# Governance News

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## Top Story | Who is an officer of a corporation? High Court decision provides some clarity on the definition of 'officer' as defined in s9 of the Corporations Act

**Case Note: Australian Securities and Investments Commission v King [2020] HCA 4**

**Key Takeouts**

- **Who falls within the definition of 'officer of a corporation'?** The case is primarily concerned with the construction of the definition of 'officer' in s9 of the Corporations Act 2001 (Cth) and more particularly, with the question of whether a group CEO, who was involved in the management of a subsidiary but who did not hold a named 'officer' role within the subsidiary, fell within the definition of 'officer' for that subsidiary.

  The Corporations Act sometimes imposes liability only on directors, for example, insolvent trading liability. But other important responsibilities are imposed more widely on 'officers'. That expression extends to anyone who participates in decision making that affects at least a substantial part of the company's business, or who has capacity to significantly affect its financial standing.

  How should para (b)(ii) of the definition of 'officer of a corporation' s 9 be interpreted? Was the Queensland Supreme Court of Appeal correct in holding that in order to fall within the definition, it is necessary to prove that the individual held or occupied a named office or a 'recognised position with rights and duties attached to it'?

- **Broader interpretation:** All five judges of the High Court of Australia who heard the case ruled in favour of ASIC and overturned the Queensland Supreme Court of Appeal's narrower interpretation of 'officer' in s9. Justices Kiefel, Gagler and Keane wrote the leading judgment. Justices Nettle and Gordon wrote a separate judgment which emphasised three points. The High Court held that:

  - contrary to the QCA's decision, s9 para (b)(ii) is not limited to those who hold or occupy a named office in a corporation or a 'recognised position with rights and duties attached to it';

  - the factual findings made by the primary judge, and accepted by the Court of Appeal, including that the group CEO in question, acted as the 'overall boss' of the group and assumed 'overall responsibility' for the subsidiary, were sufficient to establish that he 'has the capacity to affect significantly the corporation's financial standing' (in line with the definition).

- **'Clear guidance':** In a statement welcoming the decision, ASIC Commissioner John Price said the decision provides 'clear guidance on who is an "officer" of a corporation'. Mr Price added that the decision 'sends a clear signal to anyone running a company — in name or in effect — that they should be responsible and held accountable for their actions'.

### Introduction

On 11 March, the High Court handed down its decision in Australian Securities and Investments Commission v King [2020] HCA 4. The key issue in the case was the construction of para (b)(ii) of the definition of 'officer of a corporation' s 9 of the Corporations Act 2001 (Cth) (the Act).

More particularly the case considered the question of whether a group CEO, who did not hold a formal 'officer' role in a subsidiary company, but who was nevertheless 'overall responsible' for the subsidiary, fell within the definition of 'officer' for that subsidiary (and could therefore be liable under s601FD of the Act) and if so, what is needed to establish this.

Was the Queensland Supreme Court of Appeal correct in holding that it is necessary to hold or occupy a named office in a corporation or a 'recognised position with rights and duties attached to it' in order to meet the definition?

## Background

Mr King was the CEO and an executive director of MFS Ltd (also known as Octaviar Ltd), the parent company of the MFS Group of companies (MFS Group). Premium Income Fund (PIF) was the largest registered managed investment scheme in the MFS Group and MFS Investment Management Pty Ltd (MFSIM) was its responsible entity.

Mr King acted as the 'overall boss of the MFS Group' and took 'overall responsibility for MFSIM'.

On 29 June 2007, MFSIM entered into a $200m loan facility with the Royal Bank of Scotland (RBS). The RBS loan facility was to be used solely for the purpose of PIF, and not for the purposes of other companies in the MFS Group.

On 27 November 2007, MFSIM and senior personnel in the MFS Group, including Mr King, arranged for $150 million to be drawn down from the RBS loan facility, $103m of which was then used to pay a debt owed by another company in the MFS group. The debt in question was unrelated to either PIF or MFSIM and PIF received no benefit or consideration for it. This use of the PIF funds was 'authorised and approved' by Mr King.

The High Court appeal relates to ASIC's contention that Mr King was liable under s 601FD of the Act (which imposes duties on 'officers' of responsible entities) as an 'officer' of MFSIM. The key question under consideration by the Court was therefore, whether Mr King met the definition of 'officer' under para (b)(ii) of the definition of 'officer of a corporation' s 9 of the Act.

## ASIC's case

The Queensland Supreme Court of Appeal found that Mr King did not fall within the definition. In order for Mr King to meet the definition within para (b)(ii), the Court held that ASIC needed to prove that Mr King had acted in an 'office' of MFSIM, in the sense of a 'recognised position with rights and duties attached to it'.

ASIC argued that this construction was incorrect.

Among other things, ASIC argued that if not an 'officer' of MFSIM in name, Mr King was one in effect. That is, despite not being officially an MFSIM director at the time he authorised the use of PIF funds, he was nevertheless and 'officer' of MFSIM within the definition of officer in s9, as he was 'a person…who has the capacity to affect significantly the corporation's financial standing'.

As a question of fact, he both had 'overall responsibility for MFSIM' and had 'approved and authorised' the misuse of PIF's funds in this case ASIC argued, despite the fact that he was not acting in the role of an officer of MFSIM at the time.

Further, ASIC argued that the QCA's reasoning relied on a misinterpretation of Grimaldi v Chameleon Mining NL (No 2) (2012) 200 FCR 296, which ASIC maintained 'did not hold that a person must hold a "position" internal to the company of which the person is an "officer"'.

## The High Court's decision: Mr King was an 'officer' of MFSIM

The Court unanimously held that Mr King was an 'officer' of MFSIM within the definition of 'officer' in para (b)(ii), overturning the QCA's narrower interpretation.

## The facts were sufficient to establish that Mr King was an 'officer'

The facts in this case, including that Mr King acted as the 'overall boss of the MFS Group' and had 'overall responsibility for MFSIM' was sufficient, their Honours found, to establish that 'he had the capacity to affect significantly the financial standing of MFSIM' as required to meet the definition.

In their leading judgement Keifel CJ, Gageler J and Keane J said:

> 'If the CEO of the parent company of a group of companies is allowed to act in relation to other companies in the group untrammelled by the duties that attach to officers of each of the other companies in the group, shareholders and creditors would be left exposed to an obvious risk. It would be an extraordinary state of affairs if those who actually determine the course of a company's financial affairs could avoid responsibility for their conduct by the simple expedient of deliberately eschewing

> any formal designation of their responsibilities. This is especially so in the present case, when regard is had to Ch 5C of the Act, and specifically s 601FD, which was enacted to provide protection to members of managed investment schemes by imposing duties and responsibilities on the officers of responsible entities'.
>
> 'It is impossible to discern from the Act the intention that an officer of a holding company should fall outside para (b)(ii) of the definition in relation to a subsidiary if, as a matter of fact, that individual has the capacity to affect significantly the financial standing of the subsidiary, particularly where that individual has demonstrated that capacity by exercising it to the detriment of the subsidiary and its creditors and shareholders'.

