Governance News

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In Brief | In its submission to the Australian Competition and Consumer Commission's Northern Australia Insurance Inquiry Second Update Report, APRA has called for greater investment in mitigation (eg flood levies and sea walls, risk mapping and more robust building codes) to improve insurance affordability. With climate change expected to increase the damage bill from natural disasters in northern Australia, Mr Summerhayes said an informed debate was needed about the best way to fund mitigation and adaptation. Mr Summerhayes suggested that the experience of Roma in south-west Queensland after the 2012 flood event could provide a blueprint for the way forward with evidence suggesting that insurance premiums fell by 50 to 90% following the completion of flood mitigation infrastructure 23

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Diversity

'If BHP can do it there are no excuses': CEW President Sue Morphet has called for action to close the gender leadership gap. Separately, the AFR has queried whether BHP has been as successful as claimed

The Australian has published an edited version of the speech given by Chief Executive Women (CEW) President Sue Morphet to the CEW annual dinner on 19 September.

Ms Morphet expresses frustration at the lack of progress on gender diversity in leadership positions in business, government, and large and small organisations and underlines the need for change.

Some Key Points

Why do we need gender parity in leadership roles? 'It beggars belief that we should even need to be calling for equality in leadership two full decades into the 21st century, but that is the sad truth. We need more women in leadership positions for many reasons' Ms Morphet said. These reasons include: 1) economic benefits: if the workforce participation gap were halved, in 20 years our collective households would be $38bn richer and our national GDP would in increase $60bn on the status quo; 2) fairness: 'Why should women still have a pay gap to men at all levels and retire on about half the superannuation?'; and 3) the societal benefits of living in a society in which women who graduate from university in greater numbers than men, and 'aspire to become senior business leaders at almost the same rate as men' can achieve their aspirations (currently 94% of ASX 200 CEO's are men).

What is CEW doing to drive progress? Ms Morphet then outlined the practical steps Chief Executive Women (CEW) is taking to drive change. For example, providing scholarships and training programs for emerging women leaders, advocating for disclosure of gender pay gaps and for the introduction of flexible parental leave arrangements for men and women, and pushing the government to review the tax code to address the disincentive for mothers to return to full time work. In addition, she noted that the CEW also continues to invest in and publish an annual census of the number of women in ASX200 leadership roles.

[Note: The latest CEW census report — ASX200 Senior Executive Census 2019 — can be accessed here. For a summary see: Governance News 11/09/2019.]

80 years before we have gender balance at ASX CEO level is too slow: Ms Morphet said that at the current rate, it will be at 80 years before we have gender balance at ASX CEO level. 'What this census data confirms is that we have a massive uphill battle to achieving gender equality in leadership and it will require nothing short of a fundamental step change in attitude, thinking, culture and action'

No excuse: Ms Morphet went on to question why so many companies fail to appoint women to line roles when 50% of line roles at BHP (the largest Australian company) are women. 'How does it make sense that BHP, the largest Australian company and arguably one of the most complex, can have women in 50 per cent of their line roles but 114 companies have not appointed even one?...If BHP can do it there are no excuses. There is no shortage of women capable of filling these important roles. The real barrier to equal progression is not rationality — it is bias'.

[Source: [registration required] The Australian 20/09/2019]

Related News: It's an aspirational target? BHP doesn't have women in 50% of line roles?

The AFR questions Ms Morphet's assertion that women account for 50% of BHP's line roles ie those that directly drive key commercial outcomes in a business and usually involve profit and loss accountability.

According to The AFR:

- there are 11 members of Andrew Mackenzie's executive leadership team. Three of them, or 27.3%, are women in line roles
- Of 1627 managers employed by BHP in Australia, 421 of them, or 25.9% are women

According to The AFR, the 50% female target Ms Morphet referenced in her speech is an 'aspirational goal' for BHP rather than a reality.

[Source: [registration required] The AFR 23/09/2019]

Singapore | Women's Forum Asia Panel suggests that board gender quotas should be considered?

The Straits Times reports that a panel held as part of the Women's Forum Asia, has suggested that policymakers across the region should adopt quotas on corporate boards to reduce the gender gap in leadership positions.

Reportedly, members of the panel noted that gender quotas in some countries have been effective in driving progress on the issue eg 44.2% of directors in France are female (where there mandatory quotas have been in place since 2011). By contrast, a 2017 study found that women account for just 12.4% of board seats in Asia-Pacific companies.

However, non-executive Chair of strategic communications at FTI Consulting Ms Louise Harvey reportedly observed that instituting gender quotas, would face pushback, one must 'be prepared to challenge people in leadership roles to make change' she is quoted as saying.

[Source: The Straits Times 20/09/2019]

In Brief | Evidence that shareholders do care about gender diversity? Stanford research has reportedly found that shareholders penalise tech and financial companies for not hiring enough women

[Source: Stanford Business Insights 17/09/2019]

Shareholder Activism

Climate lobby group Market Forces has welcomed the show of support for a shareholder climate resolution at AGL Energy: 'The votes are in, and more than 30% of @aglenergy shareholders defied management to demand the company produce greenhouse gas reduction targets in line with the goals of the Paris Agreement!'

Market Forces filed three resolutions on behalf of shareholders at the AGL Energy AGM.

The resolutions were as follows.

- **Constitutional Amendment:** Special resolution to amend the company's constitution: a binding resolution to amend the constitution to allow for the submission of non-binding advisory shareholder resolutions. (Contingent on the constitutional amendment, two further advisory resolutions were also submitted).

  This resolution, which was not supported by AGL management, received 6.57% support (and failed to pass).

- **Two contingent resolutions:** The first seeking enhanced transition planning disclosure (and the acceleration of efforts to reduce emissions in line with the Paris goals by phasing out coal power) and the second on the public health risks of coal operations were not put to the meeting.

  These resolutions were also not supported by management and were not put to the meeting.

A demonstration of shareholder support for action on climate?

Despite the fact that the resolutions ultimately failed, Market Forces released a statement welcoming the result as a demonstration of the strong levels of support for action on climate action. 'The votes are in, and more than 30% of @aglenergy shareholders defied management to demand the company produce greenhouse gas reduction targets in line with the goals of the Paris Agreement!' Market forces said.

Market Forces commented that 'only twice before has a climate change-related shareholder proposal received more than 20% support in Australia, and this is by far the highest vote for a resolution seeking Paris-aligned emission reduction targets in this country'.

[Note: For context, in 2018, all seven 2018 shareholder ESG resolutions were subject to a constitutional amendment and none passed. Further, one resolution in three years has not been subject to a constitutional amendment and this was the only resolution to pass (though this was also a special resolution). In addition, the only resolution to have passed in the last three years had board support. This suggests that these factors are barriers to the passage of shareholder ESG resolutions. See: Key trends to emerge from the 2016-2018 AGM season]

[Sources: AGL ASX Announcements: AGM voting results 19/09/2019; Chairman's address and managing director and CEO's address 19/09/2019; Notice of meeting 08/08/2019; Market Forces media release 19/09/2019; [registration required] The Australian 20/09/2019; [registration required] The AFR 19/09/2019]

Potential new hurdles to foreign investment and shareholder activism in Japan?

The FT reports that the Japanese government is planning to implement new rules on foreign investment in 'sensitive industries' — industries related to national security eg aerospace, electricity, telecommunications, broadcasting, railway and software companies — which the FT suggests, have potential to both deter rising shareholder activism and foreign investment.

According to The FT proposed changes include the following.

1. Making board nominations in sensitive industries subject to government review. The FT comments that the measure (if implemented) would impact the ability of foreign investors to nominate new board members, something that activists have used increasingly often in recent situations.
2. Lowering the threshold above which approval is needed to hold a stake in sensitive companies from the current 10% to as low as 1%. If implemented, this would require many institutional investors to seek approval whenever they invest sensitive companies creating significant new hurdle to investment in Japan.

According to The FT, managers of both hedge funds and long-only pension funds suggested that if the changes were implemented as described, they would have a 'chilling' impact on the Tokyo market.

An unnamed banker is quoted as saying that he considers it highly likely that a period of public consultation ahead of parliamentary debate would likely draw highly critical comments not only from foreign funds but also from a number of Japanese institutions who view foreign investment and the increasing success of investor activism as a positive for the Japanese market.

The FT comments that the suggested changes are an indication of a broader shift towards countries cracking down on foreign investment in light of fears about the leakage of sensitive technology outside national borders, especially the FT suggests to China.

[Source: [registration required] The FT 20/09/2019]

Meetings and Proxy Advisers

In Brief | Ken Henry has reportedly been re-elected to the ASX board with 83.2% cent of votes in support of his re-election (and 16.8% against it). Ahead of the meeting, ISS reportedly advised investors to consider voting against Dr Henry's re-election in light of 'governance failures' at NAB and the ASA indicating that it would also vote against it. The Age reports that ASX Chair Rick Holliday-Smith acknowledged the 'commentary' on Dr Henry's re-election and indicated that he had spoken with several shareholders about the issue but was of the view that 'it is important to note that the matters raised in the royal commission did not relate to the ASX or Ken's role as an ASX director'

[Source: [registration required] The Age 28/09/2019]

Regulators

No plans to request a 'royal commission' type inquiry into banking competition, just business as usual? ACCC Chair Rod Sims told the Standing Committee on Economics that his reported plans to approach the Treasurer to undertake a competition inquiry into Australia's banks is 'just part of a sequence of

[possible] inquiries that was always intended, and quite what the next one is and when it will occur will come out of the discussions with the Treasurer'

Appearing before the Standing Committee on Economics on 18 September Australian Competition and Consumer Commission (ACCC) Chair Rod Sims provided (among other things) some clarification around a report in The Australian reporting that the regulator plans propose an inquiry into bank competition to the Treasurer.

[Note: The report Mr Sims is referring to appears to be the report entitled: Test banks on fairness, ACCC asks Frydenberg which was published on 18 September. This can be accessed (if you have a subscription) here. The transcript of the Committee hearing is available on the parliamentary website here.]

