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Following a line of recent and inconsistent cases, there is significant uncertainty surrounding the ability of directors who stand to receive a contingent personal benefit to make voting recommendations in schemes and, if they do, the level of balancing disclosure required. In fact, there are now two diametrically opposing views in the Federal Court of Australia alone.

MinterEllison's Alberto Colla outlines the practical risks and implications for directors as well as some practical guidance on how to manage the risks.

The full text of the article is available on the MinterEllison website here: https://www.minterellison.com/articles/guide-to-directors-voting-recommendations-in-schemes

A generational shift in ASX 50 CEOs? A report from Apollo Communications has found that Generation X has taken over the reins of the ASX 50 and that the key challenge facing them is gaining stakeholder trust

Report Overview | Apollo Communications, Australian Top 50 CEO Report 2019

Key Takeouts

- The report found that most ASX 50 CEOs are most likely to be internationally experienced men in their early-50s, who have worked their way up the ranks, with the benefit of a quality education from a 'power university'
- The report also found that the community lacks trust in CEOs. The report cautions that this may have a direct impact on an organisation's reputation, and its ability to build trust with stakeholders
- The report also found that ASX 50 CEOs (with some exceptions) are not easily identifiable to average Australians and that this 'anonymity' calls into question whether CEOs need to be more effective communicators if they wish to rebuild trust with their customers and others they need to reach

Apollo Communications has released a report identifying the pathways the CEOs of Australia's top 50 listed companies followed to reach their positions and has mapped some of their characteristics/backgrounds. In addition, the report presents community expectations of CEOs.

Announcing the release of the report, Apollo Communications CEO Adam Connolly said 'The Apollo Communications Top 50 CEO Report is the most detailed study of its kind ever undertaken in Australia, unmasking the pathways to success for the country's most powerful business elite'.

Some Key findings (CEO characteristics/pathway to becoming CEO)

- **Generational Shift?** The report found that there has been a generational shift in the ASX 50 over the last 12 months, with the average age of ASX 50 CEOs now at 54. The report comments that this brings Australia more into line with the US (where the average age is 58). The youngest is Coles' Steven Cain at 40, and the oldest is Sonic Healthcare's Dr Colin Goldschmidt at 64.
- **The turnover rate appears to be 'rapid'?** 80% of ASX 50 CEOs have been in their current role for less than seven years. The average tenure for an Australian CEO is five years, with 48% of consumers thinking this is 'about right'
- **Two thirds of ASX 50 CEOs are internal appointments**, an indication, the report suggests that directors prefer to appoint someone they already know than run the risk of failure with an outsider.
- **Education**
  - Most CEOs have a undergraduate degree from the University of NSW, usually in science or commerce.

- Two thirds of ASX 50 CEOs completed their postgraduate degrees overseas at 'Ivy league' institutions such as Harvard, INSEAD, or the London School of Economics. Of those who studied in Australia, Macquarie University the most favoured choice for post-graduate study.
- 56% have no post-graduate degree.
- Five of to the top 50 CEOs have no degree, which the report suggests is an indicator that 'solid work experience' remains a viable pathway

- **Gender split?** Only 3 of Australia's top 50 CEOs are women. According to the report, this still puts Australia ahead of the US in terms of female CEO gender representation. In the US 4.8% of Fortune 500 CEOs are women. The report also found that 72% of Australians consider gender to be irrelevant in rating CEO performance.
- **The report found that almost 48% of CEOs were born overseas**
- **More than 80% of ASX 50 CEOs have international work experience**
- **Social media use?** 34% of ASX 50 CEOs have no social media presence (ie zero presence LinkedIn, Twitter or Facebook), despite it being a popular communication choice for many of their customers.

What does the Australian community expect? Some key findings

Community expectations of CEOs? According to the report, the top ten attributes most sought after in an Australian CEO by the general Australian population are: 1) Ethical behaviour/trustworthiness; 2) Accountability; 3) Clear vision for the future; 4) Financial performance; 5) meets community expectations/delivers what is promised; 6) operational efficiency; 7) Likeability; 8) Has an MBA; 9) Socially progressive; and 10) International experience.

Overall, the report found that Australia's CEOs 'have a trust problem'

- **Ethics/trustworthiness is more important than profitability/returns to investors?** The study found that the number one characteristic Australians rate CEOs on is their ethics and trustworthiness. This outweighs traditional measures of performance, including company profitability and the subsequent returns to investors. Further the survey found that 24% of Australians don't trust their corporate leaders to do the right thing, with only 13% labelling them trustworthy and 63% indicating they 'don't know what to think' of the morality of our corporate CEOs. The survey suggests that this 'points to a crisis of trust between our corporate leaders and their customers'.
- **'When a company has a crisis, the Australian community is unforgiving'**: The report found that 63% Australians believe both the Chair and CEO should resign (with 15% believing only the CEO should resign and 8% believing only the Chair should resign. Having said this, 14% believe neither should have to resign.
- **'Anonymity' is a challenge?** According to the report, though Qantas CEO Alan Joyce is regarded as the best corporate leader in the ASX 50 followed by BHP's Andrew Mackenzie, Coles' Steven Cain and Fortescue Metals Group's Elizabeth Gaines, most corporate leaders are outranked by 'Haven't heard of any of them' or 'None of the above'. The report suggests that this calls into question whether CEOs need to be more effective communicators if they wish to rebuild trust with their customers and others they need to reach.
- **Most Australians (60%) believe CEOs should be subject to more regulation in their jobs**, with only 5% indicating corporate leaders are 'very accountable'.
- **Australians don't rate social activism as an important priority for corporate Australia**, ranking it 8 out of 10 in CEO priorities.
- **Leadership?** 41% of Australians surveyed said that generally speaking, CEOs of Australian corporations exhibit good leadership qualities. A further third believe they don't and 28 per cent don't know.

Some conclusions

- Generation X (born between 1965 and 1980) have taken the 'corporate and political reigns in Australia' from the Baby Boomers. They face a challenge in reshaping how companies operate, communicate and market themselves to a distrustful consumer base.
- The Chief Executive Officer of the future will increasingly need to become the 'Chief Ethics Officer' providing honest and open dialogue with customers, employees, shareholders and regulators.
- CEOs will need to raise their profiles to combat the trust deficit which could be a challenge for some, and may require an evolving set of skills from this generation of leaders.

[Sources: Apollo Communications media release; [registration required] Apollo Communications, Australian Top 50 CEO Report 2019; [registration required] The AFR 02/09/2019]

Remuneration

Deloitte UK partners set for biggest payday in a decade?

The FT reports that Deloitte UK's 699 equity partners will receive an average profit share of £882,000 for the year to June 2019, a rise of 6% on the previous year, and the largest payout in 10 years.

The average equity partner working at Deloitte for the past decade has earned a profit share of more than £9m since 2009.

The FT notes that Deloitte is the first of the big four accounting firms to report its 2019 annual profits.

The FT further comments that a regulatory inspection earlier in the year identified 'a decline in the quality of Deloitte's audits for FTSE 350 companies' in a regulatory inspection this year.

[Source: [registration required] The FT 27/08/2019]

In Brief | CEO pay in the asset management industry (may) be trending downwards? Under increasing scrutiny, and given the pressures of rising costs and adverse market movements, Asset Management CEO remuneration is reportedly coming under downward pressure according to The FT with eight CEOs in the US and ten at European fund companies seeing pay cuts last year

[Source: [registration required] The FT 01/09/2019]

Other Shareholder News

The Australian reports that Harvey Norman Chair Gerry Harvey has cautioned that superannuation funds pushing for 'box ticking' corporate governance requirements risk losing money for their members by undermining the profitability of listed companies

The Australian reports that Harvey Norman Chair Gerry Harvey has said he is 'completely at odds' with the Australian Shareholders' Association (ASA) and superannuation funds 'pushing' for governance reforms (eg the inclusion of more female directors and/or more independent directors on boards).

Reportedly, Mr Harvey's view is that these groups want him to 'forget about the profit and tick all the (corporate governance) boxes… If they keep it up, they will have companies ticking all the boxes but all the people in super funds will go broke'.

According to The Australian, Mr Harvey clarified that he is not of the view that his company should be exempt from corporate governance requirements, but rather that the current range of governance requirements had 'gone into overkill'.

Reportedly Mr Harvey went on to reject the argument that his lack of support for governance initiatives suggested by investors makes him unfit to Chair a listed company. 'The corporate governance experts out there are saying I don't conform — that I shouldn't be the chairman because I am not independent, that Kate [Harvey Norman CEO Katie Page] should not be the chief executive as she is married to me, and that we should have three or four other people on the board who are independent directors…But my argument is that we have the perfect model.'

Reportedly, Mr Harvey went on to say that in other retail companies where they 'had the governance right' the companies in question were not running well.

The Australian reports that the Chair of Britain's Financial Reporting Council, Sir Win Bischoff, has commented that it's it 'too bad' that Mr Harvey does not agree with some of the environmental, social and corporate governance policies demanded by major shareholders. Sir Win also reportedly rejected Mr Harvey's view that good governance negatively impacts financial performance, 'I can't believe that Mr Harvey or others are successful because they don't comply with certain areas of governance' the Australian quotes Sir Win as saying.

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

Shareholders press US boards to split CEO and Chair roles? The number of combined CEO/Chair roles has fallen from 62% a decade ago to 46% this year according to The FT

Citing the growing number of shareholder proposals pushing for independent board leadership this year, The FT reports that large US companies are coming under increased pressure to split combined CEO/Chair roles.

According to the FT (based on data compiled by ISS Analytics):

- A decade ago, 62% of S&P 500 companies had a CEO who was also the chair. This fell to 46% this year
- 56 shareholder resolutions on independent board chairs were voted on at annual meetings of S&P 500 companies by early August. By comparison, in 2017 there were 44 resolutions on the issue, increasing to 49 in 2018
- The FT comments that though none of the resolutions has passed so far in 2019, than 40% of shareholders backed the motion at five companies, including telecoms business AT&T and oil major ExxonMobil. Overall, such resolutions received support of at least 30% at 26 S&P 500 companies, while the median proposal received 28.7% support

The FT quotes Kosmas Papadopoulos, executive director of thought leadership at ISS Analytics, as saying that despite the fact that the 2019 voting results don't suggest 'overwhelming support for these proposals, the overall trend is for companies to move towards independent chairs' reflecting standard practice globally.

The FT comments that despite increasing shareholder calls for greater independence at board level, several asset managers including BlackRock, Legg Mason and Franklin Resources, continue to combine the CEO and Chair roles.

[Source: [registration required] The FT 31/08/2019]

Disclosure and Reporting

ASIC has remade a 'sunsetting' class order [CO 09/425] to continue the effect of the previous instrument

Following consultation, as set out in Consultation Paper 304 Remaking ASIC class order on share and interest purchase plans, the Australian Securities and Investments Commission (ASIC) has remade the relief in Class Order [CO 09/425], which was due to sunset on 1 October 2019.

ASIC writes that the new instrument — ASIC Corporations (Share and Interest Purchase Plans) Instrument 2019/547 — provides ASX-listed issuers of shares and interests under purchase plans with relief from the requirement to prepare a prospectus or Product Disclosure Statement if certain conditions are met.

The new instrument will continue the effect of the previous instrument while increasing the participation limit (for each registered holder in a 12-month period) from $15,000 to $30,000.

ASIC Commissioner John Price said, 'We consider that the increase in the purchase plan limit will help 'mum and dad' investors participate in discounted fundraisings, and further supports the efficient functioning of capital markets.'