**No requirement to prove that Mr King acted in an 'office' or position within MFSIM**

In their judgement, Keifel CJ, Gageler J and Keane J held that the Court of Appeal erred in giving 'officer' its ordinary meaning (ie the holder of an office) 'contrary to the orthodox view'.

> 'Textual differences between paras (a) and (b) of the definition make it clear that para (b) of the definition extends the scope of the term "officer" beyond its ordinary meaning of "office holder". While para (a) of the definition captures individuals who hold a named office in a corporation for which the Act prescribes certain duties and functions, para (b) captures those who do not hold such an office. Paragraph (b) defines "officer" by reference to the facts of the relationship between an individual and a corporation in relation to the affairs of the corporation. The contrasting language is a powerful textual indication that Parliament did not intend to confine the class of persons described in para (b), including sub-para (ii), by an unexpressed requirement that the relationship between an individual and a corporation be identified by reference to a recognised position with rights and duties attaching to it'.

Their Honours went on to conclude that 'considerations of legislative context, history and purpose point in the same direction as considerations of text'.

**Grimaldi?**

In their judgement, Keifel CJ, Gageler J and Keane J also found that the QCA's construction was flawed, because it relied on a misinterpretation of Grimaldi v Chameleon Mining NL [No 2] (2012) 200 FCR 296 at 324 (Grimaldi).

Their Honours state:

> 'The reasons in Grimaldi, when read as a whole, recognise that para (b) of the definition of "officer" expands the coverage of the duties of officers of a corporation to include individuals who would not be officers of a corporation within the ordinary meaning of the term. Grimaldi is distinctly not supportive of the view that, as a matter of law, a person who satisfies either of the requirements of para (b)(i) or (ii) of the definition does so only if that person is acting in a recognised office within the corporation. Accordingly, while the Court of Appeal was correct to say that there is no relevant tension between Grimaldi and Shafron, the suggestion that there was some tension arose only because the argument put by Mr King misunderstood what the Full Court said in Grimaldi'.

**ASIC's response: The decision provides welcome clarity**

In a statement, ASIC Commissioner John Price welcomed the decision as providing 'clear guidance on who is an "officer" of a corporation and establishing that the duties and responsibilities to a company, its creditors and shareholders under the Act will apply to individuals who have the capacity to significantly affect the financial standing of a company'.

Mr Price said that the decision 'sends a clear signal to anyone running a company – in name or in effect – that they should be responsible and held accountable for their actions'.

Noting that the litigation commenced in 2009, Mr Price added that the decision demonstrates ASIC's commitment to pursuing difficult, long running actions in the public interest'.

**Implications for the ALRC's reform agenda?**

On 10 March, the Australian Law Reform Commission (ALRC) released an update, following the release of its November discussion paper, flagging that the ALRC considers that the High Court's decision is relevant in the context of considering the need (or not), at a future date, for the existing definition of 'officer' in the Act to be expanded/clarified as a means of addressing the 'accountability gap' below board level.

'Depending on how the High Court interprets the existing provision, there may be a need for statutory reform to ensure that individuals below the C-suite who are responsible for a division or business unit, and executives of parent companies, are adequately captured by the definition of "officer" in the Corporations Act' the ALRC writes.

Having said this, the ALRC makes clear that it does not consider it appropriate to recommend any specific law reform 'at the present moment' given the legislative reform on foot and the (at the time) pending High Court decision. However, the ALRC says that will recommend 'a wide-ranging review of the effectiveness of individual accountability mechanisms for corporate misconduct be commissioned by December 2025'.

*[Sources: Australian Securities and Investments Commission v King [2020] HCA 4; HCA judgement summary; ASIC: Outline of oral argument; ASIC media release 11/03/2020; [registration required] The AFR 11/03/2020]*

## ALRC confirms it will not proceed with proposed recommendations to strengthen individual executive liability for wrongdoing

**Context**: The Australian Law Reform Commission (ALRC) released a Discussion Paper — Discussion Paper 87 — on 15 November 2019 seeking feedback on 23 proposed reforms of the corporate criminal responsibility regime. Among other things, the ALRC proposed changes to current liability model for corporate offences.

- Proposal 9: recommended that The Corporations Act 2001 (Cth) should be amended to provide that, when a body corporate commits a relevant offence, or engages in conduct the subject of a relevant offence provision, any officer who was in a position to influence the conduct of the body corporate in relation to the contravention is subject to a civil penalty, unless the officer proves that the officer took reasonable measures to prevent the contravention.
- Proposal 10: The Corporations Act 2001 (Cth) should be amended to include an offence of engaging intentionally, knowingly, or recklessly in conduct the subject of a civil penalty provision (as set out in proposal 9).

[Note: For discussion of the proposals above see: ALRC Discussion Paper 87 p160-172. For a summary of the proposed reforms, including proposals 9 and 10 see: Governance News 20/11/2019 at p 24.]

The consultation on the proposed changes closed on 31 January. The ALRC is due to deliver a final report on 30 April 2020.

**Update released confirming that the ALRC will not move forward with recommendations nine and ten**

On 11 March the ALRC issued an update on its position — Corporate Criminal Responsibility: Individual Liability for Corporate Misconduct An Update — which confirms earlier media reports (see: Governance News 04/03/2020 at p32) that it will not proceed with recommending proposals nine or ten.

**Some Key Points**

- **Reasons for not proceeding with the recommendations:** The ALRC says that 'in light of developments in relation to the proposed FAR [Financial Accountability Regime] since publication of the ALRC's Discussion Paper, and feedback received from stakeholders on Discussion Paper Proposals 9 and 10, the ALRC is no longer intending to recommend the scheme it had previously put forward to address these issues'.
- **Possible future reform (to strengthen individual liability)?** The ALRC emphasises that it considers that there is 'a gap in accountability' and that though, it has no plans to recommend 'any specific law reform at the present moment', in light of the proposed FAR and 'judicial determination of the scope of officer liability awaiting judgment', it will 'recommend that a wide-ranging review of the effectiveness of individual accountability mechanisms for corporate misconduct be commissioned by December 2025'.

More particularly, the ALRC update suggests that: a) if 'proven effective' the proposed FAR could be 'extended to other sectors of the Australian economy; and b) the definition of 'officer' in the Corporations Act could (potentially) be extended, though this will 'turn in part on a case currently before the High Court'.

[Note: The High Court case referred to is: Case B29/2019, on appeal from King v ASIC [2018] QCA 352, which the ALRC hopes may provide clarity on the question of the extent to which an executive of a group of companies who is involved in the management of a subsidiary falls within the definition of 'officer' for that subsidiary. On 11 March the High Court handed down its judgment Australian Securities and Investments Commission v King [2020] HCA 4. The full text of the judgement is here. A high level overview of the decision is is included in a separate post of this issue of Governance News.]

*[Source: Corporate Criminal Responsibility: Individual Liability for Corporate Misconduct An Update]*

## Boards and Directors

### Not for everyone? Governance Institute research into attitudes towards annual director elections has identified mixed views on the issue

**Context**: Noting the global shift towards mandating and or encouraging annual director elections, the Governance Institute of Australia sought feedback on the advantages/disadvantages of mandating annual director elections for listed companies in the Australian context.