No plans to hold 'something like a royal commission' into competition in the banking sector

Mr Sims explained to the Committee that the ACCC undertakes regular reviews, in line with its role to look at competition issues in the banking sector and at the direction of the Treasurer, and periodically undertakes targeted 'deep dive' reviews into specific issues. To date, Mr Sims said that the ACCC has undertaken two such reviews — one into the bank levy and the second in relation to foreign exchange. Mr Sims said that as the foreign exchange review is now complete, the regulator is in discussions with Treasury to plan the next review. 'I'm afraid that headline [in the Australian] came from a journalist who'd been ringing me up every couple of months, saying, "When's your next inquiry?" I foolishly said we were talking to the Treasurer's office and the Treasurer about it. That's the beginning of that story. It's just part of a sequence of inquiries that was always intended, and quite what the next one is and when it will occur will come out of the discussions with the Treasurer' Mr Sims said.

Mr Sims went on to say that that despite the headline in the Australian suggesting that he was planning 'something like a royal commission', this was not his intention. 'No, these are just incremental studies. We think our bank levy study provided very useful information and insight, but I don't think it was on the Richter scale of a royal commission. The same with our foreign exchange one—they are important competition and consumer issues. We judge this series of inquiries to be things that get at quite specific issues so that we can make progress and bring about change. That is, if you like, the different role we play. The Productivity Commission did that big review on competition in financial services, which came out with quite sweeping recommendations. Our job is to dive much deeper and have quite specific recommendations. It's not world-shattering stuff, but it is important' Mr Sims said.

Competition in the banking sector

Asked to outline the competition issues in the banking sector that a review might explore, Mr Sims said that the regulator does not think that there is strong competition in retail banking and more particularly that there is a lack of price competition; and the question of 'why have we got four players who seem to be able to maintain their share and earn very high profits'. A future review would be a means for the ACCC to 'chip away and see how we can deal with' the issues, Mr Sims said.

Asked to outline the role he sees for smaller banks in competition, and the risks of regulation both for the Big Four and for smaller banks, Mr Sims said that it is an issue he has spoken with financial regulators the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC) about and that further investigation is needed. 'Obviously, we've had meetings with the Customer Owned Banking Association…and their view is that, whereas some of the requirements are a burden on the big banks, they're a huge burden on the little banks. They would like differentiated rules. We're talking to people and gathering intelligence, and talking to APRA and ASIC, about these matters'.

Mr Sims went on to note that the he considers that the roll out of the Consumer Data Right in the context of the banking sector, should have a positive impact on competition. 'We think that can play an important role in terms of consumer inertia and in trying to lower some of the transaction costs from switching. That's another front that we're working on as well' Mr Sims said.

Would the ACCC like the power to self-initiate inquiries?

Asked whether he would like the ACCC, like its UK counterpart the Competition and Markets Authority (CMA) to be able to self-initiate inquiries, Mr Sims said that the regulator would like that power.

[Sources: Transcript: Australian Competition and Consumer Commission annual report 2018 Standing Committee on Economics 18/09/2019; [registration required] The Australian 18/09/2019; 19/09/2019; 19/09/2019; [registration required] The Age 19/09/2019; [registration required] The AFR 19/09/2019; [registration required]

Related News: COBA has welcomed reports of the ACCC's request for a banking competition inquiry

The Customer Owned Banking Association released a statement welcoming media reports of the ACCC's plans to request to conduct an inquiry into the banking industry's competitiveness. 'We strongly support the ACCC's calls for an inquiry to examine the banking industry's competitiveness. It's encouraging to see that the ACCC and Tim Wilson MP share our sector's concerns about competition and what an uncompetitive banking market means for consumers' COBA CEO Michael Lawrence said.

[Sources: COBA media release 18/09/2019]

ASFA has called for agencies that receive the industry funding levy to be more transparent and accountable for the way the funds are used

Context: On 16 August, Treasury consulted on the design and operation of the financial institutions supervisory levy which is designed to cover the majority of the costs of the Australian Prudential Regulation Authority (APRA) and to fund specific costs for a range of other Commonwealth agencies and departments (eg the Australian Taxation Office (ATO) and the Australian Securities and Investments Commission (ASIC)) (see: Governance News 21/08/2019). Consultation closed on 13 September.

ASFA has called for more accountability and transparency about how the funds are used: In its submission, The Association of Superannuation Funds of Australia (ASFA) called for more accountability about how the levy is spent by the agencies who receive it.

The submission notes that Registrable Superannuation Entities (RSE licensees) will pay over $89.1 million this year in supervisory levies. This represents an increase of some $6.8 million over the 2018 – 2019 levies.

'Given that this is money which could otherwise have been attributed to member accounts, it is critical that all of the agencies who receive the levy are accountable for the costs and expenditure they incur' the submission states. Among other things, the submission calls for transparency about the nature, scope and timing of the activities undertaken by agencies who receive the levy; transparency and accountability with respect to the activities undertaken and the costs incurred.

'Given the lack of transparency about the process and the length of time since the initial parameters were set, there should be a thorough review of the levy determination process performed. The basis on which the levies are determined, including the underlying methodology utilised, should be reviewed by an independent party' ASFA writes.

[Sources: ASFA submission to Treasury: Consultation on Financial Institutions Supervisory Levies methodology 17/09/2019; Money Management 19/09/2019]

ASIC's latest report on regulation of corporate finance released: Climate disclosure will remain a key focus for the regulator with ASIC indicating that it will conduct surveillances of the climate-related disclosure practices of select listed companies in the next 12 months

Report Overview | ASIC report 630: ASIC regulation of corporate finance: January to June 2019 (REP 630)

The Australian Securities and Investment Commission's (ASIC's) latest report on its oversight of corporate finance activity between January to June 2019 provides statistical data, and includes relevant guidance, about ASIC's regulation of: a) fundraising transactions; b) mergers and acquisitions; c) experts; and d) corporate governance issues.

The report also discusses key concerns arising from practices in these areas, including the conduct that has caused the regulator to intervene, ASIC's response to issues identified in transactions during the period, and insights into future areas of focus.

Some Key Findings and Reminders from ASIC

Corporate Governance

The report outlines ASIC's recent efforts to clarify its policy in relation to the disclosure of risks/opportunities associated with climate change, in line with the regulator's continued focus on climate risk disclosure. These efforts include the release of Report 593 Climate risk disclosure by Australia's listed companies (REP 593) (for a summary see: Governance News 21/09/2019) and more recently updates to Regulatory Guide 228 Prospectuses: Effective disclosure for retail investors (RG 228) and Regulatory Guide 247 Effective disclosure in an operating and financial review (RG 247) (for a summary see: Governance News 14/08/2019).

The updated guidance, ASIC says: a) incorporates the climate change risk definitions developed by the G20 Financial Stability Board's Task Force on Climate-related Financial Disclosures (TCFD) and highlights that climate change-related risks may need to be disclosed in a prospectus; b) highlights climate change as a systemic risk that could affect an entity's financial prospects for future years, which may need to be disclosed in an operating and financial review (OFR); and c) reinforces the existing policy that disclosures made outside the OFR (such as under the voluntary TCFD framework or in a sustainability report) should not be inconsistent with disclosures made in the body of the OFR.

ASIC says that it encourages listed companies and their directors to: a) adopt a probative and proactive approach to emerging risks, including climate-related risks; b) develop and maintain strong and effective corporate governance, which helps in identifying, assessing and managing risk; c) comply with the law when it requires disclosure of material risks; and d) disclose meaningful and useful climate risk information to investors.

With respect to providing meaningful and useful climate risk information, ASIC 'strongly encourages listed companies with material exposure to climate change to consider reporting voluntarily under the TCFD framework'.

ASIC says that it will continue to participate in discussions with industry and other stakeholders on climate-change related issues, and will be conducting surveillances of the climate-related disclosure practices of select listed companies in the next 12 months.

ASIC added that it encourages corporate advisers to attend upcoming bi-annual Corporate Finance Liaison meetings (which will be held in most capital cities between 25 September and 3 October 2019) as they are an opportunity for ASIC to discuss the content of these reports in greater detail and address issues that have arisen since the reporting period, as well as answer questions from participants.

[Note: For expert insights into the heightened expectations of climate related disclosure and assurance see: Heightened expectations of climate-related disclosure and assurance. MinterEllison has also released a plain language guide exploring some of the background to issues that businesses face when addressing climate change. The guide can be accessed on the MinterEllison website here: https://www.minterellison.com/articles/climate-change-a-plain-language-guide-for-business]

Fundraising

- In the period, 216 original disclosure documents were lodged, seeking to raise approximately $3.95 billion. By comparison, 296 original disclosure documents were lodged in the period 1 July 2018 to 31 December 2018 (previous period), seeking to raise $7.6 billion.
- This period saw a significant decrease in the magnitude of the largest fundraising offers, with total amounts actually raised in the top 10 fundraisings decreasing from $5 billion in the previous period to $3.3 billion in this period.
- The number of interim stop orders was more or less consistent with the previous period (12 compared with 11 during the previous period)
- In this period, the most common concerns raised with prospectuses also remained largely consistent with the previous period. The top five disclosure concerns most frequently raised were: 1) business model (not fully or adequately disclosed; 2) use of funds (unclear of insufficient detail); 3) inadequate, insufficiently prominent or not tailored risk disclosure; 4) unbalanced disclosure; clear, concise and effective disclosure (insufficient summary, investment overview of key information).

- When ASIC raised concerns about prospectuses, the most common result was the issuer providing new or amended disclosure (75% of cases) followed by an extension of the exposure period (40%).
- ASIC reminds issuers that engage marketers to promote offers that they should actively monitor marketing and promotional activities and materials to ensure that it is not misleading or deceptive. ASIC cautions that if it considers that advertisements/marketing activities are misleading/deceptive it may take action against the issuer or third party and has a broad range of regulatory tools and powers available to address concerns with the advertising and marketing of offers, including stop-order powers, injunctive orders and penalties.
- ASIC observed an increase in the number of IPOs by technology development and service companies that are relatively early stage and loss making. ASIC says that in many instances it has sought corrective and additional disclosure in relation to both revenue growth and customer numbers, which ASIC says is a 'considerable focus area in prospectuses for such types of issuers'.

Expert reports

ASIC said that its surveillance of independent expert licensees during the period identified that several experts did not maintain or had inadequate internal documentation of internal processes relating to the preparation of expert reports. ASIC cautions that all experts should regularly review internal policies and procedures to ensure that they are sufficiently documented and applied.

ASIC adds where a review indicates inadequate practices, it may seek assurances from experts that they will not prepare expert reports until ASIC complete its review and that in more 'serious cases' ASIC may consider taking licensing and/or enforcement action.

