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Disclosure and Reporting

Getting closer to mandatory TCFD disclosure? The UK government has tabled climate change-related amendments to draft pension fund legislation

Amendments to the Pension Schemes Bill: The government has proposed climate change related amendments to the Pension Schemes Bill [HL].

Amendments include the following.

- **New requirements for trustees to manage climate risks/opportunities:** New power to make regulations to impose requirements on the trustees or managers of certain occupational pension schemes to ensure 'effective governance of the scheme with respect to the effects of climate change' risks/opportunities including new requirements to:
  - reviewing the exposure of the scheme to risks;
  - assess the assets of the scheme in a prescribed manner;
  - determine, review and where necessary revise a strategy for managing the scheme's exposure to certain prescribed risks
  - determine, review and if necessary revise targets relating to the scheme's exposure to certain prescribed risks;
  - measure performance against targets;
  - preparing documents 'containing information of a prescribed description'.
- **New disclosure requirements:** Require the trustees or managers to publish information 'of a prescribed description' relating to the effects of climate change on the scheme.
- **Measures to promote compliance:** The amendments also include various measures to help promote compliance including financial penalties (not in excess of £5,000, in the case of an individual, and £50,000, in any other case).

Mandatory TCFD reporting? The text of the amendment does not mention the Taskforce on Climate-related Financial Disclosures (TCFD) but some commentators are reporting that the Department for Work and Pensions has said that the amendments will require disclosure under the TCFD.

Response? The WSJ reports that the TCFD, BT Group PLC, Royal Bank of Scotland Group PLC and BP PLC didn't immediately respond to a request for comment.

Reportedly the Pensions and Lifetime Savings Association (PLSA) has raised concerns that parts of the new amendments would give 'unprecedented new powers to government bodies to interfere and request changes to private sector schemes' investment strategies'.

Reportedly ShareAction has welcomed the move saying that it is 'very hopeful these world-first reforms will accelerate climate action'.

[Sources: Pension Schemes Bill [HL]; [registration required] The WSJ 12/02/2020; Board Agenda 13/02/2020; Manifest Minerva Analytics 17/02/2020; IPE 13/02/2020]

In Brief | ESMA Chair makes the case for more regulation of ESG rating agencies including more rigorous and standardised ESG information disclosure requirements and specific measures to prevent the risk of greenwashing: 'Personally, I believe that, where ESG ratings are used for investment purposes, ESG rating agencies should be regulated and supervised appropriately by public sector authorities'

[Sources: Speech by Chair of the European Securities and Markets Authority Steven Maijoor, European Financial Forum 2020 – Dublin, Sustainable financial markets: translating changing risks and investor preferences into regulatory action 12/02/2020; [registration required] The FT 14/02/2020]

Meetings and Proxy Advisers

In Brief | The Guardian reports that a joint submission by a group of 70 UK-based church investors has raised concerns about the US SEC's proposed plans to 'modernise' shareholder rules. Reportedly, the group's chief concern is that the proposed changes will curtail the ability of smaller shareholders to push for stronger governance and/or to challenge US companies over issues including excessive executive pay and climate issues

[Source: The Guardian 17/02/2020]

Shareholder Activism

Targeting the board over climate risk? Climate activist group Majority Action has targeted the JPMorgan Chase board as a means of pushing for a change in the bank's climate strategy

Key Takeout:

Climate activist group Majority Action is calling on investors to oppose the renomination of Lee Raymond (former Exxon Mobil CEO) to the board of JPMorgan Chase and for the separation of CEO/Chair roles at the bank as a means of pushing for a change in the way the bank approaches climate risk.

Majority Action is calling on shareholders to support governance reform at JPMorgan Chase as a means of pushing for a shift in climate strategy.

Majority action alleges that the bank's continued funding of the fossil fuel industry and close ties to the sector is standing in the way of the bank implementing a credible climate transition strategy in line with the goals of the Paris Agreement.

Flaws in governance are standing in the way of implementing a credible climate strategy? Majority Action argues that there is currently a lack of accountability at the top of the bank. 'JPM CEO Jamie Dimon is also the Chair of the company's board of directors, which places the onus on the Lead Independent Director to provide the oversight and guidance that long-term shareholders require as the climate crisis escalates. However, this role is held by Lee Raymond, who is uniquely poorly qualified to provide the oversight needed to protect long-term shareholder value in the face of these risks' the group argues.

Details

Majority Action is pushing for shareholders to:

1. **Oppose the renomination of Lee Raymond**, the former chief executive of ExxonMobil, to the JPMorgan Chase board. Mr Raymond has reportedly been on the board for 33 years (and lead independent director for 19 years). Reportedly, Majority Action alleges that Mr Raymond's close ties with the fossil fuel industry, and (alleged) climate denialism, are a barrier to changing the bank's current climate strategy. Further, the group alleges that his long tenure is contrary to the principles of sound governance. 'Considering Raymond's long tenure, his uniquely poor record on climate issues, and his potential conflicts of interests, he is unqualified to provide the kind of oversight needed to drive reforms on climate, promote long-term shareholder value at JPMorgan Chase, and protect the financial system as a whole' Majority Action states.
2. **Push for the separation of the Chair and CEO roles**: Currently the Chair and CEO role is held by Jamie Dimon. This gives Mr Dimon 'near total control over the corporation's decision-making, including on fossil fuel finance' Majority Action writes. In addition, the group argues that the majority of S&P companies now separate the Chair and CEO roles as a matter of good governance.

A test for investors? It is reportedly not certain whether Mr Raymond will seek re-election for a 34th year. However, should he stand, The FT suggests that it will provide a test for investment managers such as BlackRock that have begun putting climate issues at the centre of their stewardship policies.

[Sources: Majority Action media release 10/02/2020; Majority Action Frequently Asked Questions; Majority Action exempt solicitation; [registration required] The FT 12/02/2020]

Other Shareholder News

Top Story | NSW Supreme Court rules against US based 'activist short seller' Bonitas

Case note | *Rural Funds Management Limited as Responsible Entity for the Rural Funds Trust and RF Active v Bonitas Research LLC [2020] NSWSC 61*

Key Takeouts

- **What is the case about?** This decision concerns an attack by US based and self-described 'activist short seller' Bonitas Research LLC (Bonitas), and Bonitas' founder Matthew Wichert on Australian company Rural Funds Management (RFM), which resulted in loss/damage to RFM.
- **Allegations?** RFM alleged that Bonitas and Mr Wiechert's conduct contravened ss 1041E, 1041F, 1041H and 1041D of the Corporations Act 2001 (Cth) (Corporations Act) and s12DA(1) of the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act), as a consequence of which RFM, suffered loss and damage. RFM sought declarations as to the contraventions, damages and compensation, including profits made by Bonitas and Mr Wiechert resulting from the contravention.
- **What did the court find?** In finding in favour of RFM, Justice Hammerschlag found that:
  - Australian courts have jurisdiction: 'The Act [the Corporations Act 2001 (Cth)] and the ASIC Act reach the conduct complained of';
  - Bonitas and Mr Wiechert's actions contravened ss 1041E, 1041F and 1041H of the Corporations Act 2001 and s 12DA(1) of the ASIC Act;
  - RFG failed to establish that Bonitas and or Mr Wiechert contravened s 1041D of the Corporations Act (and in consequence, s 1317HA has no application).
- **Next steps?** The Supreme Court will consider the assessment of damages on 6 March. Damages will not include profits made as a result of the contravention.
- **Bonitas' response?** In a series of tweets responding to the judgement Bonitas reportedly defended its position. In a letter cited in the judgement Bonitas maintained that 'Australian courts have no jurisdiction over us, and we will contest the enforcement of any orders or judgments you obtain'.

Summary

On 12 February, the NSW Supreme Court handed down its decision in Rural Funds Management Limited as Responsible Entity for the Rural Funds Trust and RF Active v Bonitas Research LLC [2020] NSWSC 61.

The case concerns attacks in the form of tweets and reports by US-based short seller Bonitas Research LLC (Bonitas) and Bonitas' CEO and founder Matthew Wiechert on Australian company Rural Funds Management Limited (RFM) that caused 'a significant drop' in the traded price of units listed on the ASX.