[Sources: ASIC media release 30/08/2019; ASIC Corporations (Share and Interest Purchase Plans) Instrument

Regulators

Top Story | Constructively tougher? APRA has updated its 'constructively tough' enforcement approach

Key Takeout

- On 3 September 2019, the Australian Prudential Regulation Authority (APRA) updated its new 'constructively tough' enforcement approach to include: 1) principles that it will take into account when considering when and how to publicise its enforcement actions; and 2) to include guidance on APRA's approach to enforcement for data submissions. APRA says it will stronger action against institutions that fail to meet their legal obligations to report data to APRA in full and on time.
- Commenting on the release of the revised approach APRA Deputy Chair John Lonsdale said that 'Getting "constructively tough' is not only about taking stronger action earlier where banks, insurers and super licensees break the law, or fail to behave in an open and cooperative manner with us. It also means setting public examples where it is appropriate to do so and there's no risk to financial stability. Publicising our enforcement actions not only acts as a general deterrent, it gives the community confidence that financial institutions are being held to account when they do the wrong thing'.
- In other respects the document setting out APRA's enforcement approach appears unchanged from the version released by the regulator in April

On 3 September, The Australian Prudential Regulation Authority (APRA) updated the 'constructively tough' enforcement approach it released in April, to outline how it will increase transparency around the use of its formal enforcement powers and flagging its intention to take stronger action against institutions that fail to meet their legal obligations to report data in full and on time.

Two Key Changes

1. When will APRA publicise the enforcement actions it takes?

The revised Enforcement Approach includes an expanded section on transparency and financial stability to include guidance on how and when APRA will publicise the enforcement actions it takes and the criteria it will take into account in reaching a decision.

APRA states that it will consider when and how to publicise the enforcement actions it takes on a case by case basis. Having said this, APRA says that 'unless there are likely to be risks to beneficiaries' interests and/or financial stability from publicising an action, APRA will typically make public the following actions.

1. administrative enforcement actions taken by APRA, such as formal directions and licence conditions or infringement notices
2. acceptance of an enforceable undertaking received from a regulated entity or an individual
3. disqualifications of accountable persons under the Bank Executive Accountability Regime, or other responsible persons under the prudential frameworkcourt-based enforcement actions commenced by APRA

APRA adds that 'for reasons of natural justice, procedural steps in respect of potential enforcement actions, including the issuance of "show cause" notices will generally not be made public'.

Commenting on the changes, ASIC Deputy Chair John Lonsdale said the 'getting "constructively tough" is not only about taking stronger action earlier where banks, insurers and super licensees break the law, or fail to behave in an open and cooperative manner with us. It also means setting public examples where it is appropriate to do so and there's no risk to financial stability'. Mr Lonsdale added that 'publicising our enforcement actions not only acts as a general deterrent, it gives the community confidence that financial institutions are being held to account when they do the wrong thing'.

2. New guidance on APRA's approach to enforcement for data submissions

The updated Enforcement Approach also includes a new section (section 6) outlining APRA's intention to use enforcement action 'where appropriate to ensure that APRA's data remains fit for purpose for its users' and providing insights into the criteria APRA will use to determine whether enforcement action is appropriate in the circumstances.

Criteria APRA will take into account?

APRA states that the value of an entity's data to APRA and to the agencies it collects on behalf of is impacted by three characteristics: timeliness, quality and proportionality of the entity's data to the collection and that these form the basis of APRA's approach to enforcement for data submissions.

Figure 3 of the revised Enforcement Approach sets out the criteria the regulator will take into consideration to help determine when enforcement action may be appropriate in more detail, though APRA states that 'meeting the criteria…will not automatically lead to APRA taking enforcement action…in deciding what action to take APRA will always take into account the facts, matters and circumstances of the particular case under consideration'.

APRA adds that its revised approach to enforcement on data submissions is complementary to its approach to enforcement more broadly, adding that 'where data breaches or issues are indicative of prudential risk at a regulated entity, APRA will also consider the need to take enforcement action to address the prudential risks'.

Commenting on the changes, APRA Deputy Chair John Lonsdale said entities that failed to comply with their data reporting obligations would also be exposing themselves to potential penalties. 'As the central statistical agency for Australia's financial sector, including other regulators, APRA must ensure the data we receive is timely and accurate.' Mr Lonsdale went on to say that as was demonstrated by the move by APRA to fine Westpac recently, 'our reporting standards are legally binding, and we will act when necessary to ensure institutions meet their obligations. Consequently, we have also updated the Enforcement Approach to include guidance on how we will use enforcement action to ensure the data we collect remains fit for purpose'.

Stronger enforcement appetite?

Announcing the changes, APRA said that since the adoption of the new 'constructively touch' approach to enforcement in April, APRA has 'repeatedly demonstrated its stronger enforcement appetite' and cited a number of examples of this including the imposition of additional capital requirements on three major banks and one general insurer in response to risk/governance issues.

[Note: APRA released both the results of the enforcement strategy review led by APRA Deputy Chair John Lonsdale and details of its 'constructively tough' enforcement approach on 16 April. For a summary see: Governance News 17/04/2019]

[Sources: APRA media release 03/09/2019; APRA's Enforcement Approach 03/09/2019]

Top Story | APRA Corporate Plan 2019-2023: The regulator is set to sharpen its focus on non-financial risk and superannuation

Overview | APRA Corporate Plan 2019-2023

Key Takeouts

- In its 2019-23 corporate plan, informed by six separate reviews and inquires over the last 18 months, the Australian Prudential Regulation Authority (APRA) has identified four strategic priorities: 1) maintaining financial system resilience; 2) improving outcomes for superannuation members; 3) improving cyber-resilience across the financial system; and 4) transforming governance, culture, remuneration and accountability across all APRA regulated entities.

- APRA says that these four strategic focus areas are not intended to be an exhaustive list, they 'do not represent all outcome areas where APRA has a responsibility or will direct its attention'
- In addition, APRA says that the achievement of the plan will require an uplift in APRA's internal capabilities in the following areas: 1) improving and broadening of risk based supervision; 2) improvement of APRA's resolution capability; 3) improvement of external engagement and collaboration; 4) transformation of data-enabled decision making within the regulator; and 5) 'transforming' APRA leadership, people and culture
- The plan comes into immediate effect

On 29 August, the Australian Prudential Regulation Authority (APRA) released its corporate plan for the next four years. A high level overview is below.

Core mandate unchanged (but modernisation is required)

Though APRA's core mandate — to 'maintain the safety and resilience of the financial system' — is unchanged, the regulator writes that is operating within an increasingly complex and challenging environment and also under heightened scrutiny. In consequence, the regulator says that it will need to 'progressively transform', and to 'modernise and adapt' to ensure it remains fit for the future.

'Australia's financial system remains in good health, but we can't take that for granted. As macroeconomic and geopolitical risks play out, as technological innovation transforms the industry, and as new risks such as cyber and climate change grow, we must have the right skills and resourcing to continue protecting bank depositors, insurance policyholders and superannuation members. The new Corporate Plan acknowledges increased expectations of APRA, and fulfils the recommendations of the Royal Commission and Capability Review. Amongst other things, we will place greater emphasis on the supervision of 'non-financial risks' such as culture and accountability, and take a "constructively tough" enforcement approach when breaches of our prudential standards occur' APRA Chair Wayne Byres said.

Four Key Focus Areas

The plan identifies four strategic areas of focus for the next four years to 'strengthen outcomes of the Australian community'. They are: 1) maintaining financial system resilience; 2) improving outcomes for superannuation members; 3) improving cyber-resilience across the financial system; and 4) transforming governance, culture, remuneration and accountability across all APRA regulated entities.

APRA states that the areas identified are not intended to be an exhaustive list of the areas in which it will direct its attention.

APRA Chair Wayne Byres commented that 'APRA is well aware of the heightened expectations of the organisation, and will be regularly reporting on the progress we are making in delivering better community outcomes across the four areas of strategic focus we have called out. Although it is ultimately up to financial institutions to strengthen community trust in the industry, regulators have an important role to play. In delivering on this Corporate Plan, APRA will be better equipped to ensure the entities we regulate are not only financially resilient, but also have frameworks, systems and cultures in place designed to reduce the risk of misconduct and poor consumer outcomes'.

Further detail: Some key actions and timeframes

[Note: The report includes a 'roadmap for change' (at p22) identifying specific actions under each of the four focus areas and completion timeframes for some of these actions. This can be accessed on the APRA website: APRA 2019-2023 Corporate Plan]

1. Maintain financial system resilience

APRA will look to 'evolve its supervision and policy position to uphold the resilience of APRA-regulated financial institutions and the Australian financial system' through strengthening capital requirements for authorised-

deposit taking institutions (ADIs) as well as undertaking other targeted activities including (among others) ensuring robust governance practices and operational controls and systems are in place in superannuation funds to safeguard members' funds from 'theft or loss' and improving recovery planning across all APRA-regulated industries.

Specific actions and completion dates

The plan includes hard completion dates for some actions.

- By June 2020: Move from three yearly to an annual stress testing cycle for ADIs
- By June 2021: Complete the external audit review of ADIs covering the management of problem assets
- By June 2022:
  - Improve the data submitted by ADIs to enhance the prudential supervision of the industry by APRA
  - Implement changes to strengthen the capital prudential standards that apply to ADIs
  - Manage the reliance on overseas reinsurance by general insurers and renew the value that insurance products provide to consumers
  - Uplift the maturity or risk governance and drive sustainable products offered by life insurers
  - Implement new capital prudential standards that apply to private health insurers
  - By June 2023: Strengthen governance and risk management practices in the superannuation industry

2. Improve outcomes for superannuation fund members

APRA says that it focussed on 'actively' driving 'a superannuation trustee culture of continuous improvement in delivering quality outcomes to superannuation members, including addressing underperformance in the superannuation industry'. The plan outlines a number of actions to aimed at achieving this outcome. These include the following.

- Implementation of SPS 515 Strategic Planning and Member Outcomes and the legislated outcomes assessment, as well as 'deep dives into industry practices' in key areas.
- Improving the transparency of superannuation performance by collecting and publishing additional new and more detailed data and benchmarking performance and outcomes in key areas (investment performance, expenses, insurance and sustainability)

[Note: The Australian Prudential Regulation Authority (APRA) launched a consultation in April to clarify how Prudential Standard SPS 515 Strategic Planning and Member Outcomes (SPS 515) would interact with the government's new legislated outcomes assessment (following the passage of Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No 1) Act 2019). APRA finalised changes to SPS 515 on 28 August. In addition, the regulator said that it will publish more detailed information about fund performance. This is covered in a separate post in this issue of Governance News.]

- Enhancing transparency around supervisory actions and emerging areas of best practice identified through industry-wide reviews to influence industry practices
- Integrating APRA's assessment of member outcomes into APRA's risk assessment and response models and new enforcement approach
- Facilitating the resolution or exit of persistently underperforming superannuation funds.

- Specific actions and completion dates
- The plan includes hard completion dates for the following actions.
- By December 2021:
  - Improving the quality and consistency of superannuation data submitted to APRA
  - Increasing transparency by publishing data for MySuper and Choice superannuation products.
- By June 2022:
  - Publishing additional data on APRA's assessment of superannuation performance
  - Improving the transparency of supervisory actions taken by APRA and publish the results of benchmarking exercises
  - Facilitating the resolution/managed exit of persistently underperforming superannuation funds or products
- By June 2023:
  - Facilitating the implementation of legislation and strengthen prudential standards
  - Conducting thematic and deep dive reviews into trustee practices

3. Improving cyber resilience across the financial system

APRA will seek to reduce the impact of cyber incidents to the Australian community and financial system by ensuring that APRA-regulated financial institutions are proactively undertaking continual actions to strengthen their cyber resilience.

APRA says that it will refresh and execute its multi-year cyber strategy, which will include:

- Enforcing minimum standards and influencing sound practices: APRA will supervise the adoption of the new prudential standard CPS 234 Information Security and target areas of weakness with clear guidance to industry. Active supervision will ensure APRA-regulated institutions address basic cyber hygiene issues and maintain 'fit for purpose' response plans for plausible cyber incidents.
- Use data driven insights to interrogate cyber resilience data to prioritise and tailor supervisory activities. In the longer term, APRA says that this will inform baseline metrics against which APRA regulated institutions will be benchmarked and held to account for maintaining sound cyber defences.
- Collaborating with peer regulatory agencies for better cyber resilience outcomes, including by executing the work plan of the Council of Financial Regulators Cyber Security Working Group, and engaging with other agencies, international peers and industry experts.
- Bolstering APRA's ability to assess the cyber resilience of regulated institutions by uplifting organisational capability and by leveraging third party expertise for deeper assessments where necessary.
- Uplifting APRA's cyber incident response capabilities to respond swiftly and decisively to cyber incidents that have materially impacted APRA regulated institutions.

No hard completion dates appear to be included for this work.

