Governance News

18 September 2019

Mark Standen
Partner
Email Mark

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

Siobhan Doherty
Partner
Email Siobhan

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

Kate Hilder
Consultant
Email Kate

T +61 2 9921 8785 |

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

Contents

Boards and Directors

What's the right level of tension/challenge in the boardroom? Four high profile board members outlined their views in The AFR

The AFR has released an article reporting the views of four high profile Chairs/directors on the issue of the appropriate level of tension/debate in the boardroom for optimal decision making.

[Note: In his recent speech to the Governance Institute National Conference, UK Financial Reporting Council (FRC) Chair Sir Win Bischoff spoke on the topic of respect, trust and challenge (which was also the title of the conference). Among other things, Sir Win emphasised the importance of challenge in the boardroom, suggesting that boardrooms should not be too 'comfortable' and that a healthy amount of tension is productive. 'Without respect, you cannot achieve trust. To achieve that, boards must be held to account to challenge senior management and the decisions they make for long-term viability of their company. For this challenge to work, it has to be realised that culture is an important factor of business success'. For a summary of Sir Win's speech see: Governance News 11/09/2019]

- **Chair of Newcrest Mining, Peter Hay**: The AFR reports that Mr Hay sees lack of rigorous debate as worrying. 'I'm quite disappointed if there's no spirited discussion on where the company should be headed or whether we have the right people or culture in place…To me, questioning and debating is a very important part of the board operation' Mr Hay is quoted as saying. Mr Hay reportedly also observed that where there where robust debate has failed to achieve an outcome where everyone feels comfortable with the decision then directors have the option to resign. 'You've got to have a mindset that you're only there for as long as you're being useful and for as long as you're comfortable with the decision-making process of the company' he is quoted as saying.

- **Non-executive director of Woolworths and Australia Post, and a former director of AMP, Holly Kramer**: Ms Kramer is reported as saying 'Groupthink is quite dangerous, as is the desire for board harmony at the expense of vigorous debate…The best boardroom cultures, in my opinion, are those where the dissenting view is welcomed by others, and where board members feel that their contribution is valued, regardless of whether their point of view ultimately prevails'. Noting that in some organisations boards making major decisions appoint a director to act as 'devil's advocate' to challenge fellow board members, Ms Kramer reportedly commented that 'I've seen that make a difference to the way that management has thought about a proposal'. Ms Kramer reportedly also expressed the view that fostering the appropriate amount of productive debate is the responsibility of the Chair. 'A good chair recruits board members who bring diversity – intuitive versus analytical thinkers, risk-takers versus the risk-averse – then works hard to ensure that all views are brought to the table. One of my chairs always reminds us that it's our obligation to dissent if we have a differing perspective. This can be hard to do, as most people prefer agreement to disagreement, but it ultimately delivers the best outcomes' Ms Kramer reportedly said.

- **Chair of Campus Living Villages and The Wheeler Centre, Susan Oliver:** The AFR reports that Ms Oliver drew a distinction between productive debate and the resulting 'tension' and 'unnecessary niggling and one-upmanship'. 'The tension that's the best is the one where you're contesting a view or information that's important to the future and wellbeing of the company. That's a healthy tension, and that's what directors are there to do' Ms Oliver reportedly said.

- **Chair of Ansell, Glenn Barnes**: Reportedly, Mr Barnes suggests though the boardroom is a forum for debate, he finds it productive to take 'controversial issues outside the boardroom' to facilitate speedier decision making during meetings. For example he reportedly uses letters between the CEO and the board, a week ahead of the AGM, to assist in highlighting issues before they come into the boardroom. A dinner with board members ahead of meetings provides a forum for directors to 'put on the table what issues are concerning them and any questions that they think require answering' he is quoted as saying. Mr Barnes reportedly says that this means that 'uncomfortable issues are not aired in front of the broader management group in the boardroom but handled openly and directly between the directors and the CEO. The broader boardroom discussion can then be orchestrated appropriately' he is quoted as saying.

[Source: [registration required] The AFR 04/09/2019]

Diversity

More than 20% of Russell 3000 board members are women for the first time according to Equilar's latest Gender Diversity Index

Snapshot | Equilar Gender Diversity Index Q2 2019

Key Takeout : The percentage of women on Russell 3000 boards increased from 19.3% to 20.2% in Q2 2019. This is the first time that more than 20% of Russell 3000 board members are women.

Equilar has released its quarterly gender diversity index for Q2 2019. The index tracks progress on gender representation on corporate boards in the Russell 3000 index.

Some Key Findings

- The percentage of women on Russell 3000 boards increased from 19.3% to 20.2% in Q2 2019. This is the first time that more than 20% of Russell 3000 board members are women.
- The percentage of new female Russell 3000 directors fell to 41.9% in Q2 2019 (from 46.8% in Q1 2019)
- 309 Russell 3000 boards have zero women (down from 350 boards in Q1 2019). This means that 11.7% of the 350 companies without a female director in Q1 2019 have added a director.
- 48 Russell 3000 boards have achieved gender parity. 2811 have not reached gender parity.

Equilar said that cracking 20% female board representation is a 'milestone' and a 'testament to the many efforts of stakeholders in the governance and corporate communities to drive more action on diversity in corporate boardrooms from the large-cap to the small/micro-cap companies' in the 2.5 years since the release of the first Gender Diversity Index.

'The momentum shift is profound. The new data show sustained progress on one of the most visible board diversity issues of the past decade. The governance and corporate community will need to tackle next how to broaden the scope of diversity to see meaningful progress for other underrepresented groups' Equilar said.

[Sources: Equilar media release 11/09/2019; Equilar Q2 2019 Gender Diversity Index 11/09/2019; [registration required] The WSJ 11/09/2019]

In Brief | Tougher on board gender diversity? AustralianSuper has reportedly cautioned 52 ASX listed companies that it will vote against the most senior director up for reappointment if the board has fewer than two women

[Source: The SMH 14/09/2019]

Remuneration

'Entitlement or reward'? Most ASX200 CEOs received their bonuses last year, despite declining trust levels in business according to the latest ACSI ASX 200 CEO pay survey

Report Overview | ACSI research paper: CEO Pay in ASX200 Companies

Key Takeouts

- **Overall, the survey found that it is 'very rare' for ASX100 CEOs not to receive their annual bonuses/short term incentives** with over half of ASX100 CEOs receiving at least 70% of their maximum entitlement in 2018. ACSI says this calls into question whether bonuses are an entitlement or a reward.

- **Lends weight to APRA's stance?** ACSI comments that the survey findings both lend weight to the Australian Prudential Regulation Authority's (APRA's) recent observation that, 'there has been an absence of significant downwards adjustment to remuneration at executive level' and underlines that these issues extend well beyond the financial services sector.

- **Ten CEOs realised more than $10m at ASX200 companies in FY18.** However, the Australian comments that for the second time in the history of the report (and for the second consecutive year) the CEOs of the big four banks are not among this group.

- **The AFR suggests that this result could be viewed as good news for investors.** 'No doubt there is a question as to whether anyone ever deserves more than $10 million a year. But in these cases at least, executives were rewarded for producing returns about seven times better than the market' the AFR comments.

- **'Promising signs'?** ACSI welcomed the trend in some 'leading companies' towards lowering base pay for incoming CEOs, reducing their cash pay by deferring a portion of awards into equity that is delivered over time, and implementing malus or clawback provisions to deal with situations where poor performance and behaviours emerge after rewards have been delivered.

The Australian Council of Superannuation Investors (ACSI) has released its 18th annual survey of ASX200 CEO pay. The report includes pay data for 81 ASX100 CEOs and 77 ASX101-200 CEOs for the 2018 financial year (FY18).

Overall, the survey found that it is 'very rare' for ASX100 CEOs not to receive their annual bonuses/short term incentives with over half of ASX100 CEOs receiving at least 70% of their maximum entitlement in 2018. ACSI says this calls into question whether bonuses are an entitlement or a reward.

Culture of entitlement?

'The way bonuses are being handed out suggests there is a culture of entitlement whereby supposedly 'at risk' pay is not very risky at all,' ACSI chief executive Louise Davidson said. ' These payments occurred in a year when the Royal Commission was in full swing, revealing evidence that executives were not being held accountable for poor conduct, and in the wake of soaring 'first strike' votes against remuneration reports. Clearly, corporate Australia is not getting the message that bonus payments should be variable and awarded for stretch performance, rather than being fixed pay under another name. This is a failure of both discipline and leadership.'

[Note: ACSI's previous survey flagged a similar trend ie that bonuses 'resemble variable fixed pay'. For a summary see: Governance News 23/07/2019]

Lack of downward pressure on executive remuneration extends beyond the financial services sector?

ACSI says that the findings lend weight to the Australian Prudential Regulation Authority's recent observation in a discussion paper accompanying proposed new (and more prescriptive) proposed prudential guidance, that 'there has been an absence of significant downwards adjustment to remuneration at executive level'.

[Note: The Australian Prudential Regulation Authority (APRA) recently released a discussion paper and new draft Prudential Standard (CPS 511) proposing stronger and more prescriptive prudential requirements for remuneration across all APRA-regulated entities in the banking, insurance and superannuation sectors. Submissions close on 23 October 2019. APRA intends to release the final prudential standard (CPS 511) before the end of 2019, with a view to it taking effect in 2021 following transitional arrangements. For a summary see: Governance News 24/07/2019.]

