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Contents

Boards and Directors 4

Splitting the Chair and CEO role: Board changes announced at Crown 4

Excessive over-regulation of boards (and more particularly the insistence on the inclusion of non-executive directors on public boards) is to blame for the fall in the number of companies going public? 4

Diversity 5

Goldman Sachs to push for board diversity? The FT reports that Goldman Sachs has said it will not take companies public in the US or Europe unless their boards include one 'diverse' board member 5

In Brief | Reportedly, the Financial Conduct Authority will consider the extent to which diversity, and the extent to which it is reflected in a firm's culture, when assessing the culture of advice firms 5

Remuneration 5

Davos update | The majority of CEOs at the International Business Council Meeting expressed support for aligning executive pay with ESG criteria 6

Meetings and Proxy Advisers 6

Top Story | Accountability is the headline issue: Key trends to emerge from the 2016-2019 AGM seasons 6

Shareholder Activism 6

Stepping up engagement: The ACCR has outlined plans to step up its engagement with certain companies on climate related issues in 2020 6

Disclosure and Reporting 7

United Kingdom | Trustees of the FCA pension plan have reportedly been fined by the pension regulator for inadequate disclosure 7

Regulators 7

In Brief | The UK FCA has announced that current FCA Executive Director of Strategy and Competition Christopher Woolard, has been appointed as the successor to Andrew Bailey as CEO on an interim basis. HM

Treasury will be running an open competition for the permanent CEO. The FCA says that further details will be announced in due course ... 7

Financial Services 7

The proposed new Financial Accountability Regime: new minimum standards for entities, boards and senior management across the economy? ... 7

Interest rate benchmark reform update: RBNZ has announced its support for the selection of the Official Cash Rate (OCR) as NZ's fall back benchmark interest rate ... 13

Four week consultation on stamping fee exemption announced ... 13

Federal Labor is open to backing super choice bill? ... 14

Draft buy now pay later code expected to be released this week for consultation? ... 14

Inquiry into the future direction of the Consumer Data Right announced ... 14

In Brief | Westpac has appointed John McFarlane to the Westpac board as a non-executive director and Chair-elect. Mr McFarlane will succeed outgoing Chair Lindsay Maxsted on 2 April 2020 ... 15

Accounting and Audit 15

In Brief | ASIC needs to lift its audit capability? The Australian reports that private submissions to the Financial Reporting Council in 2017, from Australia's biggest accounting firms, blamed ASIC's poor assessment of the sector's audit quality on lack of sufficiently skilled and professional ASIC investigators. The Australian comments that similar concerns were not made by the big four firms in their public submissions to the current parliamentary joint committee into the regulation of the audit sector ... 15

In Brief | The FRC is consulting on proposed changes to International Standard on Auditing (UK) (ISA (UK) 315 (Revised June 2016): Identifying and Assessing the Risks of Material Misstatement Through Understanding the Entity and Its Environment, to reflect recent revisions to the international standards on auditing issued by the International Auditing and Assurance Standards Board. Consultation closes on 3 April ... 15

Risk Management 16

Technology, Privacy and Cybersecurity 16

Top Story | First international privacy standard released ... 16

United Kingdom | Internet of things (IoT) law? The UK government has announced it plans to enact legislation to improve the security standards of internet-connected household devices sold in the UK ... 16

Climate Risk 17

A signal of things to come? UK pension fund sets 2022 target for the companies in which it invests to align their emissions with 'Paris benchmarks and improve their climate management quality' ... 17

Will BP adopt broader carbon emissions reductions goals, including scope 3 emissions? Reportedly incoming CEO Bernard Looney is considering this course ... 18

The time is right for the government to act on climate? Climate risks are already starting to 'materialise' in Australia ... 19

In Brief | The FT reports that the 'big four accounting groups' as well as some of the world's largest companies have signed up to a new sustainability reporting framework launched at the World Economic Forum in Davos. According to The FT, the metrics, created by the WEF's International Business Council (IBC), are intended to be deployed in corporate accounts from 2021 ... 19

Other Developments 19

Employee activism on the rise at technology companies? The FT reports that more than a group of Amazon employees have publicly criticised the company's climate change record ... 19

In Brief | Evidence that ethics training is effective in raising behavioural standards? A US study has confirmed that testing financial advisers on their knowledge of ethics can lead to better behaviour 20

In Brief | Future Fund chair Peter Costello has reportedly identified coronavirus as a bigger short-term financial risk than climate change. 'It [climate risk] is a risk that we look at, but it's not the only risk' Mr Costello reportedly said. Mr Costello reportedly went on to say that 'longer term, obviously we think there is going to be a switch away from fossil fuels, and we take that into account, as all investors should' 20

Corporate Misconduct and Liability **20**

United States | US regulator holds individual former Wells Fargo executives to account: The OCC has announced enforcement actions against eight former Wells Fargo executives 20

Boards and Directors

Splitting the Chair and CEO role: Board changes announced at Crown

Crown Resorts Ltd (Crown) has issued a statement announcing changes to the board.

According to the statement:

- John Alexander has stepped down as Chair and CEO of Crown. Mr Alexander will remain and Executive Director, in order to 'assist with the transition' to the new structure
- Non-executive director Helen Coonan has been appointed as Chair
- Non-executive director, John Horwath has been appointed Deputy Chair
- Crown's CFO Ken Barton has been appointed CEO and Managing Director (subject to receipt of any necessary regulatory approvals). According to the statement, Mr Barton will oversee a process to appoint a replacement CFO. Until a new CFO is appointed, Mr Barton will continue to perform the role

In addition, Crown Melbourne Ltd, Sydney Gaming Pty Ltd and Bruswood Ltd boards have each separately appointed a non-executive director as Chair to each of the boards.

In line with contemporary governance practice: Commenting on the changes, newly appointed Chair Helen Coonan said that they reflect contemporary governance practices, 'The Crown Board has been working for some time to consider and to implement a governance structure that is more in line with the traditional model with a non-executive Chair, a position that i am very honoured and privileged to have been asked to hold, and a separate CEO. This new structure is in line with feedback we have received from a number of proxy advisers and shareholders and better aligns with contemporary governance practices.'

Executive Director John Alexander said that the 'changes have been board driven, broad and inclusive and will refresh Crown's leadership.'

Good news for investors?

The AFR suggests that the changes are in the best interests of Crown investors both because splitting the Chair and CEO roles is in line with modern governance practice and because doing so will likely mean that Crown will adopt a more open public persona. Crown 'now has two new public faces' which will help 'reset its relationship with regulators, investors and the broader community' the AFR suggests.

The AFR adds that the changes were driven by the board, rather than by shareholders directly (though the changes are reportedly expected to be welcomed by minority shareholders who had previously called for change.)