In finding in favour of RFM, Justice Hammerschlag held that Bonitas and Mr Wiechert's conduct contravened ss 1041E, 1041F and 1041H of the Corporations Act and s 12DA(1) of the ASIC Act but that RFM failed to establish that Bonitas and Mr Wiechert contravened s 1041D.

In a Nutshell: Background Facts and Allegations

The plaintiff, Rural Funds Management Limited (RFM) is an Australian unlisted public company and the responsible entity of, the trustee for, and the manager of, two stapled registered management investment schemes: Rural Funds Trust and RF Active (together RFF). Units in RFF (units) are listed on the Australian Stock Exchange (ASX).

Starting on 6 August 2019, self-described 'activist short seller' Bonitas Research LLC (Bonitas) launched what Justice Hammerschlag described as 'a concerted course of making statements and disseminating information

scathingly critical of RFM and RFF' in which they accused RFM and RFF of dishonesty and fraud with the intention of driving down the price of units for commercial gain.

This conduct caused a 'significant drop' in the traded price of units traded on the ASX.

RFM alleged that Bonitas and Mr Wiechert's actions contravened ss 1041E, 1041F, 1041H, and s 1041D of the Corporations Act, and s 12DA(1) of the ASIC Act as a consequence of which, RFM suffered loss and damage. RFM sought declarations as to the contraventions and damages and compensation, including profits made by Bonitas and Mr Wiechert resulting from the contravention.

Jurisdiction

The defendants in the case are both US based: Bonitas Research LLC (Bonitas) is incorporated in Texas, and Bonitas' CEO and principal Matthew Wiechert is also based in the US.

Neither Bonitas nor Mr Wiechert elected to defend the proceedings in court. Instead, in a letter sent to RFM's lawyers and cited in the judgement, they 'respectfully decline the invitation' to appear, and assert that Australian courts have no jurisdiction over them. 'Australian courts have no jurisdiction over us, and we will contest the enforcement of any orders or judgments you obtain that certainly will be contrary to the discoverable facts, as well as United States and Texas law and policy' the letter states.

Addressing the issue of jurisdiction, Justice Hammerschlag 'declined to express any view on the operation of the Constitution of the United States of America, or on Texas law and policy' on the basis they 'play no role in the adjudication of these proceedings, which are governed by the laws of Australia'.

His Honour held that the 'The Act [the Corporations Act] and the ASIC Act reach the conduct complained of'.

'Section 1041H of the Act and s 12DA of the ASIC Act reach conduct in this jurisdiction that is misleading or deceptive or is likely to mislead or deceive. If there has been such conduct, the provision is engaged, whether or not there is other conduct outside of the jurisdiction' His Honour writes.

In this case, His Honour explains not only was Australia an intended destination for the statements and information disseminated by Bonitas and Mr Wiechert but it was also proven that the statements and information actually reached Australia and were read here. There 'is ample evidence establishing' that the reports published by Bonitas and Mr Wiechert 'were published in a manner which made them capable of being accessed and that they were in fact accessed in Australia and that they remain accessible by persons resident in Australia'.

Contraventions of ss1041E, 1041F and 1041H of the Corporations Act and s12DA(1) of the ASIC Act

Justice Hammerschlag found that the defendants did contravene ss1041E,1041F and 1041H of the Corporations Act and s12DA of the ASIC Act.

Justice Hammerschlag accepted that the allegations of dishonest and fraudulent conduct in the two reports released by Bonitas and Mr Wiechert were baseless, and that 'neither Bonitas nor Wiechert took the trouble to check with or enquire of RFM as to any of the matters which they broadcast. They had an obvious commercial interest in depressing the price. I have no difficulty in concluding that they did not care whether what they were saying was false'.

'Manifestly, the statements and information made and disseminated by Bonitas and Wiechert were intended to, likely to, and did, induce persons in this jurisdiction to dispose of their units, or acquire units. They were also plainly intended to, likely to, and did, have the effect of reducing the trading price of the units. The conduct complained of was in relation to a financial product and was in trade or commerce' and RFM 'suffered loss or damage by the conduct complained of'.

No contravention of s 1041D?

Justice Hammerschlag rejected RFM's argument that the behaviour also constituted a contravention of s 1041D.

His Honour writes that in order for a contravention of s1041D to be established, the following three requirements must be met: 1) circulation or dissemination of information to the effect that the price for units will or is likely to fall; 2) the fall is because of a transaction or other thing done in relation to the units; and 3) that transaction, or thing done, constitutes, or would constitute, a contravention of ss 1041E or 1041F.

In finding that RFM failed to establish the breach, Justice Hammerschlag said that RFM's argument was 'unsound' because it relied on a misinterpretation of s1041D.

Justice Hammerschlag writes that s1041D 'is concerned with dissemination of information about illegal transactions, acts, or things previously done by the disseminator, not with dissemination of misleading or deceptive information about legal ones done by the subject entity and, in any event, to which the disseminator was not party. What the disseminator says cannot itself be the contravention. The circulation or dissemination of misleading information in contravention of the Act about a series of transactions or acts or things done, cannot itself be the transaction or act or thing done required by s 1041D(a). That is something separate. Consistently with this, the section contemplates that at the time the circulation or dissemination occurs, the illegal transaction, act or thing done has already taken place. That is also not the case here.'

His Honour goes on to observe that 'as dishonest and deserving of criticism as their behaviour was, what Bonitas and Wiechert did was not within that which the section contemplates. They published false information about a series of transactions said to have been entered into by RFM, none of which transactions was, in fact, illegal'.

On this basis, his Honour considers that 'sections 1041E, 1041F, and 1041H, rather than s 1041D, are directed to the type of mischief which occurred' in this case.

Given this finding, his Honour said that there is no scope for the court to make a compensation order under s 1317 HA.

Next steps?

The court will make appropriate declarations as to the contraventions of ss 1041E, 1041F and 1041H of the Act and s 12DA(1) of the ASIC Act by Bonitas and Mr Wiechert.

The assessment of damages will be made on the footing that damages do not include profits made as a result of the contravention.

Response

- Bonitas has defended its research and maintained its short position: In a letter cited in the judgement Bonitas maintained that 'Australian courts have no jurisdiction over us, and we will contest the enforcement of any orders or judgments you obtain'. Following the judgement, Bonitas Research reportedly defended its research and confirmed that it has maintained its short position in a series of tweets. The tweets reportedly describe the judgement as 'procedurally and substantially infirm'.
- Rural Funds Group has issued no comment beyond acknowledging the judgement to the SMH.
- Share price is recovering since the judgement? The SMH comments that since the judgement was released, the unit price has climbed 8% to a high of $2.08 on 13 February. The shares were reportedly trading above $2.40 prior to the release of Bonitas' communications.

Implications?

The SMH suggests that the decision could be significant given the increase in complaints to ASIC concerning similar attacks by overseas-based short sellers. Reportedly, there are calls from some quarters for ASIC to take action to address the issue.

However, according to the Australian, ASIC has no plans to implement a licensing system for activist investors/analysts. An ASIC spokesperson is quoted as saying that 'With regard to so-called activist investors or analysts, ASIC's general position has consistently been to encourage companies, where possible, to address specific external criticisms with sufficient, usable information so that the market can form its own view…If some use false or misleading information to hinder or distort that situation, then they might be potentially subject to whatever legal sanctions can be brought to bear'.