In addition, ACSI says that the findings highlight the fact that the issues extend beyond the financial services sector.

Some Key Findings

- **One eligible ASX100 CEO did not receive their FY18 bonus** which ACSI comments is 'a record low'. By contrast, in FY17, there were six ASX100 CEOs in this category.

- **The median ASX100 CEO received 70% of their maximum annual bonus**. ACSI comments that this figure has been virtually static for the past four years. Only 7% of ASX100 CEOs received less than 30% of maximum.

- **The median bonus awarded to an ASX100 CEO in FY18 was $1.61m** (down 9% on FY17). This is the second highest in the history of the report.

- **Ten CEOs realised more than $10m at ASX200 companies in FY18**. However, the Australian comments that for the second time in the history of the report, and the second consecutive year, the CEOs of the big four banks are not among this group.

- **Average realised pay dropped to $5.66m from $6.23m.** ACSI attributes this to the departure of several highly paid CEOs and the fact that only two CEOs realised more than $20m in FY18 (Qantas's Alan Joyce and Macquarie's Nicholas Moore (three were above $20m in FY17, with Domino's Don Meij above $35m)).

- **Minimal fixed pay increases for ASX100 CEOs continued the trend of recent years**. Median fixed pay for an ASX100 CEO increased 1% (to $1.79m) in FY18, having increased by an average of 0.2% per annum over the prior decade.

- **Average fixed pay for an ASX100 CEO fell 1.3%** from $1.91m to $1.88m, largely due to Westfield Corporation's co-CEOs no longer being included in the sample following the group's acquisition in 2018. Average ASX100 CEO fixed pay has fallen 0.3% per annum on average since FY08.

- **Among the ASX101-200 CEO cohort, the average and the median fixed pay both fell** – the median declined almost 2% to $937,740 and the average fell 1.5% to $1.03m. The FY18 median was still the second highest recorded in the eight years the survey has included the ASX101-200.

- **Exiting CEOs in the ASX200 'cost shareholders' $25.15m in FY18, down from $33.63m in FY17.** This was largely due to a decline in the number of termination payments from 20 to 15. Only eight termination payments topped $1m in FY18, down from 13 in FY17. There were five payments above $2m with no CEO other than Adelaide Brighton CEO Martin Brydon receiving more than $3m.

Shareholders expect at risk payments to be at risk

Commenting on the report, Australian Shareholders' Association policy director Fiona Balzer said that CEOs should not be paid bonuses 'if the target is a budgeted expectation...We want to see CEOs having skin in the game so that after three years they should have one year's fixed remuneration in shares. There is no reason why a CEO should get a bonus, unless they do something to really shoot the lights out'.

Good news for investors?

Commenting on the report findings, and more particularly on the fact that ten CEOs earned over $10 million in FY18, the AFR suggests that the result could be viewed as good news for investors. 'No doubt there is a question as to whether anyone ever deserves more than $10 million a year. But in these cases at least, executives were rewarded for producing returns about seven times better than the market' the AFR comments.

The AFR goes on to suggest that nevertheless the ongoing issue of boards treating bonuses as an entitlement rather than a reward for great performance remains a problem. 'Investors and regulators are rightly keen that the "every child gets a prize" mentality is replaced by a far more critical approach. And as much as directors seem to hate the idea, this critical approach will sometimes mean a confrontation between board and executive' the AFR states.

[Sources: ACSI media release 17/09/2019; ACSI research paper: CEO Pay in ASX 200 Companies; [registration required] The AFR 17/09/2019; 17/09/2019; [registration required] The Australian 17/09/2019; 17/09/2019; 17/09/2019; The SMH 17/09/2019; The New Daily 17/09/2019]

In Brief | Adjustments to CEO pay at BHP? The Australian reports that BHP CEO Andrew Mackenzie's total pay fell 24.2% to $US3.53m in FY19, down from $US4.66m the previous year. Reportedly the reduction was made as a result of the group's safety performance (and in particular, a fatality at QLD's Saraji coal mine in December). 'From a performance perspective, while shareholders have benefited during FY2019 from positive share price growth and significant shareholder returns, the year was a challenging one operationally for BHP, and the remuneration outcomes for FY2019 for our senior executives reflect this' the Australian quotes BHP as saying. The Australian adds that Mr Mackenzie's annual base pay rate was left unchanged at $US1.7m — the same as it was when he was appointed in 2013

[Source: [registration required] The Australian 18/09/2019]

In Brief | The FT reports 900 equity partners, who share in PwC UK's profits, will receive an average £765,000 for the year to June 2019 — a 7% pay increase on last year. Reportedly this is the biggest pay increase in since 2009, when partners earned a record £777,000. The FT observes that the increase has occurred despite a growing regulatory backlash against the accounting group and a warning that profit growth at the Big Four firm would stall next year

[Source: [registration required] The FT 17/09/2019]

Institutional Shareholders and Stewardship

Key findings from the ISS 2019 Benchmarking Policy Survey

Report Overview | ISS report, 2019 Global Policy Survey: Summary of Results September 2019

Institutional Shareholder Services Inc (ISS) has released the results of its annual global benchmark policy survey. The survey is part of ISS' annual benchmark policy development process.

Questions covered a broad range of topics, including (among others) questions on: a) the global perspective on board gender diversity; b) director overboarding; c) director accountability relating to climate change risk; d) (in the US) the combined chairman and CEO roles and the sun-setting of multi-class capital structures; and e) (in Europe) the discharge of directors and board responsiveness to low support for remuneration proposals.

Next steps? Draft policy updates will be released for public comment (prior to finalisation) in the second half of October. Final policies applicable to shareholder meetings occurring on or after 1 February 2020 will be released in mid-November.

Some Key Points

Board Gender Diversity (Global) — strong support for gender-diverse boards

Globally the majority of investors (61%) and non-investors (55%) agree that board gender diversity is an 'essential attribute' of effective board governance regardless of the company or its market.

Of those who did not agree with this view, investors tended to favour a market-by-market approach and non-investors tended to favour an analysis conducted at the company level.

Director Overboarding (Global) — opinion is divided

Globally, investors and non-investors had different views on the question of director 'overboarding' — the question of how many boards is too many for an individual director.

- According to ISS 42% of investor respondents selected four public-company boards as the appropriate maximum limit for non-executive directors. 45% also responded that two total board seats is an appropriate maximum limit for CEOs (ie the CEO's 'home' board plus one other).

- 39% of non-investors were of the view that a general board seat limit should not be applied to non-executive directors, and 36% believed that a general board seat limit should not be applied to CEOs. These groups were of the view that each board should consider what is appropriate and act accordingly.

Climate Change Risk Oversight (Global)

60% of investor respondents were of the view that all companies should be assessing and disclosing climate-related risks and taking actions to mitigate them where possible (as compared with 21% of non-investors). 35% of investor respondents were 'maybes' (as compared with 68% of non-investors). Only 5% of investors indicated that the possible risks related to climate change are often too uncertain to incorporate into a company-specific risk assessment model (as compared with 11% of non-investors).

Combined CEO/Chair (US)

Investor respondents nominated: poor responsiveness to shareholder concerns, followed by governance practices that weaken/reduce board accountability to shareholders (eg classified board, plurality vote standard, lack of ability to call special meetings and lack of a proxy access right) as the most commonly chosen factors that strongly suggested the need for an independent board chair.

Mitigating Factors for Companies with Zero Women on Boards (US)

ISS' US Benchmark Voting Policy for 2020 is to generally vote against/withhold from the chair of the nominating committee (or other directors on a case-by-case basis) at companies when there are no women on the company's board, but with some mitigating factors that may be taken into account.

ISS sought feedback on whether it should consider other mitigating factors, beyond a firm commitment to appoint a woman in the near-term and having recently had a woman director on the board, when assessing such companies. ISS found that investor respondents were less likely than non-investor respondents to say that other mitigating factors (such as adopting an inclusive Rooney Rule-style procedure for candidate searches or maintaining an active recruitment process despite the absence of a boardroom vacancy) should be considered and may be sufficient to avoid a negative recommendation on directors.

Approval of Discharge of Directors (Europe)

ISS said there was strong support from both investors (68%) and non-investors (79%) for ISS maintaining its current approach with respect to voting to approve the discharge of directors in Europe (proposals seen in some but not all European markets). ISS' approach is to recommend against discharge resolutions only in exceptional cases.

Combined CEO/Chair (US)

Investor respondents cited poor company responsiveness to shareholder concerns as the most commonly chosen factor that strongly suggested the need for an independent board chair. This was followed by governance practices that weaken or reduce board accountability to shareholders (such as a classified board, plurality vote standard, lack of ability to call special meetings and lack of a proxy access right). For non-investors, the most commonly chosen factor was a poorly-defined lead director role, followed by poor company responsiveness to shareholder concerns.

About the survey

The report is based on 396 responses (128 institutional investor representatives and 227 corporate executives, the remaining 41 responses were from corporate directors, corporate consultants, academics, trade associations, and other non-investor entities).