[Sources: ASX announcement 24/01/2020; [registration required] The Age 28/01/2020; [registration required] The AFR 28/01/2020]

Excessive over-regulation of boards (and more particularly the insistence on the inclusion of non-executive directors on public boards) is to blame for the fall in the number of companies going public?

Writing in the Australian, UNSW Professor of Finance Peter Swan argues that excessive over-regulation of boards (and more particularly the insistence on the inclusion of non-executive directors on public boards) is to blame for the fall in the number of companies going public, rather than any fundamental flaw in the capitalist model.

'The burdens being placed on listed companies due to the over-regulation of board structures accounts for the demise in the number of listed companies as smaller companies are acquired and IPOs reduce in number. Fortunately, private equity remains free to choose smaller and more effective boards with highly knowledgeable and incentivised directors and, largely, the absence of "independent" directors. Regulators such as NYSE, SEC, ASX, APRA and ASIC: expect to reap what you sow' Mr Swan argues.

[Source: [registration required] The Australian 22/01/2020]

Diversity

Goldman Sachs to push for board diversity? The FT reports that Goldman Sachs has said it will not take companies public in the US or Europe unless their boards include one 'diverse' board member

Key Takeouts

- **New diversity requirements:**
  - From 1 July 2020, Goldman Sachs will require companies seeking to list in the US or Europe to have at least one 'diverse' board candidate on their boards.
  - The requirement will increase to two candidates from 2021. Over time, the requirement will be extended to other geographical regions.
- **Motivation for the change?** Reportedly, Goldman Sachs CEO David Solomon prefaced the announcement of the new policy by saying that companies with at least one female director, at the time of listing, perform better than companies with less diverse boards.

The FT reports the Goldman Sachs has announced that from 1 July this year, it will not take companies public in the US or Europe, unless they have at least one 'diverse' board candidate.

The FT quotes Goldman Sachs CEO David Solomon as saying that 'starting on July 1 in the US and Europe, we're not going to take a company public unless there's at least one diverse board candidate, with a focus on women…And we're going to move towards 2021 requesting two.'

According to The FT, Goldman Sachs said it planned to expand this policy to countries outside the US and Europe 'over time'.

Reasons for the new policy? According to The FT, Goldman announced its new approach after its research showed a lack of female candidates on boards of newly listed companies. Reportedly about 60 companies went public with all-male boards in Europe and the US in the past two years, while another 100 went public with only one female board member.

The FT quotes Mr Solomon as saying that his company regards diversity as a 'very, very important issue' and that there is evidence that companies that have at least one female director (at the time they list) are likely to outperform those with less (gender) diverse boards.

'We might miss some business, but in the long run, this I think is the best advice for companies that want to drive premium returns for their shareholders over time' Mr Solomon is quoted as saying.

Response?

The FT quotes Ken Bertsch, head of the Council of Institutional Investors, as welcoming Goldman's new stance but cautioning that investors are looking for more than 'tokenism'. 'On one hand, Goldman is a little behind the times…It is a good step to have at least two or three women on the board' Mr Bertsch is quoted as saying.

Commenting on the new policy, Forbes writes that it's 'unfortunate' that the countries where all-male boards are most prevalent (Asia, Latin America and the Middle East) are currently excluded from the policy. Forbes also questions whether calling for the inclusion of a single 'diverse' board member is enough and ultimately argues that while welcome, the policy could/should go further.

[Sources: [registration required] The FT 24/01/2020; CNBC 23/01/2020; Forbes 26/01/2020]

In Brief | Reportedly, the Financial Conduct Authority will consider the extent to which diversity, and the extent to which it is reflected in a firm's culture, when assessing the culture of advice firms

[Source: FT Adviser 27/01/2020]

Remuneration

Davos update | The majority of CEOs at the International Business Council Meeting expressed support for aligning executive pay with ESG criteria

The World Economic Forum has issued a statement announcing that the majority of CEOs who participated in the International Business Council Meeting at Davos, have expressed support for proposals to tie executive pay to ESG targets.

WEF quotes Maha Eltobgy, Head of Shaping the Future of Investing at the World Economic Forum, as saying a large majority of the CEOs indicated that they plan to publish the metrics in their annual reports, as Siemans already does.

Ms Eltobgy said that many CEOs view the measure as a positive in terms of assisting their companies to track performance against long-term priorities.

[Source: WEF media release 22/01/2020]

Meetings and Proxy Advisers

Top Story | Accountability is the headline issue: Key trends to emerge from the 2016-2019 AGM seasons

MinterEllison has released a report providing a high level snapshot of trends from the AGMs of Australia's largest public companies (ASX 100) over the course of the last four years from 2016 to 2019.

Commenting on the data, MinterEllison Partner Mark Standen said that the overarching theme to emerge is accountability.

'Over the past few years we've seen attitudes to accountability shift. Though on paper, 2019 looks like a quieter AGM season than was perhaps anticipated, the higher incidence of 'protest' votes against individual directors, and the uptick in shareholder requisitioned ESG proposals, are two important indicators of the levels of shareholder concern around a range of issues. Shareholders appear increasingly willing to express their dissatisfaction by voting against individual directors. They're also keeping up the pressure on boards through requisitioning resolutions pushing for change.

Shareholders' apparent unwillingness to force a board spill when given the chance, is perhaps less indicative of an unwillingness to hold boards collectively to account than an unwillingness to further destabilise often already unstable boards and even perhaps to "let directors off the hook"'.

You can access the full text of the report on the MinterEllison website here.

Shareholder Activism

Stepping up engagement: The ACCR has outlined plans to step up its engagement with certain companies on climate related issues in 2020

with certain companies on climate related issues (eg continued industry association memberships and the setting of climate reductions targets) in 2020.

The ACCR has said it plans to initially target the following companies.

- **Santos and Woodside**: The ACCR says it plans to lodge two shareholder resolutions at each of the companies in 2020.
  - **Suspension of industry association memberships:** The first resolution will call on both companies' to suspend their memberships of industry associations (including the Australian Petroleum Production and Exploration Association (APPEA) and the Business Council of Australia (BCA)) whose advocacy, the ACCR considers, runs counter to the goals of the Paris Agreement.
  - **Set emissions reduction targets:** The second resolution will call on both companies to: a) set Paris-aligned emissions reductions targets; b) align capital expenditure with those targets; and c) 'incentivise executives' to achieve those targets.

- **Rio Tinto**: The ACCR says that it has been engaging with the company on the issue of its continued membership of industry associations whose climate stance/lobbying activity, the ACCR considers to run counter to the goals of the Paris Agreement for some years and that this is set to continue in 2020. In particular, the ACCR nominates the Business Council of Australia, the Chamber of Minerals and Energy WA, the Minerals Council of Australia and the Queensland Resources Council as the groups about which it is most concerned.