4. Transform governance, culture, remuneration and accountability (GCRA) across APRA regulated entities

The plan includes a number of actions under APRA's 'multi-year GCRA strategy'. These include:

- strengthening the prudential framework by 'uplifting and clarifying prudential expectations and guidance relating to GCRA', and working with government on planned initiatives to extend the legislated accountability regime to all APRA-regulated institutions
- sharing more frequent GCRA insights with external stakeholders to reinforce prudential expectations, with a view to continuing to uplift the management of non-financial risks by APRA regulated institutions
- sharpening prudential supervision of GCRA through intensifying focus on risk management outcomes including: a) refreshing supervisory tools and approaches, which includes targeted use of regulatory technology, to transform supervision of GCRA; b) undertaking intensive reviews and prudential inquiries as appropriate to identify and require action where the poor management of GCRA risks is identified; and c) embedding a 'constructively tough' mindset to the supervision of GCRA across APRA.

The roadmap sets out hard completion dates for two actions:

- By June 2020: Implementing intensive supervisory reviews (three entities per year)
- By Jan 2021: Implementing a revised prudential standard

Lifting APRA internal capability

APRA notes that the execution of the strategy will require lifting internal capability at the regulator in key areas. These include: a) improving and broadening risk-based supervision; b) improving APRA's resolution capability; c) improving APRA's external engagement and collaboration; d) data enabled decision making; and e) transforming APRA leadership, people and culture.

Resourcing

The report notes that APRA has received/will receive over the next four years increased funding, primarily to implement measures in response to the Financial Services Royal Commission and to APRA's new and expanded functions including rolling out the Banking Executive Accountability Regime (BEAR) across all APRA regulated sectors. The initiatives that informed these funding increases have been incorporated into APRA's 2019-2023 Corporate plan.

However, following the Capability Review, APRA noted that it would require additional funding or legislative and/or policy changes, to effectively implement all the recommendations arising from that review. Noting the government's indication that it will consider the need for any additional funding as part of the 2020-21 budget process, APRA said it will assess any implications to its four-year plan at that time.

Performance measures?

Chapter 5 of the plan sets out the measures against which APRA will measure its own performance against the plan. This can be accessed on the APRA website: APRA 2019-2023 Corporate Plan.

[Sources: APRA media release 29/08/2019; APRA Corporate Plan 2019-2023 August 2019; [registration required] The Australian 29/08/2019]

Engaging with ASIC: Hints from ASIC Commissioners John Price and Sean Hughes?

In separate speeches, Australian Securities and Investment Commission (ASIC) Commissioners John Price and Sean Hughes have offered some insights into ASIC's expectations of how entities should engage with regulators post-Hayne Commission.

Why 'co-operation' with ASIC still makes sense post-Hayne

In his address to the 36th Annual Conference of the Banking and Financial Services Law Association, ASIC Commissioner Sean Hughes spoke on the topic of ASIC's new 'why not litigate?' approach to enforcement.

[Note: For an overview of ASIC's 'why not litigate?' enforcement approach see: Governance News 20/02/2019]

Among other things, Mr Hughes emphasised the regulator's expectation that companies continue to co-operate with ASIC, despite objections from some quarters that companies are less likely to do so given the changed environment post Financial Services Royal Commission. Mr Hughes commented 'To this we say, that is not only illegal and illogical, but highly risky'.

Mr Hughes went on to observe that a 'cooperative approach' to dealings with ASIC could have benefits for individuals and/or entities. For example, he suggested that early notification of misconduct or a cooperative approach during an investigation would be relevant to ASIC's consideration of which type of action to pursue and what remedy or combination of remedies to seek. He added that in any proceedings commenced by ASIC, the regulator 'will give due credit for any cooperation we have received from the person or entity against whom the proceedings are brought'.

'The point here, of course, is that the question of cooperating with regulators is not simply a legal one and indeed I would argue is not even primarily a legal one in today's environment. And we are well beyond the days when merely fulfilling your legal obligations (eg by complying with reporting obligations under the Corporations Act 2001, or by producing documents in response to statutory notices issued by ASIC) is seen as cooperation' Mr Hughes said.

Breach reporting

Commenting briefly on the question of breach reporting, Mr Hughes noted that ASIC's Report 594 (for a summary of the report see: Governance News 08/10/2018) on compliance with breach reporting obligations published in September 2018 found serious, unacceptable delays in the time taken to identify, report and correct significant breaches of the law among Australia's most important financial institutions. He went on to observe that almost 12 months after the report, ASIC has observed some improvement.

For example Mr Hughes said that the initial indications from ASIC's Close and Continuous Monitoring (CCM) program (which has been reviewing breach reporting processes) has found that there 'are some positive steps that (if embedded within the organisation) should lead to longer term improvements'. More particularly he said that one improvement ASIC has observed is an increase in the number of breach reports received. 'we have seen an increase in breach reports by Financial Services licensees of over 50% compared to the previous year, and an increase of 99% compared to two years ago'. However, he also noted that the time taken to identify and report breached had not improved overall. In addition, Mr Hughes said that ASIC has observed 'some slight improvement (though not universal) in time to remediate customers'.

Mr Hughes commented that at this stage, ASIC 'can speculate that the [Financial Services] Royal Commission together with ASIC's focus on the area, has led to a proverbial "clearing out the skeletons", which has had an influence. Whether these changes are only short term remains to be seen, but ASIC's focus on breach reporting is very much long term and will continue to be so'.

He added that 'breach reporting should be part of the entity's process to identify areas for improvement, fix errors and importantly action customer remediation in a timely way. From this perspective breach reporting should be part of the entity's overall governance and risk management. As we move further away from the Royal Commission and other day-to-day pressures come to the fore, we expect entities to continue to take their regulatory obligations – including but not limited to breach reporting – seriously'.

Why are entities so slow to adopt a proactive approach to regulatory engagement?

Separately, in a recent speech at the Governance Institute of Australia National Conference entitled, How to engage with regulators, ASIC Commissioner John Price outlined the changes in the regulatory environment since the 2016 announcement of the ASIC Enforcement Review Taskforce including (among other developments) the introduction of the Banking Executive Accountability Regime (BEAR), the release of the CBA Prudential Inquiry report into the CBA, the Financial Services Royal Commission recommendations and ASIC's new 'why not litigate?' enforcement approach.

Citing a survey about regulatory engagement conducted by the Governance Institute and LexisNexis which found that: 50% of respondents said their approach to engaging with regulators was defensive or reactive, instead of proactive; 40% of respondents have no strategy for dealing with regulators; and 70% of respondents

indicating that the Financial Services Royal Commission will have zero impact on the way in which their organisation approaches remuneration, Mr Byres asked two questions.

1. 'has the wise counsel from the APRA CBA report to ask ourselves "should we not can we" got through to all levels of corporate Australia'
2. 'given that reactive or defensive conduct toward regulators and the absence of a regulatory strategy was a feature that led to the events I have mentioned today - is doing the same thing again and expecting a different result a prudent course?'

[Note: The joint Governance Institute/LexisNexis report Mr Lonsdale refers to appears to the Strategy for Engaging with Regulators report released in July of this year. The paper not only presented the results of a survey into strategies for dealing with regulators in a post-Hayne world and a subsequent roundtable discussion of the survey results, but called for submissions on a set of specific questions as part of a broader discussion on the issue. The full text of the report is available (with registration) from the Governance Institute website here. For a summary see: Governance News 24/07/2019]

[Note: For practical insights into how organisations can approach the challenges of regulatory engagement in a post-Hayne environment MinterEllison's report: Delivering sustainable shareholder value in a post Hayne Royal Commission World at p18]

[Sources: Speech by ASIC Commissioner Sean Hughes at the Banking in Spotlight' 36th Annual Conference of the Banking and Financial Services Law Association 30/08/2019; Opening remarks by John Price, Commissioner, Australian Securities and Investments Commission at the Governance Institute of Australia National Conference 2019 02/09/2019]

ASIC Corporate plan 2019-2023: Seven priorities to address 'drivers of harm'

Key Takeouts

- ASIC's corporate plan for the next four years was released on 28 August. The plan includes seven strategic priorities for addressing harms to consumers/market and key regulatory priorities/activities for the regulator over the next four years.
- Delivering as a conduct regulator for superannuation is identified as a strategic priority for the regulator. In his Keynote address to the Financial Services Summit, ASIC Chair James Shipton commented that 'While underperformance is not illegal, it is frequently caused by conduct that does breach the law e.g. conflicts of interest, failure to act in members' best interests, or lack of diligence by trustees. ASIC will consider persistent underperformance as a key indicator and red flag to help target our work to identify misconduct'
- ASIC Chair James Shipton said that the regulator is committed to using the most of its 'enhanced regulatory toolkit' by selecting the appropriate tool to address a specific problem. He added that ASIC also recognises 'the limitations of certain tools. One example is the need to shift away from an over-reliance on disclosure to protect consumers. Instead, we will look to use targeted powers like the product intervention power more often'. Mr Shipton said that ASIC would soon publish a joint report with the Dutch AFM on the inherent limitations of disclosure soon.

The Australian Securities and Investments Commission (ASIC) released its Corporate Plan setting out its 'change agenda' and 'regulatory priorities' for the next 4 years on 28 August.

The priorities set out in the plan are aimed at addressing five 'drivers of harm' to consumers and markets. These harms are: 1) poor design and inappropriate sale of investment and protection products; 2) inappropriate sale of credit products to consumers and limited access for small business; 3) poor conduct in financial markets driven by lack of competition, structural challenges or conflicts of interest; 4) poor governance (by boards, executives and investors), lack of professionalism, poor culture and lack of accountability; and 5) the lack of deterrence (to address the issue of regulated entities being undeterred from engaging in misconduct by ASIC's regulatory action).

ASIC's seven strategic priorities over the next four years

In his keynote address to the Financial Services Council Summit, ASIC Chair James Shipton highlighted a number of specific areas of focus for the regulator under each of the seven strategic priorities included in the plan.

1. **High deterrence enforcement action:** Citing the 21% uptick in the number of ASIC enforcement actions since February, the 74% increase in enforcement investigations involving the big six (or their officers or subsidiary companies) and the 166% increase in wealth management investigations since February 2018, Mr Shipton said that the regulator is already enhancing its enforcement focus. He added that the regulator is 'clear eyed' about taking matters to court.
2. **Prioritising the recommendations and referrals from the Royal Commission:** Mr Shipton said that ASIC is prioritising work directed at meeting the outcomes of the Financial Services Royal Commission and working with the Parliament, the government, APRA and other regulators to do so.
3. **Delivering as a conduct regulator for superannuation:** Consistent with establishing itself as the primary conduct regulator in superannuation and with the government's response to the Financial Services Royal Commission, Mr Shipton said that ASIC will look to improve outcomes in superannuation through: a) taking decisive regulatory and enforcement action to deter misconduct, and b) the supervision and surveillance of superannuation trustees - with a focus on whether trustees act in the best interest of members and treat them fairly.
4. **Addressing harms in insurance:** Mr Shipton said that AISC will take enforcement and other regulatory action against mis-selling of insurance products, particularly to vulnerable consumers, and review product features and practices that raise concerns. He added that AISC will also support and implement insurance law reforms to enhance ASIC's ability to act in relation to poor conduct and poor consumer outcomes in insurance (especially coverage of claims handling). 'As these legislative reforms are implemented, we will look to take action on unfair contract terms and concerns in claims handling' Mr Shipton added.
5. **Improving governance and accountability:** ASIC is conducting enhanced and intensive supervision of key firms, including through the Close and Continuous Monitoring (CCM) program and the Corporate Governance Taskforce. Mr Shipton said that these supervisory approaches are aimed at identifying cultural, organisational and management failings that may lead to conduct problems, breaches of the law and unfair outcomes. 'The goal here is to help identify deficiencies before they become breaches of the law. Also, we are committed to supporting and implementing the proposed conduct accountability regime' Mr Shipton said.
6. **Protecting vulnerable consumers:** Mr Shipton said that ASIC is committed to taking regulatory action against the unfair treatment of vulnerable consumers by financial services providers. He said that ASIC's new product intervention power and the design and distribution powers would be 'vital to the protection of vulnerable consumers' by ensuring 'that financial products which are designed for and sold to them meet their particular needs and achieve fair outcomes'. Mr Shipton added that the two initial proposed applications of the intervention power have focused on vulnerable consumers. Noting that the design and distribution obligations regime will commence in April 2021, Mr Shipton said that AISC is currently developing guidance on its expectations for the new regime but nevertheless encouraged firms to 'start planning for these significant reforms now'.
7. **Addressing poor financial advice outcomes:** Mr Shipton said that ASIC will support measures to improve the professionalism of financial advisers and target the potential misconduct and harms to consumers that may arise from the industry's shift towards 'general advice' models. He added that ASIC will also closely monitor the potential harms that may result from larger institutions departing from the advice sector.