**Evidence of a global shift?**

- The UK Corporate Governance Code requires all directors of listed entities to be subject to annual re-elections on a comply or explain basis.
- In the United States, 88% of S&P 500 companies now hold annual director elections.
- In Australia, organisations such as the Australian Council of Superannuation Investors (ACSI) are encouraging listed entities to hold annual director elections on the basis that they increase director accountability.

**Governance Institute of Australia research**

**Two surveys seeking stakeholder views on the issue**: Two Governance Institute surveys were conducted last year with different groups. Overall, the results did not support the introduction of annual elections, either through mandating annual elections through the Corporations Act 2001 (Cth) or through introducing the requirement through the ASX Corporate Governance Principles on a comply or explain basis.

**Details**

1. **LRC survey results:** The first survey was of members of the Governance Institute's Legislation Review Committee (LRC) (the policy committee that assists the board of Governance Institute in promoting good governance in listed entities).
    - 59% of LRC respondents did not support the introduction of annual director elections.
    - Of the 41% who supported annual director elections, the majority (67%) considered any requirement should be introduced through the ASX Corporate Governance Principles and Recommendations on a comply or explain basis, rather than through legislation, (though some respondents indicated support for both options).
2. **Governance Institute database survey results:** A second survey of the Governance Institute's database was conducted in December 2019. While all of the respondents to the first survey either worked in, or advised listed entities the respondents to the second survey were from a broad cross section of the governance community.
    - 68% of respondents did not support the introduction of mandatory annual director elections for listed entities by an amendment to the Corporations Act.

- 47% of respondents did not support the introduction of annual director elections on an 'if not, why not basis' under the ASX Principles and 15% provided a mixed response.

**Advantages of annual director elections?** The top advantages of annual director elections nominated by respondents were that annual director elections allow a regular and timely opportunity for boards and investors to consider director performance drive better accountability, and work to improve the focus of directors on the need to be engaged in their role.

**Disadvantages of annual director elections:**

- 34% of respondents did not consider that there were any benefits to annual director elections for listed companies.
- 64% of respondents identified insufficient time for shareholders to assess a director's contribution to the board as a disadvantage of annual director elections.
- Over 50% of respondents also identified the potential for reducing the experience and the effectiveness of non-executive directors in challenging management and incentivising directors to take a short-term approach as disadvantages.
- In addition, some respondents volunteered additional disadvantages including that annual directions would: a) encourage short-termism; b) provide an imperfect mechanism for gauging director performance (a single year was seen as too short a timeframe to enable shareholders to form a view); and c) impose an unacceptably high administrative burden on companies.
- Bi-annual elections? Some respondents stated their preference for director elections to be held at least biannually.

**Conclusions?**

The Governance Institute observes that a 'majority of respondents considered that the benefits of annual director elections did not outweigh the downsides, particularly taking into account the increase in administrative costs and additional effort involved'.

However, were annual director elections introduced, respondents were more supportive of its introduction by way of the ASX Corporate Governance Principles rather than through the Corporations Act. The Governance Institute suggests that this could be indicative of the view that 'annual election of directors should not be applied to all companies on a mandatory basis because no one size fits all'.

**Next Steps: A case by case approach, rather than automatic adoption, is best**

The Governance Institute suggests that companies considering introducing annual director elections should carefully balance the advantages against the disadvantages of doing so in the context of their own organisation.

**Relevant considerations:** It's suggested that this process should include consideration of the impact annual director elections would have on:

1. the ability of individual directors to take a long term approach to strategy and risk
2. the ability of directors to develop the necessary deep knowledge and understanding of the company, its industry sector and strategy
3. board culture, board succession planning and corporate memory (ie whether it would lead to a lack of corporate memory)
4. attracting new directors
5. resourcing (ie whether the company has sufficient secretariat resources to support annual director elections)

In addition the Governance Institute suggests that boards should consider:

1. whether the company is subject to constitutional or regulatory requirements concerning board composition that would make annual director elections problematic

2. whether shareholders have sufficient information to properly consider the contribution directors make over a twelve month period
3. whether annual director elections will be disruptive and distract the board's attention
4. whether annual elections are likely to improve stakeholder engagement and drive accountability or 'simply become another "tick the box" exercise at the AGM
5. whether effective board performance evaluations offer a more effective means of dealing with issues such as overboarding, management of conflicts of interest and performance

*[Source: The Governance Institute 03/03/2020]*

# Diversity

## Mandatory board quotas for women on the boards of European listed countries? Reportedly the EU plans to revives plans to revive a draft 2012 directive

The Guardian reports that as part of a broader five year gender equality strategy, the European Union executive has signalled that it plans to proceed with a 2012 draft directive that would require European listed companies to introduce mandatory 40% quota for women on boards. Under the directive, European-listed companies would also face fines for failure to ensure that at least 40% of their non-executive board seats were taken by women.

Reportedly, the measure is being reinstated as a means addressing the continuing lack of gender equality in leadership ranks. The Guardian quotes EU commissioner for equality, Helena Dalli as saying that though quotas 'can be a very ugly word' they are also ;a necessary evil, in the sense we have to use quotas because otherwise we will wait another 100 years for things to change by themselves'. In addition, Ms Dalli reportedly said that the measure would help close the gender pay gap which has barely shifted (from 16% across the EU) over the last ten years.

According to the Guardian, the implementation of the directive is far from certain given the opposition to the proposal when it was last put forward in 2012.

*[Source: The Guardian 05/03/2020]*

## A success? KPMG study finds that the California law requiring at least one female director by the end of 2019 has improved board (gender) diversity and has not led to tokenism

### Report Overview | KPMG, The women changing California boardrooms

KPMG has released a report reviewing the impact of California's board gender quotas on board diversity.

**Context:** California Senate Bill 826 requires public companies headquartered in California that are traded on the NYSE or Nasdaq to meet minimum (gender) diversity requirements, with monetary penalties for non-compliance. Specifically the law requires that companies:

- have at least one female director by 31 December 2019 increasing to three female directors (if the board has six or more members) or two female directors (if the board has five members) by 31 December 2021. Boards with four or fewer directors, are required to include one female director.
- companies that fail to comply with the board diversity requirements may be fined $100,000 fine for first offence, increasing to $300,000 for further offences.

### Some Key Findings

- 96% of public companies headquartered in California had at least one female director by the 31 December 2019 deadline.
- Of the companies that still had all male boards as at the 31 December 2019 deadline, 74% were microcap companies and more than one third were in the health, pharmaceutical or biotechnology sectors.