Mergers and acquisitions

- During this period, the number of independent control transactions commenced decreased to 29, compared with 44 in the previous period. The number of independent restructure transactions also decreased to 8, compared with 10 in the previous period.
- Overseas bidders or acquirers were identified as a key driver of takeovers via bids and schemes during the period with foreign bidders or acquirers behind 73% of all deal value (based on the collective and implied value of all targets).
- Consistent with the previous period, the largest control transactions during this period were, in most cases, offers of cash, rather than scrip, as consideration.
- Consistent with the previous period, voluntary escrow relief remained the most common relief sought from ASIC in relation to the takeovers provisions of the Corporations Act. Relief relating to relevant interests, item 7 transactions and variation of offer terms or bid class were the next most commonly sought relief types.
- Most of ASIC's regulatory interventions in control transactions this period related to schemes of arrangement. ASIC raised issues with offer terms, 'truth in takeovers' statements, shareholder classes and bid structures.
- During the past 12 months ASIC either withheld no-objection letters or intervened to oppose approval of a scheme on four occasions. ASIC says that it will closely scrutinise schemes of arrangements involving practices it considers 'contrary to the principles underlying the regulation of takeovers and which undermine the integrity of the scheme process'.
- ASIC recommends that 'directors who will receive benefits under a scheme consider potential conflicts of interest when considering whether to make a recommendation and carefully disclose such considerations in the scheme documentation'.
- ASIC also identified concerns with practices during transactions that affect the integrity of the markets in which they take place, including matters pertaining to substantial holding disclosure and takeover bid minimum acceptance conditions.
- Policy updates: The report outlines ASIC's work on a number of policy updates relating to mergers and acquisitions including updates related to: a) stub equity (ie recent consultation — CP 312 Stub equity in

control transactions); 'truth in takeovers' (ASIC says that work is continuing to update the 'truth in takeovers' policy in RG 25); and securities lending by agents and substantial holding disclosure (Consultation Paper 319 Securities lending by agents and substantial holding disclosure (ie recent consultation — CP 319 Securities Lending by agents and substantial holding disclosure).

- Criminal proceedings: Two matters are being prosecuted by the Commonwealth Director of Public Prosecutions.

[Sources: ASIC media release 23/09/2019; REP 630 ASIC Regulation of corporate finance: January to June 2019]

Markets and Exchanges

Under the radar? New ANU research has found evidence of 'indirect insider trading' by Australian directors

A research paper — Strategic insider trading around earnings announcements — by ANU academic Dean Katselas has tested the presence (or not) of indirect insider trading by directors in Australia by examining directors' trades around earnings announcements.

Some Key Points

- The report is based on 50 875 directors' transactions between 2002 and 2014, and19 634 announcements. These were used to test whether directors trade in the opposite direction to earnings news in the period up to 20 days following the event
- The research found that directors do strategically trade around earnings announcements. Generally speaking, during the 20 days following the release of good information (which was found to spark a rally in the shares), directors would on average sell shares in their own companies. After bad news, directors were observed to buy shares when the stock price headed lower.
- Business Insider quotes Mr Katselas as saying, 'My results show these contrary trades were being made with non-public knowledge, privy only to company insiders, about the future performance of the firm. This most certainly amounts to insider trading under the law'. Reportedly he said that the practice is both 'creative and criminal'.
- According to Business Insider the Australian Securities and Investments Commission (ASIC), while not disputing the findings, has said that it views such trading as legitimate. Business Insider quotes ASIC as saying 'Although we have yet to examine the research in detail, the announcement suggests it is based on a very different concept of what constitutes "inside information" and "insider trading" than applies in any comparable market anywhere. That is, that most directors are trading on inside information whenever they trade, and are breaching the law simply by virtue of having an intimate understanding of the business…By extension, this suggests that all directors (and for that matter, management) should be prevented from owning shares. This proposition would be contrary to common market practice here and elsewhere.'

[Sources: [registration required] Strategic insider trading around earnings announcements in Australia Dean Katselas, Research School of Finance, Actuarial Studies and Statistics, Australian national University Canberra ACT [accessed via Wiley online library]; Business Insider 23/09/2019; [registration required] The Australian 23/09/2019; ABC News 23/07/2019]

Financial Services

Top Story | Not proven (but not necessarily an endorsement either)? The Federal Court's decision in Australian Prudential Regulation Authority v Kelaher 2019 FCA 1521 (APRA's IOOF case)

Australian Prudential Regulation Authority v Kelaher 2019 FCA 1521

The Federal Court has dismissed APRA's 'best interests duty' test case against certain IOOF entities, directors and officers and ordered the regulator to pay costs. APRA has said that has not yet made a decision on whether it will appeal.

Key Takeouts

- The Federal Court has dismissed the Australian Prudential Regulation Authority's (APRA's) case against certain APRA-regulated IOOF entities and five individuals who were responsible persons of those entities for alleged breaches of the SIS Act and prudential standards (including alleged breach of the trustee duty to exercise the requisite degree of care, skill and diligence; to act in the best interests of the beneficiaries of the superannuation funds; and to give priority to the interests of the beneficiaries in the event of a conflict of interest).
- Justice Jagot found that 'none of APRA's claims of contraventions of the SIS Act against the respondents are sustainable with the consequence that there is no foundation for the making of any disqualification orders and the further amended originating application should be dismissed'.
- APRA has not yet determined whether it will appeal.
- APRA Deputy Chair Helen Rowell said that despite the disappointing result, it was a worthwhile exercise. 'This case examined a range of legal questions relating to superannuation law and regulation that had not previously been tested in court, relating to the management of conflicts of interest, the appropriate use of super funds' general reserves and the need to put members' interests above any competing priorities…APRA still believes this was an important case to pursue given the nature, seriousness and number of potential contraventions APRA had identified with IOOF'.

On 20 September, Justice Jayne Jagot handed down her decision in Australian Prudential Regulation Authority v Kelaher 2019 FCA 1521. Justice Jagot rejected APRA's case and awarded costs against the regulator.

The decision has received a high level of media coverage, in light of the Financial Services Royal Commission (IOOF was a case study considered by the Financial Services Royal Commission) and in the context of APRA's stated forward focus on improving superannuation member outcomes.

[Note: Round 5 of the Financial Services Royal Commission Hearings included a case study concerning IOOF. Counsel Assisting suggested in closing submissions, that it may (or may not) be open to the Commission to find that Questor and IIML breached s52 of the Superannuation Industry (Supervision) Act (SIS Act). See: D.3 para 228-230 Financial Services Royal Commission Round 5 (Superannuation) Closing Submissions. In his final report, Commissioner Hayne said 'These proceedings having been instituted, I will say nothing about what emerged in evidence before the Commission about events and circumstances referred to in the papers filed by APRA in the Federal Court. See: Financial Services Royal Commission Final Report at 244.]

[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]

APRA's case

Broadly speaking, APRA alleged that two registrable superannuation entities (RSEs) within the IOOF Group of companies — IIML (trustee and licensee of various superannuation funds including IPS Super) and Questor (trustee and licensee of various superannuation funds including TPS Super) — and two of their directors, Mr Kelaher and Mr Venardos contravened their obligations under the Superannuation Industry (Supervision) Act 1993 (Cth) (the SIS Act) — s 52(2)(b) and s52A(2)(b) (due care, skill and diligence covenant); s 52(2)(c) and s52A(2)(c) (best interests covenant); s 52(2)(d) and 52A(2)(d) (conflicts covenant) and s55 Recovering loss or damage for contravention of covenant as well as prudential standards — by failing to act in the best interests of superannuation members over the course of various incidents.

For context, both IIML and Questor were dual regulated entities meaning that in addition to being a trustee of one of more superannuation funds, they were also the responsible entity (RE) for one or more managed investment schemes. Both IIML and Questor invested the assets of superannuation funds of which they were trustees in the managed investment schemes of which they were REs. As REs, IIML and Questor also acquired and held interests in those schemes.

APRA alleged that Questor and IIML failed to maintain the structures, policies and procedures required to manage conflicts of interest in their superannuation business. More particularly, APRA argued that Question and IIML contravened the SIS Act by 'differentially' compensating superannuation beneficiaries and other superannuation investors for losses caused by Questor and IIML (or their service providers) 'using their own [ie the members' own] reserve funds rather than the trustees' own funds or third party compensation'.

APRA also alleged that in rejecting a proposed fund transfer — transferring the Optus employee default superannuation arrangements from IPS Super to an AMP fund by way of a successor fund transfer — Mr Kelaher did not take steps to consider whether it was in the best interests of the relevant superannuation beneficiaries.

Finally APRA alleged that Mr Kelaher, Mr Venardos and three responsible officers of the entities Chief Financial Officer David Coulter, General Manager – Legal, Risk and Compliance and Company Secretary Paul Vine, and General Counsel Gary Riordan had refused to properly acknowledge APRA's concerns since 2015 and failed to cause Questor and IIML to take the necessary actions to ensure ongoing compliance with their legal obligations.

APRA sought disqualification orders against the directors and against Mr Coulter, Mr Vine, Mr Riordan and a declaration that IIML and Questor (which at the material times were RSE Licensees owned by IOOF Holdings Limited) breached the SIS Act.

Outcome?

Justice Jagot found that APRA failed to prove that there had been any breach of any covenant.

She rejected APRA's case on the basis that 'none of APRA's claims of contraventions of the SIS Act against the respondents are sustainable with the consequence that there is no foundation for the making of any disqualification orders and the further amended originating application should be dismissed'.

Why did APRA's case fail?

'I have found APRA's approach unpersuasive' and 'fundamentally inadequate'

Justice Jagot commented that 'it was for APRA to prove the primary facts on which its allegations of contraventions depended. The way in which it sought to do so was fundamentally inadequate'.

Some of the weaknesses identified by her Honour with respect to APRA's approach (overall) include the following.

Over-reliance on IOOF documentation

Justice Jagot observed that 'it was for APRA to prove its case of contraventions by such evidence as it saw fit. The fact that it has chosen to run a purely documentary case means that it must take the documents as it finds them – as documents brought into existence for specific purposes, mostly by authors whose qualifications and experience are unknown, using the benefit of hindsight, often expressed at a high level of generality, and assuming otherwise unproven knowledge of IOOF's systems, policies and procedures'.