The plan states that these strategic priorities collectively represent the most significant ways in which ASIC is: a) promoting better corporate culture/behaviours (in particular the values of fairness and professionalism); b) addressing consumer harms (particularly where vulnerable individuals and communities are impacted) and c) improving consumer outcomes; and 'deterring, punishing and publicly denouncing wrongdoing via the regulator's new 'why not litigate' enforcement approach.

Lifting internal capabilities within ASIC

In addition, the plan outlines how ASIC will bolster its own capabilities so as to deliver on its change program/strategic priorities including. This includes: expanding the use of behavioural sciences, data and technology; positioning ASIC as a strategic and agile regulator; developing and using new regulatory tools and remedies (such as the new product intervention power, the design and distribution obligations and tougher penalties); and scaling up ASIC to achieve these outcomes.

Measuring and evaluating ASIC's performance

The plan includes a table summarising the 'outputs and evidence' ASIC will use to measure and evaluate its own performance (p42-47).

Further Detail

Focus on superannuation: 'ASIC is also putting trustees on notice where there is persistent underperformance'

Mr Shipton said that consumers 'expect super trustees to act in their best interests to improve retirement incomes - consistent underperformers are clearly not doing enough. While underperformance is not illegal, it is frequently caused by conduct that does breach the law eg conflicts of interest, failure to act in members' best interests, or lack of diligence by trustees. Mr Shipton added that ASIC will consider persistent underperformance as a key indicator and 'red flag to help target our work to identify misconduct'.

Insurance in superannuation: Mr Shipton said that balance erosion through 'inappropriate or poor value insurance is a significant issue for many' superannuation members. He added that though there has been some reduction in balance erosion as a result of Protecting Your Super Package Reforms, 'there is more to be done'.

Mr Shipton said that ASIC will address this harm by 'expecting new norms of behaviour by trustees in relation to communication, design and claims processes for insurance in superannuation'.

Fees in superannuation: Mr Shipton identified the erosion of superannuation balances due to 'excessive advice fees' as area of focus for ASIC. He said that ASIC (and APRA's shared) expectation is that all trustees should have in place strong governance, risk management and oversight processes to ensure that only authorised and appropriate fees are deducted from super accounts. 'We expect trustees to have reviewed their governance and assurance arrangements for fees charged to super accounts' he said.

Potential Conflicts: Mr Shipton said that another project ASIC is working on looks at market structure and conflicts issues in relation to advice by superannuation funds. Currently ASIC is looking 25 superannuation funds across the retail, corporate, public and industry sectors, including testing a sample of advice to see the quality of advice provided.

ASIC's other work in superannuation

ASIC's other work in the superannuation sector includes:

- Finalising the fees and costs disclosure guidance (Regulatory Guidance 97) following our recent consultation process. This critical piece of work is also relevant to the funds management sector.
- Also, we see opportunities for improvement in relation to the way trustees handle member complaints.

Investment Management

ASIC's work in this sector for the coming year will include a focus on addressing the potential for financial loss caused by underperforming funds due to conflicts of interest, poor governance and/or lack of competition; and financial hardship and loss for consumers caused by illiquid or failing funds across the economic cycle.

To address these issues, ASIC will be undertaking work in the following four areas: a) competition in the funds management industry; b) fund manager resilience; c) the best interests duty of responsible entities; and fees and costs disclosure.

Competition in the funds management industry

Mr Shipton said that ASIC will be assessing the level and effectiveness of competition in the Australian funds management industry. 'Robust competition can help ensure that consumers are obtaining good value for money by the professional management of their investment and a healthy return' Mr Shipton said.

Fund manager resilience

Mr Shipton said that ASIC will focus on resilience in the funds management industry. In particular, the regulator will: a) work towards enhancing consumer understanding; and b) plans to review the definition of liquid assets (in the context of the Corporations Act rule about whether a scheme is liquid and can therefore pay redemptions). Mr Shipton said that ASIC believes that the current definition is too broad and We believe 'allows inherently illiquid schemes to call themselves liquid'.

Mr Shipton said that ASIC intends to consult this year on a narrower definition which it considers 'better aligns with general notions of when an investment is liquid'.

Best interests duty of responsible entities

In line with ASIC's priority of improving governance and accountability, the regulator will be looking at how some responsible entities are meeting their duty to act in the best interests of investors when making decision on matters such as investment structures, business models and services providers.

Mr Shipton said that ASIC's assessment will involve looking at behaviours and actions that could indicate whether a responsible entity is failing to act in the best interests of investors, including responsible entity's use of service providers.

Financial advice

Ending grandfathered remuneration project: Mr Shipton said legislation to ban the grandfathering arrangements was recently introduced and that ASIC have recently commenced a review into industry moves to voluntarily end grandfathered commissions. Mr Shipton reiterated that ASIC is undertaking quantitative and qualitative reviews to monitor the industry's approach to ending the grandfathered arrangements and expects to deliver its final report to the Treasurer by June 2021. ASIC will also publicly release interim findings next year.

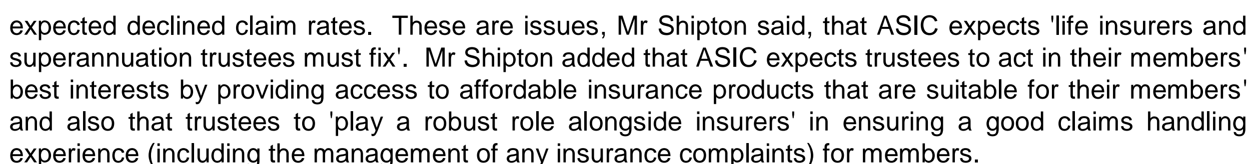
Other financial advice work

- Supporting measures to improve the professionalism of financial advisers and target potential misconduct and harms to consumers that may arise from the industry's shift from 'personal' to 'general advice' models.
- In 2020 ASIC will assess the quality of life insurance advice. The findings of this review will be finalised and published by ASIC in 2022.
- In 2020-21, ASIC will commission further research (following Report 627 'What consumers think about financial advice') to explore whether consumers have unmet financial advice needs. This project will examine: a) the state of the financial advice industry; b) the demand for and supply of financial advice; and c) what measures may be required, if any, to reduce any gaps between supply and demand.

[Note: Report 627 is covered in a separate post of this issue of Governance News.]

ASIC's work in insurance

- **Proposed use of the product intervention power:** Mr Shipton said that ASIC recently consulted on its proposal to ban unsolicited telephone sales of direct life insurance consumer credit insurance (CCI). He commented that 'In order to help rebuild consumer trust, we expect the insurance industry to support higher standards that improve consumer outcomes, and for industry to constructively engage in this consultation process'.
- **Total and permanent disability insurance (TPD) review:** Mr Shipton said that ASIC will 'shortly' publish a report outlining the findings of an industry review of TPD insurance claims handling. Mr Shipton said that ASIC has identified four industry-wide problems: 1) restrictive TPD definitions that result in poor consumer outcomes; 2) frictions in claims handling processes which are likely to lead to withdrawn claims; 3) significant deficiencies in insurers' ability to record and search for claims data; and 4) higher than



expected declined claim rates. These are issues, Mr Shipton said, that ASIC expects 'life insurers and superannuation trustees must fix'. Mr Shipton added that ASIC expects trustees to act in their members' best interests by providing access to affordable insurance products that are suitable for their members' and also that trustees to 'play a robust role alongside insurers' in ensuring a good claims handling experience (including the management of any insurance complaints) for members.

Lifting ASIC's internal capabilities

The plan also explains how the ASIC will bolster its capabilities so as to deliver its own change program and strategic priorities. This includes: a) expanding the use of behavioural sciences, data and technology; b) positioning the ASIC as a strategic and agile regulator; c) developing and using new regulatory tools and remedies, such as the new product intervention power, the design and distribution obligations and tougher penalties; and d) scaling up the ASIC to achieve these outcomes.

[Sources: ASIC media release 28/08/2019; ASIC Corporate plan 2019-2023; ASIC Chair James Shipton, Keynote address — Financial Services Council Summit 2019, 28/08/2019]

Self-reporting a problem won't mean the regulator goes easier? The ACCC has instituted proceedings in the Federal Court against Medibank Private Ltd

The Australian Competition and Consumer Commission (ACCC) has instituted proceedings in the Federal Court against Medibank Private Ltd (trading as ahm Health Insurance) alleging that the insurer falsely represented to members holding ahm 'lite' or 'boost' policies, who were making claims or enquiries, that they were not entitled to cover for joint investigations or reconstruction procedures, when in fact their policies covered these procedures.

The ACCC is seeking penalties, consumer redress, declarations, injunctions, publication orders, the implementation of a compliance program and costs.

Check your systems? The AFR reports that ACCC Chair Rod Sims has urged companies to check systems to ensure they're delivering what they say they are and cautioning that self-reporting is no guarantee of leniency from the regulator

The AFR reports that though Medibank self-reported the issue to the ACCC, and had already begun remediating affected customers ACCC Chair Rod Sims has said that the regulator will not go gently. 'We regard this behaviour as very bad…You can't have a regulatory system where if you self-report a problem before it reaches the regulator, you are let off. That's a rotten regulatory system…You don't want a culture where companies can have a lot of compliance people and when they find out they've done something wrong, they know they'll always get away with it if they self-report. That sort of culture can't work' Mr Sims is quoted as saying.

Reportedly Mr Sims went on to say that the decision to commence legal proceedings should send a message to other firms to 'check your systems'. 'If you're providing a basic service, you've sold a policy, and you don't have systems in place to check if you can deliver what you said you'd deliver, that is not a side issue, it's a core issue' Mr Sims reportedly said.

Medibank and ahm response to the ACCC proceedings

In a statement, acknowledging the proceedings, ahm Senior Executive Jan O'Keefe said 'We apologise unreservedly to our customers who have been impacted by the error'.

According to the statement, the error was caused by 'an internal process failure, where a number of MBS item codes belonging to the joint and reconstruction category were not entered on the system for the Boost and Lite products'.

The statement also outlines the steps taken to address the issue and confirms that Medibank voluntarily notified the ACCC of the issue in 2018 and briefed the regulator on its approach to customer communication and its compensation process at that time. The statement adds that Medibank has been working cooperatively with the ACCC throughout its investigation.

[Sources: ACCC media release 03/09/2019; Concise Statement; Medibank and ahm response to ACCC proceedings 03/09/2019; [registration required] The AFR 03/09/2019; [registration required] The SMH 03/09/2019]

AFCA could play a greater role in helping ASIC in the identification and reporting of conduct that may warrant intervention through the PIP? AFCA's submission in response to ASIC's proposed approach to administering the product intervention power regime is strongly supportive of the proposed approach

The Australian Financial Complaints Authority (AFCA) has released its submission in response to the Australian Securities and Investments Commission's (ASIC's) consultation paper 313: Product Intervention Power.

[Note: In July, The Australian Securities and Investments Commission (ASIC) released a consultation paper — CP 313 Product Intervention Power — and draft regulatory guide setting out how it plans to administer the new product intervention regime introduced in the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019. Consultation closed on 7 August. ASIC has said that it aims to release its final regulatory guide in September 2019. For a summary see: Governance News 03/07/2019.]

The three main points of AFCA's submission are as follows.