Geographically, 234 respondents to the online survey represented US-based organisations, 86 respondents were based in Continental Europe or the UK and 29 respondents were based in Canada. 20 respondents were from organisations based in Asia.

[Sources: ISS media release 11/09/2019; ISS 2019 Global Policy Survey: Summary of results 11/09/2019]

Disclosure and Reporting

ASIC is reportedly pushing for global regulators to step up their scrutiny of potentially misleading cross border information flows

The AFR reports that the Australian Securities and Investments Commission is pushing for global regulators (under the auspices of the International Organisation of Securities Organisations) to step up their scrutiny of cross border information flows.

Reportedly, ASIC Chair James Shipton is concerned about the quality of information being disseminated in the Australian market by organisations not domiciled or licenced to operate in Australia, which has potential mislead/misinform investors.

The AFR comments that Mr Shipton has previously had involvement in the issue during his time working as executive director and commission member of the Securities and Futures Commission of Hong Kong from 2013 to 2016.

[Source: [registration required] The AFR 12/09/2019]

Regulators

Top Story | Consultation on draft legislation to further strengthen ASIC's enforcement and supervision powers

Key Takeouts

- The ASIC Enforcement Review Taskforce Report made a number of recommendations relating to Search Warrants, Access to Telecommunications Intercept Material, Licensing and Banning Orders. On 16 April 2018 the government agreed to implement the Taskforce's recommendations.
- On 11 September, the government released five draft Bills for consultation: 1) Financial Regulator Reform (No 1) Bill 2019: Access to telecommunications; 2) Financial Regulator Reform (No 1) Bill 2019: Banning orders; 3) Financial Regulator Reform (No 1) Bill 2019: ASIC search warrant powers; 4) Financial Regulator Reform (No 1) Bill 2019: (Licensing); and 5) Financial Regulator Reform (No 1) Bill 2019: (Penalties). The deadline for submissions on all five draft Bills is 9 October.
- Treasurer Josh Frydenberg said that the exposure draft legislation is intended to strengthen Australian Securities and Investments Commission's (ASIC's) enforcement and supervision powers, in line with the government's response to certain recommendations made by the ASIC Enforcement Review Taskforce.

On 11 September, the government released five draft Bills for consultation. Announcing the consultation, Treasurer Josh Frydenberg said that the exposure draft legislation is intended to strengthen Australian Securities and Investments Commission's (ASIC's) enforcement and supervision powers, in line with the government's response to certain recommendations made by the ASIC Enforcement Review Taskforce.

[Note: The ASIC Enforcement Taskforce Review report can be accessed here. The government's response to the Taskforce Recommendations is here. For a summary of the government's response see: Governance News 23/04/2018]

A high level overview of each of the five draft Bills is below.

Strengthen ASIC's powers to enforce the Australian Financial Services (AFS) and Australian Credit Licence (ACL) licensing regimes

Fit and proper person requirement (alignment of the AFS and ACL licensing regimes): Draft Bill — Financial regulator reform (No 1) Bill 2019 (Licensing) — proposes to amend the Corporations Act 2001 (Corporations Act) and the National Consumer Credit Protection Act 2009 (NCCP Act) to strengthen ASIC's licensing powers by increasing the standards required of an Australian Financial Services (AFS) Licence holder, at both the time of application and on an ongoing basis.

The proposed amendments update the requirements for obtaining an AFS licence by replacing the requirement that a person be of 'good fame and character' with the requirement that they be a 'fit and proper person' to provide the financial service covered by the licence.

The amendments also make a number of changes to the AFS licence and credit licence regimes to ensure broader application of the respective fit and proper person tests to all officers, partners and trustees of an applicant, and to extend the test to their controllers.

It's also proposed that the 'fit and proper person' requirements be satisfied on an ongoing basis.

Align the penalties for false and misleading statements in AFS and Credit Licence applications: A second Bill — Financial Regulator Reform (No 1) Bill 2019: Penalties — proposes to amend the Corporations Act and the NCCP Act to align the penalties for making false or misleading statements in documents provided to ASIC in Australian Financial Services (AFS licence) and Australian Credit Licence (ACL) applications.

The two draft Bills propose to implement the government's response to the recommendations in Chapter 5 of the ASIC Enforcement Review Taskforce Report (the ASIC Enforcement Review) to strengthen ASIC's powers to enforce the licensing regimes and ensure integrity on licence applications and the ongoing obligations of licensees.

Enable ASIC to receive and use 'interception information' (eg phone taps) for its own investigations and prosecutions of serious offences

Though ASIC is currently able to access and use stored communications and telecommunications data (eg the content of historical communications such as SMS or email held by the carrier including the underlying details (or metadata) of communications such as subscriber details, call time or call location), it cannot presently access information about interception warrants or lawfully intercepted information (ie information obtained by listening to or recording content passing over a telecommunications service eg real-time listening of telephone calls) when available from the police, the Australian Security Intelligence Organisation (ASIO) and anti-corruption bodies (interception agencies).

Chapter 3 of the ASIC Enforcement Review Taskforce Report recommended that ASIC should be able to receive telecommunications intercept material to investigate and prosecute serious offences.

The draft Bill — Financial Regulation Reform (No 1) Bill 2019: Access to Telecommunications Interception Information — proposes to amend the Telecommunications (Interception and Access) Act 1979 to allow ASIC to receive and use lawfully intercepted information its own investigations and prosecutions of serious offences.

The amendments also allow an ASIC staff member to provide the received information to another person where the information relates to a serious offence that ASIC can investigate or prosecute.

'Harmonise and enhance' ASIC's search warrant powers

ASIC currently has a range of search warrant powers contained in the ASIC Act, The NCCP Act, the Retirement Savings Accounts Act 1997 and the Superannuation Industry (Supervision) Act 1993 (SIS Act). ASIC may also apply to a magistrate for a search warrant under the Crimes Act 1914 for execution by the Australian Federal Police and/or state police.

The draft explanatory material explains that the draft Bill — Financial Regulator Reform (No 1) Bill 2019: ASIC Search Warrant Powers — proposes to strengthen ASIC's ability to carry out its enforcement functions by 'modernising and harmonising' ASIC-specific search warrant powers in various acts to 'eliminate inconsistencies and deficiencies' that exist between the various powers.

Schedule 1 to the draft Bill proposes to align ASIC's search warrant powers across various Acts, and align them with the search warrant powers in the Crimes Act 1914 (modified 'as necessary'). Under the proposed changes, ASIC would be able to apply for a search warrant where the contravention would be an indictable offence and to search for and seize evidential material.

Schedule 1 to the Bill also makes amendments to ASIC's search warrant powers to 'modernise and make the powers more useful, recognising the integral part technology plays in the storage and communication of information'. For example, the proposed changes would give ASIC the ability to: take photographs and make video recordings of the search; operate electronic equipment on the premises to access data; move devices to another place for processing to determine if the devices contain evidential material; and operate seized devices to access data.

Extend ASIC's banning powers

Currently ASIC is able to ban a person from providing a financial services or engaging in credit activities but is not authorised to ban a person from controlling or managing a financial services or credit business. In addition, ASIC can only make banning orders where there has been poor conduct in the provision of financial services or engagement in credit activities. In consequence, existing provisions do not necessarily authorise ASIC to ban a director or senior manager of a financial services or credit business who is demonstrated to be unfit to fulfil their role or has a culture of non-compliance with financial services.

In line with recommendations 30 and 31 of the Taskforce Recommendations, the draft Bill — Financial Regulation Reform (No 1) Bill 2019: Banning Orders — proposes to modify the existing provisions for banning orders in Division 8 of Part 7.6 of the Corporations Act (for the financial services) and the equivalent provisions in Part 2-4 of the Credit Act (for credit activities) to extend ASIC's powers to ban a person from performing functions in a financial services or credit business.

More particularly, under the proposed changes ASIC would be able to make a banning order against a person under the Corporations Act in certain circumstances, including where ASIC has reason to believe that the person is 'not a fit and proper person', or is 'not adequately trained or is not competent' to do any of the following: a) provide financial services; b) perform functions as an officer of an entity that carries on a financial services business; c) control an entity that carries on a financial services business.

In addition, it's proposed that ASIC be able to make a banning order against a person that: a) is insolvent under administration or a Chapter 5 body corporate; b) has, at least twice, been an officer of more than one corporation that was unable to pay its debts; c) has, at least twice, been linked to a refusal or failure to give effect to an AFCA determination; or d) has an officer who ASIC has made, or could make, one or more banning orders against.

According to the draft explanatory materials, the proposed changes are intended to ensure that ASIC is appropriately empowered to remove individuals from continued involvement in the financial sector, particularly those in senior positions of control and influence.

Timeline: Consultation on the all five of the draft Bills closes on 9 October 2019.

[Sources: Treasurer Josh Frydenberg media release 11/09/2019; Treasury media release 11/09/2019; Access to telecommunications interception information Exposure draft; Access to telecommunications interception information Explanatory materials; Banning orders Exposure draft; Banning orders Explanatory materials; Search warrants Exposure draft; Search warrants Explanatory materials; Licensing Exposure draft; Penalties Exposure draft; Licensing and Penalties Explanatory materials]

ASIC has released its second update on progress towards implementation of the Financial Services Royal Commission recommendations

Key Takeouts

- **Prioritising FSRC referrals:** The FSRC made 13 referrals to ASIC. All referrals are under investigation and one is also in litigation. ASIC says that it is seeking to expedite the finalisation of all enforcement matters through the strategic use of the increased funding.

