

# Governance News

23 October 2019



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## Remuneration

### In Brief | Reminder: Submissions on APRA's draft, stronger and more prescriptive remuneration requirements — [draft] CPS 511 — are due by 23 October

[Note: The Australian Prudential Regulation Authority (APRA) released a discussion paper and a draft prudential standard CPS 511 for consultation in July. For a summary of APRA's proposed changes see: Governance News 24/07/2019]

[Source: APRA media release 22/07/2019]

**In Brief | Slow to include ESG metrics in incentive plans? FTI & CGLytics have jointly released a whitepaper analysing the extent to which ESG issues have been integrated into executive pay in UK and Irish companies. The report notes that despite the fact that pay is generally accepted as a key driver of C-suite behaviour, the proportion of companies to include ESG measures in remuneration plans 'has lagged somewhat' with only 27.4% of the FTSE 350 and ISEQ 20 companies including measurable ESG criteria in executive incentive plans. Further, even at these companies, the proportion of pay being driven by ESG performance is small. On average, at the 27.4% of companies, ESG-related measures account for less than 15% of bonuses**

[Sources: Harvard Law School Forum on Corporate Governance and Financial Regulation 15/10/2019; FTI & CGLytics, whitepaper: Are companies incorporating ESG factors into executive remuneration?; IR Magazine 10/10/2019]

**In Brief | Ditch LTIPs? The FT reports that the Purposeful Company has issued a report urging 25% of UK companies to consider shifting their executive remuneration policies away from long-term incentive plans towards restricted share awards, to incentivise long term performance**

[Sources: [registration required] The FT 21/10/2019; CityAM 20/10/2019]

## Meetings and Proxy Advisers

### Recent AGM results: AGL, CBA, Origin, Worley Parsons

- **AGL AGM results:** The AGL AGM was held on 19 September. All board supported resolutions were carried.
  - **The remuneration report** received 95.98% support (4.02% against). The resolution grant performance rights under the AGL long term incentive plan to CEO Brett Redman received less support with 80.14% of shareholders voting in support (19.86% voting against).
  - **Re-election/election of directors:** Two AGL directors were up for re-election (Jaqueline Hey and Diane Smith-Gander). Both received over 99% support. Patricia McKenzie was elected with 99.44% of shareholders voting in support.
  - **ESG resolutions:** Three Australasian Centre for Corporate Responsibility (ACCR) shareholder resolutions — two ordinary shareholder resolutions seeking increased disclosure around climate transition planning and disclosure of the cost of installing pollution controls to address the public health risks of coal operations (contingent on the passage of a special resolution seeking constitutional amendment), and a separate special resolution seeking the necessary constitutional change — were not passed. The constitutional amendment received on 6.57% support and in consequence the remaining resolutions were not put to the meeting. In a statement, ACCR said that the ordinary resolution filed by ACCR seeking disclosure of the cost of installing pollution controls at AGL's Bayswater and Loy Yang A coal-fired power stations, secured 10.85% proxy support. None of the shareholder resolutions were supported by the AGL board.

[Sources: AGL: Results of 2019 AGM; Notice of meeting; ACCR media release 19/09/2019]



- **Origin Energy Ltd:** The Origin AGM was held on 16 October. All board supported resolutions were carried. Six **shareholder resolutions** (one special resolution to amend the company's constitution and five contingent climate related ordinary resolutions) failed to pass.
  - **The remuneration report:** The remuneration report was carried with 98.2% support. A resolution granting equity grants to Managing Director & CEO Frank Calabria was also carried (98.85% support).
  - **Election/re-election of directors:** The two directors standing for re-election received 94.10% support (5.90% against) and 97.49% support (2.51% against) respectively. Greg Lalicker was elected with 99.65% support.
  - **Change of auditor:** A board supported resolution seeking to appoint EY as auditor (replacing KPMG) was carried receiving 98.82% support. KPMG had been the company's auditor since 2000. EY was selected by the board following a 'competitive tender process'.
  - **ESG resolutions:** The special shareholder resolution seeking to amend the constitution was not carried receiving 6.78% support (93.22% against). Contingent ordinary climate related resolutions received between 5.52% and 7.90% proxy support. An ordinary shareholder resolution seeking disclosure of lobbying activity was withdrawn ahead of the meeting. None of the resolutions were supported by the Origin board. In a response to the resolutions released ahead of the meeting, Origin said 'On this occasion, Origin believes the resolutions requisitioned by a minority of shareholders do not have comprehensive regard to Origin's current targets, policies and practices and many of the assertions lack scientific rigour or peer review or are incorrect...Origin does not consider the shareholder resolutions advance the best interests of our broader shareholder base. Therefore, the Board recommends that shareholders vote AGAINST these resolutions.' According to The AFR, despite the result, the board was 'grilled' by shareholders, proxy holders and traditional owners on climate issues raised in the resolutions including how the planned 2032 closure date for the Eraring coal fired generator aligns with the goals of the Paris agreement.

*[Sources: Origin 2019 AGM results; Origin response to shareholder resolutions; Notice of meeting; ACCR media release 15/08/2019; [registration required] The AFR 16/10/2019; The SMH 16/10/2019]*

- **CBA AGM results:** The CBA AGM was held on 16 October. All resolutions were carried.
  - **The remuneration report:** 92.68% of shareholders voted in support of the remuneration report (7.32% of shareholders voted against) and a resolution granting securities to CEO Matt Comyn received 94.63% support (5.37% against).
  - **Election/re-election of directors:** In her address to shareholders, Chair Catherine Livingstone said that CBA remains committed to board renewal, noting that the two non-executive directors standing for election, Professor Genevieve Bell and Mr Paul O'Malley each brought new skills — in the case of Professor Bell, technology and business skills and in the case of Mr O'Malley operational and finance skills — to the board. Both new directors were elected with over 99% shareholder support. The two directors up for re-election received each received over 95% support from shareholders.
  - **A special resolution to adopt a new constitution:** A board resolution to adopt an updated constitution reflecting 'developments in law, corporate governance principles and general corporate and commercial practice for ASX listed companies' since it was last updated in 2008 received 99% shareholder support.

*[Sources: CBA AGM result 2019; Chair's address; Notice of meeting]*

- **Worley Parsons AGM results:** The Worley AGM was held on 21 October. All resolutions were carried.
  - **The remuneration report:** 30.9% of shareholders voted against the adoption of the remuneration report (a first strike). A resolution granting deferred restricted share rights to CEO Andrew Wood was carried receiving over 86% support (13.07% votes against). A resolution granting long term equity performance rights to Mr Wood was supported by over 98% of shareholders. The AFR attributes the 'strike' to the decision by the company to award \$680,000 in special cash bonuses



to top executives (\$480,000 to the CEO and \$200,000 to the CFO) for completing a \$4.6 billion takeover that reportedly left the engineering group's shareholders worse off (reportedly shares have lost 30% of their value since the deal was announced). Reportedly the Australian Shareholders' Association (ASA) recommended ahead of the meeting that investors vote against the remuneration report on the basis that Worley should justify the takeover through 'performance rather than aspiration'.

- **Election/re-election of directors:** All directors standing for election/re-election received between 97%+ and 99%+ support. In his address to shareholders Worley Chair John Grill emphasised the board's commitment to ensuring it has the 'desired competencies, skills, experience and independence identified in the company's ongoing succession planning', noting that the directors standing for election were appointed with this in mind.

[Source: Worley Parsons Ltd AGM results 2019 21/10/2019; AGM addresses 21/10/2019; [registration required] The AFR 21/10/2019]

### **ACCR resolution at BHP (London AGM): 70% of shareholders voted against ACCR special resolution seeking BHP suspend its membership of lobby groups whose climate stance/advocacy is at odds with the goals of the Paris Agreement**

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The 2019 AGM of BHP Group Plc was held in London on Thursday 17 October 2019.

Reportedly, 22% of London shareholders voted in favour of an Australian Centre for Corporate Responsibility (ACCR) shareholder resolution calling for BHP to exit groups whose climate stance/advocacy is inconsistent with the Paris climate goals (reportedly 70% of shareholders voted against it). The BHP board did not support the resolution.

[Note: The Notice of Meeting includes the full text of the ACCR shareholder resolutions in full at p9. BHP's reasons for recommending shareholders vote against the resolution are at p34, namely: 'The resolutions for Items 21 and 22 are not endorsed by the Board. The Board considers that the resolutions for Items 21 and 22 are not in the best interests of shareholders of BHP as a whole, and recommends that you vote against Items 21 and 22'.]

**Mining companies 'deserve our full engagement':** In his address to shareholders Chair Ken MacKenzie said that 'at a time of increased focus on local solidarity, protection, and intervention, in response to increased insecurity and global changes, it's our participation in industry associations which can contribute to the more global solutions also required for a more progressive world. ..Mining trade associations, especially, deserve our full engagement'.

#### **ACCR response**

In a statement welcoming the result, ACCR Executive Director Brynn O'Brien said 'This is a phenomenal result, and represents a transformation that is well underway. Lobbying counter to the goals of the Paris Agreement has been tolerated for far too long. This is the beginning of the end. That companies should suspend funding to organisations that undertake lobbying counter to the goal of a habitable planet is an idea whose time has well and truly come.'

Mr O'Brien observed that the result was 'achieved despite the lack of support from proxy advisors ISS and CGI Glass Lewis, on the strength of the idea alone. We will only build from here. Every single trade association that lobbies to undermine the goals of the Paris Agreement is on notice: your time is up'.

Mr O'Brien went on to say that 'BHP should reconsider its position' in advance of the Australian AGM on 7 November. BHP Group Ltd AGM in Sydney on 7 November. Will Ken MacKenzie heed today's warning, or will he continue to cozy up to the coal heads that dominate Australian politics? History will not look kindly upon those who — in 2019 — choose to side with climate wreckers.

[Sources: BHP Notice of Meeting, BHP Speeches; ACCR media release 17/10/2019; The Guardian 18/10/2019; [registration required] The AFR 18/10/2019; Reuters 18/10/2019; [registration required] The Australian 19/10/2019; [registration required] The FT 18/10/2019]



## Headed for a quieter AGM this year? ISS, Glass Lewis and Ownership Matters have reportedly 'greenlighted' Myers' remuneration report ahead of the AGM

Reportedly, Institutional Shareholder Services Governance (ISS), Glass Lewis and Ownership matters have advised shareholders to support Myers' remuneration report ahead of the upcoming AGM (on 30 October). ISS and Glass Lewis both reportedly cited the efforts made by the Myer board to restructure its remuneration as a sign the company has listened to shareholders' demands following the second 'strike' last year.

The Age comments that the same three firms also supported the company's remuneration report last year.

[Source: The Age 21/09/2019]

**In Brief | Not really catching on? ISS' analysis of the prevalence of virtual shareholder meetings — ie digital only format with no in-person attendance option — in the US has found that despite the 7.7% increase in the number of virtual annual meetings among Russell 3000 firms, the number of new adopters has decreased in each of the last two years. Further, companies that have adopted a virtual meeting format and those who have stuck to the physical meeting format were all found to have comparable governance structures and practices**

[Source: Harvard Law School Forum on Corporate Governance and Financial Regulation 10/10/2019]

## Disclosure and Reporting

### United Kingdom | FCA feedback statement on climate changes and green finance released

#### Key Takeouts

- The UK Financial Conduct Authority (FCA) published a feedback statement on 16 October outlining a number of actions to address inadequate climate disclosure
- In early 2020, the FCA will consult on new disclosure rules for certain issuers aligned with the TCFD's recommendations on a 'comply or explain' basis and clarify existing disclosure obligations relating to climate change risks
- In the 'coming weeks' the FCA will release a feedback statement in response to a joint Discussion Paper with the Financial Reporting Council (FRC) on stewardship, identifying actions to help address some of the most significant barriers to effective stewardship

The UK Financial Conduct Authority has released a feedback statement — FS19/6: Climate change and green finance — providing a summary of feedback received in response to its October 2018 discussion paper on climate change and green finance (Discussion Paper DP18/8 Climate Change and Green Finance) outlining the regulator's response and identifying actions and next steps.