IOOF documents (including breach reports) are not themselves evidence of a breach

Justice Jagot observed that 'apart from the opinions or conclusions expressed as to breach of the statutory covenants, the documents are expressed at a high level of generality, assuming knowledge on the part of the reader as to IOOF's systems, policies and procedures (which remained unproved by other evidence). I also do not accept that there can be an effective admission of a legal conclusion, which is a matter for the Court based on the whole of the evidence. Even if such a statement could constitute an admission I would not be persuaded as to its reliability'.

Use of minutes as evidence of breaches of the no conflicts covenant

APRA relied on the minutes of the meetings of the various boards all of which recorded no conflict of interest, in support its case of breaches of the no conflicts covenant. Justice Jagot rejected this approach on the basis that 'the minutes of a meeting are not required to record everything that was said…The Courts have consistently recognised that while minutes of board meetings should record decisions and resolutions made by the board, minutes are not expected to be complete transcripts of words spoken at the meeting and nor do they need to record arguments for or against resolutions'.

As such, she concluded that 'the absence in the minutes of a detailed record of discussion or consideration about matters before the board does not support the conclusion that such discussion or consideration did not occur.'

Insufficient detail about IOOF's actual systems and procedures to support the allegations

Justice Jagot also considered that a 'systemic weakness in APRA's case is that it has asserted contravention of the covenants [under the SIS Act] and, in so doing, has alleged defaults and inadequacies in IOOF's systems, policies and procedures, without descending into the detail of proving the actual systems, policies and procedures in play in respect of the incidents in question'.

More particularly, Justice Jagot found that 'APRA has not realistically confronted the need for reliable evidence of the particular factual circumstances said to give rise to the breaches of the statutory covenants…There is an evidentiary vacuum when it comes to the existing systems and procedures making it impossible to perform the kind of analysis that would be required for APRA to make good its claims'.

Reliance on APRA's own opinion

In addition, Justice Jagot was critical of APRA's reliance on its own expressions of opinion (either by communicating its views directly to the respondents or via policy publications) observing that 'the fact that a particular person was aware of APRA's opinion is not relevant to the existence of any of the asserted contraventions'.

The group's alleged 'profit motive'

Justice Jagot found that to the extent that APRA's case was that conduct was 'driven by the relevant companies saving expenditure on reimbursing beneficiaries for losses, the case theory is tenuous in the extreme'.

Reliance on res ipsa loquitur is misplaced

Commenting overall on APRA's approach, her Honour said that APRA's 'case consisted of identifying an apparent error by the trustee which may or may not have occasioned loss to the beneficiaries, asserting that the error gave rise to reasonably arguable causes of action against the trustee and IOOF Service Co, relying on IOOF documents as constituting admissions (including purported admissions as to legal conclusions), and then treating the mere fact of error and loss as a form of res ipsa loquitur sufficient to establish that the relevant respondents breached their statutory covenants'.

'Without expressly saying so APRA's approach involved reliance on the doctrine of res ipsa loquitur when the one thing that is clear is that the facts of the incidents in question in this case by no means speak for themselves'.

Failure to explain why the extension of legal principle with respect to the trustees is warranted

In addition to taking issue with the way in which APRA approached the task of proving the alleged contraventions, Justice Jagot also rejected APRA's characterisation of the duties of trustees under the SIS Act.

'APRA has effectively cast the trustees in the role of insurer to the beneficiaries, which is contrary to principle. APRA has also sought to extend legal principle by applying the kind of requirements to which a trustee is subject in deciding whether or not a beneficiary is entitled to a payment out of the trust, a circumstance in which the trustee is bound to give proper consideration to the relevant information and if necessary obtain relevant information to fulfil its trust duty, to the day-to-day decisions which a trustee of a large fund must make in the administration of the trust. APRA has not explained why this extension of legal principle is warranted and…I am unpersuaded that it is warranted' she writes.

Care, skill and diligence covenant — discussion of the scope of the covenant

Acting in the best interests of members? The application (or not) of Finch v Telstra Super Pty Ltd (2010) 242 CLR 254?

Justice Jagot comments that a 'consistent theme of APRA's case is its attempts to draw an analogy between the kind of decision with which Finch v Telstra was concerned, and the kinds of decisions which the trustees were making in the present case'. APRA argued that Finch v Telstra is authority for the principle (among other things) that that knowingly excluding relevant information from consideration or failing to seek relevant information in order to resolve a conflict is a breach of a superannuation trustee's obligation to act in the best interests of members.

'I am not persuaded that the analogy is sustainable'

But, Justice Jagot observed that in effect APRA was seeking to extend 'the principle applying to decisions about entitlements to any and all matters potentially affecting the capital of the trust'. She observed that 'there must be a myriad of decisions taken every day by trustees of large superannuation funds which potentially affect the fund both materially and immaterially. The extension of the principle which APRA proposes appears onerous in the extreme and highly impractical'.

Justice Jagot writes, 'APRA's case, insofar as it relies on Finch v Telstra to suggest that the relevant respondents were making non-discretionary decisions and had to obtain information, such as independent legal advice, before they could make a decision is unpersuasive and not supported by authority. The core trustee duty of determining whether a beneficiary has an entitlement is not analogous to a decision as to whether or not a chose in action, such as the right to make a claim for loss, should or should not be pursued. The latter decision is more akin to an exercise of discretion because it involves a potentially wide range of relevant considerations and an evaluation of all of those considerations including the amount at stake, the prospects of success, the practical and legal issues which will be confronted, and the available alternatives (at the least). Accordingly, I do not accept a fundamental plank in APRA's case that the alleged existence of causes of action or reasonably arguable causes of action imposed on the trustee a duty to "exhaust" consideration of the potential choses in action and to inquire and obtain further information if any such further information was necessary to enable that exhaustive consideration to be given' Her Honour states.

In Justice Jagot's view 'A decision which is taken to ensure and is objectively in the best interests of beneficiaries at the time it is made does not lose that character because, at that time, more information could have been obtained…It will frequently be the case that there is more than one course of action which may be regarded as being in the best interests of the beneficiaries. The test is objective and is to be applied prospectively, that is, from the position of the trustee at the time of the decision, without impermissible hindsight'.

Further, she observed that 'As far as I am aware, there is no authority that supports this proposition as some form of rigid principle which is to be applied irrespective of the circumstances of the particular case'.

(Alleged) misuse of the reserves?

APRA argued that The Operational Risk Financial Requirement (ORFR) and the general reserve constituted 'members' money' and therefore could not properly be used to compensate members for losses caused by other companies in the IOOF group or a third party.

More particularly, APRA argued that in deciding to use the ORFR the trustee and its directors were bound by ss 52 and 52A. As such, any decision to use the reserve 'must be made in the best interests of beneficiaries and that cannot be the case where there are other sources of compensation available, outside of the trust fund, that are not being considered and pursued'.

The ORFR is not 'members' money'

In rejecting APRA's argument, Justice Jagot observed that 'it is misconceived and a complete mischaracterisation to describe the ORFR as "members' money"…it is money in a dedicated fund, held in accordance with the provisions of the SIS Act, for the express purpose of paying compensation to members for losses arising from operational risk, including risks arising from the trustee's conduct. Using that fund to compensate members in such circumstances does not involve compensating members with their own money in any relevant sense; rather, it is to use the fund for the very purpose for which it was created'.

Likewise, Justice Jagot was unpersuaded that the 'general reserve' could not be used for the purposes for which they were established and are maintained, including compensation of members.

Her Honour writes 'APRA has sought to put a gloss on the use which may be made of the ORFR to the effect that it is available to reimburse members for losses but only when consideration of all other potential avenues for redress have been exhausted. Further, in oral submissions APRA said that any use of the ORFR or the general reserve to reimburse members could not be considered to be "compensation" of the members for loss because they were being given their own money…The propriety of the use of the ORFR (and any reserve) is to be determined by the statutory scheme and the instruments and policies which regulate the use of the reserve. APRA's construct is not founded on anything in those documents and must be rejected. This

undermines a large swathe of APRA's case, founded as it is on the impropriety of the respondents' conduct in proposing the use of or using the ORFR to reimburse members for certain losses'.

No legal principle supports this view?

Elsewhere in the judgment, her Honour expands on the duty of a trustee to 'get in trust property'. Her view is that 'APRA has sought to graft onto the duty of a trustee to get in trust property the notion that this duty extends to pursuing to the point of "exhaustion" every possible claim, regardless of its legal or practical complexity or its prospects of success. I agree with the first respondent that: The consequences of this error for APRA's closing submissions is profound. In many respects, the entire architecture of APRA's new case regarding the Pursuit, Sweep, CMT and Bendigo matters depends on the correctness of its assertion that pursuing choses in action is an incident of the trustee's duty to get in trust property. The rejection of the proposition leaves those cases without any clear basis in legal principle'.

Reliance on management?

APRA submitted that 'it is no longer the law that directors can rely upon officers without verification', but Justice Jagot found that this 'goes too far'.

'As the first respondent submitted there are many circumstances in which a director is entitled to rely on management provided that there are not circumstances from which the director knew or ought reasonably to have known that such reliance was misplaced' Justice Jagot writes. With respect specifically to directors' oversight of compensation plans, Justice Jagot rejected what she described as 'APRA's attempt to label compensation plans as matters uniquely within the sphere of responsibility of directors'.

No actual conflicts proven?

APRA alleged that the conflicts of interest arising from IOOF Group's 'conflicted' structure, were not managed in the particular circumstances, and these conflicts led to various breaches of statutory obligations.

More particularly, APRA alleged that the corporate and governance structures of the IOOF Group (as distinct from the structure of IOOF Group itself) gave rise to potential conflicts between: a) the interests of beneficiaries and the obligations to beneficiaries of each of IIML and Questor in its capacity as trustee and licensee of the relevant superannuation entity; and b) the interests of other entities in the IOOF Group, or of individuals within it, or the obligations of IIML, Questor and their responsible officers to other persons.

[Note: The diagrams in Annexure A to the judgement show that the IOOF Group resulted from the merger in 2009 of AWM Ltd and IOOF Holdings Ltd, referred to as IOOF Hold Co. The post-merger structure, and relevant directors, officers and employees are shown on p 2 and p 3 of Annexure A. Page 4 of Annexure A shows the different capacities in which the various entities in the IOOF Group acted and the locations within the structure where the alleged contraventions arise. Annexure A can be found at the end of the judgment here.]