  In particular, The ACCR says that it intends ask Rio to 'attach consequences' (other than a review of its lobby group memberships) to its relationships with 'obstructive industry associations', where those groups cross the behavioural 'red lines' previously identified by Rio.

- **Coca-Cola Amatil**: The ACCR says that as part of a broader engagement strategy targeting companies who are members of industry associations the ACCR considers to run counter to the goals of the Paris Agreement, it plans to request that Coca Cola Amatil review its membership of the Business Council, and overturn its support for Kyoto carryover credits, along with a suite of other policy positions.

[Source: Australasian Centre for Corporate Responsibility media release 24/01/2020]

Disclosure and Reporting

United Kingdom | Trustees of the FCA pension plan have reportedly been fined by the pension regulator for inadequate disclosure

The FT reports that Trustees of the Financial Conduct Authority (FCA) pension plan have reportedly been fined £2,000 by the pensions regulator (TPR) for failing to include enough information for members on how well their scheme is governed. The issue was reportedly confined to one instance, the 2018 Chair's statement to members of the money-purchase plan.

The FT comments that though the fine was levied against the trustees of the money-purchase section of the pension plan, it was reportedly paid by the FCA.

The FT quotes the FCA as saying that the issues identified have been addressed, 'The FCA pension plan trustee has apologised to members of the plan, and reviewed systems and processes to ensure all the required information is available to members and the 2019 governance statement (provided in October) was fully compliant.'

[Source: [registration required] The FT 28/01/2020]

Regulators

In Brief | The UK FCA has announced that current FCA Executive Director of Strategy and Competition Christopher Woolard, has been appointed as the successor to Andrew Bailey as CEO on an interim basis. HM Treasury will be running an open competition for the permanent CEO. The FCA says that further details will be announced in due course

[Source: FCA media release 24/01/2020]

Financial Services

The proposed new Financial Accountability Regime: new minimum standards for entities, boards and senior management across the economy?

Overview| Treasury proposal paper on the new Financial Accountability Regime (FAR)

Key Takeouts

- **What is the FAR?** The Financial Accountability Regime (FAR) (which will replace the BEAR) proposes to extend BEAR-like accountability requirements to other APRA-regulated entities and directors/senior executives in accordance with the government's response to several Hayne Commission recommendations.

- **Purpose of the FAR?** The aim of extending the regime is ultimately to increase accountability. Announcing the consultation, Treasurer Josh Frydenberg said that the proposed changes 'will ensure that senior executives of these financial entities will be more accountable for the activities of the organisation for which they are responsible and, consistent with the BEAR, impose strict consequences for those who fail to perform their roles with competence, honesty or integrity'.
- **Similar (but not the same) as the BEAR?** Though the structure of the FAR is broadly similar to the BEAR, it differs in a number of respects including (among others) that: a) it will be jointly administered by APRA and ASIC; b) civil penalties for breach of FAR obligations will be larger (and will apply to both entities and individuals); c) it will incorporate end-to-end executive product responsibility requirements; d) APRA will have a (reserve) power to veto the appointment of accountable persons where they are considered not to be suitable/ceased to be suitable; d) all FAR entities (regardless of their size) will be subject to the same deferred remuneration obligations; and e) smaller entities will be exempt from requirements to provide accountability statements/maps.
- **Timing:** The deadline for submissions on the proposal paper is 14 February. The government says it intends to introduce legislation by the end of the year (following consultation on draft legislation). However, no implementation date is given. The government says it will consult on timeframes as part of the consultation on the exposure draft legislation.
- **Broader implications?** Commenting on the proposed changes, MinterEllison Partner Mark Standen said that the release of the proposals reflects a broader shift in expectations around accountability. 'The proposed changes are not unexpected. Industry has been on alert since the recommendations of the Hayne Commission were released last year. What is interesting is that the emerging importance of accountability principles in the financial services industry likely represents a new minimum standard for entities, boards and senior management across the economy.'

Overview: The proposed new Financial Accountability Regime (FAR)

The government has released a proposal paper seeking feedback on plans to extend the Banking Executive Accountability Regime (BEAR) to all Australian Prudential Regulation Authority (APRA) regulated entities, and on making the Australian Securities and Investments Commission (ASIC) a joint administrator of the regime as recommended by the Hayne Commission.

The expanded regime will be called the Financial Accountability Regime (FAR).

Who will the FAR apply to?

In addition to all ADIs already subject to the BEAR, the new Financial Accountability Regime (FAR) will cover general and life insurers, private health insurers, superannuation entities, and licensed non-operating holding companies.

Following the implementation of the FAR to prudentially regulated entities, the government will consult on extending the FAR to solely ASIC regulated entities.

Why are the changes being made?

The aim is to increase the accountability and transparency of APRA-regulated entities

The Financial Accountability Regime (FAR) will extend the strengthened responsibility and accountability framework that currently applies to directors and the most senior executives of ADIs across all APRA regulated industries. The proposal paper says that the purpose of this is to 'increase the transparency and accountability of financial entities in these industries and improve risk culture and governance for both prudential and conduct purposes'.

Consistent with this, when announcing the consultation Treasurer Josh Frydenberg said that the proposed changes 'will ensure that senior executives of these financial entities will be more accountable for the activities of the organisation for which they are responsible and, consistent with the BEAR, impose strict consequences for those who fail to perform their roles with competence, honesty or integrity'.

Implementing Financial Services Royal Commission Recommendations

The proposal paper nominates implementation of the following recommendations as the government's 'first priority'.

- Recommendation 3.9 – the BEAR be extended to all Registrable Superannuation Entity (RSE) licensees.
- Recommendation 4.12 – the BEAR be extended to all Australian Prudential Regulation Authority (APRA) regulated insurers.
- Recommendation 6.6 – the Australian Securities and Investments Commission (ASIC) and APRA jointly administer the BEAR.
- Recommendation 6.7 – the obligations be amended to make clear that an authorised deposit-taking institution (ADI) and accountable person must deal with APRA and ASIC in an open, constructive and co-operative way.
- Recommendation 6.8 – the BEAR should be extended to all APRA regulated financial services institutions and that APRA and ASIC should jointly administer those new provisions.

Executive BEAR product responsibility

The FAR will also incorporate the government's response to recommendation 1.17 which recommended that APRA should determine a responsibility (under the BEAR) within each ADI for all steps in the design, delivery and maintenance of all products offered to customers, and any necessary remediation for customers in respect of any of those products (executive BEAR product responsibility).

The paper states that the 'work and outcomes' of the earlier consultation (see: Governance News 03/07/2019) will be 'subsumed into the FAR'.

[Note: The indicative list of particular responsibilities that APRA and ASIC may prescribe under the FAR includes product responsibility. See: Attachment B of the proposal paper].