[Sources: Rural Funds Management Limited as Responsible Entity for the Rural Funds Trust and RF Active v Bonitas Research LLC [2020] NSWSC 61; [registration required] The Australian 13/02/2020; 14/02/2020; [registration required] The SMH 13/02/2020]

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[Source: Fortune 14/02/2020]

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[Source: The Age 13/02/2020]

Regulators

APRA and ASIC have written to RSEs welcoming the proposed expansion of ASIC's role in superannuation and outlining how joint regulatory oversight would operate if the proposed changes were to go ahead

- **Context:** On 31 January the government released draft legislation — Financial Sector Reform (Hayne Royal Commission Response — Stronger Regulators (2020 Measures)) Bill 2020: ASIC regulation of superannuation (FSRC Rec 3.8, 6.3, 6.4, 6.5) and draft regulations — for consultation. The proposed reforms include expanding ASIC's role as conduct regulator while retaining APRA's role as the prudential and member-outcomes regulator in superannuation. For a summary of the proposed measures see: Governance News 05/02/2020 at p19).
- **ASIC and APRA have written to industry welcoming the proposed changes:** The Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC) have written to Registrable Superannuation Entities (RSEs) welcoming the draft legislation and outlining how regulatory oversight will operate if the reforms become law.
- **Co-regulation:**
  - **Respective roles:** APRA will be responsible for prudential regulation and member outcomes (including licensing and supervision of RSE licensees) and ASIC will be responsible for protecting consumers from harm, market integrity, disclosure and record keeping.
  - **No duplication:** The letter says that the regulators 'recognise that the success of the reforms lies in ASIC seeking to complement APRA as a regulator by applying different insights, tools and focus. The reforms are not designed to empower ASIC to duplicate APRA's role nor does ASIC intend to approach the proposed new powers in this way'.
  - **'Strategic approach' to enforcement:** The letter says that 'industry may be concerned that the proposals will mean both regulators will have the power to bring enforcement action in relation to the same trustee misconduct. APRA and ASIC will be deliberately strategic in how we use our formal enforcement powers. This means both regulators will work together to determine which agency has the best available tools to address the conduct at issue and support each other in achieving the outcome that is in the interests of consumers. This is already occurring'.

- **Most trustees will not be required to take additional steps to comply with the proposed new regime?** The letter says that if the proposed reforms are implemented, most trustees (those that already hold an existing AFS licence) should not have to take additional steps to comply with the new regime.

- **Changes for non-public offer trustees**: The letter says that ASIC will write to the 25 trustees who will need to take action to comply with proposed AFS licensing changes.

- **What will change for superannuation trustees?** Under the proposed changes, all superannuation trustees subject to APRA regulation would need to provide all services involved in operating a superannuation fund in accordance with the general obligations on AFS licensees under the Corporations Act 2001 (Cth) (Corporations Act) and the consumer protection provisions of the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act). All trustees, including 'non-public offer' trustees, will be held to the same standards.

[Note: Details about what will change for superannuation trustees is included in Appendix A of the letter (at p5).]

  - **For 'non-public offer' trustees that do not hold an existing AFS licence**, a streamlined application process for the trustee to obtain an AFS licence will apply. The letter says that ASIC will be writing to the 15 affected non-public offer trustees to provide more information about how to get the licence and the authorisations they need.

  - **For 'non-public offer' trustees that hold an existing AFS licence to provide advice only**, the streamlined application process will also apply for the trustee to obtain an authorisation to deal in superannuation. ASIC says that it will write to the 10 affected non-public offer trustees to provide information about this process.

  - **For trustees that already hold an existing AFS licence**, the draft legislation provides that a new licence authorisation – to provide a superannuation trustee service – will automatically be deemed to apply. No steps need be taken by these trustees to acquire this authorisation.

- **Breach reporting:** The letter says that trustees will be able to continue to report breaches to both regulators by submitting one report to APRA, provided the information reported to APRA meets the breach reporting requirements in the Corporations Act. The timeframe for reporting breaches under the Supervision Industry (Supervision) Act 1993 (Cth) (SIS Act) will be extended to 30 calendar days to align it with the requirements under the Corporations Act.

- **Further guidance?** APRA and ASIC are considering what additional communications about the superannuation regulator roles reforms are required to assist the industry to comply with their obligations.

- **Feedback from industry:** The letter also calls for feedback about issues with the proposed Bills that RSEs believe 'may raise challenges to the industry'.

[Sources: Joint letter to industry: Law reform: Superannuation regulator roles 14/02/2020; Media release 14/02/2020; Investor Daily 14/02/2020]

Expect a busy second half of the year? ASIC Chair James Shipton has reportedly said industry should expect ASIC's enforcement efforts to ramp up H2 2020

Increase in litigation activity in H2 2020? The Australian reports that Australian Securities and Investments Commission (ASIC) Chair James Shipton has said that industry should expect an increase litigation activity in the second half of 2020.

'We're looking at mid-year to the end of 2020 to be a period of heavy activity with regard to matters coming before the court, (legal) briefs being issued, and matters getting into the public domain…We've got to a point with staffing and funding where it's coming to a head, so we need to be thorough and diligent but also move as quickly as we can in the interests of justice, and getting the deterrence message out broadly to the market and to the individuals and entities involved' Mr Shipton is quoted as saying.

Mr Shipton reportedly went on to comment that 2020 'is all about implementing our strategic goals, one of which is high-deterrence enforcement action. I became a regulator because I believe in the finance profession. I was a very proud member of it for nearly a decade. I don't want this industry to have a repeat performance, so through regulatory intensity and an ambitious policy agenda I'm feeling positive that we can get the right changes'.

A question of 'catching up' on managing non-financial risk: Reportedly, Mr Shipton went on to reject claims that the regulatory pendulum has swung too far, instead suggesting that it is a necessary investment in addressing underlying issues that went un-addressed following the global financial crisis. 'In Australia, we didn't invest in the systems, processes and management time related to non-financial risks to the same extent that the rest of the world did in the last 5-10 years, so there's a catch-up period, especially after the royal commission. That's what I think is happening right now, and the intensity of the response should not be misrepresented as the pendulum swinging too far — it should be seen as the logical response to a period of under-investment to meet community expectations. Once that period is over, there will hopefully be demonstrable improvements and it will be seen as a worthwhile investment' Mr Shipton is quoted as saying.

ASIC intends to take a strategic approach to litigation: Mr Shipton is quoted as saying that the targets of ASIC's enforcement actions are selected with the aim of signalling the regulator's interest in ensuring good conduct across all areas. 'We have actions in the pipeline against directors and officers, companies ranging in size from very small to very large, and we've also got criminal actions under way…It's not a scattergun approach; we're doing everything strategically. We have to cover the field -because we want to deliver a subliminal message that we won't just enforce to the right and allow bad activity to take place on the left' Mr Shipton is quoted as saying.

[Source: [registration required] The Australian 15/02/2020; 17/02/2020]

Financial Services

Consumer Data Right - New year, new rules (and a revised timetable)

The Australian Competition and Consumer Commission has finalised and published its Consumer Data Right Rules and has issued a proposal to revise the implementation timetable for Consumer Data Right. The four major banks will now be expected to be ready to share consumer data from 1 July 2020.

For an update on the changes see: Consumer Data Right – New year, new rules (and a revised timetable)

Proposed FAR regime: Consumer groups have called for the proposed Financial Accountability Regime to go further

Context: On 22 January, the government released a proposal paper, outlining plans for the new Financial Accountability Regime (FAR) (which will replace the Banking Executive Accountability Regime (BEAR)). The new regime 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. Consultation closed on 14 February. For a summary of the proposed changes, including expert insights into the broader implications for industry see: Governance News 23/01/2020.

The proposed regime should go further? In a joint submission to the consultation, consumer groups — CHOICE; the Consumer Action Law Centre (CALC); Financial Counselling Australia; Financial Rights Legal Centre (FRLC); and Super Consumers Australia — have called for the proposed FAR regime to go further.

Two key changes proposed: In a statement announcing the release of the submission, CHOICE said that the groups are calling on Federal Government to strengthen the proposal in two key ways.

1. **Adding a fairness obligation**:
    - **Entities should be required to 'take reasonable steps to treat their customers fairly' and accountable persons should be required to 'pay due regard to the interests of customers and treat them fairly'.** The submission says that this should mirror the individual conduct rules of the UK's Financial Conduct Authority.

- **The Treasury must clearly state that the objective of FAR legislation is 'to ensure consumers are treated fairly and their financial wellbeing is promoted'.** This should mirror the drafting of the Competition and Consumer Act 2010. This would reflect the intentions of Financial Services Royal Commission recommendation 7.4 which recommends that legislation governing financial services entities should identify expressly what fundamental norms of behaviour are being pursued when particular and detailed rules are made about a particular subject matter.

CHOICE comments, 'Fairness is missing from the Government's proposed executive accountability reforms. Executives will be obliged to ensure the prudential standing of the business but there is no mention of treating customers fairly....[the FAR should include] accountability for selling harmful products, such as the flogging of insurance products that customers could never claim against, as we saw before the Royal Commission'.

2. **Ensuring deferred remuneration meets global best practice:** The submission recommends that deferred remuneration obligations should be strengthened to: reflect global best practice; be no weaker than the obligations that existed under BEAR; be fit for purpose; and be scaled to reflect the risk profile of the entity and the accountable persons' function, as well as the total sum of the variable remuneration.