For example, APRA alleged that Mr Kelaher as managing director of IOOF Hold Co, Questor and IOOF service Co has a conflict between his duties to superannuation beneficiaries under s52A and his duties to non-superannuation investors.

Justice Jagot found that APRA failed to establish that any actual conflict existed. 'APRA's contentions about conflicts of interest remained at the level of theory. That is, as will become apparent, APRA has not established the necessary factual foundation to support the conclusion that any actual conflict of interest existed…Its case on the no conflicts covenant exists at a level of generality and theory which is inapt to make the case it apparently wants to make'.

Exclusion of liability? IIML and Questor could not be exempted from liability for contraventions of the s52 covenants

Though ultimately no breach of any covenant was proven, Her Honour did consider the operation of the right of indemnity under the Act.

APRA argued that despite their governing rules IIML and Questor could not be exempted from liability for contraventions of the s 52 covenants and could not indemnify themselves from the assets of the trusts in respect of liability for such contraventions.

In support of this, APRA contended that:

1. s 55 does not provide that it is a defence to liability to rely on an exemption or indemnity in a trust instrument;
2. s 55 cannot be modified or excluded by a trust instrument. If it were otherwise, s 55 would not apply according to its terms as provided for in s 7;
3. the object in s 3 reinforces this approach to the construction of s 55;
4. s 56 preserves a trustee's general right of indemnity out of the trust assets for liabilities incurred in the proper performance of its duties or exercise of its powers;
5. ss 56(2) and 57(2) do not specify the universe of limitations on the provisions of a trust instrument; and
6. the terms of the provisions, in the overall context of the SIS Act, mean that no provision of a trust instrument can purport to exclude or modify liability under s 55(3).

The respondents contended that the governing rules of the trusts, in conformity with the SIS Act, excluded liability for the alleged contraventions of the s 52 covenants and enabled IIML and Questor to indemnify themselves from the assets of the trusts in respect of any such liability.

Justice Jagot found that though 'resolution of this aspect of the dispute' is not straightforward, on balance, APRA's approach better reflects the provisions construed in the context of the SIS Act as a whole.

[Source: Australian Prudential Regulation Authority v Kelaher 2019 FCA 1521]

APRA's response to the decision

In a statement noting the judgement, APRA said that it is 'examining the lengthy judgment in detail and will then make a decision on whether to pursue an appeal'.

Although disappointed by the decision, APRA Deputy Chair Helen Rowell said that despite the result, the regulator considers that it was a worthwhile exercise. 'This case examined a range of legal questions relating to superannuation law and regulation that had not previously been tested in court, relating to the management of conflicts of interest, the appropriate use of super funds' general reserves and the need to put members' interests above any competing priorities. Litigation outcomes are inherently unpredictable, however APRA remains prepared to launch court action – where appropriate – when entities breach the law or fail to act in an open and cooperative manner. APRA still believes this was an important case to pursue given the nature, seriousness and number of potential contraventions APRA had identified with IOOF' Ms Rowell said.

Ms Rowell went on to say that despite the decision, APRA's tougher approach to enforcement had led to IOOF being better placed to deliver sound, value-for-money outcomes for its members. 'APRA has seen significant improvement in the level of cooperation from IOOF since this case was launched. Additionally, the new licence conditions have enhanced IOOF's organisational structure and governance, including the role and independence of the trustee board within the IOOF group. This will better support effective identification and management of future conflicts of interest'.

[Source: APRA media release 20/09/2019]

IOOF's response to the decision

In a short statement welcoming the decision and confirming the court's conclusion that neither IOOF's APRA regulated entities or the five individuals named in the proceedings contravened the SIS Act, IOOF said that it is currently reviewing the written judgment in detail and expects to issue a further announcement in due course.

[Source: IOOF ASX Announcement 20/09/2019]

A loss for APRA but not an endorsement of IOOF's approach to managing conflict?

Professor Michael Adams is quoted in the AFR as cautioning that the result should not be interpreted as an endorsement of IOOF's approach. 'This is a technical win due to the incompetence of the regulator…Financial

services entities and businesses would be very naive to interpret the decision otherwise…That would be very dangerous.'

Further, Professor Adams reportedly opined that though APRA failed to make out its case, it does not mean that no breaches occurred. '[IOOF's] decision to use members' funds instead of [its] own funds remains a conflict of interest with director's duties…The conduct on the face of it goes against the relevant superannuation legislation. That is supported by testimony at the royal commission' he is quoted as saying.

With respect to the possibility of an appeal by the regulator, Professor Adams reportedly said 'I certainly think they should be looking at an appeal'.

[Source: [registration required] The AFR 24/09/2019]

'Are you going to get better or get out?' APRA Chair Wayne Byres has reiterated that the achievement of strong member outcomes by superannuation funds is a key focus

In a 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.

[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]

Superannuation is a key focus for APRA: Are you going to 'get better or get out'?

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'.

'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

Increased transparency around superannuation fund performance

- **'Overhaul' data collection with a focus on Choice products:** In addition, Mr Byres reiterated that APRA is planning to consult on what he described as a 'major overhaul' of superannuation reporting with the aim of providing 'greater coverage, more granularity, enhanced consistency and better quality data'. 'Our MySuper data collection is now in pretty good shape, so most of our focus will be on the choice segment of the market, where the largest data gaps remain' Mr Byres added.

  Mr Byres said that 'inevitably' the overhaul of data collection would 'lead to cries of complaint from the industry' but that 'if in this day and age a trustee cannot reliably, accurately and quickly provide information on assets, returns, fees and costs for all their products across a range of dimensions, and including in relation to key service providers, one wonders how they will meet heightened standards for assessing the outcomes being delivered for their members'.

- **Traffic light or heat map data on fund performance to be publicly available:** Mr Byres reiterated that as part of the regulator's commitment to transparency, APRA plans to make as much of the data collected public as is feasible. Mr Byres said that starting with MySuper products, APRA plans to publish a selected set of performance related measures and benchmarks with an initial focus on investment returns, fees and changes, and measures of sustainability/viability.

The bar is not only getting higher in superannuation

In conclusion, Mr Byres said that APRA's approach to superannuation is 'something of a case study for how APRA's regulatory and supervisory approach is evolving…When it comes to powers and standards, it is clear that the Government is actively equipping regulators with better powers and more resources. The new powers in superannuation are merely one example of a strengthening of regulatory powers and sanctions that is occurring across the board. For APRA's part, we have an active program of policy reform ahead of us to upgrade our standards in a range of areas. The bar is not only getting higher in superannuation'.

AFSA has raised concerns about APRA's proposal to publish traffic light data/heat map data?

The AFR and the Australian report that Association of Superannuation Funds of Australia (ASFA) CEO Martin Fahy has raised concerns about APRA's proposed heat map/traffic light approach. Reportedly Mr Fahy has said that the regulator should focus on eliminating poor performers rather than what the proposed 'ill-advised' plan to publish data on fund performance.

Mr Fahy is quoted as saying that the proposed approach is flawed because it is effectively 'endorsing one group of funds and condemning another based on short-term performance…This is separate and distinct from removing habitually underperforming funds'.

In addition, Mr Fahy has reportedly suggested that APRA's assessments risked being misunderstood by the public. 'We have real concerns about heat mapping or traffic lighting funds based on a short five years of data; this binary idea that red is bad and green is good…The public might be of the perception that if they're not in a top 10 fund they're in the wrong fund. But if the fund is meeting its benchmarks then that's a perfectly good fund' he reportedly said.

Reportedly Mr Fahy has suggested that ranking funds based on a 10-year or 15-year performance would be more appropriate.

'We have a mechanism (for dealing with the worst funds) and it isn't to run into the public square and shout 'fire!'. The damage done to the member interest in an underperforming fund would be exacerbated by causing a rush to the door. If we believe that a fund is habitually underperforming then there are powers and mechanisms for an orderly resolution of that and it doesn't mean you have a rush and create a liquidity and insolvency event…We don't suffer from a lack of good funds, we suffer from a small number of habitually underperforming funds and for APRA to nominate some funds as green is essentially creating a moral hazard. They're endorsing some funds but not others' Mr Fahy reportedly said.

[Sources: APRA Chair Wayne Byres speech, Gilbert + Tobin Conversation Boardroom event, Driving better member outcomes 19/09/2019; [registration required] The AFR 19/09/2019; [registration required] The Australian 20/09/2019]

Treasury Laws Amendment (Putting Members' Interests First) Bill 2019 has passed both houses

Treasury Laws Amendment (Putting Members' Interests First) Bill 2019 passed both houses on 19 September having been amended in the senate.

What was in the Bill? The Bill originally contained measures to prevent trustees from providing insurance on an opt-out basis to members under the age of 25 and to members who hold products with balances below $6,000.

Changes?

Announcing the passage of the Bill Treasurer Josh Frydenberg and Assistant Minister for Superannuation, Financial Services and Financial Technology Jane Hume highlighted the following changes.

- **Delayed commencement:** New members under 25 and members with low balance accounts will only be offered insurance in superannuation on an **opt-in** basis from 1 April 2020.
- **A targeted exemption will allow trustees to elect to provide insurance on an opt-out basis to members employed in dangerous occupations** (eg emergency services such as police, ambulance officers or firefighters, or other workers employed in the top 20% riskiest occupations).

Industry response? Industry peak bodies have welcomed the extended timeframe

- In a statement welcoming the passage of the legislation, **The Association of Superannuation Funds of Australia (ASFA)** said that the amended start date 'should lead to more consumers maintaining valuable insurance arrangements through their superannuation. Deputy CEO Glen McCrea said that extending the commencement date to 1 April 2020 provides more time for fund members to be notified of changes and to make a considered decision about their insurance cover, before it is cancelled. The statement adds that ASFA has advocated strongly for a 1 April 2020 start date as a reasonable compromise for the full commencement of the legislation. Mr McCrea said 'There is now a better opportunity for superannuation funds to reach consumers and help them understand what the changes mean for them. Consumers will

have more time to consider their insurance needs and determine whether their insurance should be maintained.'

- In a statement welcoming the passage of the legislation, **Financial Services Council (FSC)** CEO Sally Loane said that amendments to provide additional time for impacted super fund members to opt into insurance were a sensible, consumer-focused change to the legislation. 'These changes will ensure that super funds have additional time to engage with their members about the changes, and that consumers will have time to make informed decisions about their insurance needs' Ms Loane said.