#### Why action is needed: the relevance of climate change

The paper states that 'Climate change presents a potentially irreversible threat to the planet. The complex and uncertain impact it is having, and will continue to have, is serious and wide-ranging for the UK economy and for the financial services market...Transitioning to a greener economy presents different risks that arise from extensive policy, legal, technological, market and behavioural changes. This is likely to impact some businesses' operating costs, particularly those that rely on fossil fuels, and could have a material impact on asset values in some sectors. If this transition is poorly managed or ineffective, this could significantly affect the market for financial services and the users of these services. This impact is likely to be particularly acute for longer term investments, such as pension funds'.

#### Some Key Points: planned actions and timeframes

'Priority near-term actions' to provide a 'foundation for future work on climate change and green finance' include the following.



## Issuers' climate change disclosures

1. **Finalise proposed rule changes requiring Independent Governance Committees (IGCs) to oversee and report on firms' environmental, social and governance (ESG) and stewardship policies, by the end of 2019**
2. **In early 2020, the FCA will consult on new disclosure rules** for certain issuers aligned with the TCFD's recommendations on a 'comply or explain' basis and clarifying existing disclosure obligations relating to climate change risks
3. **Feedback statement on stewardship:** Publish a Feedback Statement 'in the coming weeks' in response to a joint Discussion Paper with the Financial Reporting Council (FRC) on stewardship, identifying actions to help address some of the most significant barriers to effective stewardship
4. **Finalise proposed rule changes to facilitate investment in patient capital opportunities, 'in due course'**

To address 'greenwashing' the FCA will:

- challenge firms on 'potential greenwashing'
- clarify our expectations and take appropriate action to prevent consumers being misled'
- conduct further policy analysis on greenwashing and take action (eg guidance) to address concerns as appropriate
- engage and consider the proposals of the European Commission's Sustainable Finance Action Plan (SFAP) relevant to products and services particularly around common standards and product disclosures

**Other actions identified include contributing to several important collaborative initiatives**, including the Climate Financial Risk Forum (CFRF), the Fair and Effective Markets Review (FEMR) working group, the Government-led cross-regulator taskforce on disclosures and the European Commission's Sustainable Finance Action Plan (SFAP)

## Response?

According to The FT, sustainable finance groups welcomed the FCA's plans. Ben Nelmes, head of public policy at the UK Sustainable Investment and Finance Association is quoted as saying, 'Investors need more and better data from issuers to manage the growing physical and transition risks from climate change, and to take advantage of the opportunities from the shift to a net zero economy'.

*[Sources: FCA media release 16/10/2019; [registration required] The FT 17/10/2019; Accountancy Age 17/10/2019]*

## United Kingdom | 'Blue sky' ideas? The FRC is seeking feedback on what information users need/are looking for in corporate reports

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The UK Financial Reporting Council (FRC) is conducting a survey into stakeholders' views on what information users need/are looking for in corporate reports.

The survey asks about personal experience and expectations when seeking and using company information and will be used to inform the FRC's project to improve current regulation/practice and develop 'blue sky' thinking.

This is in line, the regulator says, with the recommendation by Sir John Kingman that the regulator should promote greater 'brevity, comprehensibility and usefulness in corporate reporting' moving forward.

[Note: The Final Report of the Independent Review of the Financial Reporting Council led by Sir John Kingman (Kingman Review) was publicly released in December 2018. One of the key recommendations was that the 'regulator should be required to promote brevity and comprehensibility in accounts and annual reports, to



engage meaningfully with investors and asset owners about their information needs, and to ensure the proportionality and value of reports. At least once in every Parliament, the regulator should report on its assessment of the extent to which the statutory reporting framework is serving the interests of users of company reports'. The full text of the Kingman Review can be accessed [here](#). For a summary see: Governance News 16/01/2019]

[Source: FRC media release 17/10/2019]

**In Brief | Gap between investor expectations and climate reporting: The UK FRC Financial Reporting Lab has released a report flagging that companies are falling short of investors' expectations for clearer reporting on climate related issues and calling on companies to address the shortfall. The report outlines what investors want to understand, questions companies should ask themselves, recommended disclosures, and a range of examples of the developing practice of climate-related reporting. Sir Jon Thompson, CEO of the Financial Reporting Council, said 'The FRC itself recognises the need to play a more active role in this space and this report is an important step in recognising climate change as a priority and building on the FRC's activities'**

[Sources: FRC media release 21/10/2019; Climate-related corporate reporting: Where to Next October 2019]

## Regulators

**Budget supplementary estimates hearings 23-24 October: Treasury, APRA, ASIC, FASEA, the Australian Office of Financial Management and the Productivity Commission (among others) will be questioned**

The hearing program for budget supplementary estimates hearings (economics) 23 October provides that the following are due to appear before the Economics Legislation Committee (represented by: Senator Mathias Cormann, Senator Jane Hume and Senator Matthew Canavan):

- Treasury
- The ATO
- The Australian Charities and not for Profits Commission
- The Office of Financial Management, Financial Adviser Standards and Ethics Authority (FASEA)
- The Australian Prudential Regulation Authority (APRA)
- The Australian Securities and Investments Commission (ASIC)
- The Productivity Commission

The following are due to appear before the Committee on the 24 October.

- Australian Competition and Consumer Commission (ACCC)
- Australian Energy Regulator (AER)
- Infrastructure and Project Financing Agency
- National Housing Finance and Investment Corporation

[Source: Budget Supplementary Estimates, 2019–20 Economics Legislation Committee Wednesday 23 October and Thursday 24 October hearings]

**An increase in enforcement and supervisory activity: ASIC 2018-2019 Annual Report released**

The Australian Securities and Investments Commission's (ASIC's) Annual Report for the 2018-19 financial year was tabled in parliament on 17 October. The report outlines ASIC's activities and performance for the previous financial year.

### Some Key Points

- ASIC says that in 2018-19, there has been: 1) a 20% increase in the number of ASIC enforcement investigations; 2) a 51% increase in the number of enforcement investigations involving Australia's largest financial institutions (or their officers, employees or subsidiary companies); and 3) a 216% increase in the number of wealth management investigations



- In addition, ASIC has established the Office of Enforcement to coordinate the regulator's enforcement strategy, including the implementation of its 'Why not Litigate?' enforcement approach as well as to carry out key enforcement activities.
- In addition, ASIC has enhanced aspects of its supervisory approach through its Close and Continuous Monitoring (CCM) program and the work of the Corporate Governance Taskforce.
- ASIC states that matters referred to/highlighted by the Financial Services Royal Commission have been prioritised and that ASIC is continuing to implement the new obligations/responsibilities flowing from the Recommendations.

## Further detail

### ASIC's key achievements by sector

The report outlines ASIC's achievements by sector.

**In the corporate sector** (which includes listed corporations, unlisted public companies, large proprietary companies, and small proprietary companies) ASIC says that its primary focus was on improving corporate governance practices (in light of the findings of the Financial Services Royal Commission and the APRA prudential inquiry into the CBA) and on enhancing fairness and disclosure for retail investors in corporate finance transactions.

ASIC highlights the release of [Report 593 Climate Risk Disclosure by Australia's listed companies](#) (for a summary see: [Governance News 21/09/2019](#)) as an example of this work, and flags that it continued work in the area, as disclosure practices develop should be expected.

### Enhanced approach to supervision and surveillance

**CCM program outcomes:** According to the report: six CCM program supervisory exercises were commenced; four findings letters were issued; 124 days were spent onsite and supervisory exercises included meeting with 462 representatives.

### Enforcement

Overall, ASIC commenced 151 investigations (as compared with 126 in 2017/2018) and completed 103 investigations (as compared to 124 in 2017/2018).

#### ▪ Criminal actions

- 89% of the 33 completed criminal proceedings were completed 'successfully' (as compared with 100% for the previous period)
- In 2018–19, as a result of ASIC investigations, 27 people were convicted of financial crime (as compared with 22 during the previous period). 14 people received sentences of imprisonment. and ten of the people sentenced to imprisonment were required to serve time in custody, compared to five in the 2017–18 financial year
- The total dollar value of fines rose from \$15,100 in 2017/2018 to \$266,050
- The average time to complete an investigation decreased from 24 months to 23 months. Likewise the average total time to complete an investigation and reach a court decision decreased slightly from 54 months to 52 months

#### ▪ Civil actions

- 96% of the 75 civil proceedings were completed 'successfully' (as compared with 99% during the previous period)
- The total dollar value of civil penalties fell from \$42.2m in 2017/2018 to \$12.7m
- The average time to complete an investigation fell from 24 months to 20 months
- the average total time to complete an investigation and reach a court decision increased from 32 months to 39 months



## ▪ **Administrative actions**

- There were 84 administrative actions completed during the period and 61 new administrative actions commenced. By comparison, in 2017/2018 91 administrative actions were completed and 56 new actions commenced
- The number of individuals disqualified or removed from directing companies role from 50 in 2017/2018 to 62. Likewise, the number of people/companies removed, restricted or banned from provided credit services increased from 41 in 2017/2018 to 97. However, the number of people/companies removed, restricted or banned from providing financial services fell from 92 in 2017/2018 to 85
- The average time taken to complete an investigation increased from 21 months to 26 months. The average total time to complete an investigation and reach a court decision also increased from 25 months to 31 months
- The number of court enforceable undertakings accepted fell from 27 in 2017/2018 to 10. The total number of infringement notices fell from 55 in 2017/2018 to 14. Likewise, there was a decrease in the total dollar value of infringement notices from \$2.02m in 2017/2018 to \$731,700
- The number of summary prosecutions for strict liability offences fell from 398 to 369, though the total value of fines and costs rose from \$1.5m to \$1.6m
- The amount of agreed compensation or remediation payments dropped from \$351.6m to \$22.8m. The amount of agreed community benefit payments also decreased from \$48.1m to \$18.1m

## ▪ **Stakeholder engagement**

- ASIC published 13 consultation papers during the period (up from 11 in 2017/2018). There was no change in the number of industry reports published. The number remained stable at 45
- ASIC released less guidance during the period: ASIC released 23 new or revised regulatory guides (as compared with 36 in 2017/2018), 27 new or revised information sheets (as compared with 32 in 2017/2018) and the number of legislative instruments made/amended/pealed decreased from 93 to 53
- ASIC received, approved, refused or withdrew fewer relief applications as compared with 2017/2018
- Education: the number of users visiting ASIC's MoneySmart website increased from 7.4m in 2017/2018 to 8.4m; the number of users who have used a MoneySmart online tool also rose from 2.3m to 2.7m

*[Sources: ASIC Media release 17/10/2019; ASIC's Annual Report 2018-19]*

## **Increased focus on non-financial risk: APRA 2018/2019 annual report released**

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The Australian Prudential Regulatory Authority (APRA) has released its 2018/19 annual report.

### **Some Key Points**

- In his introduction to the report, APRA Chair Wayne Byres highlighted some of the work APRA has instigated/completed over the period to strengthen/ensure the ongoing effectiveness of its prudential framework, underlined the shift in APRA's approach towards increasing its focus on non-financial risk, and outlined how additional funding had been deployed.
- Commenting on the overall strength of Australia's financial system, Mr Byres cautioned that though it remains strong, this shouldn't be taken for granted especially in light of the various 'vulnerabilities' domestically and internationally that could impact it, and the various industry risks (eg cyber risk) that could further compound them



- Mr Byres also flagged the outcomes of the most recent stakeholder survey, which identified (among other things) that there is a level of industry concern about the costs of regulatory compliance and concern (30% of respondents) that APRA collects too much statistical data.