   CHOICE comments, 'The deferred remuneration obligations must be significantly strengthened and brought in line with global best practice. It is very concerning that the proposed obligations are weaker than the current requirements set under the Banking Executive Accountability Regime (BEAR)...We want our financial institutions to employ senior executives who are motivated by the highest standards of integrity, not those who are seeking the least restrictive incentive payments.'

Other 'recommendations'

The submission includes a number of other recommended changes including the following:

- The non-objections power should be extended to ASIC to ensure that conduct risk is fully factored into senior executive appointments.
- Conduct rules should be established for all staff delivering financial services in a FAR entity.
- The Treasury must consider the risk of consumer harm, as well as the complexity of entities, to determine the benchmark for the 'enhanced compliance' classification.
- The Treasury should grant only APRA and ASIC the power to exempt entities for the new regime.
- The Treasury must include functions that are critical to consumer outcomes, such as dispute resolution, customer hardship and the customer advocate, within the accountable persons framework.
- The court should be required to consider the impact that the penalty has on consumers and/or beneficiaries of prudentially regulated entities.
- The Treasury must release the timetable for the expansion of the FAR regime to ASIC-regulated entities.

[Source: CHOICE media release 13/02/2020; Submission: Joint consumer submission to the Financial Services Reform Taskforce: Financial Accountability Regime February 2020; [registration required] The AFR 17/02/2020]

Proposed FAR regime: ASFA submission flags a number of concerns including that it largely duplicates existing obligations

Key Takeouts:

- ASFA's submission to Treasury's consultation 'supports the government's intent to increase the overall accountability within RSE licensees' but raises a number of 'concerns' about the proposed design of the regime.
- Concerns include: a) FAR obligations largely replicate existing legislative obligations; b) the regulators will have broad discretion to determine how the regime will apply to RSE licensees in practice; and c) there has not been sufficient consideration of the practical implications of some of the proposals under

FAR eg the need for organisational changes if FAR does not accommodate joint accountability and the significant deterrents FAR creates in attracting talent to the superannuation industry.

The Association of Superannuation Funds of Australia (ASFA) submission to Treasury's consultation on the proposed Financial Accountability Regime (FAR) 'supports the government's intent to increase the overall accountability within RSE licensees' but raises a number of 'concerns' about the proposed design of the regime.

Concerns

Concerns raised in the submission include the following:

- **There should be consistency between APRA's proposed prudential standard CPS 511 and the proposed FAR legislative provisions**: ASFA is concerned that the metric used to classify RSE licensees as either core compliance entities or enhanced compliance entities differs from APRA's proposed prudential standard CPS 511 and suggests that, for consistency and 'to reduce the differences between the legislative and regulatory provisions, the metrics used to identify an "enhanced compliance entity" and a "significant financial institution" should be identical'. In addition, ASFA says that 'further clarity is required around the movement between a 'core compliance entity' and an 'enhanced compliance entity'.

- **Clarity needed around the indicative list of particular responsibilities:** ASFA is concerned that the indicative list of particular responsibilities listed in Attachment B of the proposal, contains a number of responsibilities that overlap and has called for the regulators to provide practical descriptions of each responsibilities to ensure entities are able to clearly identify the persons accountable. In addition, ASFA says that guidance should be provided for situations in which there may be joint accountability for a responsibility.

- **Product responsibility:** ASFA is concerned about the breadth of the responsibility for end-to-end management of a given product or product group. ASFA says that 'if joint accountability for products is not accepted by the regulators, it will require RSE licensees to make significant changes to their entire organisational structure'. The submission also questions why it is necessary to assign end to end accountability for products to a single person if: a) there are clearly defined responsibility 'hand-off points'; and b) given that product accountability will be captured by FAR already (because it will capture roles accountable for the operations of an organisation) without the need for one person to be accountable for a product. The submission argues that if the decision is made to continue with end-to-end product responsibility, 'it would be beneficial to align the obligations of the responsibility to the design and distribution obligations (DDO) that are expected to come into effect in April 2021'.

- **The list of obligations largely replicates existing fiduciary duties and legislative obligations already executed by RSE licensees, creating unnecessary duplication:** ASFA argues that RSE licensees are already subject to a number of existing legislative obligations and fiduciary duties The proposed FAR obligations largely duplicate existing duties that RSE licensees currently execute. ASFA argues that where FAR obligations replicate existing obligations the same language should be used to outline obligations to avoid confusion in interpreting another set of duties. Alternatively, ASFA suggests that the FAR should directly reference existing duties (as opposed to a new list of duties/obligations).

- **Deferred remuneration obligations**: ASFA is concerned that a number of proposals relating to deferred remuneration do not align with the requirements in APRA's proposed CPS 511. 'While ASFA understands that there is general acceptance that complying with CPS 511 would be considered complying with FAR legislative obligations, this needs to be absolutely clear both in regulation and legislation' ASFA states. Guidance is also required ASFA argues around how remuneration obligations may differ for temporary/acting accountable persons.

- **Notification obligations**: ASFA recommends there be a materiality threshold for the reporting of breaches to avoid significant compliance costs for entities and the relevant monitoring costs. 'There is potential that APRA will be flooded with relatively minor breach reports' otherwise, the submission argues. ASFA also says that it would be valuable to have case studies and examples within FAR's Explanatory Memorandum identifying what a breach of FAR looks like and whether it will be required to be reported.

- **Penalties**: ASFA is concerned that 'while having individual consequences for breaches of FAR could encourage individual accountability, it may have a significant impact on the ability of APRA-regulated entities to attract talent'. Further, ASFA is concerned that 'the imposition of individual penalties could have consequences on the remuneration expectations of accountable persons and could, by extension, be a cost to members' as well as discourage innovation. ASFA recommends that 'in the first instance' penalties should be applied to entities for FAR breaches rather than to individuals, and that only if the FAR 'is not having the impact that was intended' should individual penalties be considered.

- **Non-objections power:** The submission calls for more information about how regulators will use their FAR powers in practice. For example, the submission argues that APRA's use of the non-objections power (veto power) could have a significant impact on both the individual and the entity and that as such, transparency in its use is critical.

- **Lack of transparency:** ASFA 'remains concerned about the level of discretion the FAR will provide to regulators in determining the how the regime will apply to RSE licensees'. The submission states that though the proposed legislation provides a general framework, the work of administering and designing the details of the regime will rest largely with the regulators (the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC)). 'While the regulators do consult before publishing regulation, it is not subject to the same vigorous debate that occurs in Parliament. ASFA is concerned that the decisions made by the regulators in the exercise of their powers as conferred under FAR will not be transparent'.

[Source: ASFA submission 14/02/2020]

ASIC review of trustees' PYSP communications released: ASIC expects future communications to be 'member centric' and backed by 'member centric' processes

Report overview | ASIC report, Report 655 Review of member communications: Protecting Your Superannuation Package (PYSP) reform (Report 655)

The Australian Securities and Investments Commission (ASIC) has released the findings of its recent review of superannuation trustees' communications with their members about changes introduced through the Treasury Laws Amendment (Protecting Your Superannuation Package) Act 2019 (PYSP).

Context: PYSP reforms

The intention behind Treasury Laws Amendment (Protecting Your Superannuation Package) Act 2019 (PYSP Act), which came into effect on 1 July 2019, is to address the issue of erosion of superannuation savings.

The legislation requires superannuation trustees to: a) cancel insurance on accounts that have been inactive for 16 months, unless the member acts; b) transfer to the ATO accounts with balances below $6,000 that have been inactive for 16 months, unless the member acts; c) cap administration and investment fees at 3% for accounts with balances below $6,000; and d) remove exit fees.

ASIC reviewed communications from 12 superannuation funds to their members about the changes.

Issues identified

[Note: Page five of ASIC's report includes a table summarising ASIC's findings, and the regulator's expectations of communications going forward. The report is available on the ASIC website here.]

Though the report identified some examples of good communication, it highlights a number of issues. Broadly, ASIC found that some of the communication material reviewed:

- **did not provide sufficient context for the reforms or adequately explain what the changes meant for members** eg trustees did not explain the purpose of the reforms, provided only a limited range of options for action and/or failed to highlight the impact of account proliferation.