- Of the female directors who joined boards:
  - 62% were first time directors
  - 94% were outside directors
  - only 16% serve on four or more boards while 69% serve on only one board and 22% serve on two to three boards (ie the majority of appointees would not be considered over-boarded)
  - 73% are actively employed in addition to their board service (46% in C suite roles including in positions such as CEO or president, CFO and COO)
  - 76% have an advanced degree with the BMA being the most common advanced degree level. Of this group, 18% hold two advanced degrees.
  - 73% had served on at least one board committee by the end of 2019
- **Unintended consequences? No evidence of 'tokenism' as a result of the imposition of quotas**

  KPMG found that the imposition of quotas has not lead to either the appointment of underqualified directors/insiders to serve on boards or to a large number of overboarded women directors. 'While only time will tell what the ultimate impact of the mandate will be…these concerns do not appear to have come to fruition' KPMG states.

*[Sources: KPMG Board Leadership Center report: The women changing California boardrooms; Bloomberg 01/03/2020]*

**Related News: Is it an unqualified success?**

Fortune reports that of the 625 companies listed on a report from the California Secretary of State:

- 300 companies didn't report the required information (though some of those firms do appear to have at least one female director); and
- 43 companies reported no women on their board in violation of the new regulation.

Fortune comments that information about compliance with the new law is 'somewhat limited' because California is currently engaged in litigation over it.

According to Fortune, PwC research indicates that the quotas are unpopular with directors. Reportedly, 83% of directors (including more than half of the women surveyed) oppose the quotas.

Fortune adds that there is evidence that the law has improved board diversity with the female director appointment rate in California higher than the overall national rate: 45% of new board seats went to women at California based Russell 3000 companies, as compared with 31% of appointments nationwide.

*[Source: Fortune 05/03/2020]*

## Gender parity on Russell 3000 boards by 2030? Equilar's latest Gender Diversity Index Q4 2019 predicts that gender parity will be achieved 18 years earlier than was predicted in Q4 2017

Equilar has released its latest gender diversity index — Q4 2019 Equilar Gender Diversity Index — which tracks changes on Russell 3000 boards on a quarterly basis as cited in 8-K filings to the US Securities and Exchange Commission (SEC).

**Some Key Points**

- **The number of female directors is increasing (slowly):** The percentage of female Russell 3000 board members increased in Q4 2019 from 20.9% to 21.5%. In contrast, when Equilar began tracking board gender diversity in January 2017, only 15% of board seats in the Russell 3000 were held by women.
- **Board gender parity predicted to be reached earlier:** Currently, 60 Russell companies 3000 have at least 50% women on their boards. At the current rate of growth of women joining boards, the Russell 3000 would achieve gender parity by 2030. Equilar comments that this is significant progress from Q4 2017 when gender parity was expected by 2048.

- **Number of all male boards is decreasing:** In Q4 2019, 7.7% of Russell 3000 boards had zero women down from 9.3% of boards in Q3 2019 and 15.8% one year ago.
- **Impact of legislated board quotas:** In Q3 2018, California ranked 29th among all US states in terms of the percentage of female board members (17.4%). California ranked in 16th position in Q4 2019, with 23.3% of directorships held by women.

Equilar comments that boards are facing increasing pressure, including by investors, to diversity and this is reflected in the results of the latest Gender Diversity Index. This trend, Equilar predicts, is likely to continue into the next decade.

*[Source: Equilar Q4 2019 diversity index 09/03/2020]*

### Facebook's board is now 40% women following the appointment of two new female directors

The FT reports that Facebook has appointed two new female directors to the board — CEO of Esetee Lauder, Tracey Travis and McKinsey executive Nancy Killefer — with immediate effect. The appointments lift the proportion of female directors to 40%.

The FT comments that the changes mean that Facebook is already compliant a new requirement under California law, that companies have at least three women on their board by 2021 if they have a board of at least six people.

The FT adds that Facebook is yet to appoint a new lead independent board director following the departure of Ms Desmond-Hellmann, who stood down in October 2019.

*[Source: [registration required] The FT 10/03/2020]*

### In Brief | Addressing the superannuation (gender) gap: The SMH reports that the Victorian government has agreed to pay public servants their full superannuation entitlements while on parental leave as part of broader wage negotiations. Separately, The SMH reports that banks, state governments and women's advocates have called on the federal government to consider requiring the super guarantee to be part of paid parental leave in submissions to the retirement income review as a means of addressing the gender superannuation gap

*[Sources: The SMH 06/03/2020; 09/03/2020]*

## Remuneration

### Expert panel reportedly agrees boards need to rethink CEO pay in order to rebuild community trust

The AFR reports that an expert panel at the Australian Governance Summit — Christian Gergis (head of policy at the Australian Institute of Company Directors), Kathleen Bailey-Lord (director of Bank of Queensland, Melbourne Water and QBE), Sylvia Falzon (director of Suncorp and Regis Healthcare), and Graham Goldsmith (chair of SEEK) — are agreed that a rethink of CEO pay is warranted in order to win back lost community trust.

Some key points from the discussion, based on the AFR report is below.

**Some Key Points**

- **Loss of community trust in business is partially attributable to the gap between worker pay and CEO pay:** Citing the results of the latest Edelman Trust barometer, Ms Bailey-Lord is quoted as saying that 'at a community level there is increased consternation as to the gap between CEO salaries and average worker salaries…The view is that CEOs rake it in and that labour gets automated out'. According to the AFR, Ms Bailey-Lord also suggested that short term incentive payments are generally not well understood by the community.
- **Balancing act?** Ms Falzon reportedly said that boards are faced with the challenge of needing to both: a) ensure the differential in worker pay vs CEO pay is justifiable; and b) attract the most capable senior

leaders/remain competitive. 'We've got the reality that we are in a competitive environment. You compete with peers in the sector for talent' Ms Falzon is quoted as saying.

- **Support for the introduction of CEO/worker pay ratio reporting?** Reportedly Mr Goldsmith said he would support the introduction of new requirements to publish the ratio between CEO and worker pay, as has been introduced in the US and the UK, on the basis that increased transparency will assist in attracting the best staff.
- **New expectation that boards understand the impact of various pay structures on employee behaviour:** Ms Bailey-Lord reportedly said boards needed to learn more about behavioural science to understand the impact of various pay structures on employee behaviour. 'Boards are now expected to take a much more activist role in understanding how incentives actually [work]' Ms Bailey-Lord reportedly said.

[Note: The AFR makes no reference to any discussion of the Australian Prudential Regulation Authority's (APRA's) draft prudential guidance on executive remuneration, CPS 511 Remuneration. APRA's discussion paper and draft guidance are available on the APRA website here. APRA has flagged that it is currently considering feedback received through the consultation process and plans to 'announce its response to the consultation feedback in the next couple of months'.]

*[Source: [registration required] The AFR 09/03/2020]*

## United Kingdom | The four top remuneration concerns for UK investors going into the AGM season

Ahead of the UK AGM season, The FT predicts that remuneration will again be a key concern for investors. More particularly the FT suggests that the following four issues will be top of mind.