- **ASIC as a conduct regulator for superannuation:** ASIC's focus in on the areas of misconduct 'where it has contributed to the greatest potential member harm, in the form of persistent underperformance'. ASIC says that it will pursue actions against misconduct by trustees as appropriate and will be closely monitoring the implementation of the 'Protecting Your Super' reforms.

- **Setting expectations:** ASIC says that it 'uses public communications to set expectations about important FSRC themes such as professionalism and fairness in financial services'. Schedule 3 of the Update includes a schedule of forthcoming reports, guidance and consultations.

- **Specific actions the regulator has taken since February to implement FSRC recommendations** directed at the regulator include (among others) the establishment of an Office of Enforcement and approving the first tranche of proposed changes to the Banking Code.

On 11 September the Australian Securities and Investments Commission (ASIC) provided its second update on its actions in response to the Financial Services Royal Commission (FSRC) recommendations.

[Note: ASIC provided its first update on implementation of the FSRC Recommendations on 19 February. For a summary see: Governance News 20/02/2019]

Announcing the release of the update, ASIC Chair James Shipton said that it should 'indicate the sense of urgency and significance that the ASIC Commissioners and staff are bringing to the task [of implementing the FSRC recommendations]. It also demonstrates that we will continue to use all of the regulatory tools at our disposal to deliver a fair, safe and efficient financial system for all Australians'.

Update on enforcement

- FSRC referrals and case studies:

  - The FSRC made 13 referrals to ASIC. All referrals are under investigation and one is also in litigation.

  - According to the update, ASIC has 29 investigations underway (some with external counsel involvement) into various case studies considered by the FSRC. Four matters are before the court (Select AFSL, Dover and two matters relating to NAB) and another two (unspecified) matters are being considered by the Commonwealth Director of Public Prosecutions.

- In addition, ASIC says that prior to and during the FSRC, it already had a number of referrals and case studies under investigation. Currently, ASIC has 17 case studies under review to determine if investigations are warranted or enforcement action is available to ASIC.

- As at 31 July 2019, within this dedicated enforcement program, there were 88 enforcement investigations and 17 court actions underway. Of these, 86 relate to the major banks and AMP, and their subsidiaries. In addition, 59 individuals are the subject of investigation and eight individuals were the subject of court action. ASIC says that a total of '82 outcomes' (including criminal, civil, administrative actions and court enforceable undertakings) were achieved within this timeframe.

- As at 31 July 2019, ASIC had 311 investigations on foot covering a range of misconduct across the breadth of ASIC's jurisdiction including: directors' and officers' breaches, insider trading and market manipulation, auditor and liquidator breaches, and breaches of licensing obligations including of Australian financial services (AFS) licence obligations.

- ASIC says that it is seeking to expedite the finalisation of all enforcement matters through the strategic use of the increased funding. The update adds that from July 2018 to July 2019, there has been: a) a 20%

increase in the number of ASIC enforcement investigations; b) a 55% increase in enforcement investigations involving the six major financial institutions (or their officers or subsidiary companies); and c) a 216% increase in wealth management investigations.

[Note: The update directs readers to ASIC Report 625: ASIC enforcement update January to June 2019 for further details. For a summary see: Governance News 21/08/2019]

ASIC as a conduct regulator for superannuation

The Update states that ASIC's focus in on the areas of misconduct 'where it has contributed to the greatest potential member harm, in the form of persistent underperformance'. ASIC adds that it will pursue actions against misconduct by trustees as appropriate and will be closely monitoring the implementation of the 'Protecting Your Super' reforms.

In addition, ASIC says that it will be driving better behaviour by trustees to ensure they act in in the best interests of consumers, by undertaking the necessary supervision and surveillance of superannuation trustees, with more frequent on-site visits.

'Setting expectations': A schedule of forthcoming publications

ASIC says that it 'uses public communications to set expectations about important FSRC themes such as professionalism and fairness in financial services'.

[Note: Table 3 of the report lists (at p16) forthcoming ASIC publications (reports, consultations and guidance) with accompanying timeframes.]

- **September-October 2019:** ASIC plans to release three reports during this period including: 1) a report into total and permanent disability insurance; 2) a joint report by ASIC and the Dutch Authority for Financial Markets into the limitations of disclosure; and 3) the Corporate Governance Taskforce report relating to director and officer oversight of non-financial risk.

- **By the end of 2019:**

    - ASIC plans to release five reports: 1) report updating the market on the results of ASIC's project to test compliance with fee disclosure statement and renewal notice requirements across the advice industry; 2) audit firm inspection findings for the 12 months to 30 June 2019; 3) a report into financial advice by superannuation funds; 4) a response to submissions on proposed updated responsible lending guidance (RG 209); and 5) Response to ASIC's internal dispute resolution consultation CP 311 Internal dispute resolution: Update to RG 165

    - In addition, ASIC will release updated guidance on responsible lending (Updated RG 209 Credit licensing: Responsible lending conduct) and an Updated RG 97: Disclosing fees and costs in PDSs and periodic statement for superannuation and managed investment products

[Note: ASIC has lodged an appeal against the decision in: Australian Securities and Investments Commission v Westpac Banking Corporation (Liability Trial) [2019] FCA 1244. For a summary of the decision see: Governance News 11/09/2019]

    - ASIC will also consult on regulatory guidance for design and distribution obligations.

- **By early 2020:** ASIC will issue a report on loan fraud and a report into the buy now pay later sector. ASIC says that the report will identify if provider and/or regulatory action is needed.

[Note: Centre Alliance MP Rebekha Sharkie has introduced a Bill — National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2019 — on 16 September, 'replicating' the government's Exposure Draft legislation released in October 2017. In a statement Ms Sharkie said that the Bill seeks to prevent irresponsible lending practices to low-income borrowers and to make the overall liabilities of small amount credit contracts (SACCs) more transparent. This is covered in a separate post of this issue of Governance News.]

Response to FSRC recommendations since February 2019

[Note: Table 1 (at p9) of ASIC's update sets out the actions ASIC has taken since February 2019. Table 2 of the report (at p12) sets out further actions taken by ASIC consistent with the FSRC findings and recommendations. See: ASIC Update here]

- **Amendments to the Banking Code** (FSRC recommendations 1.8, 1.10, 1.13 and 1.16): The first tranche of the Code amendments was approved by ASIC on 25 June 2019 for commencement on 1 July 2019. The regulator says that it is planning reach a decision on whether to approve the second tranche of Code amendments later in 2019, following engagement with key stakeholders to ensure that the revised Code provides an appropriate level of commitment by banks to consumer and small business protections.

- **Additional government commitment (ASIC review) in response to Recommendation 2.4 – End of grandfathered commissions:** Consistent with its 21 August announcement (see: Governance News 28/08/2019) ASIC said that it is investigating the progress of transition away from grandfathered conflicted remuneration arrangements for financial advisers. The government directed ASIC to undertake the investigation following the government's commitment to end the practice by 1 January 2021.

- **Recommendation 2.5 – Life insurance commissions review**: The FSRC report recommended that, when ASIC conducts its review of conflicted remuneration relating to life risk insurance products and the operation of the ASIC Corporations (Life Insurance Commissions) Instrument 2017/510, it should consider further reducing the cap on commissions in respect of life risk insurance products. Unless there is a clear justification for retaining those commissions, the cap should ultimately be reduced to zero. ASIC says that it will include the factors identified by the FSRC in undertaking its post implementation review of the 2017 life insurance reforms. ASIC's review will take place in 2021.

- **Recommendation 4.9 – Enforceable code provisions:** ASIC says that it will work with industry to give effect to the government's commitment to allow for greater sanctions to be imposed following a breach of an industry code of conduct and will support the government's proposed legislative reform in relation to industry Codes scheduled to be introduced into parliament before 30 June 2020.

- **Recommendation 6.2 – ASIC's approach to enforcement:** ASIC has established an Office of Enforcement the purpose of which is to strengthen its enforcement culture and effectiveness and to implement a single enforcement strategy for ASIC. The Office of Enforcement leads the application of ASIC's 'Why not litigate?' operational discipline including by developing enforcement policies.

- **Recommendation 6.10 – Co-operation memorandum:** APRA and ASIC are reviewing the cooperation and coordination arrangements between the two agencies, including revising the existing Memorandum of Understanding. This review is expected to be completed before the end of 2019. In addition, APRA and ASIC have established a new engagement structure led by the APRA-ASIC Committee (AAC) to enhance information sharing on both operational and strategic matters, with the first meeting held in July 2019.

- **Recommendation 6.12 – Application of the BEAR to regulators:** ASIC will develop and publish accountability statements before the end of 2019.

Further actions taken by ASIC consistent with Royal Commission findings and recommendations

- **Product intervention power/design and distribution obligations— guidance and application:** ASIC says that following consultation, it expects to release the final regulatory guidance on use of the product intervention power in October 2019. Separately, ASIC says that it will consult on guidance for ASIC's use of the design and distribution obligations, which became law on 5 April 2019 with a transition period of two years. ASIC plans to issue a formal consultation later in December 2019 on regulatory guidance.