- **placed insufficient emphasis on members' needs:** for example, they used complex language including legal references, provided 'bare minimum' messaging, promoted a particular option that may not have been suitable for the member or failed to include relevant information about the member's existing superannuation arrangements that ASIC considers would have been helpful to include.

- **was inaccurate:** ASIC found that while trustees appeared generally to have provided updated information to consumers about the fee and cost changes, some information provided was inaccurate. For example, there were examples where the impact of the fee caps and the benefits for members were not accurately conveyed when the trustee provided information comparing their fund and other funds in the market.
- **did not make 'effective contact with some members'** because they did not hold a valid postal or email address for the member, or had only one channel to send through the information.

ASIC's expectations going forward

ASIC expects that trustees should:

- **put greater focus in the communications on providing relevant, factual information to members.** This could include: a member's account balance, insurance premiums, level of insurance and last contribution date.
- **provide members with clear, balanced information about the importance and purpose of the PYSP and other reforms** including: the relevance of the reforms to the individual member; presenting all available options; and (where applicable) communicating the need to assess which of multiple accounts to retain.
- **help members make decisions in their best interests.** ASIC expects that trustees should: a) use plain English; b) not use 'techniques or approaches that influence members to take a certain course of action' where the benefits to the member are unclear; and c) present an appropriate range of options and benefits.
- **look for opportunities to improve member data**. ASIC expects that 'where possible, trustees should update member data regularly, so they can provide relevant information and apply a multi-channel communications approach'.
- **back the communication with member-centric processes:** ASIC writes that 'member-centric communications should be backed up by member centric processes. We encourage trustees to question the user-friendliness of processes related to or affected by the PYSP reforms and other reforms'. ASIC lists a number of questions/actions that trustees should consider in this context: 1) Are call centres resourced sufficiently to deal with potentially elevated rates of member inquiries? 2) Do call centre staff have easy access to resources to allow them to respond effectively and factually to inquiries? 3) Is there utility in implementing a specific PYSP-related interactive voice response (IVR) option or email address for member inquiries? and 4) Steps to take action should be clear and simple. There should be no risk that members inadvertently make a choice they did not intend to make.

ASIC states that though the 'review is not exhaustive, we think the findings are important, informative and useful for all trustees framing future communications to members on the PYSP reforms, as well as more broadly' .

Announcing the release of the report, ASIC Commissioner Danielle Press said that ASIC encourages 'all trustees to revisit their member communications in light of our review and consider whether they are providing clear, accurate and actionable information about the PYSP reforms. Communication with members about such important matters should not be treated as a compliance exercise'.

[Sources: ASIC media release 12/02/2020; ASIC Report 655 Review of member communications: Protecting Your Superannuation Package (PYSP) reform]

Facilitating super fund mergers? Bill introduced to make tax relief for merging superannuation funds permanent

Treasury Laws Amendment (2020 Measures No 1) Bill 2020 was introduced into the House of Representatives on 12 February.

Key Points

- **Among other things, the Bill proposes to remove impediments to mergers between complying superannuation funds** by permitting the rollover of both revenue gains or losses and capital gains or losses.

- **Proposed commencement date?** The proposed commencement date for the measure is the first 1 January, 1 April, 1 July or 1 October to occur after the day the Bill receives the Royal Assent, making tax relief for merging superannuation funds permanent from 1 July 2020.

[Source: Treasury Laws Amendment (2020 Measures No 1) Bill 2020; explanatory memorandum]

Progress Update | The Reuniting more super Bill has progressed to second reading stage in the senate

The Bill aimed at facilitating the exit of all eligible rollover funds (ERFs) from the superannuation system by 30 June 2021 and enabling the Commissioner to reunite amount he/she receives from ERFs with a members' active account — Treasury Laws Amendment (Reuniting More Superannuation) Bill 2020 — passed the House of Representatives on 12 February and has progressed to second reading stage in the senate.

[Note: For a more detailed summary of proposed changes in the Bill see: Governance News 12/02/2020 at p24]

Proposed timing: The proposed commencement date is the day after Royal Assent. Superannuation funds will be prevented from transferring new amounts to an ERF from the later of 7 days after Royal Assent or 1 May 2020. APRA will not be able to accept an application to operate a new ERF from the day after Royal Assent.

[Source: Treasury Laws Amendment (Reuniting More Superannuation) Bill 2020]

Progress Update | Choice of superannuation fund Bill has progressed to second reading stage in the senate

Legislation to enable employees under workplace determinations or enterprise agreements to choose their superannuation fund — Treasury Laws Amendment (Your Superannuation, Your Choice) Bill 2019 — passed the House of Representatives on 12 February and has progressed to second reading stage in the senate.

The Bill was referred to the Economics Legislation Committee on 28 November for report by 20 March.

[Source: Treasury Laws Amendment (Your Superannuation, Your Choice) Bill 2019]

Mandatory Comprehensive Credit Reporting: Draft regulations released for consultation

Context: The National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Bill 2019 proposes to amend the National Consumer Credit Protection Act 2009 (the NCCP Act) to establish a mandatory comprehensive credit reporting (CCR) regime within Australia (see: Governance News 11/12/2019 at p21).

The Bill passed the House of Representatives on 5 February and has progressed to second reading stage in the senate.

Draft regulations released for consultation: On 14 February, the government released exposure draft regulations — the National Consumer Credit Protection Amendment (Mandatory Credit Reporting) Regulations 2020 — for consultation. The draft regulations propose to support the proposed new mandatory CCR regime by setting out:

- additional circumstances when a bank subject to the regime must update or supply new credit information to a credit reporting body;

- restrictions on a credit reporting body disclosing the information it has received through the mandated regime or derived from this information;

- the types of information that must be included in statements provided to the Treasurer by credit providers and credit reporting bodies following the initial bulk supplies of credit information; and

- an additional circumstance when the Australian Securities and Investments Commission (ASIC) could issue an infringement notice for a civil penalty.

Timing: The due date for submissions is 28 February. The proposed commencement date is the day after the Regulations (once finalised) are registered on the Federal Register of Legislation.

[Sources: [exposure draft] National Consumer Credit Protection Amendment (Mandatory Credit Reporting) Regulations 2020; Draft explanatory statement]

Recap: Ministers provide a recap of the Bills passed during the first two sitting weeks for the year

In a joint statement, Treasurer Josh Frydenberg, Minister for Housing and Assistant Treasurer Michael Sukkar and Assistant Minister for Superannuation, Financial Services and Financial Technology Jane Hume provided a recap on the Bills passed during the first sitting fortnight of 2020 'to support bushfire affected communities and to better protect Australian consumers and businesses'.

The statement lists the following Bills:

- Treasury Laws Amendment (2019-20 Bushfire Tax Assistance) Bill 2020: The statement says that the Bill makes disaster relief payments being made to individuals and businesses impacted by the devastating bushfires tax exempt. The reforms apply to the 2019-20 tax year.

- Treasury laws Amendment (2018 Measures No 2) Bill 2019 (FinTech Sandbox Regulatory Licensing Exceptions Bill) which allows regulations to provide for exemptions from the Australian Financial Services Licence and Australian Credit Licence requirements for the purposes of testing financial and credit products and services under certain conditions. (see: Governance News 12/02/2020 at p23; Governance News 10/07/2020 at p17).

- The Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2019 Measures)) Bill 2019 which implements the government's response to recommendations 1.2, 1.3, 4.2 and 4.7 of the Financial Services Royal Commission (see: Governance News 12/02/2020 at p22)

- The Financial Sector Reform (Hayne Royal Commission Response – Stronger Regulators (2019 Measures) Bill 2019 which includes measures to a) harmonise ASIC's search warrant powers; b) improve ASIC's ability to access certain telecommunications information; c) strengthen ASIC's licensing powers; and d) strengthen ASIC's power to ban people in the financial sector (see: Governance News 12/02/2020 at p23)

- The Treasury Laws Amendment (Combatting Illegal Phoenixing) Bill 2019 which introduces new phoenixing offences and new accountability measures for directors including: a) making company directors personally liable for their company's GST liabilities in certain circumstances; and b) measures to prevent directors from improperly backdating resignations or ceasing to be a director when this would leave the company with no directors. (For a summary of the measures see: Parliament passes legislation to combat illegal phoenixing and prevent improper director resignation 13/02/2020; Governance News 12/02/2020)

[Source: Joint media release: Treasurer Josh Frydenberg, Minister for Housing and Assistant Treasurer Michael Sukkar, Assistant Minister for Superannuation, Financial Services and Financial Technology Jane Hume 14/02/2020]

APRA has released its quarterly PHI statistics for the December 2019 quarter, consumer group CHOICE has issued a statement in response, arguing the figures underscore the need for a review of the sector

The Australian Prudential Regulation Authority (APRA) has released its quarterly private health insurance publications for the December 2019 quarter.