1. **Pay rises:** Some investors (including Aviva Investors) have reportedly raised concerns about the 'trend of increasing total packages' in some of the pay packages proposed to date.
2. **High pension contributions for executives:** Noting the high level of investor concern over the size of pension contributions paid to executives last year, and the success shareholders had in forcing change at Standard Chartered and Lloyds, The FT suggests that pensions will again be a contentious issue. According to The FT, the Investment Association (IA) has said it will issue 'red tops' (it's highest level of warning for shareholders) to companies where directors are paid pension contributions worth more than 25% of salary, unless companies have set out a credible plan to fall into line with the rest of the workforce by 2022.
3. **Requirement to hold shares after departure:** The FT reports that the Investment Associations (IA's) guideline requiring executives to hold shares in the company for at least two years after their departure remains contentious. The measure is aimed at promoting long-term focus, but some executives have reportedly queried why they should be required to hold shares in a company over which they have no control. On the other hand, asset managers including Legal and General Investment Management (the UK's largest asset manager) has flagged plans to vote against any company where executives are not required to hold a 'significant proportion of shares (valued at 80% of salary) for two years after their departure.
4. **Bonus plans (restricted share plans):** Some companies are reportedly moving to replace their Long Term Incentive Plans with 'restricted share plans'. These typically involve reducing the maximum possible payout available to the CEO, but also giving more certainty over the size of the award. Reportedly both shareholders and some CEOs have raised concerns. The FT reports that on the one hand, shareholders are concerned that the shift will mean executives are more likely to receive awards regardless of performance. On the other hand, the plan is reportedly unpopular with some CEOs because it means forfeiting the potentially for large payouts.

*[Source: [registration required] The FT 04/03/2020]*

## COVID 19 response: Airline CEOs announce cost reduction measures, including pay cuts, in response to the virus threat

**Measures at Qantas:** Qantas has announced a range of cost reduction measures as part of its broader COVID 19 response plan, including changes to executive remuneration. The measures include: a) reducing annual management bonuses to zero for FY20; reducing board fees by 30% for FY20; reducing Group Executive Management pay by 30% (for FY20) and freezing all non-essential recruitment and consultancy work.

In addition, the Chair will take no fees and the Group CEO will take no salary for the remainder of FY20.

The airline has also asked that all Qantas and Jetstar employees take paid/unpaid leave in light of reduced flying activity. Asking all Qantas and Jetstar employees to take paid or unpaid leave in light of reduced flying activity.

**Measures at Air New Zealand:** Separately, Air New Zealand has announced that as part of its COVID 19 plan: CEO Greg Foran will reduce his base pay of $1.65 million by approximately 15% ($250,000) and the salary freeze already in place for the executive team will remain in place. In addition, the airline has implemented a hiring freeze for all roles that are non-critical and will offer operational staff the option to take unpaid leave 'in addition to managing annual leave balances'.

*[Sources: Qantas media release 10/03/2020; [registration required] The Australian 10/03/2020; BusinessInsider 09/03/2020; Air New Zealand media release 09/03/2020]*

## High Pay Centre queries CEO pay at Janus Henderson?

The FT reports that dual US-Australia listed fund group Janus Henderson's CEO earned $8.4m in total pay in 2019 (down from $9m in 2018) despite the group's financial results falling 'short of expectations'.

High Pay Centre executive director Luke Hildyard is quoted as saying that the result calls into question the link between pay and performance. 'From a management and governance perspective, what incentive is there to grow a business when you can make a huge fortune even as it declines?' Mr Hildyard reportedly said.

*[Source: [registration required] The FT 01/03/2020]*

# Disclosure and Reporting

## United Kingdom | Not mandatory TCFD disclosure (at this point): The Financial Conduct Authority has is consulting on proposals for new climate-related disclosure requirements for premium listed issuers

The UK Financial Conduct Authority (FCA) is consulting — CP20/3: Proposals to enhance climate-related disclosures by listed issuers and clarification of existing rules — on proposals aimed at improving climate related disclosures by listed issuers and clarifying existing rules.

Announcing the consultation, FCA CEO Andrew Bailey said, 'the changes we propose will help to provide the transparency the market needs to be able to assess how well companies are adjusting to the risks of climate change. Improved disclosures will support better asset pricing and enable investors to make more informed choices about where to allocate their capital – which will ultimately support the transition to a low carbon economy.'

**Some Key Points**

- **New 'comply or explain' TCFD disclosure requirement:** The FCA proposes to introduce a new rule for commercial companies with a UK premium listing, requiring them to state whether they comply with the recommendations of the Financial Stability Board's Taskforce on Climate-related Financial Disclosures (TCFD) and to explain any non-compliance.

  The FCA says that it will consider consulting on extending this rule to a wider scope of issuers.

  The FCA considers that the new rule will be a 'first step' towards adoption of the TCFD's recommendations 'more widely within our rules both as they apply to listed companies and as they apply to financial services companies.'

- **Why not mandate TCFD disclosure?** The FCA explains that it is not proposing to mandate TCFD disclosure 'at this point' because 'we recognise that issuers' capabilities are still developing in some areas and we do not want to set binding requirements that may not yet be fully achievable…We also do not want to be overly prescriptive given that standards for disclosure and modelling are evolving'.
- **Clarifications on existing requirement concerning climate/sustainability related disclosure:** The FCA also proposes to provide guidance (though a Technical Note) on existing obligations set out in EU legislation and in the FCA Handbook that may already require issuers to disclose information on climate related and other environmental, social and governance risks/issues under certain circumstances.

  This proposed updated guidance is expected to impact a wider scope of issuers including listed issuers, issuers with securities admitted to trading on regulated markets and other entities in scope of requirements under the Market Abuse Regulation and the Prospectus Regulation.

**Timing and next steps**

- The deadline for submissions to the consultation paper is 5 June 2020.
- Subject to the feedback received, the FCA plans to publish a Policy Statement, along with the finalised rules and Technical Note, 'later in 2020'.

*[Sources: FCA media release 06/03/2020; CP20/3: Proposals to enhance climate-related disclosures by listed issuers and clarification of existing rules]*

## Shareholder Activism

### Rio Tinto's failure to set Scope 3 emissions reduction targets has reportedly prompted an activist group to flag plans to file a resolution calling for tougher targets

**Context:** Rio Tinto recently announced plans to invest around $1 billion over the next five years to support the delivery of new climate change targets and a company objective for net zero emissions from operations by 2050 (see: Governance News 04/03/2020 at p27).

**Shareholder resolution?** The AFR reports that following Rio's announcement, Market Forces has flagged plans to strengthen a shareholder resolution it has coordinated by proposing tougher targets for the reduction of emissions, including Scope 1, Scope 2 and Scope 3 emissions.

The AFR comments that Rio Tinto's stance on Scope 3 emissions — the company has ruled out setting targets for Scope 3 (or customer emissions) — is 'at odds' with other mining companies including BHP, Glencore and Vale. The AFR adds that those companies' ability to reduce Scope 3 emissions is also greater than Rio Tinto given they produce carbon intensive energy commodities (eg oil, gas and thermal coal).

*[Source: [registration required] The AFR 04/03/2020]*

### Settlement reached after one week engagement? Twitter has reportedly agreed to makes board changes as part of an agreement with Elliott Management

**Elliott had reportedly raised governance concerns:** As previously reported in Governance News 04/03/2020 at p5, Elliott Management, which has reportedly taken a $1bn stake in Twitter, had reportedly privately raised governance concerns with the Twitter board, including concerns that: a) Twitter CEO Jack Dorsey, who is also CEO of fintech company Square, is insufficiently focussed on Twitter; and b) the turnover rate among senior operating and financial executives is high.