Implementing Capability Review Recommendation 4.3: new 'non-objections power' for APRA

In addition, as recommended by the APRA Capability Review (see: Governance News: 19/07/2020), the government proposes to give APRA a new (reserve) 'veto' power over the appointment/reappointment of directors and senior executives 'where APRA holds existing relevant information regarding a particular person that conflicts with the obligations that would be placed on him or her as an accountable person'.

APRA's decision would be reviewable by the Administrative Appeals Tribunal.

What does the proposed FAR regime look like and how is it different from BEAR?

Similar to the BEAR, the FAR will impose: 1) accountability obligations; 2) key personnel obligations; 3) accountability map and accountability statement obligations; 4) notification obligations; and 5) deferred remuneration obligations on APRA-regulated entities. However, the FAR is not a facsimile of the BEAR.

[Note: Attachment A of the proposal paper (at p 11) includes a table summarising the key differences between the BEAR and the FAR.]

Accountability obligations

No additional accountability obligations (for entities) under the FAR

Similar to the BEAR, an entity will be required to take reasonable steps to:

1. conduct its business with honesty and integrity, and with due skill, care and diligence
2. deal with APRA in an open, constructive and cooperative way
3. deal with ASIC in an open, constructive and cooperative way
4. in conducting its business, prevent matters from arising that would adversely affect the entity's prudential standing or prudential reputation (applicable only to APRA regulated entities)
5. ensure that each of its accountable persons meets their accountability obligations (the number of roles and responsibilities in the list prescribed by regulators for the purposes of defining an accountable person has been expanded under the FAR)
6. ensure that each of its significant or substantial subsidiaries that are not subject to the FAR, comply with all of the other obligations as if the subsidiary were subject to the FAR (to the extent that the obligations are relevant to the subsidiary).

The proposal paper cautions that 'FAR entities with outsourcing arrangements will need to ensure that the FAR entity and accountable persons have adequate control and oversight of activities covered by the FAR'.

Additional obligation on accountable persons

Similar to the BEAR, accountable persons will be obliged to:

1. act with honesty and integrity, and with due skill, care and diligence;
2. deal with APRA in an open, constructive and cooperative way (noting that this will not displace legal professional privilege);
3. deal with ASIC in an open, constructive and cooperative way (noting that this will not displace legal professional privilege); and
4. to take reasonable steps in conducting those responsibilities to prevent matters from arising that would adversely affect the prudential standing or prudential reputation of the entity.

New obligation: In addition to these, the FAR proposes to introduce a new obligation requiring accountable persons to take reasonable steps in conducting their responsibilities as an accountable person to ensure that the entity complies with its licensing obligations.

The additional obligation 'extends the obligations of accountable persons beyond only conduct that adversely affects prudential standing or reputation of the entity to conduct that affects entities complying with obligations under each of the respective licensing regimes that apply' the proposal paper states.

Application to a much broader range of functions within FAR entities

Importantly, it's proposed that FAR obligations (which will be prescribed by ASIC and APRA) will extend to a significantly larger list of functions than is the case under the BEAR.

An indicative list of 'particular responsibilities' for each entity type is included in attachment B to the proposal (at p 14). It's proposed that, APRA and ASIC will be able to prescribe additional particular responsibilities over time and will also be able to prescribe particular responsibilities in respect of foreign entities subject to the FAR.

Smaller entities will be exempt from the requirement to submit accountability maps and statements to the regulators

Smaller BEAR entities have provided feedback to APRA that preparing, submitting and updating accountability maps and statements under the BEAR is a significant compliance burden. Coupled with this, APRA has found that accountability maps and statements are of 'most benefit for large and more complex institutions as they provide further clarity about their accountability arrangements'.

Accordingly, it's proposed that under the FAR, only entities with total assets over a certain limit (enhanced compliance entities) will be required to submit accountability maps and statements to the regulators.

To further reduce the compliance burden, the paper also proposes that accountability maps and statements submitted to either APRA or ASIC will be shared in the case of dual regulated entities.

Streamlining classifications: Core compliance entities and enhanced compliance entities

Under the FAR, entities will not be classified as small, medium and large (as is the case under the BEAR) but instead split into two categories: 'core compliance entities' (who will not be required to submit accountability maps/statements) and 'enhanced compliance entities' (who will have to do so).

It's proposed that total assets will be the metric used to determine which category an entity fits into.

Enhanced compliance entities:

- ADIs with total assets >$10bn
- RSE licensees with total assets >$10bn (ie combined total assets of all RSEs under the trusteeship of a given RSE licensee)
- general insurers and private health insurers with total assets >$2bn
- life insurers with total assets >$4bn

Core compliance entities will not be required to submit accountability maps/statements to the regulators (but will be subject to all other FAR obligations).

It's proposed that regulators will be able to reclassify entities as core or enhanced. Further, core compliance entities may be required to submit accountability maps and statements where regulators form a view this would benefit the entity's governance accountability.

Transition arrangements for ADIs: The paper proposes that ADIs now subject to the BEAR will transition to the FAR, and be classified as core or enhanced compliance entities (depending on size and complexity) from commencement of the legislation to implement the FAR.

Deferred remuneration requirements

All FAR entities (regardless of their size) will be required to defer 40% of the variable remuneration — which the paper define as 'the proportion of an accountable person's total remuneration that is not guaranteed because it is conditional on the achievement of pre-determined objectives and can be forfeited if these objectives are not met' — for all of their accountable persons for a minimum of four years (but only if the amount that would be deferred is greater than AU$50,000).

However, entities will not be required to defer variable remuneration if variable remuneration is not a feature of a particular accountable person's remuneration structure.

Further, entities must have remuneration policies that allow for a reduction in variable remuneration in the event that an accountable person breaches their FAR obligations.

The proposal paper notes that the FAR will not impact APRA's ability to set separate prudential standards in respect of prudentially regulated entities on remuneration.

Larger maximum penalties will apply under the FAR

Penalties for (all) FAR entities

It's proposed that the maximum penalties under the FAR will be the greater of the following: either a) $10.5m (50,000 penalty units); b) the benefit derived/detriment avoided by the entity because of the contravention multiplied by three (where this can be determined by the court); or c) 10% of the annual turnover of the body corporate (capped at $525m or 2.5m penalty units). This aligns with the maximum penalty framework under the Corporations Act 2001 (Cth) (Corporations Act), Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act), National Consumer Credit Protection Act 2009 (Cth) (Credit Act) and Insurance Contracts Act 1984 (Cth) (Insurance Contracts Act). The proposal paper states that when considering whether to impose a civil penalty, the court will be required to consider the impact that the penalty has on the viability of prudentially regulated entities.

RSE licensees: The paper states that RSE licensees will be prohibited from using trust assets to pay a civil penalty arising from breaching an obligation under the FAR. Further, the proposal notes that provision will be made for the court to have regard to the impact of the penalty on the trustee’s superannuation fund membership.