Some Key Points

- APRA found that there has been a 'continued deterioration in insurance performance' with net margins declining from 5.2% to 3.9% in the year ending December 2019.

- APRA found that despite this, net profit after tax increased to $1.44 billion for the year ended December 2019 from 1.19 billion for the year ended 31 December 2018.
- Declining membership:
  - At 31 December 2019, 44.0% of the population, were covered by hospital treatment cover, (down 0.2% on September 2019).
  - Family policies also decreased by 1,951 and single policies by 1,355 during the quarter.
  - The largest decrease in coverage during the quarter was 10,286 for people aged between 30 and 34. The largest net decrease (taking into account movement between age groups) was for the age group between 25 and 29, with a drop of 11,649 people.

  APRA comments that 'the industry continues to face risks associated with affordability and the associated value proposition of private health insurance products. This has resulted in an ongoing decline in membership, particularly in the younger age groups'.

Next update? Every quarter, APRA releases its private health insurance statistics publications. The March 2020 edition will be released on 19 May 2020.

CHOICE has called for a public inquiry into the private health insurance system: In a statement responding to the release of the statistics CHOICE said that 'Australians are abandoning private health insurance and it's no wonder - private health insurance costs too much, is too confusing and offers too little value…Today's APRA statistics are further proof of the death spiral in private health insurance. This is another quarter in which fewer people have bought private health insurance. Young people are voting with their feet and telling health insurers what they're offering is poor value'.

'CHOICE calls on the government to address the increasing costs of premiums, which are made worse by the increasing out-of-pocket costs that come with using your health insurance. We want them to review the whole system by undertaking a thorough public inquiry and commit to taking all necessary action to make sure people have access to fair healthcare.'

[Note: APRA has previously signalled support for a review? In his 4th February speech to the Members Health Directors Professional Development Program Australian APRA Member Geoff Summerhayes spoke about the sustainability challenges facing the private health insurance sector and the need for urgent and collective action to address them. Among other things, he said that APRA would support an independent review of the current system. The full text of Mr Summerhayes' speech is available on the APRA website here. For a summary of Mr Summerhayes' comments see: Governance News 05/02/2020 at p30.]

[Sources: APRA media release 18/02/2020; Quarterly private health insurance statistics December 2019; Choice media release 18/02/2020]

In Brief | The Australian reports that ASIC is in the process of determining how it will expand its close and continuous monitoring (CCM) program to the superannuation sector. Reportedly, the regulator's initial focus will be trustee duties and how well trustees discharge their obligation to act in the best interests of members

[Source: [registration required] The Australian 18/02/2020]

In Brief | Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019 has progressed to second reading stage in the senate. The Opposition is pushing for amendments to explicitly ensure employee salary sacrifice arrangements do not 'satisfy the employer's obligation to make contributions' and to ensure superannuation guarantee requirements in awards/enterprise agreements are honoured

[Sources: Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019; Proposed amendments: Opposition [sheet 8872 revised]]

In Brief | Stronger powers for ASIC: The Financial Sector Reform (Hayne Royal Commission Response - Stronger Regulators (2019 Measures) Bill 2019 (Act No 3 of 2020) which 'harmonises' ASIC's search warrant powers; improves ASIC's ability to access certain telecommunications information; strengthen

ASIC's licencing powers; and extends ASIC's banning powers to ban individuals from managing financial services businesses received Royal Assent on 17 February

[Note: For a summary of the measures see: Governance News 04/12/2019 at p13.]

[Source: Financial Sector Reform (Hayne Royal Commission Response - Stronger Regulators (2019 Measures) Bill 2019]

In Brief | The Financial Sector Reform (Hayne Royal Commission Response - Protecting Consumers (2019 Measures) Bill 2019 (Act No 2 of 2020) which extends the existing protections of the unfair contract terms regime to insurance contracts from 5 April 2021, extends consumer protections under the ASIC Act to funeral expense policies, introduces a best interests duty for mortgage brokers and bans certain conflicted remuneration from 1 July 2020 received Royal Assent on 17 February

[Note: For a summary of the measures see: Governance News 28/11/2020]

[Source: The Financial Sector Reform (Hayne Royal Commission Response - Protecting Consumers (2019 Measures) Bill 2019]

Accounting and Audit

Deregulatory 'overkill'? The White House has reportedly proposed that the PCAOB should be consolidated into the SEC from 2022

The WSJ reports that President Trump's proposed budget includes plans to consolidate the responsibilities of the audit regulator, Public Company Accounting Oversight Board (PCAOB), into the Securities and Exchange Commission (SEC) from 2022. The justification for the proposal is reportedly that it will reduce duplicative regulations..

According to The WSJ concerns have been raised that should it go forward, the proposal will: a) weaken regulatory oversight of auditors; and b) reduce the total resources available for auditor oversight as SEC would also receive part of the PCAOB's funding.

The WSJ comments that the proposal is unlikely to become law given the fact that Democrats control the House and are unlikely to support it. The WSJ quotes Rep Bill Huizenga as saying 'By law, the White House proposes a budget. By tradition, Congress ignores it…But it is worth having the conversation.'

[Source: [registration required] The WSJ 13/02/2020]

IFIAR annual survey released: IFIAR calls on audit firms to continue their efforts to raise audit quality standards

International Forum of Independent Audit Regulators (IFIAR) has released its eighth annual survey of inspection findings arising from its member regulators' individual inspections of audit firms affiliated with the six largest global audit firm networks.

IFIAR collected information about two categories of activities: 1) inspections performed on firm-wide systems of quality control; and 2) inspections of individual audit engagements.

Key finding: IFIAR members reported in the 2019 survey that 33% of audit engagements inspected had at least one finding, compared to 37% in the 2018 survey and 47% in the first survey capturing this percentage (2014 survey).

Next steps? Though welcoming the downward trend, IFIAR considers that the rate remains 'high' and calls on members to continue their efforts to achieve improved audit performance. 'The recurrence and level of findings reflected in the survey continue to indicate a lack of consistency in the execution of high quality audits and the need for a sustained focus on continuing improvement' IFIAR states.

Interpreting the findings? IFIAR emphasis that the survey 'is not designed to – and does not – provide a complete measure of firms' progress in improving audit quality. Inspection findings should not be the sole measure of progress in audit quality as they do not serve as "balanced score cards" or overall rating tools'. Having said this, IFIAR says that the historical, quantitative information about inspection results are one means to identify general trends.

[Sources: IFIAR survey report stakeholders announcement 17/02/2020; IFIAR Survey of Inspection Findings 2019]

In Brief | Potential conflict concerns? The AFR reports that former PwC partners on listed boards are under increasing pressure to disclose to shareholders details about retirement payments paid by their former employer. Though there is no legal requirement to disclose the information, the AFR reports that one (unnamed) former PwC partner who now chairs an audit committee at an ASX-listed company audited by PwC, plans to begin voluntarily disclosing the payments

[Source: [registration required] The AFR 14/02/2020]

In Brief | ASIC has announced that it has taken action against a number of SMSF auditors for alleged breaches of the auditor independence rules and auditing standards, including failing to comply with Continuing Professional Development (CPD) requirements and otherwise not being a fit and proper person due to bankruptcy

[Source: ASIC media release 14/02/2020]

In Brief | The reporting date for the Parliamentary Inquiry into the Regulation of auditing in Australia has been extended by six months to 1 September 2020

[Source: Parliamentary Joint Committee on Corporations and Financial Services: Regulation of auditing in Australia]

Risk Management

Climate Risk

BCA energy and climate change policy position: Scoping Paper released

Context: As reported by the Australian, the Business Council of Australia (BCA) recently circulated a paper to members setting out the scope of a planned review of the BCA's climate policy. See: Governance News 12/02/2020 at p31.

Scoping paper released: The 'scoping paper' is now available on the BCA website.