[Note: Treasury released draft regulations — Corporations Amendment (Design and Distribution Obligations) Regulations 2019 — for consultation on 12 September. Consultation closes on 11 October. For a summary see: Governance News 13/09/2019]

- **Responsible lending:** ASIC says that revised responsible lending guidance [RG209] will be published by end of 2019.

[Note: ASIC has lodged an appeal against the decision in: Australian Securities and Investments Commission v Westpac Banking Corporation (Liability Trial) [2019] FCA 1244. ASIC has said that its intention is to release an updated RG 209 by the end of the year. For a summary of the decision see: Governance News 11/09/2019]

- **Home lending:** ASIC issued Report 628 Looking for a mortgage: Consumer experiences and expectations in getting a home loan on 29 August 2019 (for a summary see: Governance News 04/09/2019)

- **ASIC Review of the ePayments Code:** ASIC issued the first of two consultation papers in March seeking feedback from stakeholders on the proposed scope of the review. (For a summary see: Governance News 13/03/2019)

- **Anti-hawking of insurance**: To provide interim protections to consumers ahead of proposed law reform by the government in 2020, ASIC is consulting on a proposal to restrict unsolicited telephone sales of certain insurance products where consumer harm has been identified. (For a summary see: Governance News 24/07/2019).

- **Add-on insurance**: ASIC announced refund programs by insurers of over $130 million to over 245,400 consumers for the sale of add-on insurance and warranties sold by car dealers (see: Governance News 26/06/2019). ASIC says that it will continue work to support the implementation of a deferred sales model for add-on products (FSRC Recommendation 4.3) and the introduction of a cap on commission for add-on products sold through car dealerships (FSRC Recommendation 4.4).

- **Consumer credit insurance**: On 11 July 2019, ASIC issued a report setting out its expectations for issuers of CCI: Report 622 Consumer credit insurance: Poor value products and harmful sales practices. ASIC says that the expectations set out in this report are supported by FSRC Recommendations 4.1, 4.3, 4.7 and 4.8. (For a summary of the report see: Governance News 17/07/2019)

- **Insurance claims handling**: On 4 July 2019, ASIC issued Report 621 Roadblocks and roundabouts: A review of car insurance claim investigations. ASIC says that the review is informing ASIC's input to the proposed legislative reform relating to the insurance claims handling exemption. (For expert insights into the implications of the report see: Roadblocks and roundabouts: A review of car insurance claim investigations 05/07/2019)

- **Superannuation: No inducing of employers**: ASIC issued guidance to superannuation trustees in Information Sheet 241 Prohibition on influencing employers' superannuation fund choice: section 68A of the SIS Act. (For a summary see: Governance News 07/08/2019)

- **Financial advice**: ASIC has issued two reports in relation to financial advice: Report 627 Financial advice: What consumers really think and Report 614 Financial advice: Mind the gap. ASIC says that in 2020–21, ASIC it will be conducting further research to explore whether there is a problem with unmet advice needs in Australia. Also in 2019–20, ASIC will conduct consumer testing of more appropriate labels for general advice and different versions of the 'general advice' warning, and publishing a report on the findings.

- **Disclosing fees and costs in Product Disclosure Statements (PDSs) and periodic statements for superannuation and managed investment products**: ASIC released a consultation paper — CP 308 Review of RG 97 Disclosing fees and costs in PDSs and periodic statements — in January seeking feedback on a draft updated regulatory guide and proposed amendments to Sc 10 of the Corporations Regulations (for a summary see: Governance News 16/01/2019). Consultation closed on 2 April.

- **Internal dispute resolution:** On 15 March, ASIC sought feedback on its proposals to update its policy on the internal dispute resolution (IDR) requirements that apply to a range of licensees and certain other classes of entities.

- **Whistleblower policies:** On 7 August 2019, ASIC issued a consultation paper seeking feedback on proposed guidance for entities that must have a whistleblower policy—public companies, large proprietary companies and proprietary companies that are trustees of registrable superannuation entities (for a summary see: Governance News 14/08/2019).

- **Retail OTC derivatives:** ASIC issued in August (Report 626 Consumer harm from OTC binary options and CFDs) which describes the consumer detriment ASIC has observed and ASIC's proposed actions to address it. To address this harm, ASIC is consulting on a proposal to make market-wide product intervention orders relating to the issue and distribution of OTC binary options and CFDs (for a summary see: Governance News 28/08/2019).

- **ASIC enforcement updates:** ASIC has issued two enforcement updates providing an overview of ASIC enforcement outcomes, priorities and cases for the periods: January to June 2019 and July to December 2018.

- **Regulator performance:** ASIC published Report 618 Regulator Performance Framework: ASIC self-assessment 2017–18 on 16 April 2019, which sets out ASIC's self-assessment of its performance against the key performance indicators in the Regulator Performance Framework in 2017–18.

[Sources: ASIC media release 11/0pds9/2019; ASIC Royal Commission implementation update September 2019; ASIC Update, A speech by ASIC Commissioner Sean Hughes at the Risk Management Association Australia event, Melbourne 10/09/2019 [released 11/09/2019];

ASIC has remade existing relief on changing scheme constitutions with some minor amendments to simplify drafting/provide greater clarity following consultation

The existing relief under Class Order [CO 09/552] Change scheme constitutions was to end on 1 October 2019.

ASIC has remade existing relief on change scheme constitutions following consultation in August (Consultation Paper 320 Remaking ASIC class order on changing scheme constitutions [CO 09/552]). No submissions were received in response to the consultation.

ASIC states that the new instrument — ASIC Corporations ASIC Corporations (Changing Scheme Constitutions) Instrument 2019/700 — continues to provide relief in certain situations to vary how the constitution of a registered scheme may be modified, or repealed and replaced with a new constitution.

ASIC also issued ASIC Corporations (Repeal) Instrument 2019/885, which repeals [CO 09/552]. ASIC says that the new instrument will continue the effect of the previous instrument with some minor amendments, which include simplifying the drafting to give greater clarity.

[Source: ASIC media release 17/09/2019; ASIC Corporations (Changing Scheme Constitutions) Instrument 2019/700; ASIC Corporations (Repeal) Instrument 2019/885]

Corporate Social Responsibility and Sustainability

Shift in expectations? The Committee for Economic Development of Australia Company Pulse 2019 poll has found that 'Australians expect a broad contribution from business, focused not just on the bottom line, but social and environmental performance as well'

The Committee for Economic Development of Australia (CEDA) has released the results of a national poll of more than 3000 members of the general public and business leaders examining community expectations of business and business priorities.

Some Key Findings

- **Expectation that companies should be equally concerned with social and environmental performance as with financial performance:** 72% of the general public, 65% of employees of large companies and 88% of business leaders indicated that large companies should be equally concerned about their economic performance and their social and environmental performance

- **Support for corporate leaders speaking out on key issues:** More than three-quarters of the general public surveyed support corporate leaders speaking out on economic, environmental, international and social issues of national importance

- **Scepticism about the motives of leaders in speaking out?** Less than 50% of the general public believe that business leaders are concerned about the interests of the nation or community when they speak out on issues

- **Priorities for business?** Overall, the general public said that the top priority for business should be: 1) work/life balance for employees; 2) quality products; and 3) staff wellbeing. By contrast, business leaders said that the top priorities for business should be: 1) tailoring products and services to customer needs; 2) shareholder returns; and 3) training for staff.

Clear and authentic communication is key?

CEDA CEO Melinda Cilento is quoted in The Australian as commenting that 'The weight of an argument in the public's view is diminished if it is seen as supporting vested interests or if the alignment between company and national interest is not well understood…It's really important for business to be demonstrating and clearly communicating why they're speaking out, what they expect the outcomes to be and who they expect to benefit. The survey showed us that most business leaders are speaking out in the national interest but that's not quite connecting to the community'.

Separately, The Australian opines that the research findings are indicative of a broader shift in expectations about the purpose of corporations, citing among other things the recent statement by the US Business Roundtable on the purpose of companies (for a summary see: Governance News 21/08/2019) and the role of leaders with expectations shifting towards leaders taking a stand on key issues.

[Sources: CEDA media release 16/09/2019; CEDA Company Pulse 2019; CEDA report snapshot; [registration required] The Australian 16/09/2019; 17/09/2019]

Stick to your knitting? The Australian reports that the government has called on business to focus on the future of the economy and workplaces, and on supporting the government's deregulation agenda, rather than on social issues

Deregulation Taskforce: On 12 September, Treasurer Josh Frydenberg announced the first three priorities for the government's 'Deregulation Taskforce' which will work with state and territory governments and business to identify and address the most significant regulatory barriers to investment for selected industries.

The Taskforce's primary focus is to work from the perspective of business. It will 'co-design solutions with business and agencies across jurisdictions to identify and remove unnecessary barriers to investment'. Its initial focus will be on a selection of sectors and activities to target critical pain points. These initial areas of focus are: a) reducing regulatory burden for food manufacturers with an initial focus on exporting; b) making it easier for sole traders and micro businesses to become first time employers; and c) getting beneficial major infrastructure projects up and running sooner.

Assistant Minister to the Prime Minister and Cabinet Ben Morton added that 'a better regulatory environment will help businesses lower their costs, save time and improve their competitiveness, while major infrastructure projects will help get us home sooner and safer'.