Penalties for individuals

Accountable persons will also be liable for civil penalties for breaches of their accountability obligations (there is no equivalent BEAR obligation). It's proposed that the maximum penalties will be the greater of the following: either a) $1.05m (5,000 penalty units) or; b) the benefit derived or detriment avoided because of the contravention, multiplied by three (where the court can determine it).

Consistent with the proposed penalties for entities, maximum civil penalties will be consistent with the newly introduced maximum penalties for individuals under the Corporations Act, ASIC Act, Credit Act and Insurance Contrasts Act.

Breach notification obligations

Under the FAR, it's proposed that entities will be required to notify APRA and/or ASIC when they become aware that they have breached either their accountability or key personnel obligations.

Timing: No implementation timeframe?

The deadline for submissions to the consultation is 14 February. The proposal paper asks that submissions focus on how the proposals should be implemented rather than whether they should be implemented.

The Government intends to consult on and introduce legislation by the end of 2020 to implement the model.

The government has not yet determined an implementation timeframe for the FAR and intends to consult on timeframes as part of the consultation on exposure draft consultation.

Broader implications?

Commenting on the proposed changes, MinterEllison Partner Mark Standen said that the release of the proposals reflects a broader shift in expectations around accountability.

> 'The proposed changes are not unexpected. Industry has been on alert since the recommendations of the Hayne Commission were released last year. What is interesting is that the emerging importance of accountability principles in the financial services industry likely represents a new minimum standard for entities, boards and senior management across the economy.'

[Sources: Treasurer Josh Frydenberg media release 22/01/2020; Proposals Paper: Implementing Royal Commission Recommendations 3.9,4.12, 6.6, 6.7 and 6.8 Financial Accountability Regime]

Interest rate benchmark reform update: RBNZ has announced its support for the selection of the Official Cash Rate (OCR) as NZ's fall back benchmark interest rate

Key Takeouts: The Reserve Bank of New Zealand (RBNZ) has announced its support for the selection of the Official Cash Rate (OCR) as New Zealand's fall-back benchmark interest rate.

Context: Assistant Governor/GM Economics, Financial Markets and Banking Christian Hawkesby said that following manipulation of global interest rate benchmarks such as LIBOR by several financial institutions overseas, work is being undertaken internationally to improve the integrity of benchmarks.

Mr Hawkesby went on to say that despite the fact that the New Zealand's benchmark interest rate (BKBM) has not faced these issues, the New Zealand Financial Markets Association (NZFMA) has made a number of changes to 'further improve the benchmark's reliability and robustness in line with developments in global best practice'. As a part of these improvements the NZFMA has selected the OCR to act as 'the risk-free fall-back benchmark interest rate for BKBM'.

Next steps: Mr Hawkesby said that:

- The International Swaps and Derivatives Association (ISDA) will update its 2006 fall-back provisions in the first quarter of 2020. He added that, 'following this it would be prudent for market participants to adopt them in contracts that reference BKBM'.
- ISDA will also publish a protocol to enable market participants to include fall-back benchmark rates within legacy IBOR trades if they so choose.
- The NZFMA has advised that it intends to operate dual interest rate benchmarks, retaining BKBM and developing risk-free rates (RFRs). The new risk-free interest-rate benchmarks will be calculated independently to the BKBM fall-back benchmark rate, with the NZFMA currently developing a term structure methodology.

Market participants need to 'accelerate efforts to ensure' they prepared for LIBOR cessation: The statement concludes by calling on market participants who have contracts referencing LIBOR 'to accelerate efforts to ensure they are prepared for LIBOR cessation by the end of 2021'.

[Source: RBNZ media release 28/01/2020]

Four week consultation on stamping fee exemption announced

Key Takeout

- Currently, financial advisers and stockbrokers are allowed to receive commissions for selling LICs to retail investors. The Treasurer has announced a four week consultation on the 'merits' of this 'stamping' fee exemption.
- Reportedly, the Federal Labor Party have called for immediate action to 'close the loophole' and ASIC has previously advised the government to do so.

Treasurer Josh Frydenberg has announced a four week 'targeted public consultation process' on the merits of the current stamping fee exemption in relation to listed investment entities (LICs).

Announcing the consultation, the Treasurer said that it will ensure the government is in the position to 'make an informed decision on whether to retain, remove or modify the stamping fee exemption in order to ensure that the interests of investors are protected and capital markets remain efficient and globally competitive'.

Calls for the removal of the exemption? According to The AFR, documents obtained through a Freedom of Information request show that the Australian Securities and Investments Commission (ASIC) has previously 'privately advised' the government that the exemption is 'hard to justify' and has pushed for the loophole to be closed. Reportedly the Federal Labor Party has made similar calls.

The AFR quotes Shadow Assistant Treasurer Stephen Jones as calling on the government to take immediate action. 'It is quite clear what needs to happen - close the loophole down - it's not a sophisticated piece of legislation that needs to be done here…They should just do it. The longer they wait the greater risk that more mum and dad investors are exposed to risky investments."

[Note: The government's August implementation roadmap for implementing the Financial Services Royal Commission's recommendations indicates that the government plans to undertake a review of measures to improve the quality of financial advice (in response to recommendation 2.3), including a review of 'all exemptions from the ban on conflicted remuneration, including for general insurance, consumer credit insurance, timeshare and stockbroking remuneration, and stamping fees'. The review is scheduled to occur in 2022. The Treasurer appears to be acting on one aspect of this plan earlier than scheduled.]

[Sources: Treasurer Josh Frydenberg 27/01/2020; [registration required] The AFR 28/02/2020; 28/01/2020; [registration required] The Australian 28/01/2020]

Federal Labor is open to backing super choice bill?

Context: Treasury Laws Amendment (Your Superannuation, Your Choice) Bill 2019 (Your Super legislation) proposes to enable workers under an enterprise agreement or workplace determination to nominate their preferred superannuation fund. The Bill was referred to committee on 28 November for report by 21 February.

Federal Labor willing to support the Bill? The AFR reports that Shadow Assistant Treasurer Stephen Jones has signaled that the Labor party is prepared to support the government's Your Super legislation, despite opposition from the Australian Council of Trade Unions (ACTU), but will seek to use a senate inquiry to 'guard against unforeseen consequences'.

'We will make a final decision on the legislation when the Senate inquiry is concluded but what is clear is that people do want the right to choose their super fund and the law should support that' Mr Jones is quoted as saying.

[Source: [registration required] The AFR 27/01/2020]

Draft buy now pay later code expected to be released this week for consultation?

The Australian reports that the Australian Finance Industry Association (AFIA) is expected to release its draft code of practice for buy now pay later providers (BNPL providers) this week (see: Governance News 15/01/2020 at p 26).