Starting point: A media release accompanying the release of the scoping paper sets out the BCA's position on climate action. The BCA states that it: a) supports the science of climate change; b) supports the Paris Agreement and transitioning to net-zero emissions by 2050; c) supports the use of carryover credits to meet emissions reduction targets; and d) supports the need for a market-based carbon price to drive the transition and incentivise investment in low and no-emissions technology.

Details of the review? As previously reported, the objective of the review is to 'develop an updated, comprehensive energy and climate change policy package that is driven by science, technology and innovation to put Australia on a path to net-zero emissions by 2050'. The paper states that the review will include all aspects of energy and climate policy including: a) policies required to drive the transition to net-zero emissions by 2050; b) how emissions reductions targets are set, delivered and reviewed; and c) the impacts on communities, jobs and industries of climate change and climate-related policies. Further, in addition to working closely with members, the BCA says that it will be 'seeking expert advice to test ideas and provide an independent reference point'.

Next steps? The BCA says that it will contact members to arrange a time to discuss their priorities/key areas of focus on a one-on-one basis and welcomes feedback/ideas. No timeframe is given.

Time for parliament to act? BCA CEO Jennifer Westacott has reportedly called on both sides of politics to 'sit down' and discuss a bipartisan commitment to net-zero emissions by 2050, arguing that the target need not lead to job losses if the transition is planned appropriately.

[Note: As previously reported in Governance News, Independent MP Zali Steggal plans to introduce a private members' Bill committing Australia to a net zero emissions target by 2050. The full text of the Bill — Climate Change (National Framework for Adaptation and Mitigation) Bill 2020 — is available here. BCA CEO Jennifer Westacott has reportedly signalled support. Parliament is set to resume sitting on 24 February. For details of the proposed Bill see: 12/02/2020 at p31]

[Sources: BCA media release 10/02/2020; Scoping Paper; [registration required] The Australian 17/02/2020]

The FT reports that BP has committed to cutting GHG emissions to net zero by 2050 or sooner (including cutting Scope 3 emissions)

Key Takeouts:

- The FT reports that BP CEO Bernard Looney has committed the company to cutting GHG emissions to net zero by 2050 or sooner.
- This will reportedly involve cutting emissions across its operations including from BP fuels burnt by customers (scope 3 emissions).
- Further detail is reportedly expected in the coming months.
- The FT comments that the target is more ambition than those of European rivals Royal Dutch Shell and France's Total as well as ExxonMobil and Chevron in the US.
- 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).

The FT is reporting that BP CEO Bernard Looney has committed to cutting GHG emissions to net zero by 2050 or sooner. Mr Looney's comments follow earlier reports that he was considering such a move (see: Governance News 29/01/2020).

Details

- According to The FT, the company has committed to net zero emissions across its operations, including from BP fuels burnt by customers. The FT quotes Mr Looney as saying that the company will 'drive returns and cash flow, not production volumes. And with that, you can expect oil and gas production to decline gradually over time.'

- BP plans to restructure the business and as part of this, it will create four new divisions: 1) production and operations; 2) customers and products; 3) gas and low carbon; and 4) innovation and engineering.

The company said it would provide more details in September.

Evidence of a global shift in thinking around the purpose of companies? The FT comments that the announcement 'speaks to the changes under way in the energy industry and wider society that Mr Looney has felt emboldened to push through a significant reappraisal of what a 21st century energy major should look like so soon after taking the reins'.

Pressure on BP's rivals? The FT comments that the target is more ambition than those of European rivals Royal Dutch Shell and France's Total as well as ExxonMobil and Chevron in the US. BP's announcement, it's suggested, will put pressure on the company's rivals to follow suit, though the FT adds that the lack of detail has drawn criticism from some quarters.

[Source: [registration required] The FT 13/02/2020; 13/02/2020]

In Brief | A 'just' transition away from coal: Anglo American CEO Mark Cutifani has reportedly said that the company will announce details of the future of its coal operations by the end of 2020, noting that finding thermal coal buyers will be more difficult now, than it may have been in the past. Mr Cutifani also reportedly emphasised the importance the company places on a 'just transition'. 'We can't just walk away from local communities; we can't walk away from employees; we can't walk away from stakeholders. You have to make sure they're engaged and part of the process' he is quoted as saying

[Source: [registration required] The Australian 17/02/2020]

In Brief | Broad consensus on the value of ESG programs? A McKinsey survey has identified that executives and investment professionals largely agree that environmental, social, and governance programs create short and long-term value, though their perceptions of value have changed over the past decade

In a new survey, executives and investment professionals largely agree that environmental, social, and governance programs create short- and long-term value—though perceptions of how have changed over the past decade.

[Source: The ESG premium: New perspectives on value and performance February 2020]

In Brief | Full TCFD compliance next year: QBE's Annual Report identifies climate change as a material risk to the business as well as a driver of significant opportunities, and flags that the next report will be fully TCFD compliant

[Source: QBE ASX Announcement: Annual Report 17/02/2020; [registration required] The Australian 17/02/2020; 18/02/2020; The SMH 17/02/2020]

Cybersecurity, Technology and Privacy

ACCC to inquire into digital platform services and separately into digital advertising services

On 15 February, Treasurer Josh Frydenberg issued a statement announcing that the government has directed the Australian Competition and Consumer Commission (ACCC) to conduct two inquiries. The two inquiries are part of the government's response to the ACCC's initial digital platforms inquiry.

1. **Digital platform services inquiry 2020-2025:**

   - **The ACCC will continue to inquire into Digital Platforms:** Announcing the inquiry, the Treasurer said that as part of the Government's response to the ACCC's report into digital platforms on 12 December 2019, the Government agreed that the ACCC will continue to inquire into digital platforms.

[Note: For a summary of the government's response to the Digital Platforms Inquiry see: Government's support of ACCC Digital Platforms Inquiry 13/12/2019]

   - **What are 'digital platform services'?** Digital platform services include: internet search engine services; social media services; online private messaging services; digital content aggregation platform services; media referral services; and electronic marketplace services.

   - **Matters to be considered by the inquiry will include** the following: a) the intensity of competition in markets for the supply of digital platform services 'with particular regard to the concentration of power, the behaviour of suppliers, mergers and acquisitions, barriers to entry or expansion and changes in the range of services offered by suppliers of digital platform services'; b) supplier practices which may result in consumer harm; c) market trends that may affect the nature and characteristics of digital platform services; and d) overseas developments.

   - **Timeline:** The ACCC will provide the Treasurer with an interim report on the inquiry by 30 September 2020 and then further interim reports every six months until the inquiry concludes with a final report to be provided to the Treasurer by 31 March 2025.

2. **Digital advertising services inquiry:**

   - **Focus on technologies facilitating the supply of targeting online advertising:** Announcing the inquiry, the Treasurer said 'the ad-tech inquiry will focus on technologies facilitating the supply of online advertising to Australian consumers. These technologies gather information about consumers and use it to target them with highly personalised advertising.' Media reports have interpreted this to mean that Facebook, Google, Apple and others will be required to explain how they use consumer data to target advertising.

- **Matters to be considered by the inquiry will include the following**: a) the competitiveness and efficiency of markets for the supply of digital advertising technology services and digital advertising agency services; b) the availability to advertisers, publishers and other market participants of information on activities in those markets; c) the concentration of power in those markets; d) auction and bidding processes; e) the impact of mergers and acquisitions in those markets; f) the behaviour of suppliers in those markets; g) whether the corporate structures of suppliers, or contractual arrangements between suppliers and customers, have a negative effect on competition or informed decision making in those markets; h) the distribution of digital display advertising expenditure between publishers, digital advertising technology services providers and advertising agencies; and i) how competition in those markets impacts on competition in the market for the supply of digital display advertising services.

- **Timeline:** The ACCC will publish an issues paper for the inquiry in March 2020. This paper will provide further details of the inquiry's areas of focus. The ACCC will provide the Treasurer an interim report on the inquiry by 31 December 2020 and complete the inquiry and provide a final report to the Treasurer by 31 August 2021.

According to media reports, the inquiries will be undertaken by the ACCC's digital platforms branch which was provided with $26.9m in funding last year.