Prime Minister has called on business to focus on the future of the economy not social issues: Subsequently, The Australian reports that, citing a speech by Mr Morton in which he reportedly expressed criticism of moves by some companies to focus on social issues, Mr Morrison called on businesses to focus on workers rather than activist causes and to support the 'public case for reform to ordinary Australians'. 'I want more conversation about the future of the economy and what is needed in workplaces…not summits between employer associations and unions' Mr Morrison is quoted as saying.

[Sources: Treasurer Josh Frydenberg media release 12/09/2019; Assistant Minister to the Prime Minister Ben Morton, Delivering Deregulation for Australian Business 12/09/2019; [registration required] The Australian 13/09/2019]

Japanese companies lead the UK and the US on climate disclosure?

The FT reports that 172 of Japan's big companies and agencies, including Mazda Motor, Nomura and Sony have committed to report in accordance with the Task Force on Climate-related Financial Disclosures recommendations (TCFD recommendations). Further, by the end of 2020, Japan's Ministry of the Environment reportedly wants at least 100 local companies, compared to 51 currently, to have their carbon reduction efforts audited by the Science Based Targets initiative, a not-for-profit group that is a collaboration between the UN Global Compact and environmental associations. Reportedly, these are some of the initiatives in the works ahead of the 2020 Tokyo Olympics which is viewed as an opportunity to showcase Japanese innovation/raise awareness.

The FT comments that Japan now leads the US and the UK on climate disclosure (in terms of the rate of TCFD adoption). Reportedly in the US only 107 companies have backed the measures and in the UK only 109 companies have done so.

The FT suggests that Japan's stance is likely to spark debate at next week's meeting of the United Nations General Assembly in New York, where the body will unveil a new initiative to champion the United Nation's Sustainable Development Goals.

[Sources: [registration required] The FT 16/09/2019]

Related News: GPIF has reportedly become an advocate of responsible investing helping to drive the 307% growth in sustainable assets in Japan from 2016-2018

The FT Reports that Japan's Government Pension Investment Fund (GPIF) — the world's largest retirement scheme with ¥159tn ($1.5tn) in assets — plans to increase the range of sustainable indices it allocates money to as it increases its efforts to hold companies to account on their environmental, social and governance (ESG) responsibilities. Reportedly GPIF has become a vocal proponent of responsible investing in recent years, helping to fuel the 307% growth in sustainable assets in Japan from 2016 to 2018.

Reportedly as part of its new large-scale tendering programme for indices, GPIF will shortly begin a search for an index that selects and weights companies based on ESG factors and a diversity-focused index constructed according to themes such as women's empowerment. The FT adds that GPIF also reportedly wants to receive ideas for a green bond index for Japanese and non-Japanese fixed income.

Passive managers are more effective stewards than active managers? The FT comments that passive managers have attracted criticism for not serving as effective stewards of the companies in which they invest. However, Mr Mizuno has reportedly challenged this view in a recent speech at the annual conference of the Principles for Responsible Investment (PRI) arguing that passive investors are better equipped than active managers to perform this stewardship role because they are compelled to remain invested for the long term. 'There is a dilemma in active asset management: you have to sell [a company] to realise a return when you see an appreciation in value…We depend on passive managers to do more engagement and [carry out] an active ownership role' Mr Mizuno is quoted as saying.

Reportedly GPIF has backed up this approach by:

- **overhauling its approach to dealing with external active managers:** Given the choice of two active managers that generate the same level of returns, GPIF will reportedly select the manager based on its level of engagement with the companies in its portfolio. 'We made it clear to active asset managers that ESG integration is now analysed and evaluated as part of the investment process' Mr Mizuno reportedly said.

- **implementing a new model of compensating active managers only when they generate excess returns,** which with a view to making clear that promoting sustainability is asset managers' primary aim and that 'any alpha they deliver is a bonus'.

[Source: [registration required] The FT 16/09/2019]

Shell has linked executive remuneration to the achievement of 2-3% net carbon emissions reduction

Shell has set an 'unconditional three-year target to reduce its Net Carbon Footprint — that is, emissions from the life cycle of each of its energy products from production through to final use — by 2% to 3% compared to 2016. Consistent with Shell's December 2018 commitment, the company has linked executive pay to the achievement of this target.

'Governments, regulators and consumers also have a major role to play if the world is to achieve the goal of the Paris Agreement. The world must change the way it uses energy and the types of energy it demands. And if Shell is to meet our ambition we will have to be a part of this effort by changing what we sell. Shell only controls its own emissions but by changing the mix of energy products we supply, we aim to help and influence others to lower their emissions' Shell states.

[Source: Shell media release]

Scope 3 emissions? Market Forces has determined not to file a Scope 3 resolution at BHP following BHP's commitment to set public reduction targets but has said that that it will target Rio Tinto instead

Context: In July BHP CEO Andrew Mackenzie gave a speech in which he said BHP plans to spend $US400m to create a climate investment program to reduce emissions from its own operations as well as those generated from its resources (scope 3 or customer emissions) (for a summary see: Governance News 31/07/2019). According to lobby group, Market Forces, in the days after the speech that first flagged the company's scope 3 emission reduction goals, Yancoal, Fortescue Metals and Beach Energy all declined to follow suit.

Public targets? The AFR reports that BHP has now committed to set public targets for its Scope 3 emissions within nine months.

Reportedly, BHP has said that that reporting of Scope 3 emissions poses some challenges in that it 'necessarily requires a degree of overlap in reporting boundaries' eg BHP said emissions from its coking coal were counted in both the 'use of sold products' category and the 'processing of sold products' category. BHP also reportedly observed that it requires certain assumptions to be made about the way in which products will be used eg that all iron ore sales were turned into steel, all copper production turned into copper wire and all crude oil and condensate was refined and combusted as diesel.

Market Forces won't lodge a shareholder resolution at BHP, but will target Rio Tinto over Scope 3 emissions?

In a statement, Market Forces said that following BHPs confirmation the public goals it will release next year for its scope 3 emissions will be aligned with the Paris Agreement, externally verified and time-bound, it has agreed not to lodge a shareholder resolution with BHP this year.

Instead, the climate lobbying group has said that it will instead target Rio Tinto. 'Earlier this year, Rio Tinto resisted a resolution coordinated by Market Forces calling for Paris-aligned targets to reduce scope 3 greenhouse gas emissions, despite recognising that the need to decarbonise the steel sector "could materially affect" the value of Rio Tinto's iron ore business. Market Forces is ready to test the company's resolve once more' the statement reads.

Market Forces' statement goes on to note that BHP is facing a shareholder resolution from the Australasian Centre for Corporate Responsibility (ACCR) over its membership of lobby groups that the ACCR considers advocate against strong action on climate change. The statement expresses support for the resolution arguing that 'BHP actually does stand out from its peers before it's even announced the actual targets…This only serves to underscore the need for BHP to run a mile from lobby groups that get in the way of Paris-aligned climate change action'.

[Sources: Market Forces media release 12/09/2019; [registration required] The AFR 13/09/2019; 17/09/2019]

ExxonMobil in reportedly in exclusive talks to sell final Norwegian oil assets

The FT reports that ExxonMobil is in talks to sell its final Norwegian oil and gas assets to Vår Energi, a joint venture between Italian energy company Eni and HitecVision, a private equity fund specialising in North Sea investments.

The FT comments that Exxon is not the first major US producer to begin withdrawing from the North Sea, with Chevron and ConocoPhillips scaling back multibillion-dollar deals as they sharpen their focus on shale fields in America.

Reportedly, Exxon, the largest oil company by market capitalisation, is separately considering the sale of stakes in about 40 UK North Sea oil and gasfields, many operated jointly with Shell, which produce on average about 80,000 barrels of oil a day. The FT observes that this would 'spell the end' of the company's presence as a producer in the region, where it has been active since the 1960s.