### **Progress against the six strategic priorities identified in APRA's 2018-22 Corporate Plan**

The report provides an update on progress against the six strategic priorities in APRA's 2018-2022 Corporate Plan. These are: 1) broadening risk based supervision; 2) improving data-enabled decision-making; 3) building crisis resolution capability; 4) strengthening external engagement and collaboration; 5) enhancing leadership, people and culture; and lifting organisational capability.

[Note: Chapter 3 of the report provides an update against each of the strategic priorities identified in the 2018-2022 report.]

Mr Byres observed that APRA's updated corporate plan, builds on these initiatives and incorporates the recommendations coming out of various inquiries (see below).

### **Reviews and Inquiries**

Mr Byres observed that in 2018/19, APRA was subject to six reviews and inquiries into its activities and operations. Namely: The International Monetary Fund's (IMF) Financial Sector Assessment Program (FSAP); The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry; The Productivity Commission's reviews on 'Competition in the Australian Financial System' and 'Superannuation: Assessing Efficiency and Competition'; APRA's own Strategic Enforcement Review; and The APRA Capability Review.

Mr Byres says that a key theme to emerge from these inquiries was that 'APRA has delivered well on its core mandate to protect the financial well-being of the Australian community' and that further, 'when taken together, the recommendations from these reviews largely align with the intentions and strategic direction behind the 2018-2022 Corporate Plan'.

Having said this, he observed that 'in an increasingly complex operating environment with changing community expectations about regulators and their role, a consistent theme to emerge was that APRA needed to do a lot more in a number of areas if it wished to successfully fulfill its mandate into the future' including increasing its focus on non-financial risk.

Mr Byres said that though APRA's primary focus remains protecting the stability and soundness of the financial system, APRA's has been applying more of its resources to issues outside of the traditional realm of financial risks and delving more deeply into non-financial risks including culture, remuneration and governance. It has also increased its attention on matters such as competition and contestability in the financial system.

**Work on ensuring the prudential framework remains effective:** In his introduction to the report, APRA Mr Byres outlined ten areas in which work was instigated or completed over the period, with a view to ensuring the ongoing effectiveness of the prudential framework. These include the areas of: 1) mortgage lending; 2) information security; 3) remuneration; 4) member outcomes in superannuation; 5) APRA's program of work to embed 'unquestionably strong capital ratios in the ADI sector; 6) APRA's work on instituting requirements obliging the largest ADIs to have additional loss absorbing capacity to facilitate their orderly resolution (should a crisis occur); 7) the roll out of the Banking Executive Accountability Regime (BEAR); 8) APRA's new licencing framework for banking, 9) APRA and ASIC's joint work in releasing information and an online tool to enable policy holders to compare insurers' performance in handling claims and disputes; and 10) the launch of a review of capital requirements for private health insurers to ensure they remain sufficient to protect policy holders.

### **Resourcing and Funding**

\$60m (over four years announced in 2018) has been directed to: 1) improving APRA's data collection, storage and analysis systems to improve supervisory assessment and decision making; 2) increasing the number of frontline supervisors for the largest and most complex financial institutions; and 3) enhancing APRA's ability to address new and emerging risk areas by strengthening internal technical expertise and increasing access to specialists outside APRA.



In particular, Mr Byres flagged the appointment of John Lonsdale as Deputy Chair as a key measure that has strengthened APRA's leadership.

Mr Byres said that the additional \$150m in the April 2019 Federal Budget (over four years) is intended to substantially upgrade APRA's supervisory capabilities by: 1) enhancing the supervisory framework and approach for governance, culture and remuneration applying to all APRA-regulated entities, including through building internal technical expertise and accessing technical specialists outside of APRA (supporting APRA's response to key areas of concern raised by the Financial Services Royal Commission); 2) extending the Banking Executive Accountability Regime (BEAR) to all APRA-regulated entities including insurers and superannuation licensees, again as recommended by the Financial Services Royal Commission; and 3) increasing APRA's broader supervision capacity across all regulated entities and ensuring this can be sustained in future years.

Overall, Mr Byres comments that the new funding measures have 'significantly increased APRA's available resources, with staffing levels set to increase in 2019/20 by around 100 permanent employees and enabling a substantial upgrade in APRA's supervisory capabilities.'

**'Million dollar man'?** APRA Chair Wayne Byres' pay received wide media coverage. The Australian calling him a '\$1m man' and commenting that he is one of Australia's highest paid public servants.

*[Sources: APRA Annual Report 2018/2019; registration required] The Australian 17/10/2019; 16/10/2019]*

## **ASIC and the European Securities and Markets Authority will cooperate on benchmarks**

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The Australian Securities and Investments Commission (ASIC) and The European Securities and Markets Authority (ESMA) have announced that they have signed a Memorandum of Understanding (MoU) setting out cooperation arrangements in respect of Australian benchmarks.

**Context:** On 29 July 2019, the European Commission recognised Australia's legal and supervisory framework applicable to the administrators of certain financial benchmarks as equivalent to the corresponding requirements under the EU Benchmarks Regulation (BMR) and recognised that those requirements are subject to effective supervision and enforcement. The impact of this, ASIC explains, is that it will allow benchmarks declared significant by ASIC (BBSW, S&P/ASX200, Bond Futures Settlement Price, CPI, and Cash Rate) to be used in the EU by EU-supervised entities.

**What does the MoU achieve?** The MoU sets out cooperation arrangements to complement the EU's equivalence decision, as well as to ensure effective information exchange and supervisory coordination. Under it, both authorities agree to both provide each other with the fullest cooperation permissible under their laws and regulations in relation to all relevant information and supervisory activities regarding the covered benchmarks; and agree to confidentiality requirements for any information shared, requests made, and contents of the requests made, under the MoU.

The MoU was signed on 9 October 2019 by James Shipton, the Chair of ASIC, and by Steven Maijor, the Chair of ESMA.

Commenting on the MoU, James Shipton said: 'Enhancing and improving regulatory cooperation with our international counterparts is a priority for ASIC. We are very pleased to announce this agreement and look forward to our cooperation with ESMA in the future. Benchmarks play a vital role in cross-border financial transactions and international regulators need to work together to ensure their integrity and accuracy'.

*[Source: ASIC media release 21/10/2019]*

## **Financial Services**

**Top Story | 'It is apparent that urgent change is required': ASIC's review of TPD insurance calls on insurers and superannuation trustees to raise standards, but the FSC has queried whether the findings remain current**

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**Report Overview | ASIC Report 633 Holes in the safety net: A review of TPD insurance claims (REP 633)**



ASIC's review of total and permanent disability (TPD) insurance identifies 'significant industry-wide problems with the design of total and permanent disability (TPD) insurance and the claims handling process and calls on insurers and superannuation trustees to take 'urgent' action to raise standards.

However, the FSC has queried whether the findings remain current. According to The FSC, the 2018 data 'tells a very different story'.

### Key Takeouts

1. Addressing harms in insurance is one of ASIC's seven strategic regulatory priorities for 2019-2023.
2. The report identifies 'significant industry-wide problems with the design of total and permanent disability (TPD) insurance and the claims handling process that mean many consumers can't rely on this cover when they need it most'.
3. ASIC expects insurers and trustees to take steps to 'implement changes to their claims handling practices and to redesign TPD products so that they offer significantly better value for consumers'.
4. Table 3 (p17) of the report identifies the four issues ASIC expects insurers and superannuation trustees to address — 1) Poor consumer outcomes from the ADL test and other restrictive definitions; 2) hurdles in the claims handling process leading to withdrawn claims; 3) consumer harm arising from poor data; and 4) higher than predicted declined claim rates. The table also includes specifies the actions ASIC expects insurers/superannuation trustees to take.
5. ASIC says that it expects insurers and superannuation trustees to take action by 31 March 2020.
6. In addition, ASIC outlines the action it plans to take to monitor the response to the report recommendations. Among other things, ASIC says that it will 'consider reporting publicly on the appropriateness of the changes made' by industry.
7. Old data? In a statement, the Financial Services Council (FSC) CEO Sally Loane said that ASIC's report relies on 2016/17 data, and 'fails to highlight the significant positive reforms the industry has initiated since then, including the introduction of the Life Insurance Code of Practice and the world-class FSC/KPMG claims data initiative'.. According to The FSC, the 2018 data 'tells a very different story'.

### About the report

The Australian Securities and Investments Commission (ASIC) has released the findings and recommendations of its thematic review of total and permanent (TPD) insurance in Australia, 90% of which is provided through superannuation funds.

Below is an overview of ASIC's findings as well as the actions ASIC expects insurers and superannuation trustees to take to address them. ASIC says that it expects insurers and superannuation trustees to have acted on the recommendations by 31 March 2020.

The report reviews: 1) outcomes for consumers; 2) claims handling practices; 3) the role of data in managing the risk of consumer harm; and 4) ASIC's findings on insurers with higher than predicted rates of declined claims.

The findings are based on a review of 35,000 TPD claims and on the findings of ASIC commissioned consumer research.

ASIC reviewed conduct between 1 January 2016 and 31 December 2017.

The review focused on seven insurers — 1) AIA Australia Limited; 2) AMP Life Limited and the National Mutual Life Association of Australasia Limited (part of the AMP Group of companies); 3) Asteron Life & Superannuation Limited (previously Suncorp Life & Superannuation Limited); 4) MetLife Insurance Limited; 5) MLC Limited; 6) TAL Life Limited; 7) Westpac Life Insurance Services Limited — that ASIC says, represent 65–70% of the total number of TPD claims.



## Snapshot: What did ASIC find?

**Key finding:** The report identifies 'significant industry-wide problems with the design of total and permanent disability (TPD) insurance and the claims handling process that mean many consumers can't rely on this cover when they need it most'.

Broadly speaking, ASIC made four key findings.

1. Poor consumer outcomes from the activities of daily living (ADL test) and other 'restrictive definitions': Nearly half a million individuals, often working in casual roles or high-risk occupations, are covered by what ASIC describes as 'a very narrow TPD policy definition' (the activities of daily living or ADL test) that only pays out if they are unable to perform several 'activities of daily living' such as feeding, dressing or washing themselves.
2. Hurdles in the claims handling process contribute to claim withdrawals: The report identifies a number of factors in the claims handling process that ASIC says, contribute to one in eight or 12% of claims being withdrawn. These include, among others: difficult lodgement processes, 'poor communication practices', multiple requests for medical assessments, and 'excessive' delays in handling claims.
3. Consumer harm arising from poor data: Insurers were found to lack key claims data which ASIC says is necessary to help manage the risk of consumer harm. For example, insurers were found to lack the data needed to be able to identify the value of products to consumers and key friction points in their claims handling processes.
4. Higher than predicted declined claim rates: Based on ASIC's own industry-wide statistical modelling, ASIC found that for claims where a decision has been made, certain insurers (named in the report) had higher than predicted decline rates, in one case the declined claim rate was double what was ASIC predicted.

### A question of 'fairness' — 'it is apparent that urgent change is required'

In his address to the GRC Conference: Regulatory Panel, Australian Securities and Investments (ASIC) Commissioner Sean Hughes spoke on the topic of fairness, one of Commissioner Hayne's six 'norms' of conduct and the need for industry to raise standards. Mr Hughes cited TPD insurance (and the findings in the report) as one example of where change is required.