**Reportedly board changes have been agreed:** According to media reports, Elliott and Twitter have reached an agreement which requires that Twitter: a) appoint two new board members to the board; b) search for a new third independent director; and c) commit to $2 billion in share repurchases.

The agreement reportedly does not include any change to CEO Jack Dorsey's role.

*[Source: [registration required] The WSJ 09/03/2020; The Guardian 10/03/2020]*

### Activists are increasingly adding social and environmental demands to the list of 'standard' changes they're pushing for

The WSJ reports that a number of activists (though by no means all) are increasingly adding to the list of their 'standard' demands, calls for improvements to companies' environmental, social and governance (ESG) practices. The WSJ gives a number of examples of this including the following.

- Elliott Management recently suggested in its public letter to Evergy Inc that the company consider reducing its carbon footprint.
- Third Point's February letter to Prudential PLC management raised concerns about the scale of the carbon footprint created by maintaining a London headquarters for the company's American and Asian businesses.
- The decision by Jeff Ubben (a founder of ValueAct Capital Management) to buy into BP, on the strength of the company's plan to eliminate most of its carbon emissions.

Reportedly, the activists who are emphasising ESG have said it is an extension of their focus on corporate governance and is in line with their goal of driving higher shareholder returns.

The WSJ suggests that highlighting ESG issues/adding ESG demands could assist activists to win the support of funds such as BlackRock, Vanguard and State Street Corp — which are estimated to collectively hold a fifth of the S&P 500 through funds they run for investors — whose support is generally needed in order for demands to be met.

*[Source: [registration required] The WSJ 08/03/2020]*

## Institutional Shareholders and Stewardship

### In Brief | Japan's Government Pension Investment Fund, the California State Teachers' Retirement System and the UK's USS Investment Management Ltd have released a joint statement underlining the importance they place, as asset owners, on long-term sustainable growth and calling on the companies in which they invest to improve their disclosures and enhance their integration of environmental, social and governance factors into their decision making processes

*[Sources: CALSTRS media release 02/03/2020; Joint statement on the importance of long-term, sustainable growth 02/03/2020; Harvard Law School Forum on Corporate Governance and Financial Regulation 05/03/2020; [registration required] The FT 04/03/2020]*

## Other Shareholder News

### Parliamentary Inquiry to be held into Australia's class action system

Attorney General and Minister for Industrial Relations Christian Porter has released a statement announcing that a parliamentary committee will be asked to examine the 'extraordinary profits being made by the booming litigation funding industry to determine whether Australians are receiving their fair share of class action settlements'.

Mr Porter said that the Parliamentary Joint Committee on Corporations and Financial Services will be given broad terms of reference to:

- inquire into all aspects of the class action system, including whether further regulation of litigation funders is needed to improve justice outcomes
- review the broader impact of the increase in class actions on the Australian economy
- review the potential impact of a move by the Victorian Government to abolish the prohibition on lawyers being paid on a contingency basis, where lawyers claim costs as a percentage of their clients' damages.

**Timing**: The Committee will be asked to report back to Parliament by 9 November 9 2020.

**Response to the ALRC inquiry expected soon:** The statement adds that the Committee's work will 'complement the work already done in this area by the Australian Law Reform Commission' (ALRC). According to the statement, the government plans to 'shortly release' its response to the ALRC inquiry.

[Note: This appears to be a reference to the ALRC's inquiry into class action proceedings. The ALRC's final report — Report 134: Integrity, Fairness and Efficiency — An Inquiry into Class Action Proceedings and Third-Party Litigation Funders —was tabled in Parliament on 24 January 2019. MinterEllison authored the Australian Chapter of Thomson Reuters Practical Law: Class/Collective Actions Global Guide which provides an expert summary of the current procedural and regulatory framework underpinning class action litigation in Australia, including insights into the implications of the ALRC's report. The full text of the chapter can be downloaded from the MinterEllison website here.]

**Response to the announcement**

In a brief statement, the Australian Institute of Company Directors (AICD) welcomed the announcement of the inquiry adding that the AICD has previously encouraged the government consider both: a) stronger regulation of litigation funders; and b) to implement the ALRC's recommendation to conduct a review of the legal and economic consequences of the continuous disclosure and class action regimes.

Ahead of making a formal submission to the inquiry, AICD Managing Director and CEO, Angus Armour commented that the AICD 'consistently hear that this increase in class actions is leading to a risk-averse culture in Australian boardrooms which is bad for investment and the broader economy. The proliferation of securities class actions in particular has led to a crisis in Australia's directors and officers insurance market. While class actions are a very important means for people to access justice, litigation funders from around the world clearly consider Australia a prospective market where there are good returns to be made by funding litigation. Complete transparency around the returns to litigation funders against the returns to plaintiffs would go a long way to re-establishing confidence in the equity of the system. Given the economic challenges confronting the nation currently, it is good to see the Government addressing this issue.'

*[Source: Attorney General Christian Porter media release 05/03/2020; AICD media release 05/03/2020]*

### In Brief | The Australian Shareholders Association (ASA) has announced the appointment of Mr Andrew Kearnan as a Non-Executive Director of ASA. The ASA is also seeking nominations from members to fill a member board vacancy

*[Source: ASA media release 04/03/2020]*

## Meetings and Proxy Advisers

### The Australian reports that State Street has flagged climate, gender diversity and culture as key concerns ahead of the AGM season

**Climate risk**: The Australian reports that State Street Global Advisers (SSGA) has called on Australian companies to do more to build consideration of climate risk into their longer-term strategies and decision making. The Australian quotes State Street's global co-head of asset stewardship Ben Colton as saying that SSGA considers that Australian 'companies are often responding very tactically to what is a long-term strategic matter' and that SGGA is 'absolutely committed to ensuring companies are thinking about climate and incorporating it into their long-term strategies'.

The Australian comments that Mr Colton's comments add to the pressure already on boards to lift standards. The comments follow SSGA's announcement earlier in the year that it will start voting against the boards of large companies that fail to make sufficient progress on environmental, social and governance issues, BlackRock's announcement that it will be 'increasingly disposed to vote against management' teams that fail to make sufficient progress on these issues and, in Australia pressure from the Australian Council of Superannuation Investors to take action on climate risk.

**Culture:** The Australian reports that following the Financial Services Royal Commission last year, and SGGA's global push for more boardroom and management accountability for company culture, culture remains an issue of concern. More particularly, SSGA is reportedly looking for more disclosure from companies about the metrics used to measure, monitor and assess culture. Mr Colton is quoted as saying, 'It is something we have talked about extensively with companies. It continues to be a thematic priority. We are seeing how it links closely with human capital management…They need to show what kind of culture they want to have and be able to monitor it effectively'. Reportedly, Mr Colton added that he considers that some Australian companies are at the 'cutting edge globally' in their monitoring of the issue.