Reportedly, the Code, which is expected to include responsible-lending type consumer safeguards, is expected to be released for a six week public consultation before it is finalised and/or adopted by industry.

The Australian quotes AFIA CEO Diane Tate as commenting (in December) that the draft code would go 'above and beyond' legal requirements, ensuring strong safeguards around disclosures to customers about the product and their rights.

[Source: [registration required] The Australian 27/01/2020]

Inquiry into the future direction of the Consumer Data Right announced

Treasurer Josh Frydenberg has announced an inquiry into the 'future direction' of the consumer data right .

The inquiry will examine ways in which the Consumer Data Right (CDR) can further support innovation and competition including how the CDR can be:

- Expanded beyond its current 'read' access to include 'write' access to enable customers to apply for and manage products (including, for Open Banking, by initiating payments)
- Leveraged with other frameworks to enhance security, efficiency and the consumer experience including the New Payments Platform (NPP)

- Further used to overcome behavioural and regulatory barriers to allow consumers to more easily switch between products and providers
- 'Enhanced by considering global developments with respect to similar reforms'

[Note: The Terms of Reference are available on the Treasury website here.]

The inquiry will be led by Scott Farrell (who undertook the formative review and recommended legislating the Consumer Data Right).

Announcing the inquiry, the Treasurer said that the review will also 'draw upon technical expertise from the private sector by consulting broadly with industry, consumer and privacy advocates, and other interested parties in developing the report and recommendations'.

Timing: The inquiry will commence in January 2020 for report by September 2020 (according to the Treasurer's media release). An Issues Paper will be made available in early 2020 for interested parties to provide input and feedback.

Response to the inquiry

A potential win for non-bank challengers? The AFR comments that providing 'write access' (which could let a third party make a payment from a customer's account on behalf of the customer without the customer having to engage with their bank) as is reportedly the case in the UK, could have the effect of reducing major bank fee revenue by enabling merchants to elect to use non-bank payment services to process payments. Any such move is therefore likely, the AFR suggests to be opposed by the major banks. Conversely, fintechs are likely to support it.

Reportedly, the banks have also raised concerns that such a move could increase cybersecurity risks for customers.

[Sources: Treasurer Josh Frydenberg media release 23/01/2020; Terms of Reference; [registration required[The AFR 23/01/2020]

In Brief | Westpac has appointed John McFarlane to the Westpac board as a non-executive director and Chair-elect. Mr McFarlane will succeed outgoing Chair Lindsay Maxsted on 2 April 2020

[Sources: ASX announcement 23/01/2020; [registration required] The Australian 23/01/2020; [registration required] The AFR 23/01/2020]

Accounting and Audit

In Brief | ASIC needs to lift its audit capability? The Australian reports that private submissions to the Financial Reporting Council in 2017, from Australia's biggest accounting firms, blamed ASIC's poor assessment of the sector's audit quality on lack of sufficiently skilled and professional ASIC investigators. The Australian comments that similar concerns were not made by the big four firms in their public submissions to the current parliamentary joint committee into the regulation of the audit sector

[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. Submissions closed on 28 October 2019. The Committee is due to report by 1 March 2020.]

[Source: [registration required] The Australian 28/01/2020]

In Brief | The FRC is consulting on proposed changes to International Standard on Auditing (UK) (ISA (UK) 315 (Revised June 2016): Identifying and Assessing the Risks of Material Misstatement Through Understanding the Entity and Its Environment, to reflect recent revisions to the international standards on auditing issued by the International Auditing and Assurance Standards Board. Consultation closes on 3 April

[Sources: FRC media release 28/01/2020; Consultation and impact assessment: Proposal to revise ISA (UK) 315 (Revised June 2016) Identifying and Assessing the Risks of Material Misstatement through Understanding of the Entity and its Environment]

Technology, Privacy and Cybersecurity

Top Story | First international privacy standard released

MinterEllison has released an article on the world's first International Standard for privacy information management (ISO 27701:2019) and its implications for Australian business. The new ISO standard is expected to assist organisations to meet privacy-specific requirements, irrespective of the jurisdictions in which they operate.

The full text of the article is available on the MinterEllison website here

United Kingdom | Internet of things (IoT) law? The UK government has announced it plans to enact legislation to improve the security standards of internet-connected household devices sold in the UK

Key Takeouts

- The UK government has announced plans to introduce a new law to improve the security standards of all internet-connected household devices sold in the UK.
- Digital Minister Matt Warman said that the new law will 'hold firms manufacturing and selling internet-connected devices to account and stop hackers threatening people's privacy and safety. It will mean robust security standards are built in from the design stage and not bolted on as an afterthought'.
- No specific timeline for introducing the law/implementation date is given. The government's statement says that the government 'aims to deliver this legislation as soon as possible'.

The UK government has announced plans to introduce a new law to improve the security standards of all internet-connected household devices sold in the UK.

According to the statement, research suggests there will be 75 billion internet connected devices, such as televisions, cameras, home assistants and their associated services, in homes around the world by the end of 2025.

Three guidelines/requirements will underpin the new law: According to the government's statement, the new law will ensure devices adhere to three 'rigorous security requirements for the Internet of Things (IoT)':

1. All consumer internet-connected device passwords must be unique and not resettable to any universal factory setting
2. Manufacturers of consumer IoT devices must provide a public point of contact so anyone can report a vulnerability and it will be acted on in a timely manner
3. Manufacturers of consumer IoT devices must explicitly state the minimum length of time for which the device will receive security updates at the point of sale, either in store or online

Digital Minister Matt Warman said that the new law will 'hold firms manufacturing and selling internet-connected devices to account and stop hackers threatening people's privacy and safety. It will mean robust security standards are built in from the design stage and not bolted on as an afterthought'.

Timing: The statement says that the government 'aims to deliver this legislation as soon as possible'.

The statement notes that the announcement follows the government's voluntary Secure by Design Code of Practice for consumer IoT security which was launched in 2018.

[Sources: UK Department for Digital, Culture, Media & Sport, National Cyber Security Centre media release 27/01/2020; Government response to consultation 27/01/2020; [registration required] The FT 28/01/2020]

Climate Risk

A signal of things to come? UK pension fund sets 2022 target for the companies in which it invests to align their emissions with 'Paris benchmarks and improve their climate management quality'

Key Takeouts

- UK pension fund, Brunel Pension Partnership has released a five point climate policy committing it to a stronger stance on climate risk.
- Among other things, the five point climate policy sets a 2022 deadline for:
    1. Brunel's 130 asset managers to reduce their exposure to climate change: Brunel says it will 'challenge their investment managers to demonstrate reduced exposure to climate risk and effective corporate engagement that puts companies and portfolios on a trajectory to align with a 2°C economy'. Brunel cautions that managers that 'fail to do so face the threat of having their mandates removed'.
    2. The companies in which Brunel invests to take steps to align their emissions with 'Paris benchmarks and improve their climate management quality'. Brunel cautions that 'those that fail to do so will face the threat of votes against the re-appointment of Board members, or being removed from Brunel's portfolios when the partnership carries out a stocktake of its policy's effectiveness in 2022.'
- The FT quotes ShareAction as suggesting that the move by Brunel is likely to be followed by other funds going forward.

