engaging intentionally, knowingly, or recklessly in conduct the subject of a civil penalty provision (as set out in proposal 9).

  The ALRC seeks feedback on whether the proposals above should apply to 'officers', 'executive officers' or another category of person and whether there are any provisions that should not be amended as proposed.

- **Increase individual accountability:** The ALRC goes on to explain that the proposals would create a separate offence for failing to prevent the misconduct of a corporation. 'Under the proposal, senior officers would be liable for the conduct of corporations where they were in a position to influence the relevant conduct and failed to take reasonable steps to prevent a contravention or offence'.

  This would mean that it would not be necessary to secure a conviction against the corporation before prosecuting an individual.

  'The proposals are designed to ensure that senior officers can be held liable when serious crimes are committed by the company. They aim additionally to ensure that individual liability cannot be pushed too far down to middle management, shielding the most senior officers, but instead accurately reflect where authority resides in corporations of any size or complexity. The proposals therefore seek to reduce corporate misconduct and increase individual accountability for wrongdoing.'

- **Fault:** The ALRC notes that Proposal 9 would lower the burden for establishing civil liability by removing the fault element. 'It could therefore be argued that the proposal undermines fundamental principles of civil justice as it imposes a reverse onus in civil proceedings for individuals who have been identified as being in a position to influence the conduct of the corporation in relation to a contravention'. The ALRC argues that this is 'balanced' by retaining a 'clear defence (reasonable measures) also retaining a fault element for criminal proceedings in relation to the same conduct (Proposal 10).

- **Why not model the proposal on BEAR?** The ALRC explains that it did consider whether an approached modelled on the Banking Executive Accountability Regime (BEAR) could be appropriate in the broader corporate law context but in light of the fact that the regime is 'relatively untested' and given the reservations expressed by 'consultees' did not pursue this option.

Whistleblowing

The ALRC proposes reforms intended to enhance protections for whistleblowers in the private sector. Under the proposal (proposal 11) existing requirements for large corporations to implement a whistleblower protection policy would be expanded to make the policy necessary for a corporation to demonstrate that it exercised due diligence in order defend any criminal offences in respect of which a due diligence defence applies.

The ALRC seeks feedback on whether: a) existing statutory whistleblower protections should be amended to provide a compensation scheme for whistleblowers; and b) whether whistleblower protections should be amended to apply extraterritorially.

In addition, The ALRC seeks feedback on whether a deferred prosecution agreement (DPA) scheme for corporations should be introduced into Australia as proposed by the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (or with modifications).

[Note: The Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 was introduced in December 2017 and lapsed at the end of parliament on 1 July 2019. With respect to the introduction of a DPA scheme, the explanatory memorandum says that the initiative is aimed at enhancing the accountability of Australian business for serious corporate crime and supporting improved corporate culture. It states: 'The DPA scheme is designed to address some of the challenges in detecting and addressing serious corporate crime by encouraging corporations to self-report misconduct by offering greater certainty of outcome when compared to litigation, and an opportunity to avoid some of the reputational and financial costs associated with lengthy criminal investigations and trial processes'. In April 2018, the standing committee on legal and constitutional affairs recommended that the Bill be passed, but also that the government consider publishing an exposure draft which allows corporate stakeholders a four week period to provide comment.]

Sentencing Corporations

Proposals 12 to 20 are relate to sentencing and are intended, the ALRC writes, to 'improve the processes and outcomes of sentencing corporations' by promoting consistency in approach (unless there are principled reasons for divergence).

Among other things, it's proposed that the 'court's sentencing toolkit' be enhanced by providing for a range of non-monetary penalty options for corporations and 'strengthening the information base available to courts when sentencing corporations'.

For example its proposed that the Corporations Act be amended to provide new non-monetary penalty options for corporations that have contravened a civil penalty provision including: orders requiring the corporation to publicise/disclose certain information; to undertake activities for the benefit of the community; to take internal disciplinary action/internal reform; and orders disqualifying the corporation from undertaking specified commercial activities.

The ALRC seeks feedback on a number of questions including (among others): whether the maximum penalty for corporations requires review and whether court powers should be reformed 'to better facilitate the compensation of victims' of criminal conduct and civil penalty proceedings contraventions by corporations.

Illegal phoenix activity

Proposals 21 and 22 recommend various changes to 'build on' the Bill currently before parliament: Treasury Laws Amendment (Combatting Illegal Phoenixing) Bill 2019.

Transnational business

The ALRC seeks feedback on whether the criminal law could be enhanced to better promote compliance by Australian corporations in the context of their overseas operations.

Timeline: The deadline for submissions on the Discussion Paper is 31 January 2020. The ALRC is due to deliver its final report by 30 April 2020.

[Sources: ALRC Review into Australia's corporate criminal responsibility regime: media release 14/11/2019; Corporate Criminal Responsibility: Discussion Paper 87 (DP 87)]

AICD response to the consultation

In a short statement, acknowledging the release of the discussion paper the Australian Institute of Company Directors (AICD) said it supports 'important elements' of the proposals including drawing a 'principled distinction between corporate criminal and civil liability and to better target corporate criminal liability and defences' as well as the ALRC's recognition of the oversight role of the board as distinct from executive management, and the importance of targeting liability for corporate conduct.

However, the AICD also expressed concern that some proposals that 'reverse the civil onus of proof for senior management and pierce the corporate veil go too far'.

'The ALRC has recommended that any officer who was in a position to influence the conduct of a body corporate should be subject to a civil penalty, where the corporation has committed an offence. The onus would then be on the individual to show that they had taken reasonable measures to prevent the contravention' the AICD explains.

In addition, the AICD said that the proposed new 'attribution model for corporations to be held criminally liable for offences…raises concerns and requires detailed assessment'.

The AICD said it looks forward to considering the ALRC's proposals in detail and contributing to the public consultation process.

[Source: AICD media release 15/11/2019]