'Over 12 million Australian workers automatically pay for TPD cover through their superannuation to provide financial protection when they are so sick or injured that they can never work again. ASIC expects industry to make urgent changes to ensure this cover provides real value. Fairness requires as much' Mr Hughes said.

'Recalling Commissioner Hayne's norms – particularly: Be fair. Provide services that are fit for purpose. Deliver services with reasonable care and skill – it is apparent that urgent change is required'.

### Further detail: ASIC's findings

#### ***'Junk insurance'? Claims assessed under the Activities of Daily Living (ADL) test 'generally result' in poor consumer outcomes***

- TPD cover is designed for people who are totally and permanently disabled, but the definition of the meaning total and permanent disablement varies between the different TPD products distributed by insurers.
- Though most consumers are assessed under the 'any occupation' or 'own occupation' tests, some consumers including 'economically vulnerable consumers' (eg casual, contract or seasonal employees) may be paying premiums for TPD cover under a more restrictive policy definition, the 'activities of daily living' (ADL) test.
- ASIC says that this is of concern, for a number of reasons including that the declined rate for TPD claims assessed under the ADL test is five times higher than the average declined rate for all other TPD claims,



at 3 in 5 declined (or 60% of claims declined). Further, the declined rates for TPD claims assessed under the ADL test were 'concerningly high' for some group superannuation policies. The 10 highest ADL declined rates at group policy level ranged from 45% to 87%.

- ASIC Commissioner Sean Hughes said, 'Alarming, we found that three TPD claims a day are assessed under the restrictive "activities of daily living" definition, which has a concerning high decline rate. People that hold this type of automatic cover through superannuation are typically paying the same premium – for what is essentially junk insurance – as people who can access less restrictive definitions under general TPD cover'.

***Economically vulnerable consumers are 'especially disadvantaged' as the eligibility criteria often means that casual, contract or seasonal employees are more likely to be assessed under the ADL definition***

- ASIC found that 'economically vulnerable consumers' are more likely to be assessed under the ADL definition because the eligibility criteria in group TPD cover means that: a) casual, seasonal or part-time employees who work less than a specified number of hours (eg 15 hours per week); b) people who have been unemployed or on leave without pay for a stated period before the TPD event (often six months, but for some policies 12 months); and/or c) people in specified occupations that the insurer considers are high risk are assessed under the ADL definition. ASIC says that it is concerned that these types of eligibility criteria 'unfairly affect more vulnerable consumers' and that with 'the changing nature of the workforce and the growth of the 'gig economy', these types of eligibility criteria will capture an increasingly broad range of consumers' going forward.
- The fact that 4% of TPD claims are assessed under the ADL test means that at least 4% of the 12 million consumers (480,000) who hold TPD in superannuation are potentially at risk of unusable or inadequate cover.
- The report observes that low engagement with superannuation heightens risks to consumers as does the complexity of and lack of comparability across insurance offerings (which makes it difficult for consumers to compare policies/understand the cover they have).
- ASIC says that findings 'endorse the need for greater standardisation of terms, especially within superannuation'.

***ASIC found that the ADL test is 'unsuitable for a range of common illnesses and injuries, including mental illness and musculoskeletal disorders'***

- The report compared declined claim rates for certain conditions under the narrower ADL definition with rates under the broader TPD definition and found that: 1) mental health claims were approximately five times more likely to be declined (77% for ADL compared to 15% for the general definition); and b) mental health claims were approximately five times more likely to be declined (77% for ADL compared to 15% for the general definition).
- ASIC concludes from this 'concerningly high declined claim rate' that 'restrictive TPD cover is unsuitable for many consumers to whom it is being provided or sold' especially given the medical conditions in question may be a common cause of disability for certain groups of workers eg manual workers whose employment arrangements mean they are defaulted into ADL-only TPD cover.
- ASIC says that superannuation trustees have a 'key role' to play in this context. Trustees 'have a legal obligation to offer insurance benefits for fund members (consumers) that are both appropriate and affordable' the report states.
- ASIC notes that 'one insurer has removed ADL cover from some TPD policies offered within superannuation' and comments that 'this is a step in the right direction...we expect insurers and trustees to stop providing 'junk' insurance products to consumers. Trustees and insurers must ensure that the products they design and/or distribute are suitable for the consumers to whom they are provided or sold'.



### ***Insurers' claims handling practices were found to contribute to consumers withdrawing claims***

Information obtained from insurers together with ASIC-commissioned consumer research identified numerous 'frictions' or pain points for consumers in the claim assessment process that ASIC says, contributed to the withdrawal of approximately one in eight claims.

These include: a) lack of empathy/proactive approach to handling claims on the part of insurers; b) multiple requests for further medical assessments that consumers perceived to be unreasonable/unnecessary; c) potentially threatening behaviour (eg surveillance of claimants and 'questionable allegations of fraud'); d) excessive delay in receiving a claims decision; e) 'fishing' for non-disclosure as a method of avoiding claims; f) the ongoing costs of the claims process (in terms of time, financial cost and physical cost) and; g) changes to claims handling staff (several insurers had a claims staff turnover rate near or above 25%).

### ***Other factors contributing to claims being declined which ASIC considers 'unfairly' affect some consumers***

The report identified a number of other factors that contributed to the likelihood that a claim would be declined. These include the following.

- There was a significant difference between the declined rates for disease-related claims and for claims for other conditions. According to ASIC, mental illness-related claims had the highest declined rate at 16.9% closely followed by injury or fracture conditions at 16.1%. TPD claims for disease-related conditions had a lower declined rate of 9.7%. ASIC says that it expects insurers to 'ensure that their claims handling procedures are not operating unfairly for consumers with mental health, injury or fracture conditions'.
- The rate of declined claims decreased as the age of the consumer increased, which ASIC says 'could be expected, as it is more difficult for an insurer to determine that a younger person will never be able to work again, than to determine the same for an older person'. However, the report found that two insurers had a noticeably lower rate of declined claims for younger consumers. ASIC says that it 'will be working with the other insurers to understand this difference'.
- The age of the policy at the time the claim was made and the length of any delay in claim reporting were both found to impact the rate at which claims were likely to be declined. Generally, ASIC found that the longer a policy had been in force, the lower the declined claim rate was likely to be. Claims that were reported more than 1,000 days after the claim event were declined at a higher rate (17.4% vs 12.4% for other claims).
- ASIC found that there was only a slight difference between the declined rates for claims on group policies (13.6%) and for retail policies (14.5%).
- ASIC says that it expects all insurers to 'review their claims handling practices in light of this analysis to ensure they are not treating groups of consumers unfairly'.

### ***Insurers were found not to have sufficient understanding of the reasons for withdrawn claims***

- Insurers were found to be 'generally poor at capturing reasons for withdrawn claims'.
- The two reasons most often given by insurers for withdrawn claims were: lack of response by the consumer to a request for information (over 50% of withdrawn claims); followed by the consumer withdrawing for reasons other than eligibility or return to work (31%). ASIC notes that insurers did not record the actual reason for these active withdrawals.
- ASIC comments that though it is 'not always possible for an insurer (or superannuation trustee) to know the reasons for withdrawn claims, we expect insurers to improve their understanding of these reasons. When a consumer begins a claim via a trustee for insurance held in superannuation, a superannuation trustee has obligations to pursue insurance claims for members. Therefore, we expect trustees to improve their own understanding of the reasons for withdrawn claims'.



### ***Insurers did not have adequate data to effectively manage the risk of consumer harm***

- ASIC considers that timely, accurate and complete data is necessary to the proactive management of the risk of consumer harm. For example, the report states that good data is necessary to identify and address the value of products to consumers and whether they are meeting consumer needs.
- The report found that 'no insurer had a holistic, up-to-date picture of the potential consumer harm arising from TPD claims handling and outcomes'. Rather, 'they could only get this information from reactive, post-event quality assurance reviews, audits or analysis—by which time conduct risk and consumer harm had already crystallised'.
- ASIC Commissioner Sean Hughes commented that ASIC finds 'it inexcusable that insurers did not use, or in some cases even collect, data to enable them to identify the very poor consumer outcomes that are being produced because of these restrictive definitions [the ADL definition]'.

### ***Insurers 'must invest more time, resources and funds to strengthen data resources to effectively reduce the risk of consumer harm'***

- ASIC notes that though insurers are already improving their data capability (largely to meet the requirements of APRA and ASIC's data collection initiatives) ASIC expects insurers to do more to address the issues identified. More particularly, ASIC expects:
  - Boards and owners of all insurers to 'ensure there is sufficient investment in the business to appropriately manage the risk posed by inadequate data resources'. ASIC states that this will 'require additional investment and the active engagement of boards and senior management'.
  - Superannuation trustees to 'ensure that they receive adequate data from insurers to manage the risk of harm to their members (consumers)'.
- ASIC observes that recent and anticipated changes to life insurer ownership 'create an opportunity for these issues to be resolved. We are aware of at least one new owner investing in data and systems since buying a life company from an Australian bank, and we encourage other owners to do the same'.

### ***TPD declined claim rates varied significantly between individual insurers and actual declined rates were higher than predicted for some insurers.***

- The declined rate was found to vary between individual insurers from a low of 9% to a high of 29%.
- According to the report, for claims where a decision had been made, some insurers (named in the report) had declined claim rates higher than predicted (based on ASIC's statistical modelling), with one insurer's declined rate 'almost double what our analysis predicted'.

[Note: Figure 2 at p14 of the report is a table naming the insurers. This can be accessed on the ASIC website [here](#).]

ASIC says that it 'may undertake targeted surveillance work to examine the reasons for the substantially higher declined claim rates and consider appropriate regulatory action if required'.

### **ASIC's expectations and planned actions**

By 31 March 2020, ASIC expects insurers and superannuation trustees to have acted on the recommendations of the report. The actions insurers/trustees are expected to take are outlined briefly below.

[Note: Table 3 of the executive summary (p17) summarises ASIC's expectations of insurers and superannuation trustees, and ASIC's planned actions. It can be accessed on ASIC's website [here](#).]

### ***Poor consumer outcomes from the ADL test and other restrictive definitions***



To address poor consumer outcomes from the ADL test and other restrictive definitions, ASIC expects insurers and superannuation trustees to:

- review TPD policies with a view to removing definitions in group policies that are 'so restrictive as to make the policy unlikely to benefit the consumers to whom the policy is sold or provided, or appropriately redesign the product'
- develop measures to assess the value of the product offered or provided to consumers
- improve data collection on outcomes for different types of TPD cover, including ADL or other restrictive definitions; and improve communications with consumers about the type of TPD cover they will be eligible for under various circumstances

ASIC also says that it expect trustees to consider the reporting findings when negotiating future group insurance arrangements with insurers

**ASIC's will consider naming and shaming?** Among other things, ASIC says that it will 'ask certain insurers selected at our discretion to report to us on the changes made to their claims handling practices, using our compulsory notice powers under financial services laws if necessary' and consider reporting publicly on the appropriateness of the changes made.

### ***Addressing frictions in claims handling leading to withdrawn claims***

ASIC expects all insurers and trustees to: 'work constructively towards a consistent set of binding standards for life insurance that covers both insurers and trustees and contains robust standards for all third-party providers. The next iteration of the Life Code and the Insurance in Superannuation Code should incorporate additional or enhanced obligations including for proactive communication with consumers during their claim, appropriate use of desktop surveillance, and documented guidelines on training and competency requirements for claims handling staff'.

ASIC adds that it expects immediate steps to be taken to implement the recommended changes to claims handling practices, reinsurer arrangements and claims staff remuneration scorecards.