Brunel Pension Partnership (which The FT describes as one of Britain's largest pension schemes, managing £30bn on behalf of 700,000 members and 10 government bodies) has released a new climate policy committing it to using its influence to challenge the asset manager industry on climate risk.

Announcing the policy, Chief Responsible Investment Officer Faith Ward said, 'We have a climate emergency on our hands and it would be irresponsible of us to accept the status quo. We need to systematically change the investment industry in order to keep temperature rise to well below 2°C.'

The five point plan

The five point plan commits Brunel to take the following actions.

1. **policy action:** encourage policymakers to adopt policies such as a meaningful price on carbon and removal of fossil fuel subsidies
2. **products:** Brunel will identify product areas where there is client demand for more innovative products and invest in their development
3. **portfolios:** Brunel says it will stress-test its portfolios under a range of climate scenarios. More particularly, the policy sets a 2022 deadline for its investment managers to 'demonstrate reduced exposure to climate risk and effective corporate engagement that puts companies on a trajectory to align with a 2°C future'. Brunel cautions that managers that 'fail to do so will be replaced'.
4. **reporting on impact:** Brunel will report on the proportion of its portfolios invested in the low-carbon transition and on how its portfolios align with the goals of the Paris Agreement.
5. **engagement/persuasion –** Brunel says it will engage with its material holdings to persuade them to improve their climate management quality, using the Transition Pathway Initiative assessment framework. It will ask its material holdings to advance at least one level on the TPI management quality staircase each year, with the aspiration of all material holdings being on TPI Level 4 by 2022. Brunel cautions that in cases where companies fail to show progress, Brunel will vote against the reappointment of the Chair and other board members.

Key barriers for the finance sector to overcome?

Brunel's Chief Responsible Investment Officer Faith Ward identified the key challenges for the financial sector to address as follows: over-emphasis on short term, rather than long-term performance; an unwillingness on the part of asset managers to invest in the low carbon economy; use of backward-looking risk assessment models that are unable to take climate risk into account; and 'instances of 'perverse incentives and conflicts of interest throughout the system'.

Other funds may follow suit?

The FT quotes ShareAction campaign manager Lauren Peacock as saying that the pressure on funds will mean more pension funds are likely to take a similar stance going forward.

'All asset owners should now be scrutinising their managers' voting record on climate issues and giving mandates to smarter, more responsible asset managers…We fully expect this to become the new normal' Ms Peacock is quoted as saying.

[Sources: Brunel Pension Partnership media release 27/01/2020; [registration required] The FT 27/01/2020]

Will BP adopt broader carbon emissions reductions goals, including scope 3 emissions? Reportedly incoming CEO Bernard Looney is considering this course

Key Takeout

- BP incoming CEO is reportedly considering plans for the company to adopt broader carbon emissions reductions goals, including setting targets for reducing Scope 3 emissions (customer emissions).
- No details or timing are known.
- A shareholder resolution calling for BP to set firm emissions reduction targets (including scope 3 emissions) failed to secure sufficient support to pass last year and was not supported by the board at the time (see: Governance News 29/05/2019 at p3).

Reuters reports that incoming BP CEO Bernard Looney plans to expand the company's climate targets as part of a 'broad reorganisation of the company aimed at cutting costs'.

According to Reuters, Mr Looney plans to adopt broader carbon emissions reduction goals that will likely include emissions from fuels and products sold to BP customers (Scope 3 emissions). Reportedly, Scope 3 emissions currently account for nearly 90% of BP's total emissions.

Reuters says that it is unclear what reduction targets the company could set for its Scope 3 emissions but that further details are expected later in the year. Mr Looney is also reportedly expected to detail his 'ambitions' for BP in a speech to be given on 12 February.

Reuters speculates that the adoption of steeper targets (if implemented), could lead to the sale of BP's most carbon-intensive businesses such as oil and gas fields in Angola and Canada.

Response?

Balancing increasing demand for oil/gas against the need to plan/for and implement a transition strategy will be a challenge

The article quotes Morgan Stanley analyst Martijn Rats as saying that Mr Looney is 'coming in at a crucial moment for the oil sector…Over the next decade, companies like BP will need to maintain supply of oil and gas, for which demand is continuing to grow. That will require ongoing investment. At the same time, they will need to prepare for a decarbonised future. All the while, their investors will ask them to keep up these large dividend payments. Balancing these three demands will be the key challenge.'

Alasdair McKinnon, manager at The Scottish Investment Trust, which holds shares in BP, is reportedly of a similar view. Mr McKinnon is quoted as saying that he considers that 'BP needs to be a willing and enthusiastic participant in the energy transition. But this needs to be balanced by the current reality of the economics of the low-carbon technologies' that are generally less profitable than oil and gas.

[Source: Reuters 23/01/2020]

The time is right for the government to act on climate? Climate risks are already starting to 'materialise' in Australia

The Australian reports that Chair of the Centre for Policy Development (CPD) Terry Moran has said that the risks associated with climate change have already started to 'materialise' for big business in Australia. This, he suggested can already be seen the 'fast growing' adoption of climate mitigation strategies by those businesses, and in the stance of the financial regulators (Reserve Bank, the Australian Securities and Investments Commission (ASIC) and the Australian Prudential Regulation Authority (APRA)).

This, in combination with the recent bushfire crisis and heightened levels of community concern, is likely, Mr Moran has reportedly said, to push the government to take a 'tougher position on climate and energy policy'.

Reportedly, Mr Moran likened the public mood 'to the wave of sentiment' that catalysed action from previous governments. As was the case in the 1980s when industry groups, unions, economists, media groups, academics and the public had a 'sense that something needed to be done', the community and business sector are leading the government, he reportedly said.

'In our democracy, we don't rely on government all the time…With climate change, businesses sees a big risk that needs to be handled' Mr Moran is quoted as saying.

[Source: [registration required] The Australian 27/01/2020]

In Brief | The FT reports that the 'big four accounting groups' as well as some of the world's largest companies have signed up to a new sustainability reporting framework launched at the World Economic Forum in Davos. According to The FT, the metrics, created by the WEF's International Business Council (IBC), are intended to be deployed in corporate accounts from 2021

[Source: [registration required] The FT 22/01/2020]

Other Developments

Employee activism on the rise at technology companies? The FT reports that more than a group of Amazon employees have publicly criticised the company's climate change record

The FT reports that more than 350 Amazon employees have publicly criticised Amazon's climate record and the company's policy (which reportedly stipulates that employees must not engage with the press, or speak publicly about the business or any company matter, without going through an approval process), in a blog post entitled, 'Amazon Employees Share Our Views on Company Business'.