[Sources: Schedule of Senate amendments; Treasurer Josh Frydenberg media release 19/09/2019; ASFA media release 19/09/2019; Financial Services Council media release 19/09/2019; Money Management 20/09/2019]

2019 Global Retirement Index: The top ten countries for retirement security? Australia and New Zealand are in the top ten for the third year in a row

The Natixis 2019 Global Retirement Index examines key factors that drive retirement security across 44 countries and then provides a ranking of countries based on four factors: 1) the ability of retirees' ability to live comfortably in retirement (material wellbeing); 2) retirees' access to quality healthcare (health); 3) access to quality financial services and the ability to preserve savings (finances in retirement); and 4) whether the country can provide a clean, safe environment in which to live (quality of life).

Some Key Findings

- Iceland is the top ranked country. Followed by Switzerland (2); Norway (3); Ireland (4) and New Zealand (5).
- Australia is ranked ninth (down three places on last year). The slide in rankings is attributed to lower scores in quality of life (15th) and finances (4th) which outweighed improved rankings on health and material wellbeing.
- The report comments that both New Zealand and Australia's respective scores have remained consistent over the past three years, with both are in the top ten for the third year in a row.
- The report identifies three key threats to retirement security overall: 1) interest rates; 2) demographics; and 3) climate change.
- With respect to climate change in the Australian context the report comments that the rising sea levels pose a threat to coastal cities that rises into the hundreds of billions of dollars. According to a Climate Council report, more than $226 billion USD in commercial, industrial, and residential assets and public infrastructure on the Australian Coast are potentially exposed to the risks of climate change

[Source: Natixis 2019 Global Retirement Index]

ASIC probe into how conflicts of interests are managed in managed investment funds?

The Australian reports that the Australian Securities and Investments Commission (ASIC) is conducting a probe into the investment account industry and has issued in depth questionnaires to industry with a view to identifying how conflicts of interest are managed and if providers are baking hidden fees into investment accounts.

Reportedly, ASIC is working on a detailed report on the broader investment account industry, which is due to be released in the December quarter for consultation.

According to The Australian, the focus of the review will be on ASIC's concerns that some providers of managed discretionary accounts (MDAs) are not acting in their customers' best interest and whether changes to regulatory settings or further investor protections are required.

The Australian says that ASIC has declined to comment.

[Source: [registration required] The Australian 24/096/2019]

Clarity on responsible lending: Industry bodies, the MFAA (Mortgage and Finance Association of Australia) and FBAA (Finance Brokers Association of Australia) are working on a proposal to take to ASIC?

InvestorDaily reports that during a panel discussion at the REAL Future of Advice Conference Tim Brown (former Macquarie head of sales and distribution for mortgages and current CEO of Ezifin Financial Services) said that the lack of clarity around responsible lending guidelines in light of the recent Westpac decision — Australian Securities and Investments Commission v Westpac Banking Corporation (Liability Trial) [2019] FCA 1244 (see: Governance News 11/09/2019) — will cause problems for lenders over the next six months.

Mr Brown reportedly suggested that the big four banks in particular are likely to demand clearer guidance from the Australian Securities and Investments Commission (ASIC). 'I think it is going to be a problem for at least another six months until some of the banks get together with ASIC and say look we need to get some clear guidelines around this. Because they're basically saying HEM isn't acceptable anymore' he is quoted as saying.

Reportedly Mr Brown described the current lending landscape as a 'minefield' in which lenders 'can't get clarification' from the regulator over standards for evaluating consumers' eligibility for mortgages. 'I think the problem with this whole expense discussion, as I was pointed out earlier on is that a lot of the assessors put their own personal assessment on what someone else spends money on, which is where the problem lies…It needs to be much more factual' Mr Brown is quoted as saying.

Mr Brown reportedly added 'The banks are sick of this game that they're playing with ASIC at the moment and eventually the four of them will get together and say look, you need to give us some clear guidelines…At the moment, I think the industry bodies are trying to come together with something they can take to ASIC both from a vendor's perspective and also from a MFAA (Mortgage and Finance Association of Australia) and FBAA (Finance Brokers Association of Australia).'

Broader context

- ASIC has appealed the decision in Australian Securities and Investments Commission v Westpac Banking Corporation (Liability Trial) [2019] FCA 1244.
- ASIC is currently consulting on proposed changes to its guidance on responsible lending. On 14 February, ASIC released proposed changes to responsible lending guidance (CP 309 Update to RG 209: Credit Licensing: Responsible Lending Conduct) for consultation. Consultation closed on 20 May (see: Governance News 20/02/2019). ASIC subsequently released submissions received in response to the consultation paper and announced that it would hold public hearings (12 August and 19 August) to 'robustly test' some of the issues/views raised in submissions. A number of submissions raised concerns about ASIC's proposed approach. The Australian Banking Association raised concerns that ASIC's move away from a 'principles based approach that embeds appropriate flexibility' would negatively impact competition and cautioned that 'the broader economic and regulatory environment impacts the speed and availability of credit for consumers and should be considered as part of the review of RG209'. ASIC has said that during recent public hearings on the issue, industry representatives, consumer groups, academics and service providers indicated they would appreciate the guidance including further clarification to support compliance (eg the inclusion of additional case studies and examples). In addition, ASIC noted that industry supports the continuation of guidance giving licensees flexibility. The regulator has also committed most recently in its update on implementation of the Financial Services Royal Commission recommendations (see: Governance News 18/09/2019) to release updated guidance by the end of the year.

[Source: InvestorDaily 19/09/2019]

New Zealand | Evidence of the need for more regulation of insurers? RBNZ has expressed disappointment in insurers' responses to the joint conduct and culture review

The Reserve Bank of New Zealand (RBNZ) has expressed disappointment in insurers' responses to the joint conduct and culture review. The RBNZ concluded that 'significant work is still needed to address the issues of weak governance and ineffective management of conduct risk, identified in the regulators' report earlier this year'.

[Note: For expert insight into the FMA/RBNZ Life Insurer Conduct and Culture Report see: 07/03/2019]

Some Key Points

- Sixteen life insurers were asked to provide work plans outlining the steps they will take to improve their existing processes and address the regulators' findings and recommendations.
- According to the RBNZ there was a wide variance in the comprehensiveness and maturity of the plans provided.
- Insurers that completed the exercise identified at least 75,000 customer issues requiring remediation, with a value of at least $1.4 million.
- Some of the new issues identified included: 1) overcharging of premiums and benefits not being updated due to system errors, human errors and under-reporting of deaths; 2) poor customer conversations overlooking eligibility criteria and poor post-sale communications, which lead to declined claims and underpayment of benefits; and 3) poor value products were identified, where premiums charged were not fair value for the cover provided.

Next steps: The RBNZ has required that companies yet to undertake a comprehensive systematic review of policyholders and products to do so by December 2019.

In addition, despite the 'weak appetite' for new legal requirements requiring insurers to be more customers focused, the RBNZ said that 'deficiencies in some of the plans received, and some insurers' lack of commitment to implementing the regulators' recommendations, further demonstrates the need for additional obligations to be included in the regulation of conduct of life insurers'

[Source: RBNZ media release 17/09/2019]

New Zealand | RBNZ to publish material bank breaches on its website from 1 January 2020 in an effort to improve transparency and market discipline

Following public consultation and ongoing discussion with stakeholders on a new framework for the reporting of banks' breaches, the Reserve Bank of New Zealand has published a summary of submissions and final policy decisions on the reporting and publishing of breaches by banks.

New Policy?

Under the new policy, banks will be required to promptly report to the RBNZ when there is a breach or possible breach of a requirement in a material manner, and report all minor breaches every six months.

Actual material breaches will then be published on the Reserve Bank's website.

Timing? Following further discussion with banks on implementation details the policy is planned to take effect from 1 January 2020.

Deputy Governor and General Manager Financial Stability Geoff Bascand said that the policy is aims to 'enhance market discipline by ensuring prompt breach reporting and publication, and by making it easier to find and compare information about banks' compliance history…It also encourages bank directors to focus on materially significant issues and the management of key risks rather than concern themselves with relatively minor issues'.

[Sources: RBNZ media release 23/09/2019]

In Brief | On 18 September 2019, the government re-introduced Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019 into the House of Representatives to establish and extend its proposed one-off amnesty to enable employers to self-correct historical underpayments of Super Guarantee (SG)

[Source: Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019]

In Brief | Two industry superannuation funds worth more than $45 billion combined — Hostplus and Club Super — have reportedly confirmed that they will merge later this year. Reportedly, both funds

have said that the move is in the best interests of members. Hostplus CEO David Elia is quoted as saying that the decision to merge will guarantee high-quality superannuation for members of both funds

[Source: Financial Standard 23/09/2019]

In Brief | ASIC announced that ClearView Financial Advice Pty Ltd (ClearView) has completed a review and remediation program for over 200 clients who received poor life insurance advice. According to APRA, 215 clients were offered $730,138 in financial compensation and 21 clients received non-financial remediation through reissued advice documents and fee disclosure

[Source: ASIC media release 18/09/2019; [registration required] The Courier Mail 19/09/2019]

In Brief | APRA has released key observations from a recent recovery planning thematic review of life and general insurers in a letter to industry. The letter identifies 'considerable areas for improvement' before 'in-scope insurers can be assessed to have credible plans in place that are effectively integrated with the risk management framework'. The letter sets out a number of better practice examples of where weaknesses in current approaches could be improved

[Source: APRA Letter: Insurance recovery planning thematic review — Key observations 18/09/2019]

In Brief | In its submission to the Australian Competition and Consumer Commission's Northern Australia Insurance Inquiry Second Update Report, APRA has called for greater investment in mitigation (eg flood levies and sea walls, risk mapping and more robust building codes) to improve insurance affordability. With climate change expected to increase the damage bill from natural disasters in northern Australia, Mr Summerhayes said an informed debate was needed about the best way to fund mitigation and adaptation. Mr Summerhayes suggested that the experience of Roma in south-west Queensland after the 2012 flood event could provide a blueprint for the way forward with evidence suggesting that insurance premiums fell by 50 to 90% following the completion of flood mitigation infrastructure

[Sources: APRA media release 24/09/2019; APRA submission: Norther Australia Insurance Inquiry Second Update report]

In Brief | ASIC has welcomed the Federal Court's judgement in proceedings against Gallop International Group Pty Ltd (In liquidation), Gallop Asset Management Pty Ltd, Stumac Pty Ltd and former director Mr Ming-Chien Wang. Justice Charlesworth proposed orders that include imposing a $3m penalty on Mr Wang and banning him from managing a corporations for ten years. ASIC said the proposed order against Mr Wang would be the highest civil penalty awarded against an individual in an ASIC proceeding

[Sources: Australian Securities and Investment Commission v Gallop International Group Pty Ltd [2019] FCA 1514; ASIC media release 19/09/2019; [registration required] The Australian 20/09/2019]

Risk Management

Climate Risk

Top Story | MinterEllison has released a plain language guide for business on climate change

MinterEllison has released a plain language guide exploring some of the background to issues that businesses face when addressing climate change.