### **ASIC's planned actions:**

- **Possible intervention?** ASIC says that it will monitor changes made and 'if we remain concerned' will 'use our current and proposed powers including under the Corporations Act 2001 to intervene'.
- **Consider naming and shaming?** ASIC will ask some insurers to report on the changes made, using compulsory notice powers under financial services laws if necessary. ASIC says that 'it will consider reporting publicly on the appropriateness of the changes made by insurers during 2020 and 2021'.
- **Engage with trustees:** Noting ASIC has previously highlighted the need for trustees to improve their claims handling processes, ASIC says that it will engage with trustees to review 'what progress has been made'.

### ***Consumer harm arising from poor data***

ASIC expects all insurers to: a) invest in data resources and improve the quality of their data; b) develop plans and timeframes for further developing their data capabilities to capture, store and retrieve data and information that is necessary to adequately manage conduct risk and consumer harm; c) collect more data including on withdrawn claims, product value, consumer satisfaction, claim assessment practices, and involvement of third parties such as legal representatives; d) collect data that enables analysis of each individual policy offered (including where there are multiple covers in one policy), not merely data aggregated at an insurer level; and e) continue to work with APRA and ASIC on the industry-wide collection of life insurance claims data.

### **ASIC's planned actions**



1. **Possible legislative reform?** Among other things, ASIC says that its ability to intervene on issues of data resources and conduct risk management is limited by the exemptions in s912A(4) and 912A(5) of the Corporations Act. On this basis, ASIC will 'recommend strengthening the regulatory framework for data resources and the management of conduct risk to the government'.
2. **Expanding public reporting:** ASIC says that it will 'continue to work with APRA to improve the public reporting regime for claims data and outcomes including considering expanding its existing scope beyond claims into underwriting and other non-claims areas'.

### ***Insurers with higher than predicted declined claim rates***

ASIC expects all insurers to review their claims handling practices in light of the report to 'ensure they are not treating certain groups of consumers unfairly. They should also review a statistically significant sample of declined claims between 1 January 2016 and 31 December with the claims characteristics set out in Table 23 in this report'.

[Note: The claims characteristics referred to are: claims that were reported more than 1,000 days after the claim event; claims made on group policies that the insurer no longer underwrites (ie legacy policies where the superannuation trustee has since changed insurer); and mental illness claims made by consumers under the age of 30 at the time of the claim event. Table 23 is at p96 of the report and can be accessed on the ASIC website [here](#).]

### **ASIC's planned actions**

1. **ASIC may ask certain insurers to report** on the outcomes of their reviews, using our compulsory notice powers if necessary as well as any steps taken by insurers to address the findings of We may also examine any steps taken by insurers to address the findings of their reviews.
2. **Naming and shaming?** ASIC says it will consider reporting publicly on insurers' response to these expectations.

[Sources: ASIC media release 17/10/2019; ASIC report 633: holes in the safety net: A review of insurance claims; ASIC Executive summary to report 633; ASIC Commissioner Sean Hughes' speech to the GRC Conference 17/10/2019]

### **Industry Response?**

#### ***AIST response: No place for 'junk insurance' in superannuation***

In a statement welcoming the report, Australian Institute of Superannuation Trustees (AIST) CEO Eva Scheerlinck said the evidence contained in the report was essential reading for all super trustees.

'Insurance is an integral part of our compulsory super system which provides the vast majority of members with value for money life insurance. It is incumbent on all superannuation trustees to review this report and ensure that their fund's TPD offering provides good value and delivers appropriate outcome for members. There is no role for junk insurance in superannuation and we need to weed out such products' she said.

Ms Scheerlinck also noted that many AIST member funds had already made changes to their TPD insurance to further improve their offerings to members. Ms Scheerlinck said that 'As signatories to the Insurance in Super Code of Practice, AIST member funds are committed to reducing claims handling times and ensuring that policy definitions are accurate and appropriate. In addition, the newly legislated and soon-to-be implemented Members' Outcome test explicitly requires trustees to determine whether their insurance offerings are appropriate, good value and in members' financial interests'.

[Source: AIST media release 18/10/2019]

#### ***FSC response: ASIC's report is based on out of date data?***

In a statement responding to the release of the report, the Financial Services Council (FSC) said that the report does not represent the current state of the industry. CEO Sally Loane said that ASIC's report relies on 2016/17



data, and 'fails to highlight the significant positive reforms the industry has initiated since then, including the introduction of the Life Insurance Code of Practice and the world-class FSC/KPMG claims data initiative'.

According to The FSC, the 2018 data 'tells a very different story'. For example: the FSC says that data to the end of 2018 shows that 88% of TPD claims are paid in the first instance, rising to 91% for mental health TPD claims. This, Ms Loane said includes claims against all definitions including the ADL definition. Further, only 3.6% of claims were assessed using either the non-occupational or ADL definition. As such, Ms Loane says that ASIC's report highlights the progress the life insurance industry has made in the last couple of years.

With respect to claims handling issues, the FSC says that since ASIC's review, additional consumer protections at claim interviews and for surveillance have commenced under the Life Insurance Code of Practice which are intended to ensure claims are not withdrawn for inappropriate reasons. The statement notes that the Hayne Commission found that the introduction of the Code had 'significantly improved' outcomes for consumers, including with respect to claims handling. Further, the statement says that work is also underway to further improve the Code.

Ms Loane said that the FSC (with KPMG) will continue to gather an analysis 'even more granular and up to date data' to help inform better products and services for life insurers and also policy development.

Ms Loane concluded by saying that group life insurance through superannuation continues to offer 'better value for money than any other type of insurance offered anywhere else in the world. With more than 80 cents paid out in the claims for every dollar paid in premiums.'

*[Source: FSC media release 17/10/2019]*

## ASICs' strategic priorities in the insurance sector

### Key Takeouts

- **Supervisory shift:** In her address to the National Insurance Brokers Association (NIBA) Convention, Australian Securities and Investments Commission (ASIC) Commissioner Danielle Press said that in light of the findings in [Report 632](#) (which highlighted the limits of disclosure), instead of relying on disclosure, ASIC will look to use targeted powers, including the product intervention power more often.
- **Prepare for the imposition of DDOs:** Ms Press also called on industry to read the findings in [Report 632](#) 'and look at what you need to do in your own organisations to monitor consumer outcomes and prepare for DDOs [design and distribution obligations]'.
- **UCT and claims handling legislative reforms:** Ms Press said that ASIC is 'supporting Treasury' with developing the insurance law reforms coming from the Financial Services Royal Commission including in relation to unfair contract terms and issues in claims handling.
- **Claims handling:** Ms Press called on industry to respond to the findings in [Report 621 Roadblocks and roundabouts: A review of car insurance claim investigations](#), by: 1) implementing better standards; 2) improving written communication to consumers; and 3) reviewing how claims are selected for investigation.
- **Industry Codes:** Noting the work being undertaken by industry to strengthen codes, Ms Press 'encouraged' industry to also 'consider whether your code compliance bodies can be strengthened further'.
- **Complaints handling:** Ms Press said that there was room to improve timeframes in handling consumer complaints. She added that ASIC has recently consulted on proposals to update the internal dispute resolution requirements in [Regulatory Guide 165](#) and is considering submissions received.
- **2021 Life Insurance Review** — ASIC will consider recommending that the cap on commissions be reduced further if the 2018 reforms are found not to be effective



In her address to the National Insurance Brokers Association (NIBA) Convention, Australian Securities and Investments Commission (ASIC) Commissioner Danielle Press reiterated ASIC's strategic priorities for the year ahead, and detailed ASIC's work in the insurance and financial advice sectors.

In addition, Ms Press outlined the implications of ASIC's recent findings on the limitations of disclosure a tool to protect consumers — in [REP 632 Disclosure: Why it shouldn't be the default](#) (see: [Governance News 16/10/2019](#)) — for insurers.

## Some Key Points

### Implications of the findings in REP 632 in the insurance context

**ASIC's approach to supervision — ASIC is more likely to use its product intervention power:** Ms Press said that in light of the findings in [Report 632](#) (see: [Governance News 16/10/2019](#)) and more particularly the finding that product disclosure generally speaking, neither enhances consumer decision making nor permits real time comparison of products and services, 'we all need to shift away from an over-reliance on disclosure to protect consumers'. Ms Press reiterated, that instead of relying on disclosure, ASIC will 'look to use targeted powers like the product intervention power more often'.

**The upcoming design and distribution obligations (DDOs) provide an opportunity to prioritise consumer needs:** Ms Press said that the upcoming DDO obligations provide industry with an opportunity to 'design products and services that deliver value (not surprises) and are sold fairly'. Ms Press called on industry to 'read this report [Report 632] and look at what you need to do in your own organisations to monitor consumer outcomes and prepare for DDOs'.

### ASIC's strategic priorities

Ms Press reiterated the seven strategic priorities outlined in [ASIC's Corporate Plan for 2019-2023](#) (see: [Governance News 04/09/2019](#)) and briefly discussed ASIC's work in relation to each. ASIC's priorities are: 1) High deterrence enforcement action; 2) Prioritising the recommendations and referrals from the Royal Commission; 3) Delivering as a conduct regulator for superannuation; 4) Addressing harms in insurance; 5) Improving governance and accountability; 6) Protecting vulnerable consumers; and 7) Addressing poor financial advice outcomes.

### ASIC's work in insurance

**Add-on insurance sold through car dealerships and consumer credit insurance:** Giving the sale of add-on insurance in car dealerships and consumer credit insurance as examples, Ms Press said that 'unfortunately and disappointingly, we have seen very low value products and policies sold to consumers ineligible to claim under them. We have seen mis-selling and unfair practices. Simply, too many poor results for consumers'. She added that ASIC is overseeing 'significant remediation' in the general insurance space eg refunds of over \$130m for the sale of add-on insurance products in the car dealer distribution channel and \$100m in consumer credit insurance (CCI) remediation.

Ms Press outlined the actions ASIC has taken on both issues including: issuing industry guidance on product design and sales practices for CCI; consulting on banning cold calling of CCI and direct life insurance; and consulting on using its product intervention powers to introduce a deferred sales model to apply to sales of add-on insurance products and warranties by caryard intermediaries.

**Unfair contract terms and claims handling:** In addition, Ms Press said that ASIC is 'supporting Treasury' with developing the insurance law reforms coming from the Financial Services Royal Commission including in relation to unfair contract terms and issues in claims handling.

With respect to claims handling, Ms Press said ASIC looks forward 'to enhanced powers...something that we have long advocated for. We consider that claims handling is a key area in the insurance product life cycle where our supervision can help reduce consumer harms'. She added that ASIC has undertaken a number of reviews of claims handling processes, and directed listeners to the most recent: Roadblocks and roundabouts: A review of car insurance claim investigations (REP 621). Ms Press called on industry to respond to the findings in the report by: 1) implementing better standards; 2) improving written communication to consumers; and 3) reviewing how claims are selected for investigation.

### Insurance Codes: Can they be further strengthened?



Acknowledging the work the life and general insurance industries have undertaken to date in reviewing and updating their Codes of Practice, and efforts by industry to strengthen code enforceability, Ms Press said that industry codes 'have a pivotal role to play in restoring consumer trust in the industry'.

Ms Press added that 'Insurers and distributors – including brokers – must work together to ensure standards are consistent and successfully achieve the goal of improving outcomes for consumers. The codes will only be effective in achieving this goal if all parties involved in the insurance industry work together and agree on the need to lift standards. Similarly, they will only be effective if they are not only enforceable, but rigorously enforced'.

Ms Press also 'encouraged' industry to 'consider whether your code compliance bodies can be strengthened further'.