[Sources: [registration required] The FT 07/09/2019; 06/09/2019]

In Brief | Whitehaven Coal says that climate change and its mitigation could provide positive for our national coal sector? The AFR reports that Whitehaven's first TCFD compliant sustainability document says that Whitehaven expects to remain cash-flow positive over the next 20 years with its growth projects remaining viable under a scenario which broadly reflects the Paris agreement goals and further that the 'future of the Australian coal sector and high-quality coal producers such as Whitehaven is expected to remain robust over the long term'

[Source: [registration required] The AFR 11/09/2019; 12/09/2019]

In Brief | Ten ACSI members – Cbus, First State Super, HESTA, Local Government Super, VicSuper and Vision Super, ABP (part of APG Asset Management), CalPERS, New Zealand Superannuation Fund and Universities Superannuation Scheme — have been named in the Principles for Responsible Investment (PRI) Leaders' Group for 2019. ACSI says that more than 20% of those named in this year's Leaders' Group are ACSI members and over 12% are Australian asset owners. ACSI CEO Louise Davidson said that 'this acknowledges that ACSI members are global leaders when it comes to incorporating environmental, social and governance considerations into their investment strategies'

[Source: ACSI media release 11/09/2019]

In Brief | Westpac has been named Australia's most sustainable bank in the 2019 Dow Jones Sustainability Indices rated on the areas of climate strategy, environmental reporting, social reporting, financial inclusion and corporate citizenship and philanthropy. Westpac Group CEO Brian Hartzer said 'To be named Australia's most sustainable bank is reflective of the priorities we have set ourselves to be better and do better. It demonstrates to our customers and communities that we are serious in our actions to help create a more sustainable future, something that is a great source of pride for our people'

[Source: Westpac media release 14/09/2019]

In Brief | A delegation of Australian farmers have called on parliamentarians to take urgent action on climate change. The Australian Farm Institute has released a report outlining the case for development of a comprehensive climate action strategy. 'Action taken now will decrease future impact and importantly will provide opportunity for Australian agriculture to continue to set the agenda on efficient profitable and sustainable climate resilient farming systems' Executive Director of the Australian Farm Institute Richard Heath writes

[Sources: Australian Farm Institute Report: Change in the air: Defining the need for an Australian agricultural climate change strategy; SBS 17/09/2019]

Markets and Exchanges

In Brief | The FT reports that Hong Kong Exchanges and Clearing (HKEX) will increase its efforts to buy the London Stock Exchange Group (LSE) by appealing directly to shareholders, following the LSE's rejection of its £32bn offer. Reportedly the LSE cited concerns about the deal's structure and value, as well as the political risk (given the social unrest in Hong Kong) in rejecting the deal. According to The FT, HKEX has until 9 October to decide whether to proceed with a formal offer. Reportedly, if the HKEX offer succeeds, it would create the largest exchanges operator in the world by revenues

[Source: [registration required] The FT 14/09/2019]

Financial Services

ASIC is 'ready and willing' to use its new product intervention powers

ASIC has deployed its new product intervention power for the first time to target a specific short term lending model that it considers causes 'significant consumer detriment' to vulnerable customers.

Key Takeouts

- ASIC has deployed its new product intervention power for the first time to target a specific short term lending model that it considers causes 'significant consumer detriment' to vulnerable customers.
- ASIC has imposed an industry wide product intervention order banning (certain) lending models which benefit from the short term credit exemption.
- The model has been used by Cigno Pty Ltd and Gold-Silver Standard Finance Pty Ltd, and more recently by MYFI Australia Pty Ltd and BHF Solutions Pty Ltd.
- The order is an industry wide order made by legislative instrument and will apply to any person that attempts to use the particular short term lending model or variations of the model.
- The order was registered with the Federal Register of Legislation on 12 September 2019 commencing on 14 September 2019 and remains in force for 18 months. ASIC can extend the order's duration or make it permanent with Ministerial approval.
- There are criminal and civil penalties for breaching the product intervention order, including up to five years imprisonment and fines of up to $1.26 million per offence.
- ASIC notes that the order does not seek to modify the existing exemption for short term credit. Instead it 'ensures that short term credit providers and their associates do not structure their businesses in a manner which allows them to charge fees which exceed the prescribed limits for regulated credit'.
- Separately, Treasury released draft regulations — Corporations Amendment (Design and Distribution Obligations) Regulations 2019 — for consultation. Consultation closes on 11 October.

Following consultation (see: Governance News 10/07/2019), the Australian Securities and Investments Commission (ASIC) has deployed its product intervention power for the first time to ban a specific short term lending model which it considers causes 'significant' consumer detriment to retail clients.

What exactly is being banned?

The model being targeted by the regulator is used by a short term credit provider and its associate — Cigno Pty Ltd and Gold-Silver Standard Finance Pty Ltd and more recently, by MYFI Australia Pty Ltd and BHF Solutions Pty Ltd.

The model operates by:

- offering short term credit to consumers, mostly for small amounts up to $1,000. The application process is advertised as taking about two weeks

- an associate of the short term credit provider offers collateral services under a separate services agreement for a 'fast track application' if the consumer wants the money immediately. The fees for the collateral services are very high relative to the amount borrowed — total fees and repayments can amount to up to 990% of the loan amount

- the money must be repaid within a maximum term of 62 days and sometimes a shorter period of time, increasing the risk of default as repayments are based on the term of the credit rather than being based on capacity to repay

ASIC notes that the model falls under the short term credit exemption and in consequence, consumers do not have a number of rights/protections which they would otherwise have (for example, the right not to be obliged to repay more than double the amount borrowed in the event of a default and the right to rely on the various other protections and provisions of the National Consumer Credit Protection Act and the National Credit Code).

Scope of the banning order

The order — ASIC Corporations (Product Intervention Order—Short Term Credit) Instrument 2019/917 — is an industry wide order made by legislative instrument and will apply to any person that attempts to use this specific short term lending model 'or variations of the model'.

The ban applies in relation to a short term credit facility entered into on or after the commencement of this instrument.

The order does not seek to modify the existing exemption for short term credit

ASIC states that the order does not seek to modify the existing exemption for short term credit. Instead it 'ensures that short term credit providers and their associates do not structure their businesses in a manner which allows them to charge fees which exceed the prescribed limits for regulated credit'.

When will it apply and for how long?

The order was registered with the Federal Register of Legislation on 12 September 2019 commencing on 14 September 2019 and remains in force for 18 months unless it is extended or made permanent. ASIC can extend the order's duration or make it permanent, but only with Ministerial approval.

Penalties

There are criminal and civil penalties for breaching the product intervention order, including up to 5 years imprisonment and fines of up to $1.26 million per offence.

Response to consultation

ASIC received 20 submissions in response to consultation: 12 submissions from financial counselling services and legal community centres, 6 submissions from industry bodies and participants, and 17 submissions from aggrieved consumers who have been affected by the use of the short term lending model.

According to ASIC, with the exception of submissions provided by current users of the short term lending model, the submissions supported ASIC's finding of significant detriment caused by the short term lending model, and supported the making of ASIC's proposed product intervention order.

The submission from the National Credit Providers Association (NCPA) states 'The NCPA commends ASIC for using the product intervention powers and urges the use of intervention in relation to 18(a): an individual product intervention order which applies to a person, or specified persons in relation to a class of products'.

Cash Converters also expressed support for ASIC's proposed approach in its submission. 'The identified model is clearly designed to circumvent responsible lending obligations, which should apply under the National Credit Act. Cash Converters fully support the intervention powers which will allow ASIC to eliminate any avoidance of responsible lending obligations' the submission states.

[Note: ASIC has published a full list of submissions on its website. These are accessible here.]

ASIC is 'ready and willing' to use its new powers

In announcing ASIC's decision Commissioner Sean Hughes said 'ASIC is ready and willing to use the new powers that it has been given. The product intervention power provides ASIC with the power and responsibility to address significant detriment caused by financial products, regardless of whether they are lawfully provided'.

ASIC is also consulting (see: Governance News 28/08/2019) on the proposed use of its product intervention power to address consumer harm to retail clients resulting from over-the-counter binary options and contracts for difference.

Impact for industry?

ASIC's action underlines the shift in the regulatory environment post Hayne and the new tools that are available to ASIC. In this case, although the model being banned technically fell within the short term credit exemption, the regulator stepped in because it determined that it needed to do so to prevent 'significant detriment' to consumers.

From a practical perspective, ASIC's action underscores the need for credit and financial service providers to ensure that the products and services they offer are in line not only with letter of the law, but with customer and community needs and expectations that no longer tolerate products or distribution techniques that are harmful to customers, predatory, or which provide little or no benefit to the consumer.

Products or behaviours that are seen to deliberately avoid substantive consumer protections are particularly at risk.

[Sources: ASIC media release 12/09/2019; ASIC Corporations (Product Intervention Order—Short Term Credit) Instrument 2019/917; Explanatory Statement; Product intervention order notice; CP 316 submissions]

Consultation on draft Design and Distribution Obligations Regulations

Separately, Treasury released draft regulations — Corporations Amendment (Design and Distribution Obligations) Regulations 2019 — for consultation.

Announcing the consultation, Treasurer Josh Frydenberg noted that the design and distribution (DDO) regime was extended to include a broader range of financial products, including credit products prior to its passage through parliament in April of this year (see: Governance News 05/04/2019; 10/04/2019). Mr Frydenberg said that the draft regulations reflect both the outcomes of consultation on a previous version of the regulations and the extended scope of the obligations as a result of the Financial Services Royal Commission.

The draft regulations are intended to 'ensure that the obligations operate as intended, both in relation to the range of products covered and the entities that will be subject to the new regime' Mr Frydenberg said.

[Sources: Treasury media release 12/09/2019; Corporations Amendment (Design and Distribution Obligations) Regulations 2019 - Explanatory Statement; Corporations Amendment (Design and Distribution Obligations) Regulations 2019; Treasurer Josh Frydenberg media release 12/09/2019]

Pay day lending reform? Centre Alliance MP Rebekha Sharkie has introduced a Bill 'replicating' the government's own proposed pay day lending legislation, with a view to preventing irresponsible lending practices to low-income borrowers

Centre Alliance MP Rebekha Sharkie introduced a Bill — National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2019 — on 16 September, 'replicating' the government's Exposure Draft legislation released in October 2017.

[Note: On 28 November 2016 the Government released its response to the Review of the Small Amount Credit Contract laws. On 22 October 2017-3 November 2017 the government consulted on exposure draft legislation — National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2017 — proposing to implement the government's response.]