The guide can be accessed on the MinterEllison website here: https://www.minterellison.com/articles/climate-change-a-plain-language-guide-for-business

A 'record' 515 institutional investors managing $35 trillion in assets have urged governments globally to step up their efforts to take action on climate change

Key Takeout

A powerful group of 515 institutional investors have called on governments globally to: 1) phase out thermal coal power worldwide; 2) put a meaningful price on carbon pollution; 3) end government subsidies for fossil fuels; and 4) update and strengthen nationally-determined contributions to meet the emissions reduction goal of the Paris Agreement no later than 2020.

515 institutional investors managing $35 trillion in assets have issued a statement (originally launched in June 2018 ahead of the G7 summit) — The Global Investor Statement to Governments on Climate Change — urging governments worldwide to take urgent action on climate change.

[Note: The statement includes a full list of signatories at p2. The statement is available here.]

In particular, the statement calls on governments to:

1. **step up efforts to achieve the goals of the Paris Agreement** by: a) updating and strengthening nationally-determined contributions to meet the emissions reduction goal of the Paris Agreement, starting the process now and completing it no later than 2020, and focusing swiftly on implementation; b) formulating and communicating long-term emission reduction strategies; c) aligning all climate related policy frameworks holistically with the goals of the Paris Agreement; and d) supporting a just transition to a low carbon economy.

2. **support a just transition to a low carbon economy** by: a) incorporating Paris aligned climate scenarios into all relevant policy frameworks and energy transition pathways; b) putting a meaningful price on carbon; c) phasing out fossil fuel subsidies by set deadlines; and d) phasing out thermal coal power worldwide by set deadlines.

3. **commit to improve climate related financial reporting** by: a) publicly supporting the Financial Stability Board's Task Force on Climate-related Financial Disclosures (TCFD) recommendations; b) committing to implement the TCFD recommendations in their jurisdictions no later than 2020; c) requesting the FSB incorporate the TCFD recommendations into its guidelines; and d) requesting international standard-setting bodies incorporate the TCFD recommendations into their standards.

The Investor Agenda Founding Partners have also released an open letter from their CEOs, and a briefing paper outlining the key asks in the statement.

[Sources: Investor Group on Climate Change media release 19/09/2019; Global Investor Statement to Governments on Climate Change]

In Brief | Divestment makes zero sense because it doesn't starve companies of capital? The FT reports that Bill Gates has cast doubt on the efficacy of divestment as a strategy to reduce carbon emissions, arguing instead that investors who want to use their money to promote progress will have better results by funding innovative businesses such as Beyond Meat and Impossible Foods. 'When I'm taking billions of dollars and creating breakthrough energy ventures and funding only companies who, if they're successful, reduce greenhouse gases by 0.5 per cent, then I actually do see a cause and effect type thing' Mr Gates reportedly said

[Note: The argument reportedly put forward by Mr Gates appears to bear some measure of similarity to the approach advocated by Robert Eccles (Founding Chair of the SASB) in the context of driving change in the big tobacco industry. See: Governance News 12/06/2019.]

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

Culture

The cultural issues identified over the course of the Financial Services Royal Commission are not unique to the financial services sector but are pervasive across industry according to an AHRI report

Report Overview | Australian HR Institute Report, 5 Hard Truths About Workplace Culture

Key Takeouts

- The report provides a picture of the way in which CEOs, department secretaries, executives and other employees across numerous industries across Australia view their respective organisational cultures. It is based on 967 survey responses from these respective groups.
- 60.5% of respondents were in an HR role with the title HR Director/Manager.
- According to the survey there is a disconnect between CEOs and department secretaries view of their organisations culture and the view of others within the organisation, with CEOs/department secretaries generally taking a more 'rosy' view than executives and senior managers and a 'significantly more rosy' view than employees.
- The five 'hard truths' about workplace culture identified in the report are: 1) that cultural problems are pervasive and that consequently change is not only required in financial services; 2) the cultural issues identified by the Financial Services Royal Commission are not unique to the financial services sector but are present across sectors; 3) the bigger the organisation, the bigger the cultural issue; 4) CEOs have trouble seeing culture issues; and 5) organisations need HR as a professional culture partner to guide change.

A report into the state of organisational culture in Australia by the Australian HR Institute (with Insync) has found that the cultural issues identified by the Financial Services Royal Commission are not unique to the financial services sector, but are pervasive across a range of sectors. More particularly the report identifies 'five hard truths' about workplace culture in Australia and outlines how organisations should respond.

Not limited to the financial services sector: cultural problems are pervasive across a range of sectors

According to the survey, respondents identified that significant cultural change is needed across a range of sectors including: construction education and training; electricity, gas, water and waste services; financial and insurance services; health care and social assistance; professional services; and government and public administration.

The lack of ethics was attributed by respondents to a range of factors including: lack of an ethical and cultural framework, leaders not setting the right example and lack of accountability (poor behaviours not being called out). AHRI found that this was broadly consistent across all sectors.

In addition, respondents indicated that they consider that there is too much emphasis on the achievement of short term financial outcomes. Most indicated that they would like to see this shift towards long term sustainability.

Cultural problems are 'often immense'

The report found that around 22% of respondents consider that there needs to be some change in the culture of their organisation and 34% consider that significant change is required.

Asked to identify what factors would assist or hinder leaders in achieving an ethical culture respondents said that the following could assist leaders: ethical leadership from the top down; clear vision and mission/purpose; clear and transparent communication; training and tools to embed ethics; focus on customer needs; clear values and behavioural expectations; clear codes of conduct and policies and calling out and consequence management for poor behaviour

Respondents identified the following as barriers to achieving an ethical culture: poor leadership (including unethical behaviour and self-interest); lack of accountability for poor behaviour; limited performance and behavioural measures; lack of communication; lack of clarity and education around vision and culture; resource and time constraints; a short term results focus and external political, stakeholder and compliance pressures.

The bigger the organisation the bigger the cultural problems?

Overall, respondents in larger organisations (organisations with more than 5,000 employees) felt that the culture of their organisation needed to change to a greater extent than respondents in smaller organisations.

In addition, respondents in larger organisations rated their organisations' performance in terms of balancing long term sustainability against short term financial focus as worse than those in smaller organisations.

For example, 39% of survey respondents from larger organisations consider that their organisations do not display zero tolerance towards employees who put their own success ahead of customers and shareholders. By comparison, only 15% of survey respondents of organisations with less than 100 employees thought that this was the case in their organisations.

Larger organisations were also found to be perceived to be less likely to screen out employees who may not be ethical or live the organisation's values and less likely to have systems and processes that are conducive to ensuring the organisation achieves an ethical culture.

The survey comments that the challenge of changing culture in larger organisations is more time-consuming and more difficult than in smaller ones, particularly in organisations that are geographically dispersed. In consequence, the report argues that the leaders of larger organisations will need a 'much greater and more sustained commitment to bring about cultural change'.

CEOs are slow to see cultural problems?

According to the survey there is a disconnect between CEOs and department secretaries view of their organisations culture and the view of others within the organisation, with CEOs/department secretaries generally taking a more 'rosy' view than executives and senior managers and a 'significantly more rosy' view than employees.

For example:

- 63% of CEOs perceive that they regularly talk about ethics and doing the right thing but by comparison, only 44% of executives/senior manager and 38% of employees lower down the hierarchy agree that this is the case

- 77% of CEOs perceive that their organisation does not tolerate 'mavericks' who cut corners to achieve short term targets. By comparison, only 46% of executives/senior managers and 41% of employees share this view. 27% of both employees and executives/senior managers disagreed that this is the case.

Further, the survey identified that even if employees do hear the words from leaders about ethics and importance of doing the right thing, they don't see an alignment between these statements and the actions/decisions of the leaders in question. The survey quotes respondents as commenting with respect to this issue: 'Our leaders don't walk the talk – they do a great job at selling this amazing culture we want, but then their actions contradict what they are saying.'

In some cases, leaders were perceived to be acting out of self-interest. The survey quotes one respondent as commenting that 'leaders in influential positions who only look to improve their own personal situation and who will use at times an unethical means to do so'.

In addition, the survey round that some employees think that some leaders are out of touch and overly focused on delivering financial and other outcomes, perhaps due to the distance between leaders and the 'coalface'.

The role of HR: HR could play a bigger role?

The survey found that there was support among both HR respondents and non-HR respondents for applying professional standards and certification to HR professionals and for holding them accountable.

For example:

- 78% of HR respondents and 82% of non-HR respondents agreed that standards should be set for HR practice (just as they are in professions like accounting)

- There was also support (84% support from HR respondents and 86% from non-HR respondents) for HR professionals to undertake continuous professional development activities.
- 52% of HR respondents and 64% of non-HR respondents agreed that HR practitioners should hold an independently assessed certification from the professional body that attests to their standard of HR practice
- 62% of HR respondents and 68% of non-HR respondents were of the view that the professional body for HR practitioners should hold members accountable for adhering to professional standards

These findings suggest, the report argues that there is a 'desire for HR' to play a greater role in assisting in the promotion and support of ethical culture within organisations and the communication of that culture throughout organisations.

Suggested steps to promote an ethical culture

The report suggests four broad steps organisations could consider taking to drive cultural change. These are: 1) check in to assess whether the organisation has a realistic view of the current culture, a firm idea of the desired culture and a commitment to achieving it; 2) based on this initial check in, collect quantitative and qualitative data to provide a clear description and measurements of the current state of the organisation's culture; 3) set a vision and commit to change; and 4) partner with a skilled HR team.

About the survey: This report was based on a 31 item cultural change survey that was undertaken by 967 respondents from across Australia during May and June 2019, and included the views of CEOs, department secretaries, executives and other employees across numerous industries. 60.5% of respondents were in an HR role with the title HR Director/Manager.