1. AFCA strongly welcomes the addition of the product intervention power to ASIC's regulatory toolkit on the basis that the new powers will enhance ASIC's ability to make more proactive interventions including in response to financial and credit products that deliver poor consumer outcomes and gaps or unintended consequences in the current regulatory architecture.
2. AFCA considers that the product intervention power will allow ASIC to apply a 'fairness lens' over the conduct of financial firms in their assessment of whether a product has, will or is likely to result in consumer detriment.
3. AFCA considers that it could 'have an increased and evolving role in working with ASIC regarding the identification and reporting of conduct that may warrant regulatory intervention through the exercise of the product intervention power'. AFCA Chief Ombudsman and CEO David Locke suggested that 'there is potential for AFCA to act as a facilitator in informing ASIC of problem areas within the financial services industry through the intelligence we gather in our complaint handling processes, and systemic issues and serious contravention reporting functions'.

Related News: AFCA is supportive of ASIC's proposal to prohibit the provision of credit via short term lending arrangements

Separately, AFCA also released its submission in response to ASIC's consultation paper 316: short term credit

[Note: In CP 316 ASIC proposed to use its product intervention powers to target a specific short term lending model that it claims causes 'significant consumer detriment' to vulnerable consumers. ASIC's preferred approach is to impose an industry wide product intervention order banning (certain) lending models which benefit from the short term credit exemption. Consultation closed on 30 July. For a summary see: Governance News 10/07/2019]

Key points of AFCA's submission

1. AFCA 'strongly welcomes' ASIC's intervention and supports ASIC's preferred approach ie the prohibition of specific short term lending models which benefit from the short term credit exemption (Option 1)
2. AFCA says it considers that short term credit arrangements can have significant adverse effects on individuals, their families and communities, as well as the broader financial services system. In addition, firms may not require a licence and therefore are not required to be a member of AFCA, which 'significantly' limits consumer's ability to access justice.
3. AFCA considers that further intervention is required to prohibit the provision of other poor value and harmful products including credit repair; debt negotiations and budgeting services; junk add-on insurance cover; funeral insurance and expenses only products; buy now, pay later; dealer issued warranties and over-the-counter derivatives.

[Sources: AFCA media release 27/08/2019; AFCA's submission in response to ASIC's consultation paper 313 - Product intervention power 27/08/2019; AFCA's submission in response to ASIC's consultation paper 316 - Using the product intervention power: short term credit 27/08/2019]

HESTA has become the first superannuation fund to be certified as carbon neutral

Superannuation fund HESTA released a statement announcing that it is Australia's first superannuation fund to be certified by the Federal Department of Environment and Energy as Carbon Neutral for emissions produced from its business operations.

The carbon neutral certification is granted by the Australian Government and is based on international standards. To attain certification organisations must adhere to a strict criterion including calculating their carbon footprint, identifying opportunities to reduce emissions and offsetting remaining emissions by purchasing offset credits HESTA said.

HESTA adds that it has been measuring its carbon emissions since 2011 and has implemented numerous measures to reduce its footprint, including hybrid vehicles, waste separation, the use of technology, intelligent design of its offices and employee education. In addition, HESTA has purchased a limited number of certified offsets including in savanna burning projects that support Aboriginal employment in the Northern Kimberly region of WA and tree planting initiatives in North-Western NSW and the Babinda rainforest.

HESTA CEO Debby Blakey said that the certification is recognition of HESTA's long term commitment to sustainability. 'We're passionate about championing long-term change for our members and want to lead by example in our approach to climate change, not only by being a responsible investor but also in how we advocate, and the action we take to reduce our environmental footprint…We want to lead through action, we're doing this by focusing on the broader impact we can have on the world our members live in and retire into by aligning our investments and actions with seven strategic UN Sustainable Development Goals (SDGs), including climate change' Ms Blakey said.

Finally, the statement notes that HESTA is a member of the Investor Group on Climate Change and the Climate Action 100+ which push for improved climate change policy and action from governments and organisations around the globe.

[Sources: HESTA media release 03/09/2019; Investor Daily 04/09/2019]

The Australian Conservation Foundation has reportedly called on nine major listed companies to review their membership of the BCA over its climate stance

The AFR reports that the Australian Conservation Foundation (ACF) has urged the CEOs of nine major listed companies — ANZ, NAB, Westpac, Telstra, Woolworths, Coles, Medibank, Coca Cola Amatil and Qantas — to review their membership of the Business Council (BCA) over its opposition to environmental protection laws.

The AFR quotes from a letter the ACF reportedly sent to the companies which calls on the companies to 'consider the steps you can take, as a member company, to promote responsible, science-based climate and nature conservation policies within the BCA. We ask that you assess the climate and nature policies and public statements of the BCA against your own and engage with the BCA on the concerns raised in this briefing…If you assess, as other companies have, that the BCA is unwilling to constructively engage with your organisation on climate and nature conservation policy, we ask that you conduct a transparent review of your BCA membership, with particular focus on the alignment of your climate and nature conservation policies'.

Reportedly, the ACF's move was prompted by the BCA's stance on the Environment Protection and Biodiversity Conservation Act 1999, which is due for review in October. According to The AFR, BCA CEO Jennifer Westacott has previously expressed the view that the Act is causing new projects to become 'tangled up in green tape' eg by allowing environmental groups to appeal against proposed projects such as Adani's Carmichael coal mine in Qld.

The AFR comments that ACF's action follows a similar campaign earlier in the year that called on companies to review their membership based on the BCA's position on climate change, for example its description of Federal Labor's policy of a 45% reduction of emissions by 2030 as 'economy wrecking' and the BCA's support of the use of Kyoto carryover credits to meet the Paris target.

[Source: [registration required] The AFR 29/08/2019]

ACCR resolution at BHP: BHP is reportedly under pressure from investors to suspend membership of groups including the Business Council of Australia and the Minerals Council?

The Guardian reports that BHP is under increasing investor pressure to suspend its membership of industry groups including Australia's Minerals Council and Business Council of Australia. Reportedly, shareholders are concerned that the industry groups' lobbying efforts are at odds with the goals of the Paris agreement and with BHP's stance on climate.

[Note: BHP CEO Andrew Mackenzie recently gave a speech outlining a number of measures the organisation will take to act on global warming including a US$400 million commitment to reduce Scope 1, 2 and 3 emissions though a new Climate Investment Program. Mr Mackenzie described the need to act as a 'strategic imperative for us to deliver long-term shareholder value'. For a summary see: Governance News 31/07/2019]

A shareholder resolution calling for the suspension has reportedly been filed by the Australasian Centre for Corporate Responsibility (ACCR) Co-filers of the resolution are reportedly, Australia's Vision Super, the Netherlands' ACTIAM, Denmark's MP Pension and the Church of England Pensions Board. The Guardian quotes Grok Ventures (which has expressed support for the resolution) as saying that 'until BHP stops funding coal lobbyists, we're extremely sceptical of their environmental or green credentials'.

Reportedly, the ACCR has said that the resolution was filed following engagement with BHP on the issue, but that to date, though BHP 'does acknowledge that there is a serious issue' it has been 'unable or unwilling to resolve it.'

When is the resolution likely to be considered? BHP's annual general meetings are due to be held in London on 17 October and Sydney on 7 November.

[Sources: The Guardian 04/09/2019]

In Brief | The Australian reports that Whitehaven Coal plans to report against the Taskforce on Climate Related Financial Disclosures. The Australian quotes an unnamed Whitehaven spokesperson as saying that the company's debut sustainability report — to be released in the next few weeks — will feature an entire section on climate change, including risk factors and mitigation measures

[Source: [registration required] The Australian 02/09/2019]

In Brief | The SMH reports that HESTA has reportedly called on oil and gas companies (including Woodside and Santos) to link executive pay to the reduction of scope 3 (customer) emissions. Reportedly HESTA has said that it considers existing arrangements at both companies to be inadequate and will consider voting against resolutions at upcoming AGMs if the companies in question fail to take further action. 'We feel the time is right to take a strong position on this. We strongly suggest that this needs to occur…If we don't see that this year we will be considering our options….We have been prepared to vote strongly where we believe that is required' HESTA CEO Debbie Blakey is quoted as saying

[Source: The SMH 29/08/2019]

In Brief | The SMH reports that PwC will not be seeking more work with the COAL21 project, established to advocate for low-emission coal technologies, possibly due to criticisms from environmental groups about PwC's work for mining companies

[Source: [registration required] The SMH 28/08/2018]

Financial Services

Stop Press | ASIC has commenced proceedings in the Federal Court of Australia against Bendigo and Adelaide Bank concerning unfair contract terms in small business contracts

On 4 September, The Australian Securities and Investments Commission (ASIC) announced that it has commenced proceedings in the Federal Court against Bendigo and Adelaide Bank concerning (allegedly) unfair contract terms (UCT) in small business contracts.

ASIC alleges that certain terms used by Bendigo and Adelaide Bank in contracts with small businesses are unfair. If the Federal Court finds that any of the terms of the standard form contracts are unfair, the unfair terms are void.

ASIC is seeking that the terms are declared void from the outset, not from the time of the court's declaration.

For further detail see: Originating Process; Concise Statement

[Source: ASIC media release 04/09/2019]

The Insurance Council of Australia has outlined concerns about the proposed extension of UCT protections to insurance contracts in its submission on draft legislation, consumer groups have expressed strong support of the proposed changes

The Insurance Council of Australia (ICA) submission on draft legislation — Treasury Laws Amendment (Unfair Terms in Insurance Contracts) Bill 2019 — which proposes to extend unfair contract terms (UCT) protections to insurance contracts has raised concerns about the proposed changes.

[Note: For an overview of the proposed legislation please see: Governance News 30/07/2019]

'The Insurance Council and its members have carefully considered recommendation 4.7 of the Financial Services Royal Commission's (FSRC) Final Report concerning the extension of unfair contract terms protections to insurance contracts. We support that extension in a manner that genuinely assists consumers. However, we are seriously concerned that the draft Bill, if enacted, would harm rather than improve consumer outcomes' the ICA writes.

More particularly the ICA argues that the draft Bill (as currently drafted) would operate 'more severely' on the insurance sector than the general UCT regime does for other sectors of the economy. 'Being required to justify the specified cover in the insurance policy is more onerous than what is required in other sectors. For example, a cleaning service is not required under the existing UCT regime to justify terms setting out areas that it will and will not clean. The failure to exclude from review terms in insurance contracts relating to the risks an insurer will and will not cover causes significant uncertainty. The scope of application of the proposed UCT regime in the draft Bill and impact of the uncertainty created by this scope on insurers will be significant, and will be passed on to consumers' the submission states.

[Sources: Insurance Council of Australia submission: Treasury Laws Amendment (Unfair Terms in Insurance Contracts) Bill 2019; [registration required] The Australian 29/08/2019]

Another point of view? 'This reform will finally level the playing field' a joint submission from the CALC, FRLC and WEJustice argues

In a joint submission on the proposed extension of UCT provisions to insurance contracts the Consumer Action Law Centre (CALC), Financial Rights Legal Centre (FRLC) and WEstjustice argue that the need to extend UCT protections to insurance contracts is 'irrefutable' and expressed strong support for the government's move to implement 'the important and long overdue' reforms.

In particular, the submission expresses support of the government's commitment to implement the specific recommendation from the Hayne Royal Commission Final Report that the 'main subject matter' be narrowly defined, so that unfair terms in policy exclusions, benefits, and conditions must pass the fairness test.

[Note: Financial Services Royal Commission Final Report Recommendation 4.7 recommends that 'The unfair contract terms provisions now set out in the ASIC Act should apply to insurance contracts regulated by the Insurance Contracts Act. The provisions should be amended to provide a definition of the 'main subject matter' of an insurance contract as the terms of the contract that describe what is being insured. The duty of utmost good faith contained in section 13 of the Insurance Contracts Act should operate independently of the unfair contract terms provisions. See: Financial Services Royal Commission Final Report volume 1 at p32]

In addition, the submission makes comments on where the regime should be strengthened. Recommendations include: a) that unfair terms be prohibited (not just voidable) with civil penalties applying; b) closing the effective loophole for some group insurance (eg complimentary travel insurance with credit cards, life insurance through super, and employer-sponsored policies); and c) establishing a Federal Insurance Monitor, similar to those found in Victoria and NSW.