### **Code Compliance: room for improvement**

Referencing the Insurance Brokers Code Compliance Committee report, Ms Press said that it 'indicates room for significant improvement' in the way that brokers who subscribe to the Insurance Brokers Code of Practice manage their timeframes in handling consumer complaints as part of internal dispute resolution processes. Ms Press said that 'ASIC will continue to consider the findings in this report. As you are aware, ASIC has recently consulted on proposals to update the internal dispute resolution requirements in Regulatory Guide 165. Our consultation closed in August and we are currently considering submissions received'.

### **ASIC's work in the financial advice sector**

**2021 Life Insurance Review — ASIC will consider recommending that the cap on commissions be reduced further if the 2018 reforms are found not to be effective:** Ms Press said that when the 2018 Life Insurance Framework reforms were introduced ASIC was tasked with conducting a review into whether the reforms to specify the maximum upfront and ongoing commission amounts have been effective in better aligning the interests of consumers and those providing life insurance advice in 2021.

Ms Press said ASIC will conduct a surveillance to assess the quality of advice provided to consumers, looking at representative and random samples of life insurance advice. In addition, Ms Press said that ASIC has also been collecting aggregate level data from life insurers every six months to assist with the 2021 review. She said that ASIC is in the process of analysing this data.

In undertaking the review, Ms Press said that ASIC will consider the factors identified by the Financial Services Royal Commission and, 'if we think the reforms have not been effective, we will consider recommending to the government that the cap on commissions be reduced further'.

Ms Press added that ASIC will 'continue to take action to protect consumers where financial advisers and insurance brokers are failing to comply with their obligations under the law, including to act in the best interests of their clients'.

### **Conflicted remuneration**

Ms Press said that ASIC 'will continue to support Treasury in implementing the Royal Commission reforms that relate to banning conflicted remuneration'.

### **Ending grandfathered remuneration: ASIC to report by 30 June 2021**

Ms Press said that ASIC is continuing its investigation into industry's moves to voluntarily end grandfathered conflicted remuneration by January 2021, and the extent to which the benefits are being passed on to affected clients before that date. Ms Press reiterated that the investigation involves both quantitative and qualitative reviews to monitor the industry's approach to/progress towards ending grandfathered arrangements.

Ms Press said that the purpose of the qualitative review is to explore why payers of grandfathered remuneration have or have not ended grandfathered arrangements and how rebating arrangements are working in practice. She added that the qualitative review would assist in identifying examples of payers who have ended their grandfathered remuneration arrangements. Ms Press said that ASIC expects to deliver its final report to the Treasurer by 30 June 2021 and will update the Treasurer and industry 'as appropriate' during the review period.

**General insurance and consumer credit insurance commissions:** Ms Press said that ASIC will provide input into, and is considering how best to support the government in undertaking, the planned review (to occur



in three years) into the removal of current exemptions from the ban on conflicted remuneration in line with the government's response to the Financial Services Royal Commission recommendations.

The review, she observed is part of a broader review to assess the effectiveness of current measures in place by government, regulators and financial services entities to improve the quality of advice

Ms Press said that 'of course, a forthcoming review does not and should not prevent the industry from itself reviewing and considering innovative ways to alter its commission structures to reduce conflicts of interest in the meantime'.

**Consumer research into alternate 'general advice' label:** Ms Press said that ASIC is also focused on 'addressing misconduct and consumer harms that may arise from the industry's shift towards "general advice models" including through consumer testing of more appropriate labels and alternative warnings for general advice. Ms Press said that building on the Mind the Gap report (ASIC Report 614) and the Financial advice: What consumers really think report (ASIC report 627) ASIC will commission further research in 2020-21 to explore whether consumers have unmet advice needs.

Ms Press said that this research will examine: 1) the state of the financial advice industry; 2) the demand for and supply of financial advice; and 3) what measures may be required (if any) to reduce any gaps between supply and demand.

**Other financial advice work:** Ms Press said that ASIC is assisting Treasury to implement the other Royal Commission recommendations relating to financial advice for which legislation is expected to be introduced and passed by mid-2020.

*[Source: Speech by ASIC Commissioner Danielle Press at the National Insurance Brokers Association (NIBA) Convention: National Insurance Brokers Association Convention – ASIC Update 15/10/2019]*

## **Robo advice needs to meet the same requirements as advice provided by a human financial adviser: ASIC has announced that an Sydney based AFS licensee has voluntarily shut down two robo advice tools following concerns raised by ASIC**

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The Australian Securities and Investments Commission (ASIC) has announced that Australian financial services (AFS) licensee, Lime FS Pty Ltd (Lime FS), has voluntarily shut down two robo advice tools — digital tools that provide automated financial product advice using algorithms and technology, without the direct involvement of a human adviser — following concerns raised by ASIC.

### **What sort of advice?**

Lime FS' corporate authorised representatives, Plenty Wealth Pty Ltd (Plenty Wealth) and Lime Wealth Pty Ltd (Lime Wealth), are digital advice providers authorised to provide personal financial advice to consumers.

- Plenty Wealth provided advice via an online tool about budgeting analysis, life insurance reviews, tax, investment and superannuation recommendations.
- Lime Wealth provided advice via an online tool about the establishment of self-managed super funds (SMSFs), purchasing property with superannuation, commencing and ceasing pensions, and contributions into superannuation.

### **ASIC's concerns?**

ASIC says that following a review of a sample of advice samples, it raised concerns about: 1) the quality of the advice being generated by the online tools; and 2) Lime FS' ability to monitor the advice.

More particularly, ASIC says that it was concerned that the level of inquires made by the online tools about client objectives, financial situation and needs, were inadequate eg in some instances, the recommendations generated by the tools were (allegedly) in conflict with client goals or with other recommendations also generated by the tools.

ASIC says that consumers concerned about the advice they received have the option to consider: a) lodging a complaint with Lime FS via its internal dispute resolution process; b) notifying a dispute with the Australian Financial Complaints Authority (AFCA); and c) contacting their current financial adviser or obtaining independent legal advice.



**Lime FS' response:** Lime FS decided to voluntarily close down both online tools 'for the foreseeable future' as a result of ASIC's concerns.

**Robo advice must meet the same standards as advice provided by human advisers:** ASIC Commissioner, Danielle Press said, 'the advice provided through these [digital] tools must meet the same legal obligations required of human advisers – the advice must be appropriate to the client and comply with the best interests duty. ASIC expects AFS licensees and financial advisers using or recommending digital advice tools to ensure that they adequately monitor and test the advice for quality and appropriateness'.

ASIC suggested industry refer to [Regulatory Guide 255: Providing digital financial product advice to retail clients \(RG 255\)](#) for guidance on how the organisational competence obligation applies to digital advice licensees and the ways in which digital advice licensees should monitor and test their algorithms.

[Source: ASIC media release 18/10/2019]

## **Standardised reporting on operational outages on the way? The Reserve Bank of Australia Payments System Board annual report identifies system outages as a 'concern', and separately, flags that 'policy issues associated with the growth of BNPL services' will be included in its 2020 review of card payments regulation**

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The Reserve Bank of Australia Payments System Board [Annual Report 2019](#) was submitted to the Treasurer on 17 September. The report outlines, among other things: trends in payments, clearing and settlement systems, as well as strategic priorities for the Reserve Bank's payments work and retail payments regulation and policy issues.

A brief overview of two issues — the uptick in the number of 'outages' disrupting access to banking services and 'policy issues' associated with the growth in the buy now pay later sector —and the proposed actions in response are below.

### **Uptick in systems outages: proposed actions in response**

Among other things, the report flags the uptick in 'operational system outages' as a concern, especially in light of the shift away from cash toward use of electronic payments. 'The operational reliability of retail payment services is becoming more critical to day-to-day economic activity' the report observes.

### ***Software failures are the most common cause of outages***

The report identifies 'software failure' as the most common report cause of outages in 2018. According to the report, both the number of software failures and the average time taken to resolve them rose sharply in the year. The report comments that 'The increasing complexity of IT environments, together with problems stemming from legacy systems, seem to be important factors contributing to rises in the number of operational incidents and the time taken to resolve them'. The report observes that 'ultimately, it is in the interests of financial institutions to ensure their retail payment services are reliable'.

### ***Planned actions in response***

The report also outlines a number of actions to address the issue including the following.

- 1. New disclosure requirements on the way in light of the 'concerning' uptick in 'operational outages'?** The report states, 'the Board has been paying closer attention to the reliability of retail payment systems. It has been concerned about the recent significant increase in the number of operational outages in retail payment services. These outages reduce confidence in the system and can cause great inconvenience to households and businesses. The Bank will be working with the industry and the Australian Prudential Regulation Authority on a standard set of operational performance statistics to be disclosed by individual institutions'.
- 2. New 'operational resilience standards' will be considered (if deemed necessary)?** The report states that 'Following a sharp jump in outages recently, the Bank will be looking to take additional steps to encourage improved operational resilience. To strengthen transparency and market discipline, the Bank will be working with Australian Prudential Regulatory Authority (APRA) and the industry to develop a standardised set of statistics on operational outages in retail payments to be publicly disclosed by individual institutions. The Bank will also be engaging more closely with retail payments providers on



operational risks in retail payments and how these issues are being managed. If operational incidents continue to rise, the Bank could also consider imposing operational resilience standards on operators and participants in retail payment systems, as some other jurisdictions have done'.

**Impact?** iTNews suggests that the planned changes will end 'end decades of banks, payment schemes and telecommunications carriers hiding behind an incoherent jumble of performance statistics generated by each institution that have prevented regulators gaining a cohesive picture and stymied compensation claims'.

### **'Policy issues' associated with Buy Now Pay Later (BNPL) services to be included in 2020 review of card payments regulation**

The report also outlines the rapid growth of the buy now pay later (BNPL) sector, with the report finding that the both the value of BNPL transactions and the number of providers in the BNPL sector have significantly increased since 2016/2017. However, the report notes that:

- consumer uptake is strongest among certain sectors of the population (young people: who may not have a credit card). This observation is based on The Australian Securities and Investment Commission (ASIC) Report 600: Review of buy now pay later arrangements (for a summary see: Governance News 03/12/2019).
- though BNPL services may be attractive to merchants from the perspective of facilitating sales, there are drawbacks including: a) fees paid to BNPL providers are 'typically much higher' than fees paid on other payment methods (eg credit cards and debit cards); and b) BNPL providers' 'no surcharge' rules operate to prevent merchants from levying a surcharge on customers to recover the fees.

### **Planned action in response?**

The report states that the 'The Bank will be considering if there are any policy issues associated with the growth of BNPL services as part of its 2020 review of card payments regulation'.

### **Afterpay's response?**

In a statement responding to media commentary around the RBA report and more particularly the planned review of BNPL services (including 'surcharging practices') Afterpay said it 'is not currently subject to an RBA inquiry or review process. We welcome the opportunity to engage with the RBA as part of its broad based, periodic review of the payments industry next year'.

The statement goes on to say that the Afterpay platform delivers value to merchants and customers that 'extends beyond the payment processing aspects of a transaction' and gives a number of examples including (among others) that the services is free to customers who pay on time and acts as a marketing channel to 'millions of hard to reach core millennial and Gen Z consumers' for merchants.

On the issue of surcharges, the statement says: 'Australia is one of very few OECD countries where surcharging fees are permissible and subject to regulation. Since January 2018, surcharging fees have been banned for retail credit and debit card transactions across all member states of the European Union including the UK. Similar bans apply in a number of states in the US. Notwithstanding legislation which allows merchants to surcharge card transactions in Australia today, very few choose to do so, as it is generally perceived negatively by consumers'.