Around 650 respondents provided comments about the factors that both prevent and help leaders to achieve an ethical culture.

[Sources: [registration required] Australian HR Institute Report, 5 Hard Truths About Workplace Culture; [registration required] The AFR 19/09/2019; MyBusiness 19/09/2019]

Global survey has found that 80% of employees around the world have observed or experienced discrimination – but only 1 in 3 feel empowered to escalate the matter to their HR

A global employee survey 18,000 people in 14 countries and working in 24 different industries — the Kantar Inclusion Index — has examined employee perceptions of equality and inclusive working and ranked countries and industries on these measures.

Some Key Findings

Based on Kantar's media release announcing the release of the index:

- 80% of employees around the world have observed or experienced discrimination – but only 1 in 3 feel empowered to escalate the matter to their HR department
- Almost half of employees (46%) believe 'who you know' rather than 'what you know' drives career progression
- Almost 1 in 5 (19%) employees have been bullied, undermined or harassed in the workplace in past year, rising to 23% for people of an ethnic minority background and 24% for gender-non-binary identifying individuals
- Brazil, Mexico and Singapore are the countries identified with the highest level of workplace bullying. Italy, Netherlands and Spain are identified as the countries with lowest level of bullying
- The survey identified that 27% of women overall have been made to feel they don't belong in their workplace
- One in five (20%) women believe they are paid less than peers at a similar level

- LGBTQ+ identifying individuals represent only 2% of board director roles vs an estimated 9% of the global workforce
- 24% of LGBTQ+ population have been bullied at work in the past year and more than one third (36%) believe that they have faced obstacles in career progression due to sexual orientation
- According to the survey, over half of LGBTQ+ people suffer from consistent, high stress and anxiety and mental health problems at work
- 11% of employees identifying as an ethnic minority believe they are treated very differently at work because of their ethnicity and 13% feel excluded and 28% consistently feel anxious in their jobs specifically because of their ethnicity.
- 19% of all workers believe colleagues of an ethnic minority have had career progression damaged in their current company because of their ethnicity
- 60% of workers have care responsibilities for loved-ones and 38% feel care responsibilities leaves them feeling left out at work

Commenting on the findings, Global Director of Kantar's Inclusion Index Mandy Rico said that the findings 'illustrate that a significant amount of work remains to be done to make workplaces more inclusive, diverse and equal, especially around the subject of bullying which persists at high levels around the world.'

[Sources: Kantar media release 17/09/2019; Gay Times 21/09/2019]

Cybersecurity, Privacy and Technology

Australian boards lag their global counterparts on innovation? A joint AICD/University of Sydney Business School report has identified that directors are struggling to prioritise innovation and adapt to a rapidly changing and uncertain environment

Report Overview | Driving Innovation: The Boardroom Gap 2019 Innovation Study

In partnership with the University of Sydney Business School, The Australian Institute of Company Directors (AICD) has released report examining the role of boards in driving organisational innovation. Introducing the study, AICD Managing Director and CEO Angus Armour and Chair Technology and Governance Kee Wong said that it 'establishes a base-line for our understanding of how the Australian director community views the challenge of innovation, and identifies further areas where more work must be done. It also presents a challenge for the AICD – how can we help directors put innovation onto boardroom agendas across the nation…Our continued prosperity depends on it'.

Some Key Findings

Overall, the report found that directors are struggling to prioritise innovation and adapt to a rapidly changing environment.

1. **The majority of Australian directors recognise the importance of innovation** with 75% of respondents indicating that their organisation had an innovation vision/innovation featured in their strategic plan.
2. **But despite this, innovation is not a top board priority on many boards:** Though 39% of boards have innovation as an ongoing agenda item, 57% of respondents said that innovation has never been or was only an occasional board item. Further, 57% said that they did not know how much their organisation spends on research and development and innovation, suggesting that directors are not discussing innovation implementation at board level. The fact that half of Australian boards are irregularly looking at innovation suggests other external pressures are shaping board agendas eg rapidly changing regulatory environment, the report suggests. Also, by failing to prioritise innovation, the report suggests, Australian boards may be underestimating 'looming strategic risks'. With respect to prioritising innovation, the report found that Australian boards lag their international counterparts.
3. **Why isn't innovation being prioritised**? Directors identified the following as key barriers to innovation: 1) shortage of human talent (31%); 2) limited financial resources (28%); and 3) a focus on short term financial performance (19%).

4. **Australian boardrooms have low innovation and digital literacy levels:** 35% of respondents said their boards had the right mix of skills and experience to assess both the ethical and practical implications of modern technology and 3% of respondents had science/technology expertise. The report suggests that this signals a need to up-skill directors, increase access to specialist advice and seek to broaden the talent pool to include more directors with science and technology backgrounds.

Five recommendations for boards to consider

The report includes five practical steps for boards to consider to help ensure innovation is prioritised within their organisation.

1. **Directors should take steps to lift their own levels of digital and technological literacy** to enable them to make informed decisions on proposals put forward by the executive. The report clarifies that 'directors do not need to be technical experts, but they must be able to understand how key technological developments will impact their business. Innovation should form part of directors' program of continuing education'.
2. **Clear permission to learn from failure?** 'True innovation exists by learning from failure. It is the board's role to set clear expectations of the executive regarding what calculated risks they are expected to take. In some organisations, this might require the board re-evaluating the organisation's risk appetite entirely' the report suggests.
3. **Develop a shared language with management, and clear narrative for investors/members on innovation.** The report advises directors to support management in balancing continuous improvements to current processes and products, while also investing in products and services that will become available in a five to ten-year horizon. 'Agreed language and a clear narrative will set expectations for the executive team, broader workforce, members/shareholders, and other stakeholders' the report suggests.
4. **Ensure innovation features regularly on boardroom agendas:** Boards should monitor how their innovation strategy is being implemented and key obstacles to implementation through regular conversations on innovation via periodic agenda items. In addition, the report suggests that governance arrangements should be reviewed to determine whether formal board committee or advisory panel structures, drawing on outside experts, would help organisations achieve their innovation goals.
5. **Establish a budget and executive incentives for long-term innovation:** 'If innovation is to become a priority, boards need to assign time and a budget for it' the report states. Further, the report suggests that performance and remuneration frameworks should be 're-calibrated such that innovation, including innovation with longer horizons, is encouraged within the organisation'.

[Sources: AICD media release 18/09/2019; Driving Innovation: The Boardroom Gap 2019 Innovation Study]

Right to be forgotten? Treasury Laws Amendment (2018 Measures No 2) Bill 2019 introduced

Treasury Laws Amendment (2018 Measures No 2) Bill 2019 was introduced into the House of Representatives on 18 September. Among other things, Schedule 4 to the Bill creates a requirement that consumer data rules include an obligation on accredited data recipients to delete consumer data right (CDR) data in response to a request from a CDR consumer ie a right to be 'forgotten'.

Why include the measure? The explanatory memorandum states that 'an integral element of the CDR system is the protection of consumers' CDR data. These amendments support this by requiring the ACCC [Australian Competition and Consumer Commission], when it makes consumer data rules, to include a requirement that accredited data recipients delete all or part of CDR data in response to a valid request by a CDR consumer for that CDR data'.

The proposed commencement date for Schedule 4 is the first day following the day of Royal Assent.

[Sources: Treasury Laws Amendment (2019 Measures No 2) Bill 2010; Explanatory Memorandum; InnovationAus 19/09/2019]

Restructuring and Insolvency

Use of cash Bill referred to committee

The Currency (Restrictions on the Use of Cash) Bill 2019 was introduced into the House of Representatives on 19 September and referred to the Senate Committee on Economics for report by 7 February.

The Bill proposes to introduce offences for entities that make or accept cash payments of $10,000 or more. According to the explanatory memorandum, the purpose of the measures is to 'protect the integrity of the taxation law and other Commonwealth laws by ensuring that entities cannot avoid scrutiny and facilitate their participation in the black economy by making large payments in cash'.

It's proposed that the cash payment limit apply to payments made or received from 1 January 2020.

[Sources: Currency (Restrictions on the Use of Cash) Bill 2019; Currency (Restrictions on the Use of Cash) Bill 2019 [Provisions]; Banking Day 20/09/2019]

ASIC has re-issued Information Sheet 29 External administration, controller appointments and schemes of arrangement - most commonly lodged forms (INFO 29) to help liquidators comply with their lodgement requirements

The Australian Securities and Investments Commission (ASIC) has re-issued Information Sheet 29 External administration, controller appointments and schemes of arrangement - most commonly lodged forms (INFO 29) with the aim of helping liquidators to comply with lodgement and publications requirements under the law.

ASIC says that the information sheet has been updated, following engagement with the Australian Restructuring Insolvency Turnaround Association (ARITA) about the revisions, to reflect the changes made to the Corporations Act by the Insolvency Law Reform Act 2016.

Updates?

To help external administrators, controllers and scheme administrators meet their obligations and know the order in which forms must be lodged, ASIC has updated flowcharts covering most types of external administration, controller appointments and schemes of arrangement.

The information sheet also outlines ASIC's expectations for forms commonly lodged with ASIC and certain publication requirements when: a) an external administrator (liquidator, voluntary administrator or deed administrator) has been appointed to a company; b) a controller (receiver, receiver and manager, controller or managing controller) has been appointed over company property; and c) n administrator of a scheme of arrangement has been appointed.

The information sheet also provides guidance on using the registered liquidator portal, using the ASIC published notices website for notices and specific commonly lodged forms.

[Sources: ASIC media release 19/09/2019; Information Sheet 29 External administration, controller appointments and schemes of arrangement - most commonly lodged forms (INFO 29)]

In Brief | The Federal Court has made an order appointing a provisional liquidator to Merlin Diamonds Ltd following ASIC's application. ASIC is seeking that Merlin be wound up pursuant to ss 461(1)(e) and/or (k) or s 464 of the Corporations Act 2001 (Cth). The proceeding arises out of a formal investigation by ASIC. The matter will be listed by the Court for a further hearing on a date to be fixed. ASIC says that its investigation into the affairs of Merlin is continuing

[Note: The Federal Court's decision: Australian Securities and Investments Commission v Merlin Diamonds Limited [2019] FCA 1546 is available here.]

[Source: ASIC media release 23/09/2019]