The group also express 'disappointment' and 'concern' over what they term 'scare tactics' by certain parts of the insurance industry, over rising premiums/withdrawing cover. 'A key lesson from the Royal Commission was that industry lobbying for loopholes and exemptions has watered-down and complicated our financial services laws to the point where they don't serve consumers. It appears this lesson has been lost on parts of the insurance industry' the group writes.

[Source: Consumer Action Law Centre, WEstjustice, Financial Rights Legal Centre joint submission, Extending unfair contract terms laws to insurance contracts – Exposure draft legislation 30/08/2019]

An opportunity for superannuation funds to better communicate the value of insurance in super to members and combat 'misinformation'? A report from Metlife recommends superannuation funds take a more proactive approach to informing and educating disengaged members about their cover

Metlife has released its second annual report into consumer attitudes towards insurance in superannuation.

Some Key Points

Awareness but lack of engagement?

Overall 73% of people are aware they have insurance via their superannuation fund, but:

- 50% are unaware of what cover they have
- nearly 40% were not aware they could modify the level of their insurance cover
- 28% said they were not aware they are charged a premium for insurance inside super and for those that were aware, only 34% knew the premium amount being charged
- 57% don't know how to calculate how much cover they need
- 27% first became aware of having insurance via their superannuation fund while 14% were alerted when they discovered premiums coming out of their account. This discovery can lead to members cancelling cover if they don't understand its value and benefits

High degree of trust in superannuation funds?

Receiving communications from their superannuation fund is the main driver of initial awareness of insurance, and member trust their superannuation fund to help them navigate insurance inside super:

- 72% of respondents trust their superannuation fund to help them make informed decisions about life insurance
- 70% trust their superannuation fund to help them understand how much life insurance they need

Women appear less engaged than men with their super?

The research found:

- 19% of women as compared with 25% of men are aware they have insurance inside super and have modified their cover
- 57% of women are unaware they can modify their cover as compared with 63% of men
- 66% of women are aware they are charged a premium for their insurance inside super compared with 76% of men
- women are more likely to have modified and increased their cover if they are married, separated or divorced or are parents
- Women are more likely to join their employer's default fund (71% of women compared with 62% of men). Only 9% said that they were likely to do their own research before joining a superannuation fund compared with 13% of men
- 79% of women who were not aware they can modify insurance inside super said they don't know how to calculate the amount of life insurance cover they should have compared to 62% of men

Consumer assumptions about insurance inside super?

The report identifies that the assumptions consumers make about their super are, in some cases, at odds with the facts. For example, according to the report, 60% of people have concerns about whether their insurer

would actually pay a claim. This is almost 10% higher for people aged 18-39. The report attributes these concerns to 'distrust, poor reputation and negative publicity'.

Further, the report notes that the industry average acceptance rate for claims against death cover is 98% and for total and permanent disability (TPD) it's 88%. TPD claims tend to have a slightly lower average acceptance rate because they are more complex to assess, the report comments.

Communication about super: An opportunity for funds?

The report found that 85% of consumers would like communication from their superannuation fund about their insurance at least every year and that 52% want communication at least every six months. In addition, the report found that younger members prefer more regulator contact: 91% of 18-29 year olds prefer to be contacted every year and 71% every six months (as compared to 79% of 50-64 year olds and 39% every six months).

The report suggests that this represents an opportunity for superannuation funds to communicate in clear language about key points in their life and to highlight when they should be thinking about the protection they have.

Further, the report suggests that there is also a need for funds to proactively educate members about: a) why insurance inside super exists; b) why insurance inside super was introduced; c) the fact that they have insurance inside super and can control what they are covered for/level of cover; d) the advantages of being protected with insurance inside super; and how they can calculate how much cover they need and who to ask for advice.

[Sources: Metlife Report, 2019 Metlife Insurance Inside Super Report; [registration required] The Australian 29/08/2019; Independent Financial Adviser 02/09/2019]

Not harder for small businesses to secure finance (despite perceptions to the contrary)? The ABA says small business loan approvals are at 94% and there's no better time for small businesses to apply for loan. ABA, COSBOA and CPA Australia have launched a website to assist prospective borrowers

According to Australian Banking Association (ABA) commissioned research, small business loan approvals are currently at 94%, despite the fact that 60% of people believe that 'access to money' is a barrier to starting a their own business. In addition, loan applications have declined 33% since the 2014 calendar year.

The ABA suggests that the drop in loan applications could be attributable to a number of factors, including that: prospective borrowers believe they won't get a loan; believing the process takes too long and is too complex; or that they are borrowing from sources other than banks.

ABA CEO, Anna Bligh commented that there is 'no better time to contact your bank about a small business loan, interest rates are at record lows, banks approval of small business loans is at 94%, and the new Banking Code provides for fairer and simpler small business contracts'.

To assist prospective small business borrowers in the process of securing finance, The Australian Banking Association (ABA), in conjunction with COSBOA (Council of Small Business Organisations Australia) and CPA Australia, have developed the 'Financing your small business' website which they urge prospective borrowers to make use of.

[Source: ABA media release 30/08/2019]

10% of borrowers who used a broker are in financial trouble within 12 months? ASIC says the findings in ASIC REP 628 underline the importance of proposed broker reforms including the imposition of a best interests duty on brokers

Report Overview | ASIC report 628: Looking for a mortgage: Consumer Experiences and expectations in getting a home loan

The Australian Securities and Investments Commission (ASIC) has released a report into consumer decision making in relation to home loans to identify what factors influence the process.

Some Key Findings

- One in 10 consumers (in the survey) said they were struggling to meet their repayments: ASIC found that approximately 1 in 10 consumers who had recently taken out a home loan and had started making repayments: a) assess themselves to be 'struggling' to meet their repayments (9%); or b) had missed at least one repayment (1.5%). In addition, consumers who said they were struggling to meet their repayments or had missed at least one repayment thought that they would have to change their spending habits, either a little (20%) or a lot (50%), before taking out a loan. ASIC comments that this appears to be 'a relatively high proportion of consumers self-perceiving a level of financial pressure within 12 months of entering into a new home loan'.
- Consumers who visit a mortgage broker expect the broker to find them the 'best' (best price or rate) home loan. The report found that while consumers engage brokers for different reasons (including broker expertise or the fact that the broker would 'do the work for you') generally consumers were in fact all expecting the broker to deliver the same result — to get the 'best' home loan for them
- Consumers were most likely to take out their loan with a lender they had an existing relationship with. 'By far the strongest factor' influencing consumers to stay with a lender they had an existing relationship with was convenience.
- Even though consumers were likely to stay with a lender they had an existing relationship with, consistently across the qualitative research consumers indicated that they were disappointed that their lender (usually a bank) did not offer any rewards for an existing relationship. If consumers wanted a lower interest rate on their home loan, they had to ask for it and this was often met with mixed results.
- Consumers who used brokers were different to consumers who went direct to a lender. Consumers going through a broker were more likely to: a) be first home buyers; b) have less knowledge; and c) have done less research
- How brokers presented loan options to consumers was inconsistent. Based on the survey, 58% of consumers received two or less loan options from brokers. While most consumers were provided with multiple loan options, some consumers (often first home buyers and consumers with circumstances that might have limited their ability to get a loan) tended to be given only one loan recommendation. In addition, the report comments that the objective criteria on which the recommendations were made was not always made clear to borrowers.
- Consumers had a mixed understanding of how brokers are paid: In the qualitative research, ASIC found that consumers' understanding and perception of how mortgage brokers were paid varied considerably. Most consumers appeared to be aware that a broker was paid by a lender through a commission payment, but did not always understand that a broker is likely to receive different commission payments based on the lender selected and that this presented a conflict of interest.
- The report found that taking out a home loan is a complex and often overwhelming experience for prospective borrowers. ASIC found that as consumers progressed along the home loan journey, the importance of finding a good rate seemed to decrease in some case as they because more influenced by other factors such as the convenience of staying with an existing lender (or a lender they had an existing relationship with) and home loan features such as offset accounts. Also, some consumers said that they found it challenging to navigate online resources such as comparison websites. Based on the survey, of those consumers who had recently taken out a loan: a) 19% took their loan out direct with a lender they had an existing relationship with and did not engage any other provider (lender or broker) to obtain an alternative quote; and b) 21% believed they could have got a better interest rate or were not sure whether they got a good rate.

The findings underline the importance of broker reforms

ASIC writes that the findings in the report highlight the importance of proposed broker reforms including the proposed extension of a best interests duty to mortgage brokers.

'This research confirms that consumers who use mortgage brokers expect brokers to act in the consumers' interests. The [Financial Services] Royal Commission recommended that the law should be amended to provide that, when acting in connection with home lending, mortgage brokers must act in the best interests of the intending borrower. On 19 August 2019 the Government announced that a best interests duty for mortgage

brokers will be introduced by the end of 2019. Importantly, the implementation of this duty will align the role of brokers with the expectations of consumers' ASIC writes.

[Note: Treasury is consulting on an exposure draft Bill and Regulations which propose to implement the government's response to Financial Services Recommendation 1.2 (best interests duty) and Recommendation 1.3 (mortgage broker remuneration). Consultation on the proposed reforms will close on 4 October. For a summary see: Governance News 28/08/2019]

Improvement areas?

The report also identifies a number of areas in which ASIC considers 'further work' is required.

- **Industry participants should consider the findings in this report to improve consumer outcomes**: ASIC says that industry participants (including lenders, brokers and aggregators) should consider how they can use the findings and insights the research to provide better outcomes for consumers. ASIC suggests that this should include developing or improving information that will help consumers to make informed decisions when looking for/considering a home loan and while they retain their mortgage with a lender or remain a current customer of a mortgage broker.
- **Industry participants should provide consumers with greater transparency about the home loan recommendation(s) presented to them:** ASIC suggests that further consideration should be given by industry participants (including lenders, brokers and aggregators) as to how brokers can demonstrate that they are meeting consumers' expectations and presenting them with the 'best value' home loan option or options. This evidence should be provided with the consumer in mind so they can: a) better understand the basis on which a broker has selected a home loan option presented to them; and b) meaningfully compare home loan options (eg based on potential savings).

Comparison tool

Announcing the release of the report, ASIC Commissioner Sean Hughes called on 'lenders, brokers and aggregators' to 'step up to make it easier for consumers to meaningfully compare loan options and for brokers to communicate how a home loan option has been selected for them.'

Mr Hughes added that ASIC 'strongly supports the recent government announcement to enact a best interests duty for mortgage brokers. Importantly, the implementation of such a duty will align the role of brokers to the reasonable expectations of consumers.'

In addition, he said that ASIC is working with other regulators to develop a new home loan interest rate tool to improve price transparency for consumers to compare options. The new tool is expected to be available on ASIC's MoneySmart website next year.

[Sources: ASIC media release 29/08/2019; REP 628 Looking for a mortgage: Consumer experiences and expectations in getting a home loan*]*

Minister Jane Hume has issued a statement announcing the government plans to extend the deadline for existing financial advisers to comply with new professional/ethics/education requirements

Minister Jane Hume has issued a statement announcing the government plans to extend the deadline for existing financial advisers to comply with new professional/ethics/education requirements.

'While making these changes to raise education standards in the industry, we also need to balance the impact of these reforms against maintaining the ongoing availability, quality and affordability of advice. Therefore, the Government intends to legislate to provide additional time for existing advisers to meet new qualification and examination requirements set by FASEA' Ms Hume said.

Under the new requirements, advisers who were registered on the Financial Adviser Register on 1 January 2019 must: complete the FASEA-approved exam by 1 January 2022 (one additional year); and meet FASEA's qualification requirements by 1 January 2026 (two additional years).

These changes will not apply to new advisers registered after 1 January 2019.

[Source: Assistant Minister for Financial Services, Superannuation and Financial Technology Jane Hume media release 30/08/2019]

Industry response? In a statement, the Financial Services Council (FSC) welcomed the extended timeline. FSC CEO Sally Loane said Minister Hume's announcement shows leadership and commitment to ensuring the success of the new professional standards by recognising the implementation challenges faced by existing advisers and that the Minister is listening to industry.

The FSC's statement goes on to confirm that in accordance with the Minister's announcement, existing advisers must: a) complete the FASEA-approved exam by 1 January 2022 (the effect being advisers will have one additional year to pass); and b) meet FASEA's university qualification requirements by 1 January 2026 (an additional two years to complete).