[Sources: Payments System Board annual report 2019; The SMH 18/10/2019; iTNews 21/10/2019; Business Insider 21/10/2019; Afterpay media release 21/10/2019]

### **APRA has confirmed it will not appeal the IOOF decision, but will consider revising prudential standards and/or seeking law reform to ensure 'member interests are protected to the maximum extent possible'**

The Australian Prudential Regulation Authority (APRA) has announced that it will not appeal the Federal Court decision — *Australian Prudential Regulation Authority v Kelaher 2019 FCA 1521* (see: Governance News 25/09/2019) — to dismiss APRA's court action against IOOF entities, directors and executives.

In a statement, APRA Deputy Chair Helen Rowell said the 'judgment nevertheless raised some issues of wider importance for APRA in its supervision of superannuation trustees'.



**Revision of prudential standards/seeking law reform?** Ms Rowell added that APRA is considering any further action that may need to be taken in relation to the issues in the case, 'such as revising its prudential standards or seeking legislative amendments, to ensure that member interests are protected to the maximum extent possible'.

[Source: APRA media release 17/10/2019]

## **Pushing ahead with new ethical requirements for financial advisers: FASEA has released code of ethics guidance ahead of 1 January commencement date**

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- **New Code will apply from 1 January 2020:** Following consultation, The Financial Adviser Standards and Ethics Authority (FASEA) released a Code of Ethics in February, 2019. FASEA describes the Code as 'the sole, compulsory Code of Ethics that is applicable to the conduct of all advisers who provide financial services to retail clients'. Compliance with the Code which comprises five (5) values and twelve (12) Standards will come into effect on 1 January 2020.
- **Guidance released:** On 18 October, The Financial Adviser Standards and Ethics Authority (FASEA) released a Code of Ethics guide (FG002 Code of Ethics Guidance). FASEA says that the guide, which includes case study examples illustrating when standards may have been breached/complied and giving reasons, is aimed at assisting stakeholders to understand, interpret and apply the Code.

FASEA makes clear however that 'The Code is a living document and subject to change, as required. It is principles-based and is intended to apply to a wide range of situations. All of the formal obligations lie in the language of the Code – not the guidance document which is illustrative rather than conclusive in its guidance. As with all professions, advisers are ultimately responsible for exercising judgement in the application of the Code'.

- **Briefing sessions:** FASEA adds that it will host a series of consultation briefing sessions with a number of educational, professional, consumer and industry stakeholders to provide opportunity for consultation on the practical elements of the Code, and to communicate and explain the integrated nature of the Code.

**Code compliance?** Referencing Treasurer Josh Frydenberg's recent announcement of plans to establish a single disciplinary body to oversee Code compliance (rather than industry body or bodies), The West Australian suggests that in practice, it will mean that it will be 'at least 2021' before the Code will be 'properly' administered.

[Note: The announcement referenced by the West Australian appears to be the announcement made by the Treasurer and Assistant Minister for Superannuation, Financial Services and Financial Technology on 11 October, announcing plans to accelerate the 'establishment of a new disciplinary system and single disciplinary body for financial advisers in line with recommendation 2.10 of the Hayne Commission. For a summary see: Governance News 16/10/2019.]

[Sources: FASEA media release 18/10/2019; FG002 Code of Ethics Guidance; [registration required] The West Australian 19/10/2019]

## **Time for regulators and industry to 'lean into' the challenge of meeting high community expectations: In his opening statement to the CFA Societies Australia Investment Conference, ASIC Chair James Shipton called on industry to put people first**

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In his opening statement to the CFA Societies Australia Investment Conference, entitled New Frontiers in Regulation, Australian Securities and Investments Commission (ASIC) Chair James Shipton spoke about: the concept of 'other people's money' and the need for the financial services industry to focus on people; and about ASIC's strategic priorities with an emphasis on outlining ASIC's 'multi-dimensional and multi-disciplinary approach to regulation'.

**The financial services sector needs to increase its focus on 'the end user — people':** Mr Shipton said that the financial services sector 'needs to ensure it stays true to its ultimate function of serving the economy, and people individually and collectively. In other words, stay true to its societal purpose' as described in Professor John Kay's book Other People's Money. The upshot of this, he explained is that each entity/individual has a role in promoting greater professionalism, as well as an awareness that finance ultimately serves people and communities. This can best be achieved by embedding 'fairness into every corner of the financial system'.



**ASIC's key strategic priorities:** Mr Shipton said that the seven strategic priorities outlined in ASIC's most recent Corporate plan — 1) high deterrence enforcement action; 2) prioritising the recommendations and referrals from the Financial Services Royal Commission; 3) delivering as the primary conduct regulator for superannuation; 4) addressing harms in insurance; 5) improving governance and accountability; 6) protecting vulnerable consumers; and 7) addressing poor financial advice outcomes — are aimed at achieving the regulator's 'vision for a fair, strong and efficient financial system for all Australians'. ASIC's priorities also represent, he said, the most significant ways in which ASIC is addressing consumer harm, punishing wrongdoing, and encouraging better culture and behaviour in the financial system and corporate Australia — including through a greater emphasis on fairness and professionalism.

**'Taking a multi-dimensional and multi-disciplinary approach to our job as a regulator': ASIC is prepared to use the full suite of regulatory tools available:** Mr Shipton said that ASIC's strategy reflects that the regulator needs to use the full suite of its regulatory tools to achieve its stated goals. 'To this end, where we identify problems and harms in the financial sector, we will make the most of our enhanced regulatory toolkit by selecting the tools most appropriate to address the problem' he said.

**Shift away from 'over-reliance on disclosure to protect consumers':** Mr Shipton said that ASIC also recognises the limitations of certain tools eg the need to shift away from over-reliance on disclosure to protect consumers (as highlighted in [ASIC's recent report](#)). He reiterated that ASIC will look to use targeted powers such as the product intervention power 'more often'. Though ASIC has a role to play he added, 'crucially, responsibility also rests with the sector itself who must knowingly recognise that they are not doing justice to consumers by solely relying on disclosure, without asking themselves 'What else can you do to properly inform your customers?'

**'New frontiers' of regulation?** Mr Shipton listed, described and provided a brief update on a number of examples of the programs/tools ASIC is using including: 1) ASIC's enhanced supervisory approach (eg the Close and Continuous Monitoring (CCM) program and the Corporate Governance Taskforce); 2) ASIC's new product intervention power (PIP); 3) preparing to implement Design and Distribution Obligations (DDOs), and 4) advancing ASIC's Regtech initiative.

**Time to 'lean in' to the challenge:** In closing, Mr Shipton said that there are 'high community expectations on not only the entire financial sector right now, but also on the regulators. Ultimately, we all need to lean into this challenge because Australians deserve a fair, strong and efficient financial system'.

*[Source: Opening statement by ASIC Chair, James Shipton, at the CFA Societies Australia Investment Conference 17/10/2019]*

## **'ASIC enforcement and regulatory update': Update from ASIC Commissioner John Price**

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In his keynote address at the Australian Institute of Credit Management (AICM) 2019 National Conference, Australian Securities and Investments Commission (ASIC) Commissioner John Price: 1) outlined government plans to introduce a director identification number (DIN) and to modernise Australian business registers; 2) called on credit managers to actively participate in the external administration of insolvent companies; 3) provided an update on ASIC's review of responsible lending guidance and other 'home lending related work' by ASIC; and 4) briefly spoke about ASIC's priorities as outlined in the latest Corporate Plan.

### **Some Key Points**

- **DIN/Modernisation of business registers:** Mr Price said ASIC strongly supports the 'proposals' to implement a director identification regime and at the same time, to modernise ASIC's business registry systems on the basis that doing so is: a) an opportunity to transition ASIC's business registers to a modern platform; b) a way to deliver wide-ranging benefits to all users of the registry reducing complexity and cost; c) an important tool for government in addressing illegal (phoenixing) conduct.

*[Note: Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019 was part of a package of reforms to modernise Commonwealth registers and to introduce a 'director identification number' (DIN) requirement. The Bill had progressed to second reading in the House of Representatives before it lapsed with the calling of the Federal Election. The Bill has not been reintroduced.]*

- **Active creditor participation:** Mr Price said ASIC encourages active creditor participation in the external administration of insolvent companies on the basis that 'it leads to fairer outcomes for all stakeholders, promotes better behaviour by insolvency practitioners, and builds confidence in the insolvency system'.



He added that though he could understand why creditors of a company that goes into external administration 'may question why, if there is little or no prospect of receiving a dividend, they should commit further resources' there are benefits for creditors in staying involved. He then outlined a number of actions creditors could consider taking including: 1) telling the external administrator about the company's affairs (to assist the liquidator to perform their duties more efficiently and improve the prospects of a dividend being paid); 2) participating in creditor meetings/responding to requests to vote on a proposal without a meeting being convened (to ensure the external administration of a company's affairs does not become 'protracted'); 3) engaging with external administrators' remuneration claims (despite the fact that the reports provided by liquidators are long); and 4) notifying ASIC if reasonable requests for information to the liquidator are not responded to (so ASIC can take appropriate action).

▪ **Responsible lending**

- Mr Price said that 'with better access to information and the development of regtech tools, there is capacity for credit providers to innovate to more efficiently; meet the 'not unsuitable' responsible lending requirement. He said, 'Digital data capture, comprehensive credit reporting and Open Banking provide opportunities for lenders to make lower cost, faster and more accurate lending decisions. Lenders should strive to use these opportunities to provide 'suitable' products that are designed and priced in a way that meets the needs of each consumer'.
- Responsible lending guidance (ASIC's review of RG 209): Mr Price reiterated that ASIC is currently reviewing guidance on the application of the responsible lending rules; Regulatory Guide 209 Credit licensing: Responsible lending conduct (RG 209), to 'provide increased certainty'. Mr Price said that ASIC is 'currently preparing a response to the submissions we received and the information obtained through the public hearings with a view to updating RG 209 by the end of the year.'
- 'Westpac appeal': Mr Byres reiterated that ASIC has filed an appeal with the Full Federal Court against the decision of the Honourable Justice Perram regarding ASIC's allegations against Westpac Banking Corporation (Westpac). Mr Price observed that 'On 13 August 2019, it was found that Westpac had not breached the responsible lending rules, and therefore that a lender may do what it wants in the assessment process. This appears at odds with the view that the National Consumer Credit Protection Act 2009 (Credit Act) imposes specific obligations on credit providers. The Westpac decision therefore creates uncertainty about what is required for a lender to comply with its assessment obligation. Our objective in appealing the Westpac decision is to clarify the application of the law. This is therefore in the interests of consumers and credit providers'.
- Home Lending Consumer Experience: Mr Price said that ASIC recently published findings from research into consumer experiences and expectations when taking out a home loan (Report 628). Mr Price said 'I would encourage you to look to this report to consider what can be done to improve consumer experiences, not only in relation to consumers seeking a home loan, but to better meet the expectations of existing customers.' He added that the findings will be used to 'inform legislative changes to better align the interests of consumers and mortgage brokers'.

- **Legislative change and future work?** Mr Price said that supporting the implementation of the law reform flowing from the Financial Services Royal Commission will form a substantial part of ASIC's future work. The mortgage broker 'best interest' duty and the removal of the point of sale exemption for retail dealers, in addition to the product intervention power and the design and distribution obligations (that will commence in April 2021) will have the most impact for the credit industry, he said. 'We consider these obligations not to be a substitute for responsible lending but a requirement that credit providers have appropriate product governance processes and controls in place to ensure products are designed and distributed with a view to consumers' objectives, financial situations and needs. We expect to provide draft guidance on Design and Distribution Obligations later in the year' he said. In addition he flagged ASIC's plan to conduct financial hardship review, examining how lenders engage with consumers experiencing financial difficulties including whether the assistance lenders offer to consumers is effective in assisting the consumer to recover. He directed his audience to refer to ASIC's 2019-2023 Corporate Plan for further detail.