**Gender diversity**: Reportedly in the three years since the launch of SSGA's Fearless Girl campaign (which is designed to improve gender diversity in corporate leadership) SSGA engagement has resulted in 681 publicly traded companies with all male boards adding at least one female board member, including 30 companies in Australia. On the issue of board diversity, Mr Colton is quoted as saying that he considers 'Australia is ahead of the curve…There are also some very prominent chairman positions headed by women in Australia, which is very encouraging'. Mr Colton reportedly added that SSGA will start voting against the entire nominating and governance Committees of the 29 'recalcitrant' Australian companies with all male boards with a year, if there is no change. 'For us that can't be justified and that is why we are holding directors to account for it…This is an issue that is important regardless of the industry you are in' Mr Colton reportedly said.

*[Source: [registration required] The Australian 09/03/2020]*

**In Brief | COVID-19 is responsible for the spike in the use of online voting at AGMs? IT News reports that Swiss technology firm Sherpany has said that there has been a considerable uptick in the usage of both online voting at this year's AGMs and usage by company boards and executives of remote meeting facilities. The firm reportedly attributes this primarily to the impact of both travel restrictions implemented by the Swiss government to contain the spread of COVID 19 and to investor's desire to avoid large gatherings for fear of infection**

*[Source: ITNews 06/03/2020]*

## Financial Services

### Top Story | Super 2020: the BEAR necessities and a FAR horizon

**Expert insights into what the proposed Financial Accountability Regime will entail in the superannuation context.**

**Context**

The government recently released a proposal paper seeking feedback on plans to extend the existing Banking Executive Accountability Regime (BEAR) to all Australian Prudential Regulation Authority (APRA) regulated entities and to directors/senior executives in accordance with the government's response to several Hayne Commission recommendations. The expanded regime will be called the Financial Accountability Regime (FAR).

Consultation on the proposed changes closed on the 14 February and the government has flagged its intention to introduce legislation to by the end of the year. However, no precise implementation date has been confirmed.

**Extending the BEAR to the superannuation sector: expert insights**

MinterEllison's Mark Standen recently presented a paper at the Law Council Conference, on the implications of extending the proposed FAR regime to the superannuation sector.

[Note: The full text of the paper can be downloaded in full from the MinterEllison website here.]

The paper includes:

- a detailed overview of the BEAR and the proposed FAR regimes
- key differences between the two regimes
- expert insights into the practical issues trustees are likely to face in implementing the proposed FAR (informed by the experiences of ADIs over the past two years).

### Seven steps for implementing the proposed FAR

Mr Standen suggests that a practical approach to a FAR implementation project for an RSE licensee is likely to include the following seven steps:

1. determine an executive sponsor for the project and establish a supporting steering group (ie, CEO, Business Executive, CRO, Head of Legal, or HR);
2. gather a picture of current state (organisational structure charts, role descriptions, employment arrangements, etc) so that a 'gap analysis' to FAR target state can be determined;
3. schedule board and executive team briefings to raise awareness and answer questions the board and executive may have on the implications of FAR on their roles;
4. conduct sessions where key executives can workshop how they might respond to some of the scenarios criticised in the Financial Services Royal Commission (FSRC), or which may be identified as being issues of concern within the organisation, if they were the relevant accountable persons;
5. gather a multidisciplinary team to support the project, including specialised experience in legal, executive remuneration and governance;
6. start the process early as industry has found the process more complicated than originally anticipated and have needed time to understand and resolve the complexities; and
7. see the opportunities for the organisation and the industry and communicate those benefits early on to key stakeholders.

Commenting on the proposed changes, Mr Standen emphasised the value of early preparation. 'Given the complexity of the changes, it would be prudent for entities to start thinking, if they haven't already, about some of the steps I've outlined in the paper. We don't know exactly when the changes will be introduced, and we don't know that the detail will remain exactly the same as what has been proposed, but we know that change is inevitable and therefore, as Deputy Chair Helen Rowell recently said , it makes sense to start to prepare.'

Full text of the paper: The full text of the paper can be accessed on the MinterEllison website here.

## Unintended consequences? The AFR reports that superannuation fees have increased for some members following the government's protecting your super reforms

The AFR reports that a Senate Estimates hearing has heard that some superannuation funds have increased fees for certain members, following the passage of the government's protecting your superannuation reforms (which were aimed at reducing member fees).

Reportedly, the Australian Prudential Regulation Authority (APRA) has said that five or six superannuation funds have raised fees since the passage of the legislation.

AustralianSuper reportedly wrote to members in January regarding a new levy (due to be implemented 1 April) which the fund (reportedly) said was being introduced in response to the government's changes. The AFR reports that ASIC has requested further detail concerning the communications and that some changes have been made to disclosure around the new levy.

According to the AFR, APRA does not consider that AustralianSuper has breached its obligation to act in the 'best interests' of members by introducing the new levy, as reducing fees on low balance accounts would necessarily have consequences for other members as funds review their overall fee and cost structures. 'One response would be to cut expenditure on investment, or review fees. Some members will benefit and some members will not and pay a higher cost as a result of that' APRA Deputy Chair Helen Rowell is quoted as saying.

*[Source: [registration required] The AFR 06/03/2020]*

## Top Story | Final foreign financial services regime released

Following consultation, the Australian Securities and Investments Commission (ASIC) has released its new regulatory framework for foreign financial services providers (FFSPs) providing financial services to Australian wholesale clients. The new framework replaces ASIC's previous licensing exemptions for foreign providers.

MinterEllison has prepared a short article on the changes. The full text can be accessed on the MinterEllison website here.

## FSC supports the passage of the Your Super, Your Choice Bill

**Context**: Treasury Laws Amendment (Your Superannuation, Your Choice) Bill 2019 passed the House of Representatives on 12 February and is currently before the Senate. Broadly, the Bill proposes to enable employees under workplace determinations or enterprise agreements to choose their preferred superannuation fund for their compulsory employer contributions.

The Bill was referred to the Senate Economics Legislation Committee on 28 November for report by 20 March. The Committee held a public hearing on 9 March.

**The Financial Service Council supports the passage of the Bill**: Appearing before the Senate Economics Committee on the Treasury Laws Amendment (Your Superannuation Your Choice) Bill 2019, The Financial Services Council (FSC), consistent with its submission to the Committee, reinforced its support for the Bill on the basis that all consumers should have the ability to choose their own superannuation fund.

FSC CEO Sally Loane said that she could see 'no justification' for preventing consumers for choosing their own fund and called for further reform to staple one 'high quality default fund' to consumers (to avoid the issue of multiple accounts). 'For those individuals who want to choose, they should have the freedom to manage their superannuation as they wish' Ms Loane said.

**One recommendation:** The FSC's submission makes one recommendation, namely that the Bill be amended to require that all employees on existing or expired agreements be granted choice of fund by a certain date, for example one year after royal assent, to provide certainty to employers and ensure workers are not disadvantaged.