[Source: Financial Services Council media release 01/09/2019]

AFCA has named 29 firms that have failed to pay complaint-related charges, in breach of AFCA membership requirements

The Australian Financial Complaints Authority (AFCA) has released a statement naming 29 financial firms who AFCA maintains have failed to pay a collective total of $1.715 million in outstanding complaint-related charges, in breach of their AFCA membership requirements.

AFCA members are required by law to pay a membership levy, along with fees for every complaint received about them. According to the statement, AFCA has made numerous attempts to contact the financial firms to recover the amounts owing.

A full list of the entities is included in the statement and is available on the AFCA website here

[Sources: AFCA media release 02/09/2019; Investor Daily 03/09/2019]

Increased transparency? APRA has finalised changes to its requirements for how superannuation licensees assess the outcomes they are delivering to their members (SPS 515), in addition, APRA has said it plans to publish additional superannuation fund performance data by the end of 2019, starting with MySuper funds

Key Takeouts

- APRA has now finalised changes to its requirements for how superannuation licensees assess member outcomes (SPS 515). APRA licensees will be required to undertake an annual review under SPS515, in addition to a new government-legislated outcomes assessment.
- Commencing with MySuper products APRA plans to start publishing additional information on super performance, using a heat map or traffic light approach, by the end of the year before expanding to other products. This is part of the regulator's focus on 'weeding out' underperforming funds.

APRA Prudential Standard SPS 515 Strategic Planning and Member Outcomes (SPS 515).

The Australian Prudential Regulation Authority (APRA) launched a consultation in April to clarify how Prudential Standard SPS 515 Strategic Planning and Member Outcomes (SPS 515) would interact with the government's new legislated outcomes assessment (following the passage of Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No 1) Act 2019).

APRA has now finalised changes to its requirements for how superannuation licensees assess member outcomes.

In a response letter, released on 28 August, deputy chair Helen Rowell said the key changes to SPS515 are:

1. a requirement for each RSE licensee to undertake an annual business performance review (BPR), to assess its performance in achieving its strategic objectives across its business operations, taking into account the results of the legislated outcomes assessment, and to use the BPR as the basis for taking action to improve performance; and
2. the inclusion of requirements to support the legislated outcomes assessment.

Mrs Rowell said APRA designed the Business Performance Review to complement the requirements of the legislated outcomes assessment.

'Where the legislated outcomes assessment requires RSE licensees to assess member outcomes at a product level at a point in time, APRA's Business Performance Review also requires them to assess outcomes across a broader range of metrics for different member cohorts. Further, licensees must consider whether they will continue to deliver quality outcomes for all their members into the future, and take action if they identify areas needing improvement. Working together, SPS 515 and the legislated outcomes assessment will strengthen APRA's ongoing efforts to lift industry practices and drive improvements in the outcomes all RSE licensees deliver for their members' Mrs Rowell said.

The commencement date is unchanged

APRA has maintained the commencement date for SPS 515 as 1 January 2020.

APRA's expectations of the first BPR? In acknowledgement of the complexities/uncertainty associated with the new legislated outcomes assessment (including: the need for in supporting Superannuation Industry (Supervision) Regulations 1994 (SIS Regulations) to be finalised, and the fact that appropriate and consistent data for all choice products and options to support the legislated outcomes assessment is more limited than is the case for My Super products) APRA says that it has amended SPS 515 to provide that RSE licensees do not need to consider the results of the legislated outcomes assessment in undertaking their first BPR. However, 'APRA expects appropriate review and analysis of performance across each RSE licensee's business operations to be undertaken to support its BPR in 2020'.

ASIC is consulting on draft Guidance: APRA also released has draft Prudential Practice Guide SPG 516 Business Performance Review (SPG 516) for consultation. Written submissions on draft SPG 516 are due by 10 October 2019.

APRA plans to release the final SPG 516 by December 2019. APRA flagged that it will make any necessary further adjustments to SPG 516 to reflect the SIS Regulations once they are finalised.

Commenting on the changes, Mrs Rowell said, 'Where the legislated outcomes assessment requires RSE licensees to assess member outcomes at a product level at a point in time, APRA's Business Performance Review also requires them to assess outcomes across a broader range of metrics for different member cohorts. Further, licensees must consider whether they will continue to deliver quality outcomes for all their members into the future, and take action if they identify areas needing improvement. Working together, SPS 515 and the legislated outcomes assessment will strengthen APRA's ongoing efforts to lift industry practices and drive improvements in the outcomes all RSE licensees deliver for their members'.

APRA supervisors will continue to engage with RSE licensees over the second half of 2019 on their preparations for commencement of SPS 515 on 1 January 2020.

Focused on 'weeding out underperforming funds': APRA will start publishing additional information on superannuation fund performance by the end of the year

- Starting with MySuper products, APRA will start publishing additional information, including performance relative to a range of benchmarks in key areas: investment returns, fees and charges, sustainability and (in due course) insurance with a view to providing enhanced transparency on the performance of the superannuation industry.
- Traffic light approach: APRA is developing a heat map or traffic light approach that will assist stakeholders to form an overall view of the performance of each MySuper product against the measures and benchmarks used.
- The first publication is 'expected to be released in late 2019'.
- Over time, the 'enhanced publications' will be expanded as additional reported data is available and other benchmarks are developed, particularly for choice products and options.

Mrs Rowell said that the additional information 'adds to the pressure APRA is applying on the trustees of underperforming funds to promptly address weaknesses or consider whether restructuring or exiting the

industry is in their members' best interests. Where trustees fail to respond appropriately, APRA will not hesitate to use its new directions power to protect the interests of superannuation members'.

[Note: Copies of the new SPS 515 and SPG 515, APRA's Response Letter and draft SPG 516 are available on APRA's website here]

[Sources: APRA media release 28/08/2019; Draft Prudential Practice Guide SPG 516 Business Performance Review August 2019; Response to submissions — Proposed revisions to SPS 515 August 2019]

Related News: Support for APRA's proposed 'traffic light' approach to comparing funds?

The AFR reports general manager of superannuation at Westpac-owned BT Financial Group Melinda Howes, has welcomed the prospect of a like-for-like comparison of outcomes by APRA. 'I think in 12 months' time we'll be looking at a very different picture of who the good funds are and which funds have the scale to survive.' Ms Howes is quoted as saying.

Industry Super Australia, which represents the rapidly expanding industry funds segment, also reportedly supports APRA's traffic light system. Industry Super CEO Bernie Dean is quoted as saying 'We can't afford to end up in a situation where underperformance ends up in the too hard basket…The cost to members' super balances will be astronomical." Mr Dean said a performance yardstick could, and should, be settled upon quickly'.

[Source: [registration required] The AFR 02/09/2019]

In Brief | Fat cat/Fit cat superannuation funds report: Stockspot has released its annual report looking at the performance of Australia's largest superannuation funds. The report rates funds based on how they performed (after fees) over five years compared to funds with similar risk. The report lists the ten top performing (fit cat) funds and the bottom ten (fat cat funds) in an effort to encourage the public to engage with their superannuation; prompt funds to improve performance and lobby government to improve fairness and transparency

[Sources: [registration required] Stockspot report: The Fat Cat Funds Report: Super Fund Guide 2018; Business Insider 29/08/2019]

In Brief | ASIC has announced that Suncorp Life and Superannuation Limited (Suncorp) has recently completed a remediation program, to compensate Guardian Advice clients who had received poor advice. In total, Suncorp paid $1.431 million

[Source: ASIC media release 03/09/2019]

In Brief | The final report of the ACCC's Foreign Currency Conversion Services Inquiry has found consumers are paying too much in foreign transaction fees: During 2017-18, individual consumers who used the big four banks to send international money transfers (IMTs) in US dollars and British pounds could have collectively saved about AUD150 million if they had instead used a lower priced IMT supplier. ACCC Chair Rod Sims said: 'consumers and small businesses tend to default to their usual bank to send money overseas, but this may not be the cheapest option. This is another example where consumers may end up paying more for their loyalty'

[Sources: Treasurer Josh Frydenberg media release 02/09/2019; ACCC media release 02/09/2019; Foreign Currency Conversion Services Inquiry Final Report 02/09/2019]

Accounting and Audit

United Kingdom | Sports Direct may potentially face an 'investor rebellion' at its September AGM as it faces the prospect of becoming the first UK listed business to fail to appoint an auditor?

The FT reports that Sports Direct may be facing the prospect of an 'investor revolt' against its board at its upcoming AGM, over concerns with respect to the company's audit/accounting arrangements.

Context: The FT reports that Grant Thornton, Sports Direct's auditor of 13 years, has said it will cease its work for Sports Direct at the end of October and that Sports Direct is yet to appoint a replacement auditor. The FT comments that Grant Thornton's decision has left Sports Direct 'struggling to appoint' a replacement auditor as rival accounting firms have not previously tendered for its audit contract, citing concerns about reputational risk or claiming to be conflicted in pitching for the work.

Reportedly though Sports Direct has started early discussions with Mazars and MHA Macintyre Hudson, two mid-tier accounting firms, in recent weeks, and also approached the UK government to ask how it might act if it fails to find an auditor it is not in a position to propose a replacement audit firm for shareholders to vote on at the upcoming AGM (to be held on 11 September).

Possible protest vote against the board? According to the FT, shareholder advisory service Pirc has recommended that investors vote against the company's senior management, citing concerns over the delayed publication of its annual results, the disclosure of a £605m Belgian tax bill and a decline in its share price in the past month of nearly 50%.

Pirc has reportedly also urged independent shareholders to oppose the re-election of the group's founder and CEO, the Chair and three of its four directors on the basis that they did not exercise sufficient oversight.

Pirc reportedly did not oppose the election of Cally Price, the company's employee representative on the board.

Further, the FT reports that Glass Lewis has also flagged concerns about a possible 'audit succession crisis', which may result in the company failing to appoint an auditor, in its report to investors and has advised investors to vote against the reelection of the CEO on that basis. However, according to The FT, Glass Lewis has not opposed the re-election of Sports Direct's other board members.

The FT comments that Sports Direct has had several years of 'revolts' at its annual meetings including over staff working conditions in its shops and warehouses which reportedly led to the departure of the former Chair.

[Sources: [registration required] The FT 27/08/2019; Accountancy Age 30/08/2019]

Related News: Institute of Chartered Accountants in England and Wales (ICAEW) CEO Michael Izza has reportedly cautioned there may be further auditor walk-outs

Accountancy Age reports that ICAEW CEO Michael Izza has said that the audit sector is facing a 'watershed moment' as auditors come under increased scrutiny and criticism over the quality of their work in the wake of a number of high profile corporate collapses.

Mr Izza is quoted as saying 'it may become a more regular scenario for auditors to rule themselves out of jobs which they feel they may not be able to perform to a high enough quality' as a way of managing potential risk to their reputation.

The government could (theoretically) direct a firm to undertake an audit? Accountancy Age comments that Grant Thornton's decision to step away from acting as Sports Direct's auditor, and the Big Four firms' reluctance to take on the work, places the government in the position of having to direct a firm to take on the job (which is reportedly within the power of the Secretary of State for Business, Energy and Industrial Strategy, though the power has not yet been exercised). Reportedly, industry is concerned about this. 'How will we convince one of our audit partners to be the signed partner on the accounts? Will they be given special dispensation from enforcement action from the regulator?' an unnamed industry source reportedly said.

Reportedly, Deloitte, KPMG, EY and PwC as well as Grant Thornton and BDO are all completing companywide reviews of their clients to determine which could be problematic to their reputations.

[Source: Accountancy Age 02/09/2019]

United Kingdom | Room for improvement? Research from the UK Charities Commission has found that many UK charities are failing to provide an accurate and clear picture of their finances

According to a study published by the UK Charity Commission, only around half of charity accounts reviewed met the regulator's external scrutiny benchmark. The Charity Commission notes that this follows reviews of the quality of charity accounts which show that auditors and independent examiners are failing to identify significant failings in charity accounts.