In a statement Ms Sharkie said that the Bill seeks to prevent irresponsible lending practices to low-income borrowers and to make the overall liabilities of small amount credit contracts (SACCs) more transparent. Ms Sharkie added that she considers action on payday lending reform is overdue, 'It has been over 1000 days since the Government accepted the recommendations from the 2016 Independent Small Amount Credit Contract Review into this sector and it has been nearly two years since the Government circulated its own exposure draft legislation in response to that review…But the years have passed and the Coalition Government is yet to introduce the Bill into Parliament, so I have done it for them' she said.

What's being proposed: some Key Points

The Bill proposes to:

- introduce a cap on the total payments that can be made under a consumer lease
- require small amount credit contracts (SACCs) to have equal repayments and equal payment intervals
- remove the ability for SACC providers to charge monthly fees in respect of the residual term of a loan where a consumer fully repays the loan early
- prevent lessors and credit assistance providers from undertaking door-to-door selling of consumer leases at residential homes
- introduce broad anti-avoidance protections to prevent SACC loan and consumer lease providers from circumventing the rules and protections contained in the Credit Act and the Code
- strengthen penalties to increase incentives for SACC providers and lessors to comply with the law

In addition, the Bill proposes to make changes to the NCCP Act to facilitate the making of regulations.

The Bill also provides for consequences for the breaches of the above requirements including civil penalties and criminal penalties. The proposed commencement date is 12 months after the day the Bill receives the Royal Assent.

Not seeking to eliminate small amount credit contracts

In her statement, Ms Sharkie emphasised that 'nobody is seeking to eliminate small amount credit contracts. All I want, what the public want, and arguably what the Government has already accepted, is improved protections for people who use payday loans and consumer leases'.

[Sources: Rebekha Sharkie MP media release 16/09/2019; National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2019; Explanatory memorandum]

COBA calls on parliamentarians not to stifle competition with FSRC red tape: customer owned banking institutions aren't asking to be regulated differently, 'but in proportion to the size, scale and complexity of their organisation' COBA says

The Customer Owned Banking Association (COBA) says that a delegation of more than 30 CEOs and Directors from customer owned banking institutions will lobby members of Federal Parliament 'to keep competition in mind as the Financial Services Royal Commission recommendations are implemented'.

COBA CEO Michael Lawrence said 'The message is clear, greater competition leads to greater customer outcomes. Government must keep competition front of mind if consumers are to receive a better outcome from their banking…Our CEOs are here to remind MPs that for more than 150 years, our sector has been trusted by Australians to look after their banking and financial well-being.'

Mr Lawrence added that customer owned banking institutions aren't asking to be regulated differently, 'but in proportion to the size, scale and complexity of their organisation'. 'Using the one size fits all approach for all authorised deposit taking institutions with no consideration of the size or complexity of the organisation has serious consequences. The cost of compliance for a smaller institution may outweigh the benefits of the regulation, leading to stifled innovation and reduced investment in the community' he said.

In addition, Mr Lawrence said customer owned banking institutions encourage government to do more to make it easier for consumers to switch banks. 'There is a role for Government to play to help make it easier for consumers to switch. Creating a taskforce of Treasury, ACCC, ASIC, industry and consumer groups to investigate the barriers to switching is a good start.'

[Source: COBA media release 11/09/2019]

FinTech/RegTech committee established: On 11 September 2019, the Senate resolved to establish a Select Committee on Financial Technology and Regulatory Technology

On 11 September 2019, the Senate resolved to establish a Select Committee on Financial Technology and Regulatory Technology.

The committee will inquire and report on the following matters: a) the size and scope of the opportunity for Australian consumers and business arising from financial technology (FinTech) and regulatory technology (RegTech); b) barriers to the uptake of new technologies in the financial sector; c) the progress of FinTech facilitation reform and the benchmarking of comparable global regimes; d) current RegTech practices and the opportunities for the RegTech industry to strengthen compliance but also reduce costs; e) the effectiveness of current initiatives in promoting a positive environment for FinTech and RegTech start-ups; and f) any related matters.

The Committee is due to present its final report on/before the first sitting day in October 2020.

According to The AFR, the committee is expected to hold hearings involving the major banks, start-ups and potentially global technology players as the government looks to lift competition in the financial system via its 'consumer data right' (CDR). Further, it is reportedly expected to monitor: a) the introduction of open banking and how banks are deploying technology to improve compliance in the wake of the Financial Services Royal Commission; b) access to the 'new payments platform'; c) APRA's licensing regime for start-up banks; and (potentially) the role of agriculture technology as a potential area of competitive advantage for Australia given the size of the rural sector.

In addition, the AFR suggests that the Committee may look to Singapore which has 'a well co-ordinated bureaucracy on data policy'.

[Sources: Select Committee on Financial Technology and Regulatory Technology; [registration required] The AFR 12/09/2019; Financial Standard 12/09/2019]

In Brief | 'The same rules should apply to both FinTechs and old school banks'? The AFR reports that Yarra Capital's head of Australian equities Dion Hershan has called for buy-now-pay-later providers to be held to the same rules as other credit providers especially given the number of customer complaints from buy now, pay later schemes is rising in line with the popularity of the service. 'We are far better off dealing with issues before they become systemic. The same rules should apply to both FinTechs and old school banks' Mr Hershan is quoted as saying

[Sources: [registration required] The AFR 16/09/2019]

In Brief | The 'forgotten topic' of financial stability and resilience: In an address to the European Australian Business Council in Melbourne, APRA Chair Wayne Byres emphasised the importance of preventative regulatory action to mitigate financial stability risks. 'The Australian banking system is broadly in good prudential shape. That reflects an unrelenting focus on steadily building resilience within the system' he said

[Sources: APRA Chair Wayne Byres' remarks to the European Australian Business Council: Financial instability: prevention is better than cure 13/09/2019; InvestorDaily 16/09/2019]

In Brief | Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Bill 2019 has passed the House and has progressed to second reading stage in the Senate. The Bill implements the government's response to FSRC recommendation 2.4 to remove grandfathering arrangements for conflicted remuneration and other banned remuneration from 1 January 2021 and enable regulations to provide for a scheme under which amounts that would otherwise have been paid as conflicted remuneration are rebated to affected customers

[Source: Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Bill 2019]

In Brief | Treasury Laws Amendment (Putting Members' Interests First) Bill 2019 passed the House of Representatives on 16 September has progressed to second reading stage in the Senate. The Bill proposes to prevent insurance within superannuation from being provided on an opt-out basis for low balance accounts and to members under 25 years old (who begin to hold a new product on/after 1 October 2019

[Source: Treasury Laws Amendment (Putting Members' Interests First) Bill 2019]

In Brief | Industry superannuation funds are outstripping retail funds on customer satisfaction? According to Roy Morgan, in six months to July 2019, the average member satisfaction for retail superannuation funds was 57.4% (down 1.2% points from the same period a year ago). Over the same period, satisfaction with industry super funds improved by 1.1% points from 61.7% in 2018 to 62.8% and is now at its equal highest satisfaction level since March 2008 (63%) (before the GFC began later that same year)

[Source: Roy Morgan media release 13/09/2019]

In Brief | (Possible) competition inquiry into Australia's banks? The Australian reports that the ACCC is seeking a formal directive from the Treasurer to conduct another inquiry into Australia's banks following consistent complaints that consumers are not being treated fairly. Consumer group Choice is reportedly strongly supportive of the proposed inquiry

[Source: [registration required] The Australian 18/09/2019]

In Brief | AFCA 'financial fairness roadshow': Between September and April, AFCA will stop at 77 metro, regional and rural communities across Australia to raise awareness of the services AFCA provides and help guide consumers and small businesses through the process of lodging a complaint

[Source: AFCA media release 12/09/2019]

Accounting and Audit

United Kingdom | The FRC has written to audit committee chairs and finance directors setting out some of the 'generic actions' they should consider in advance of Brexit

The UK Financial Reporting Council (FRC) has written to audit committee chairs and finance directors setting out some of the 'generic actions' they should consider in advance of Brexit. The purpose of the letter is 'to raise the profile of the extensive material that has been developed to help companies ensure that they are as prepared for EU exit as possible, at a time of heightened media interest' the FRC said.

The letter includes a non-exhaustive list of the actions businesses should consider. These include: a) asking employees to check if they need to apply to the EU Settlement Scheme; b) checking whether their business may face additional legal, regulatory and/or administrative barriers as a result of the UK becoming a 'third country' in the event of a 'no deal' EU exit; c) ensuring suppliers and customers have considered the impact of and are prepared for the UK's exit from the EU; and d) engaging with local chambers of commerce or business advisors and attending a Brexit Business Readiness event; reporting the risks association with Brexit clearly and in a sufficiently detailed way.

The letter reminds readers that there is a 'significant amount' of information about preparing for Brexit on the dedicated website (here).

[Source: FRC Letter to firms - EU exit preparations 16/09/2019]

In Brief | 'We have not seen a significant increase in audit quality': The UK FRC's annual report highlights (among other things) that 25% of audits failed to meet the 90% audit quality target

[Sources: FRC media release 06/09/2019; FRC Report and Financial Statements for the year ended 31 March 2019; [registration required] The WSJ 09/09/2019]