[Sources: Treasurer Josh Frydenberg media release 15/02/2020; ACCC Digital Advertising Services Inquiry; Digital Platform Services Inquiry 2020-2025; The Guardian 15/02/2020; [registration required] The Australian 14/02/2020]

In Brief | Recent ransomware attack on Toll should put other companies on alert: The AFR reports that the recent cyber-attack on Toll is continuing to disrupt the business. The report quotes Federal Police cyber security specialist Nigel Phair, as saying that the attack should be a 'massive wakeup call' for other companies, which have been too complacent on the threat of cyber-attacks

[Sources: Toll media release 03/02/2020; [registration required] The AFR 17/02/2020]

Other Developments

Addressing wage underpayments: Attorney General Christian Porter has flagged plans to introduce legislation to criminalise the 'most serious forms' of worker exploitation/wage underpayments, and announced the release of a discussion paper seeking feedback on possible reforms

Key Takeouts

- Attorney General Christian Porter has said that legislation will be introduced in the coming weeks that will criminalise the most serious forms of deliberate worker exploitation and wage underpayments and introduce significant jail terms and fines.
- A discussion paper — Improving protections of employees' wages and entitlements: further strengthening the civil compliance and enforcement framework — outlining a range of reform options has been released. The paper asks whether courts should be given greater powers to: a) disqualify directors of companies where significant underpayments occur; b) issue banning orders to prevent companies doing certain things such as employing workers on certain visa types; and c) issue adverse publicity orders that force companies to disclose or publish their offences.
- The closing date for submissions is 3 April 2020.

Legislative response

In a statement, Attorney General Christian Porter said that the government is taking action to ensure workers are paid appropriately. Mr Porter said that:

- legislation will be introduced in the coming weeks to 'criminalise the most serious forms of deliberate worker exploitation and wage underpayments and introduce significant jail terms and fines'.

- the government is also considering options to strengthen the existing civil compliance and enforcement framework within the Fair Work Act 2009, to help deter other types of wage underpayments and non-compliance that do not meet the threshold of criminal conduct.

Discussion paper released

On 18 February, the government released a discussion paper — Improving protections of employees' wages and entitlements: further strengthening the civil compliance and enforcement framework — seeking feedback about the operation of the current compliance and enforcement framework relating to protection of employees' wages and entitlements. The paper is focused on two issues: a) the adequacy of compliance and enforcement tools available to workplace regulators and the courts; and b) mechanisms to recover unpaid wages.

The paper includes a number of questions to guide feedback. These include (among others) whether the courts should be given greater powers to: a) disqualify directors of companies where significant underpayments occur; b) issue banning orders to prevent companies doing certain things such as employing workers on certain visa types; and c) issue adverse publicity orders that force companies to disclose or publish their offences.

The paper also seeks feedback on whether: a) existing mechanisms such as the small claims processes available through the Federal Circuit Court and State and Territory courts could be streamlined to encourage greater participation and at reduced costs; and b) a formal role should be conferred on the Fair Work Commission to help mediate and conciliate in disputes between employers and employees, as a way of delivering faster and cheaper outcomes.

The due date for submissions is 3 April 2020.

[Sources: Attorney General Christian Porter media release 18/02/2020; Discussion paper: Improving protections of employees' wages and entitlements: further strengthening the civil compliance and enforcement framework]

Related News: Underpayments have become 'endemic'?

Mr Porter's statement follows recent media reports that Wesfarmers and Coles have respectively identified wage underpayment issues. Reportedly, Coles has set aside $15 million in backpay salaried managers at its supermarkets and liquor stores, plus $5 million in interest and costs, as a result of underpaying them over six years. The supermarket has reportedly implemented measures to require all managers to clock on and off to help ensure there is no reoccurrence of the issue.

The AFR quotes Attorney General Christian Porter as saying that underpayments had become 'endemic' in corporate Australia. 'With organisations like Coles or Woolworths or Qantas, when this process is complete, penalties will be inescapable, whether they are civil, criminal or of the type that we are now proposing with respect to directorships: banning and publicity' Mr Porter is quoted as saying.

[Sources: [registration required] The AFR 19/02/2020; 18/02/2020]

Former director facing criminal charges for failure to meet disclosure requirements

Key Takeout: ASIC has charged a former director of Bellamy's Australia Ltd with contravening sections 671B(1) and 1308(2) of the Corporations Act 2001 (Cth) with the charges listed for a mention hearing before the Hobart Magistrates' Court on 12 March 2020.

On 14 February, the Australian Securities and Investments Commission (ASIC) announced that a former director of Bellamy's Australia Ltd (Bellamy's) is facing criminal charges as a result of an ASIC investigation.

ASIC alleges that:

- The former Bellamy's director contravened s671B of the Corporations Act 2001 (Cth) (Corporations Act) by failing to disclose his/her stake and that of his/her associate the Black Prince Foundation (Black Prince)

in Bellamy's at the time it became a listed company. According to ASIC the holding in question represented 14.74% of Bellamy's total issued capital.

- Subsequently, the former director lodged an initial shareholder holder notice 'that was misleading on the basis that it failed to properly disclose…[his/her] true and complete relationship with Black Prince and the basis upon which…[he/she] had an interest in 14 million Bellamy's shares' in contravention of s1308(2) of the Corporations Act.

The charges are listed for a mention hearing before the Hobart Magistrates' Court on 12 March 2020. The matter is being prosecuted by the Commonwealth Director of Public Prosecutions.

Implications

The AFR quotes University of Melbourne Professor Ian Ramsay as commenting that the regulator's action underlines expectations of conduct, and more particularly underlines the expectation that participants adhere to disclosure requirements. 'If you don't have this as a market participant in front of mind - the company and its directors will not be well informed - and this is even more important when there is a possible change of control' Professor Ramsay is quoted as saying.

[Sources: ASIC media release 14/02/2020; [registration required] The AFR 14/02/2020; 15/02/2020; 17/02/2020; [registration required] The Australian 14/02/2020; The Guardian 14/02/2020]

Related News: Separately, ASIC has announced that the former CEO of NewSat Limited has pleaded guilty authorising the making of three invoices that were false or misleading contrary to section 1308(2) of the Corporations Act. The charge carries a maximum penalty of five years' imprisonment.

The matter is being prosecuted by the Commonwealth Director of Public Prosecutions.

[Source: ASIC media release 17/02/2020]

Restructuring and Insolvency

Parliament passes legislation to combat illegal phoenixing and prevent improper director resignation

As previously reported in Governance News (12/02/2020 at p34), Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 was passed by both houses of Parliament on 5 February 2020, with an amendment made by the Senate to review the operation and effectiveness of the legislation after five years.

For a detailed summary of the changes see: Parliament passes legislation to combat illegal phoenixing and prevent improper director resignation

Progress Update | Legislative package to consolidate and modernise business registers and establish the DIN regime

Context: The new Commonwealth business registry regime and Director Identification Bills were reintroduced (after they lapsed at the dissolution of parliament) on 4 December.

Recap: What the package of five Bills will do

The five Bills — 1) Commonwealth Registers Bill 2019; 2) Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019; 3) Business Names Registration (Fees) Amendment (Registries Modernisation) Bill 2019; 4) National Consumer Credit Protection (Fees) Amendment (Registries Modernisation) Bill 2019; and 5) Corporations (Fees) Amendment (Registries Modernisation) Bill 2019 — will create a new Act, the Commonwealth Registers Act 2019 and amend existing laws to create a new Commonwealth business registry regime and introduce Director Identification Numbers (DINs).

[Note: For a summary of the proposed Bills see: Governance News 11/12/2019 at p25]

What is a DIN? The DIN will be a unique identifier for each person who consents to being a director. The person will keep that unique identifier permanently, even if they cease to be a director. A person appointed as a director of a body corporate will be required to apply to the registrar for a DIN.

Progress? The five Bills have progressed to second reading stage in the senate. No amendments have been circulated.

(Proposed) Timing? The Commonwealth Registers Bill 2019 commences the day after Royal Assent. The remainder of the new registry regime (DIN regime) commences two years after Royal Assent or on such earlier date as may be proclaimed by the Governor-General.

[Sources: Commonwealth Registers Bill 2019; Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019; Business Names Registration (Fees) Amendment (Registries Modernisation) Bill 2019; National Consumer Credit Protection (Fees) Amendment (Registries Modernisation) Bill 2019; Corporations (Fees) Amendment (Registries Modernisation) Bill 2019]