Further Detail

- A sample of 296 charities' accounts were assessed against a new external scrutiny benchmark developed by the Charities Commission to determine whether a minimum standard of scrutiny by auditors and independent examiners has been met.
- According to the study, three quarters of charities with incomes over £1 million met the external scrutiny benchmark. This fell to half or less of the charities in our two lower income samples.
- All of the charities in the two largest income samples provided a trustees' annual report and nearly all of them filed an audit or independent examination report with the required wording, as did the vast majority of charities in the lowest income sample. However, compliance with the accounts criteria was much lower in all three samples.
- The main reasons why charities in the two largest income samples failed to meet the benchmark were the incomplete reporting of related party transactions and, for companies, not providing a separate summary income and expenditure account, or not stating that it was included in the Statement of Financial Activities. The charities in the lowest income sample also performed poorly on these criteria and more than a quarter did not meet a basic integrity standard, such as incorrectly labelled or missing statements.

The regulator states that it is working closely with ICAEW and ACCA to improve their members' awareness of charity reporting and accounting requirements and has passed details of accounting practitioners that failed to meet the benchmark to their relevant professional bodies so that they can assist them. In addition, the Commission writes that it may also use non-compliance with the benchmark to raise formal complaints with professional bodies.

Nigel Davies, Head of Accountancy Services at the Charity Commission said: 'We know from research we have carried out into public trust in charities that the public care deeply about transparency. It is therefore vital that charities are able to provide an accurate and clear picture of their finances. External scrutiny is an essential part of the checks and balances process that charity accounts go through and so it is disappointing that so many independent examiners and auditors appear to lack the necessary understanding of the external scrutiny framework'.

[Sources: UK Charity Commission media release 28/08/2019; Report: Accounts monitoring review: auditors' and independent examiners' compliance with their responsibilities; Policy Paper: External scrutiny benchmark]

In Brief | Writing in The Australian, University of Sydney's Sandra van der Laan writes that the risk to independence arising from auditors also providing non-audit services to a client is a priority for the upcoming parliamentary inquiry into assurance quality. Ms van der Laan argues the case for banning auditors from such work, arguing that it would both address potential conflicts of interest or threats to independence and be 'an easy win for the audit quality inquiry'

[Note: On 1 August 2019 the Senate referred an inquiry into the regulation of auditing in Australia to the Parliamentary Joint Committee on Corporations and Financial Services for report by 1 March 2020. The terms of reference can be accessed here.]

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

In Brief | The Australian reports that a study by Chartered Accountants Australia and New Zealand Independent Auditors measuring retail investor confidence in the Australian capital markets, has found that 86% of the retail investors surveyed view independent auditors as having the most effective role in advancing protection for investors in public companies

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

In Brief | Too slow to switch auditors? The Australian reports that an analysis of ASX 20 companies has found that the average tenure of auditing firms employed across the group is 22.4 years, with one outlier using the same firm for 65 years. The Australian comments that the average term is longer than the maximum 20 years allowed under European laws and quotes Allan Fels as cautioning that the trend could lead to 'disastrous consequences' for consumers and industry. 'It's clear that the tenure of audit firms in Australia is far too long. It's about time it stopped. Auditors have an awesome responsibility. They are the stewards of the spending of billions of dollars and it's crucial that this job is done properly.

When it's not done properly there are disastrous consequences for consumers, investors and businesses dealing with them. We need a higher level of improved stewardship' Mr Fels reportedly said

[Source: [registration required] The Australian 03/09/2019]

Risk Management

Whistleblowing

In Brief | Promoting a speak up culture: The Australian reports that AMP has appointed a whistleblower investigation officer as part of a broader $200m two-year program to strengthen risk and governance and controls. The Australian quotes AMP CRO Jenny Fagg as saying that the appointment is an indicator of 'how seriously we take whistleblowing and to help people feel comfortable speaking up… Our stakeholders, including our customers, expect us to manage our risk effectively and the commercial return on doing so is profound'

[Source: [registration required] The Australian 02/09/2019]

Technology, Cybersecurity and Privacy

Consumer Data Right | Extending the CDR to the energy sector: Treasury is consulting on the data sets and data access model that will apply to the energy sector

Key Takeouts

- The Consumer Data Right (CDR) for energy will initially apply to the National Electricity Market and will be expanded to other energy markets over time.
- Treasury is seeking feedback on three broad issues: a) what datasets should be designated to support basic energy retail product comparison and switching use cases; b) what datasets are required to support more advanced use cases, such as, whether consumers should adopt smart meters, solar panels, battery storage, and/or more energy efficient appliances; and c) what other datasets should be designated in the energy sector to support use cases not identified in the consultation paper.
- The consultation will also inform the Australian Competition and Consumer Commission's (ACCC's) development of the rules that will govern the operation of AEMO Gateway data access model, the customer authentication and authorisation framework, and the obligations the CDR will place on data holders and accredited entities.
- The deadline for submissions is 26 September

As the government moves to extend the Consumer Data Right (CDR) to the energy sector, Treasury has released a consultation paper seeking feedback on the scope of National Electricity Market datasets and energy market entities that should be subject to a future energy sector CDR designation instrument.

Announcing the consultation, Treasurer Josh Frydenberg said that 'giving consumers more control over their data will support the development of more convenient products and services that are customised to individuals' needs encouraging more competition, lower prices and better switching between electricity plans and providers'. According to the Treasurer's statement, 30% of electricity consumers do not switch electricity plans due to the effort required and 22% do not do so due to lack of information. However, 'a consumer would be around $1,000 better off by switching from the worst to the best electricity plan in both New South Wales and South Australia. A small business would be over $7,000 better off in South Australia and over $4,500 better off in Victoria from a similar switch' the Treasurer said.

Broadly, the consultation paper seeks feedback on the following issues:

1. What datasets should be designated to support basic energy retail product comparison and switching use cases

2. What datasets are required to support more advanced use cases, such as, whether consumers should adopt smart meters, solar panels, battery storage, and/or more energy efficient appliances
3. What other datasets should be designated in the energy sector to support use cases not identified in the consultation paper

No decision made as yet: The government has not made a decision on what datasets should be designated under the CDR in energy, or who should be obligated to make that data available to customers. This initial consultation on the priority datasets will be followed by consultation on the text of the designation instrument at a later date.

The consultation will also inform the Australian Competition and Consumer Commission's (ACCC's) development of the rules that will govern the operation of AEMO Gateway data access model, the customer authentication and authorisation framework, and the obligations the CDR will place on data holders and accredited entities. The ACCC's position paper on the data access model for the energy sector, which proposes to use the AEMO gateway model for sharing electricity market data, can be accessed on the ACCC's website here.

Timeline: The consultation period closes on 26 September 2019.

[Sources: Consultation Paper: Consumer Data Right – Priority Energy Datasets; Treasurer Josh Frydenberg media release 29/08/2019; ACCC media release 29/08/2019; ACCC position paper: Data access model for energy data 29/08/2019]

Consumer Data Right (Open Banking) | The ACCC has released rules required to implement the CDR in the banking sector

The Australian Competition and Consumer Commission has published what it terms a 'lock-down version' of the Consumer Data Right (CDR) Rules and accompanying Explanatory Statement. Separately the government is consulting on the data sets and data access model that will apply to the energy sector.

Open Banking: The Australian Competition and Consumer Commission (ACCC) has published what it terms a 'lock-down version' of the Consumer Data Right (CDR) Rules and accompanying Explanatory Statement.

The rules cover the foundational rules required to implement the CDR in the banking sector, following consultation and feedback received by the ACCC on the draft CDR Rules released on 28 March 2019.

The ACCC writes that the publication of the rules to key stakeholders on 31 August 'represents an important milestone towards the implementation of the CDR. The rules reflect a responsible approach to commencing CDR in February 2020, which will incrementally scale up with further functionality over time'.

The ACCC expects that additional functionality, such as the introduction of different tiers of accreditation, will be provided in future versions of the CDR Rules and as additional sectors of the economy are designated.

The ACCC's expectation is that the four major banks continue to work on the products identified for February 2020 commencement of the CDR in banking, placing a priority on deposit and transaction account and credit card data to be available from day one. Other products, including mortgages and joint accounts, will become available no later than July 2020.

The ACCC also released a 'phasing table' setting out the details of the proposed phased commencement to the sharing of product reference data and consumer data as provided for in Schedule 3, Part 6 of the CDR Rules. This can be viewed on the ACCC website here

[Sources: Consumer Data Right (CDR) Rules Banking 02/09/2019; Proposed CDR rules - August 2019; Proposed CDR rules - Explanatory statement - August 2019; Proposed CDR rules - Phasing table]

Banks and credit unions to potentially face fines over NPP security breaches?

The AFR reports New Payments Platform Australia (NPPA) CEO Adrian Lovney has confirmed his intention to amend the body's compliance codes to capture new protections after a sequence of breaches since June exposed customer data. The AFR quotes Mr Lovney as saying 'We will be recommending to our board that we will designate the PayID anti-harvesting rules as being a mandatory compliance requirement, which would bring a participant inside that fining penalty.'

If the changes are approved, banks and credit unions using the New Payments Platform could face fines of up of $500k if there is another failure in their systems that 'ruptures the platform' the AFR writes.

The AFR comments that the fines are a relatively new power for the NPPA after the Reserve Bank first recommended the body implement a sanctions scheme in June (see: Governance News 19/06/2019).

Reportedly, in addition to fines, the NPPA is also in the process of putting additional protections in place. Among other measures, the NPPA will reportedly begin independently verifying the protections the individual banks have in place around the database to ensure its effectiveness.

[Source: [registration required] The AFR 02/09/2019]

Human error accounted for 34% of breaches according to OAIC's latest National Breaches Statistics Report

The Office of the Australian Information Commissioner (OAIC) has released the latest National Data Breaches Statistics Report: 1 April to 30 June 2019.

Some Key Points

- **There were 245 notifications received over the period** (this is consistent with the number of reported breaches in previous quarters)
- **34% involved human error** (eg compromised credentials with log in and password information used to gain unauthorised access to personal information, clicking on phishing emails, reusing passwords across services).
  - The most common types of breaches identified as human error involved personal information being sent to the wrong recipient by email (35%), followed by the unintended release or publication of information (18%), followed by the loss of paperwork/data storage device (12%).
  - The unintended release or publication of personal information impacted the largest number of people (an average of 9,479 affected individuals per data breach). This is consistent with the previous quarterly trend. Failure to use BCC when sending emails impacted an average of 601 individuals per data breach. The loss of paperwork/data storage device impacted 70 people on average.
  - Commenting on this, Australian Information Commissioner and Privacy Commissioner Angelene Falk said that 'The fact that there is a human factor involved in so many cases demonstrates the need for staff training to increase awareness of cyber risks and to take the necessary precautions'.
- **62% (151 breaches) involved malicious or criminal attacks.** The vast majority of cyber incidents (79%) were linked to compromised credentials, either through phishing (44%), by unknown methods (30%) or by brute-force attack (5%) ie they exploited vulnerabilities involving a human factor.
- **The majority (62%) of data breaches in the period involved the personal information of 100 individuals or fewer.** Data breaches impacting between one and 10 individuals comprised 42% of the notifications.
- **The kinds of information involved in data breaches** was most often contact information (90% of breaches); financial details (42%) and identify information (31%).
- **The top five sectors by notifications** were: 1) private health service providers (19%); 2) Finance sector (including superannuation) (17%); 3) Legal, accounting and management services (10%); 4) private education sector (9%); and 5) retail sector (6%). OAIC notes that notifications made under My Health Records Act 2012 are not included in the report.

Commenting on the report, Ms Falk said that the notifiable data breach (NDB) scheme had established itself as an effective mechanism for organisations to notify affected individuals and the Australian Information Commissioner about 'eligible data breaches'. More particularly, Ms Falk said that 'putting data breaches in the spotlight has heightened awareness of the privacy rights of consumers, who in turn are demanding greater security from the organisations with which they share information'

Ms Falk went on to say that the onus is now on organisations to further commit to best practice in combatting data breaches and improving response strategies.

Finally, Ms Falk said the OAIC remained ready to exercise its enforcement powers to support the NDB scheme's purpose of protecting consumers.

[Sources: Office of the Australian Information Commissioner (OAIC) media release 27/08/2019; National Data Breaches Statistics Report: 1 April to 30 June 2019; [registration required] The AFR 28/08/2019]