- **Ultimate responsibility for change lies with industry:** Mr Price said ASIC's four-year Corporate Plan for 2019 to 2023 details ASIC's other strategic priorities/planned actions. Mr Price concluded by reminding his audience that ultimate responsibility for change lies with industry: 'Remember, Commissioner Hayne stated the ultimate responsibility for change in the financial system rests with corporate Australia. What will you do to restore trust, improve consumer outcomes and enhance fairness and professionalism in your industry?'

*[Source: ASIC Commissioner John Price, Keynote address at the Australian Institute of Credit Management (AICM) 2019 National Conference: ASIC regulatory and Enforcement Update 17/10/2019]*

## **'House of brands model' a path for other superannuation funds to follow?**

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Equip Super and Catholic Super have reportedly formally launched their \$26bn joint venture and have reportedly engaged in discussion with other funds that could expand the assets under management.

According to media reports:

- The EPO Licence enables Equip Super to be the trustee of multiple funds (a 'house of brands' model): The funds have consolidated their trustee, administration and investment operations (providing economies of scale and fee savings) but have retained their individual brand identities, control of relationships with members, employers and other stakeholders.
- The merged trustee board will be comprised of seven members from the existing Equip Super board and five from Catholic Super. Members and employers will retain their existing representation of one third each of seats on the board. Scott Cameron was appointed chief executive of both funds in August. More recently, Anna Shelley was confirmed as the inaugural chief investment officer for the two funds.
- Danny Casey, deputy chair of the new entity and former chair of Catholic Super, is quoted as saying that the new structure will deliver benefits to members. 'As trustees we have a firm obligation to act in our members best interests...With the industry being challenged to consolidate further, funds that are seeking to ensure they can deliver sustainable member outcomes are encouraged to be part of this new and innovative approach. We've studied this model and unlocked the potential to join forces and maintain our super fund's heritage. Those who join can retain their distinct identity that attracted members to their fund of choice in the first place' Mr Casey reportedly said.

Media reports have commented that the Australian Prudential Regulation Authority (APRA) has identified increased focus on superannuation member outcomes as a priority and there is increasing pressure on the industry to merge.

[Note: APRA's latest [corporate plan](#) lists among other things, improving outcomes for superannuation members as a key priority. For a summary see: [Governance News 04/09/2019](#). In a recent speech entitled [Driving better member outcomes](#), APRA Chair Wayne Byres reiterated that superannuation fund performance (the delivery of strong member outcomes) is a key focus for the regulator. In the same speech, Mr Byres said that the passage of [Treasury Laws Amendment \(Improving Accountability and Member Outcomes in Superannuation Measures No 1\) Bill 2019](#) and a new prudential standard on member outcomes, which comes into effect from the beginning of next year [SPS 515 Strategic Planning and Member Outcomes](#) and guidance gives APRA a 'critical foundation' to 'do more to hold trustees to account'. Mr Byres also called on funds to lift performance of exit the industry: 'Together, the legislation and standards provide a strong platform for APRA to drive a much more intense focus on member outcomes. It will inevitably produce some difficult discussions with trustees who are not delivering for their members – put very bluntly, are you going to get better or get out?' Mr Byres said. For a summary see: [Governance News 25/09/2019](#).]

*[Sources: [\[registration required\] The Australian 21/10/2019](#); [Financial Standard 21/10/2019](#); [Investment Magazine 21/8/10/2019](#); [Nestegg 21/10/2019](#)]*

## **Treasurer Josh Frydenberg has welcomed the appointment of Tim Read as President of the BCA**

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Treasurer Josh Frydenberg has issued a statement welcoming the announcement from the Business Council of Australia (BCA) of the appointment of Mr Tim Reed as their new President.

Commenting on Mr Reed's appointment, Mr Frydenberg said that 'The industry experience and insight Mr Reed brings to the role will help to ensure the Business Council continues to make a valuable contribution to



the policy debate and the interests of business, with nine out of ten Australian workers employed in the private sector'.

Mr Frydenberg also acknowledged outgoing CBA President Grant King's leadership over the past three years. He said that 'Mr King guided the BCA and its members through complex public policy debate and made a significant contribution. His vision took the BCA out of boardrooms and into regional Australia to work with regional communities and businesses to provide opportunities for jobs and investment'.

The statement goes on to say that the government 'looks forward to the BCA's ongoing contribution to policy debate under the leadership of both Mr Reed and CEO, Jennifer Westacott. We will continue to work with the business community to ensure businesses can stay competitive, keep investing and create more jobs so that all Australians have the opportunity to get ahead'.

*[Source: Treasurer Josh Frydenberg media release 18/10/2019]*

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### **In Brief | ANZ has provided an update on the potential implications of APRA's proposed changes to the capital treatment by Australian ADIs of their investments in banking and insurance subsidiaries**

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**Context:** On 15 October, the Australian Prudential Regulation Authority (APRA) released for a discussion paper for consultation, setting out its proposed revisions to Prudential Standard APS 111. APRA says that the revisions 'aim to ensure Australian deposit holders continue to be protected when the major banks hold significant investments in subsidiaries'. Submissions are due by 31 January.

[Note: For a summary of APRA's proposed changes see: Governance News 16/10/2019]

*[Source: ANZ media release 15/10/2019]*

**In Brief | No decision until November? In August, ASIC consulted on a proposed ban on the sale of binary options to retail clients, and on plans to impose restrictions on the sale of CFDs. Reportedly, due to the high volume of submissions received, and the concerns raised in them, the regulator is not expected to make a decision until early November (which is reportedly later than ASIC's original plan)**

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[Note: For a summary of the Australian Securities and Investments Commission's (ASIC's) proposed actions see: Governance News 28/08/2019]

*[Source: [registration required] The Australian 21/10/2019]*

**In Brief | The AFR reports that QBE has withdrawn its membership of the Business Council of Australia. Reportedly, QBE said that its position is 'not a response to any one policy issue'. The AFR comments that QBE's decision follows the withdrawal of Medibank Private and IAG from the BCA and comes as NAB and ANZ face ACCR shareholder resolutions calling on them to follow suit, due to the BCA's climate stance**

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*[Source: [registration required] The AFR 21/10/2019]*

## Accounting and Audit

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**United Kingdom | The UK FRC says that the accounting profession needs to lead by example on diversity**

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In a statement issued ahead of the release of a report: Key Facts and Trends in the Accountancy Profession report, the UK Financial Reporting Council (FRC) called on the accounting profession to take steps to catch up on business when it comes to the diversity of senior management.

The FRC says that the research has revealed one in three UK audit and accountancy firms do not even collect diversity data for their workforce.

Despite acting as advisers on diversity, women and ethnic minority groups, the FRC comments, women and ethnic minorities remain under-represented at top levels of management. For example, the report found that



while women make up 46% of manager level roles at audit and accountancy firms, just 17% of women rise to partner level roles.

**The FRC is 'challenging firms to take rapid action to address this gap and report on their progress'.** For example, the FRC suggests one step would be for firms to sign up to the Government's Equalities Office pledge which challenges business leaders to take personal responsibility for promoting better diversity and inclusion in their own workplaces.

**Business case for diversity is established:** The FRC's CEO Sir Jon Thompson said: 'The business case for improved diversity has been made and now it's time for the audit and accountancy profession to take further positive action. While it is encouraging to see more firms implementing diversity and inclusion strategies and more women, ethnic minority groups and disabled people being appointed to middle management roles, more needs to be done to ensure the firms are not limiting access to the most senior roles.'

*[Source: FRC media release 21/10/2019]*

**In Brief | Amendment to FRC Bulletins: The FRC issued a revised standard for the audit of Going Concern – ISA (UK) 570. As a result Bulletin 2008/10 Audit issues when financial market conditions are difficult and credit facilities may be restricted and Bulletin 2008/10 Going Concern Issues During the Current Economic Conditions are being withdrawn with immediate effect**

*[Sources: FRC media release 18/10/2019]*

## Risk Management

### OAIC is consulting on draft privacy guidelines for the Consumer Data Right

The Office of the Australian Information Commissioner (OAIC) will regulate and enforce the privacy aspects of the Consumer Data Right scheme and has released [draft privacy safeguard guidelines](#) ahead of the roll out of the Consumer Data Right (CDR) in February, for consultation.

OAIC says that the draft Guidelines are intended to assist industry to understand their obligations and to ensure that consumers can transfer their data with their consent, safely and securely.

The guidelines are primarily aimed at organisations who will be handling CDR data.

**Timing:** The closing date for comments is Wednesday 20 November 2019.

*[Source: OAIC media release 16/10/2019; Draft Privacy Safeguard Guidelines]*

### New AML Bill introduced: Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Bill 2019

#### Key Takeouts

- In his second reading speech, Mr Chester said that the Bill 'is the next phase of the government's reforms to bolster our anti-money-laundering and counter-terrorism financing, or AML/CTF, regime, to prevent criminals from enjoying the profits of their illegal activities, and to stop funds falling into the hands of terrorists. This regime is centred on hardening the financial sector against these threats'. He added that the Bill will also improve Australia's compliance with the international standards for combating money laundering and terrorism financing set by the Financial Action Task Force.
- Proposed changes include: 1) changes to customer due diligence requirements; 2) amendments to correspondent banking obligations; 3) reform of cross-border reporting requirements; 4) increases in the penalties for failing to comply with cross-border declaration requirements; 5) changes to 'modernise' secrecy and access provisions in the AML/CTF Act to establish a framework for the access, disclosure and use of financial information held by AUSTRAC

A new Bill — Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Bill 2019 — was introduced into the House of Representatives on 17 October.



## Some Key Points

The Bill proposes to implement a range of measures intended to strengthen Australia's capabilities to 'address money laundering and terrorism financing risks, and generate regulatory efficiencies'. Changes include the following.

- expand the circumstances in which reporting entities may rely on customer identification and verification procedures undertaken by a third party
- explicitly prohibit reporting entities from providing a designated service if customer identification procedures cannot be performed
- strengthen protections on correspondent banking by: a) prohibiting financial institutions from entering into a correspondent banking relationship with another financial institution that permits its accounts to be used by a shell bank, and b) requiring banks to conduct due diligence assessments before entering, and during, all correspondent banking relationships
- expand exceptions to the prohibition on tipping off to permit reporting entities to share suspicious matter reports (SMRs) and related information with external auditors, and foreign members of corporate and designated business groups
- provide a simplified and flexible framework for the use and disclosure of financial intelligence to better support combatting money laundering, terrorism financing and other serious crimes
- create a single reporting requirement for the cross-border movement of monetary instruments
- address barriers to the successful prosecution of money laundering offences by: a) clarifying that the existence of one Commonwealth constitutional connector is sufficient to establish an instrument of crime offence, and b) deeming money or property provided by undercover law enforcement as part of a controlled operation to be the proceeds of crime for the purposes of prosecution
- make it an offence for a person to dishonestly represent that a police award has been conferred on them. The introduction of this offence will preserve the significant honour associated with receiving a police award

According to the explanatory memorandum, by providing reporting entities with further options to rely on customer due diligence (CDD) procedures undertaken by a third party, the time involved in identifying each customer is expected to be reduced by 66% and the cost of verifying each customer by 80%. This is expected to deliver significantly reduced compliance costs and an estimated regulatory saving of \$3,107,229,243 over ten years.

*[Sources: Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Bill 2019; Explanatory memorandum; Minister's second reading speech]*

## **In Brief | Treasury Laws Amendment (2019 Measures No 2) Bill 2019 passed both Houses on 17 October**

*[Sources: Treasury Laws Amendment (2019 Measures No. 2) Bill 2019]*