The blog post is comprised of individual 357 statements, each signed by the employee who contributed it. Among other things, the statements call on the company to end its contracts with oil and gas companies, 'Our AI and ML are being used for "finding oil", "producing oil" and "optimizing production" one employee writes.

Many of the statements also call on Amazon to take a leadership stance on climate risk in the interests of the broader community. 'Amazon's main principle is Customer Obsession, it is time to broaden it and get obsessed with Humanity. Collaborating all together we can save our Planet. With great power comes great responsibility — Amazon should make drastic changes in the way it operates, shift company goals and values to be an example for other corporations' one employee states.

Response from Amazon? The FT quotes Amazon as commenting, 'While all employees are welcome to engage constructively with any of the many teams inside Amazon that work on sustainability and other topics, we do enforce our external communications policy and will not allow employees to publicly disparage or misrepresent the company or the hard work of their colleagues who are developing solutions to these hard problems.'

Broader issue: employee activism on the rise? The FT comments that this is the latest 'coordinated action' at the company and suggests that is part of a broader trend at technology companies towards employees become more vocal on these issues.

Is taking a hard line the best way forward? The FT queries whether Amazon's 'hard-line' strategy for dealing with the issue is the optimal approach. 'Over the past year rival Google has grappled with escalating employee backlash, leading it to abandon at least two major initiatives, including plans to work with the US military on cloud computing and to re-enter the Chinese market with a Beijing-friendly search engine, codenamed Dragonfly. Amazon's activists have used these "wins" to reassure workers that there will be strength in numbers, the FT comments.

[Sources: 'Amazon Employees Share Our Views on Company Business'; [registration required] The FT 28/01/2020]

In Brief | Evidence that ethics training is effective in raising behavioural standards? A US study has confirmed that testing financial advisers on their knowledge of ethics can lead to better behaviour

[Source: The Conversation 27/01/2020]

In Brief | Future Fund chair Peter Costello has reportedly identified coronavirus as a bigger short-term financial risk than climate change. 'It [climate risk] is a risk that we look at, but it's not the only risk' Mr Costello reportedly said. Mr Costello reportedly went on to say that 'longer term, obviously we think there is going to be a switch away from fossil fuels, and we take that into account, as all investors should'

[Source: [registration required] The AFR 28/01/2020]

Corporate Misconduct and Liability

United States | US regulator holds individual former Wells Fargo executives to account: The OCC has announced enforcement actions against eight former Wells Fargo executives

Action against former Wells Fargo executives announced

US regulator (the Office of the Comptroller of the Currency (OCC)) has announced enforcement actions against eight former Wells Fargo executives in connection with their involvement in the 'systemic sales practices misconduct problem' at the bank during the period 2010 to 2016.

Announcing the actions, Comptroller of the Currency Joseph Otting said 'The actions announced by the OCC today reinforce the agency's expectations that management and employees of national banks and federal savings associations provide fair access to financial services, treat customers fairly, and comply with applicable laws and regulations'.

Details

The OCC announced that it had reached settlements with three of the executives. The OCC comments that 'in making the determination to file the notice of charges and enter into these settlements, the OCC considered, among other things, the culpability of these individuals and their financial resources, including compensation previously clawed back by the bank'.

Settlement with former Chair and CEO John Stumpf: The OCC identifies the root cause of the systemic issues identified as the bank's 'business model which it says imposed 'unreasonable sales goals on its employees along with unreasonable pressure to meet these goals' as well as 'ineffective' controls that were not designed to detect/prevent the misconduct.

Broadly, the OCC alleges that Mr Stumpf 'was or should have been aware of the problem and its root cause'.

'During Respondent's [Mr Stumpf's] tenure, there was a culture in the Community Bank that resulted in systemic violations of laws and regulations, breaches of fiduciary duties, and unsafe or unsound practices by large numbers of Community Bank employees'.

As part of the settlement, Mr Stumpf has agreed ('without admitting or denying any wrongdoing') to:

- pay a $17.5m (civil money penalty (CMP))
- a ban from any role at a US bank, 'without prior written consent of both the OCC and the institution's appropriate Federal financial institutions regulatory agency'.

Settlements with two other former Wells Fargo executives: In addition, the OCC said it has also reached settlements with the bank's former Chief Administrative Officer and Director of Corporate Human Resources Hope Hardison, and its former Chief Risk Officer Michael Loughlin under which each respectively agreed 'without admitting or denying any wrongdoing' to a personal cease and desist order and a civil money penalty.

Charges against a further five former Wells Fargo executives: The OCC has also charged five former senior Wells Fargo executives in connection with the 'systemic sales practices misconduct'.

The OCC states that 'based on the facts and circumstances of each individual's actions, the relief sought may include a lifetime prohibition from participating in the banking industry, a personal cease and desist order, and/or CMP. A personal cease and desist order would require the individual to take certain affirmative actions or refrain from certain conduct in any future involvement in the banking industry. Pursuant to federal law, the respondents may request a hearing challenging the allegations and relief sought by the OCC'.

Response

In response to the OCC actions, Wells Fargo released a following statement, sent by Well Fargo's CEO and President to all employees.

Mr Scharf writes: 'The OCC's actions are consistent with my belief that we should hold ourselves and individuals accountable. They also are consistent with our belief that significant parts of the operating model of our Community Bank were flawed. At the time of the sales practices issues, the Company did not have in place the appropriate people, structure, processes, controls, or culture to prevent the inappropriate conduct. This was inexcusable. Our customers and you all deserved more from the leadership of this Company.'

Mr Scharf went on to say that the company is reviewing the filings to determine whether any further action by the company is appropriate with respect to any of the named individuals. In addition, he said that 'Wells Fargo will not make any remaining compensation payments that may be owed to these individuals while we review the filings'.

Mr Schart added that significant changes have been made at the company over the past three years, and that in consequence, the 'company is different today', though 'we know we still have significant work to do to regain the trust of all stakeholders'.

[Sources: Office of the Comptroller of the Currency media release 23/01/2020; Prohibition Order and CMP Against John Stumpf; Personal Cease and Desist Order and CMP Against Hope Hardison; Personal Cease and Desist Order and CMP Against Michael Loughlin; Notice of charges against five former executives; Wells Fargo media release 23/01/2020; [registration required] The Australian 24/01/2020; [registration required] The FT 24/01/2020; [registration required] The WSJ 23/01/2020]

An indication that the pendulum has further to swing? Commenting on the US action, the Australian suggests that it signals that the global regulatory 'backlash' against the banking industry 'still has plenty of time to run'.

[Source: [registration required] The Australian 28/01/2020]