*[Sources: FSC media release 09/03/2020; FSC Submission: Treasury Laws Amendment (Your Superannuation, Your Choice) Bill 2019] :*

## Work test draft legislation released: Treasury is consulting on draft legislation aimed at helping Australians aged 65 and over to boost their retirement savings

On 5 March, the government released draft legislation — [exposure draft] Treasury Laws Amendment Bill 2020: Improving Flexibility for older Australians, [exposure draft] regulations and accompanying explanatory materials — for consultation.

Announcing the consultation, Assistant Minister for superannuation, financial services and financial technology Jane Hume said that the purpose of the changes is to 'help Australians aged 65 and over to boost their retirement savings'.

### Three key changes

Broadly, the draft laws propose to:

- amend the Superannuation Industry (Supervision) Regulations 1994 to allow people aged 65 and 66 to make voluntary contributions without meeting the work test (ie the work test would apply to people aged 67 and over);
- allow people aged 70 to 74 to receive spouse contributions by increasing the maximum age from 69 to 74 years (ie increase the cut off age for spouse contributions to 74); and
- extend access to the bring-forward arrangements to people under 67 years of age (ie to people aged 65 and 66).

### Timing

- The due date for submissions to the consultation is 3 April.
- The proposed commencement date is 1 July 2020.

*[Sources: Treasury consultation: Exposure draft Bill; Exposure draft regulations; Exposure draft explanatory statement (Bill); Exposure draft explanatory statement (Regulations); Assistant minister for superannuation, financial services and financial technology Jane Hume 05/03/2020]*

## AFCA says that complaints about home loans increased 20% between July and December 2019

The Australian Financial Complaints Authority (AFCA) has released the latest six monthly update on financial complaints through the AFCA Datacube.

**Some Key Points**

- **20% uptick in home loan complaints:** AFCA found that complaints about home loans increased 20% between July and December 2019 with the financial ombudsman receiving 2201 complaints about home loans during the period.

  AFCA Chief Operating Officer Justin Untersteiner attributed the increase to 'financial firms failing to respond to requests for assistance, the conversion of loans from interest only to principal and interest and issues with responsible lending'.

- **Fewer complaints about financial advice:** AFCA identified that complaints about financial advice decreased significantly over the period to 30 per month. Likewise, complaints about debt buyers or collectors rose by 'just 5%'.
- **Most complained about products/issues**:
  - credit cards were the most complained about product (2,748 complaints)
  - home building insurance was the most complained about insurance product (1,445 complaints)
  - Account administration was the most complained about superannuation issue (1,129 complaints)
  - derivatives, hedging and securities was the most complained about investment and advice product (794 complaints)

*[Source: AFCA media release 10/03/2020; [registration required] The AFR 10/03/2020]*

## Financial advice fee consents and independence: ASIC is consulting on three draft legislative instruments ahead of the passage of draft legislation proposing to implement the government's response to Hayne recommendations 2.1, 2.2 and 3.3

**Context:** Consultation on draft legislation proposing to implement the government's response to Hayne commission recommendations 2.1 (annual renewal and payment of ongoing fee arrangements), 2.2 (disclosure of lack of independence) and 3.3 (limitations on deducting advice fees from superannuation choice accounts) closed on 28 February.

Broadly, the relevant draft legislation proposes to introduce new requirements to: a) seek consent to the deduction of ongoing fees (Recommendation 2.1); b) seek consent to the deduction of ongoing and non-ongoing advice fees from choice superannuation products and meet other requirements (Recommendation 3.3); and c) provide disclosure of a lack of independence (Recommendation 2.2).

The draft legislation also proposes to give the Australian Securities and Investments Commission (ASIC) power to make certain legislative instruments to implement aspects of the Hayne Commission's recommendations.

[Note: The draft legislation referred to above is available on the Treasury website here: Ongoing fee arrangements and disclosure of lack of independence and Advice Fees in Superannuation. For high level summaries of the draft legislation see: Governance News 05/02/2020 at p13-14 and p16]

**Consultation on three draft legislative instruments**

Ahead of the passage of the draft legislation, ASIC has released three draft legislative instruments (based on the exposure draft legislation) and an accompanying consultation paper — Consultation Paper 329: Implementing the Royal Commission recommendations: Advice fee consents and independence disclosure (CP 329).

1. Draft ASIC Corporations (Consent to Deductions — Ongoing Fee Arrangements) Instrument 2020/XX: Sets out requirements for the giving of written consent (or 'express written authority') for the deduction of ongoing fees (ie fees payable under an ongoing fee arrangement) from a client's account (Recommendation 2.1).

2. Draft ASIC Superannuation (Consent to Pass on Costs of Providing Advice) Instrument 2020/XX: Sets out proposed requirements for the member consent form to deduct fees ('non-ongoing fees') from a member's superannuation account for an arrangement that is not an ongoing fee arrangement ('non-ongoing fee arrangement') (Recommendation 3.3).

3. Draft ASIC Corporations (Disclosure of Lack of Independence) Instrument 2020/XX: Sets out proposed requirements for the written statement that discloses a lack of independence (Recommendation 2.2).

**Updating RG 245: fee disclosure statements**

ASIC says it plans to update RG 245 fee disclosure statements, in mid-2020 and is seeking feedback obligations around ongoing fee arrangements, including renewal notices and fee disclosure statements. ASIC says that to 'offer more clarity and certainty to industry', the updated guidance will address the key areas of non-compliance identified in ASIC Report 636 Compliance with the fee disclosure statement and renewal notice obligations (for a summary see: Governance News 04/12/2020 at p24).

**Regulatory Guidance**

ASIC says that it is not proposing to issue new regulatory guidance about the proposed changes to implement recommendations 2.1,2.2 and 3.3. Rather, the explanatory statements accompanying the final legislative instruments will provide guidance about the requirements in the instruments.

**Why consult on draft legislative instruments before the legislation has been finalised?**

ASIC says that in order to allow time to review submissions to the consultation and finalise the draft instruments in time for the planned commencement of the final legislation on 1 July 2020, it has released draft instruments for a four week consultation 'notwithstanding that our proposals may need to change depending on the final legislation'.

ASIC says that it will take into account 'any changes to the final legislation and the submissions to this paper when making the final instruments'.

**Timing:**

- The deadline for submissions is 7 April 2020.
- ASIC says that legislative instruments will be made (subject to the passage of legislation) by 1 July 2020.

*[Sources: ASIC media release 10/03/2020; Consultation Paper 329 Implementing the Royal Commission recommendations: Advice fee consents and independence disclosure and draft instruments; Attachment 1 to CP 329 – Draft ASIC Corporations (Consent to Deductions—Ongoing Fee Arrangements) Instrument 2020/XX (PDF 86 KB); Attachment 2 to CP 329 – Draft ASIC Superannuation (Consent to Pass on Costs of Providing Advice) Instrument 2020/XX (PDF 75 KB); Attachment 3 to CP 329 – Draft ASIC Corporations (Disclosure of Lack of Independence) Instrument 2020/XX (PDF 71 KB)]*

## Inquiry into Future Directions for the Consumer Data Right: Issues Paper released for consultation

**Key Takeouts**

- **Future focussed:** The Issues Paper states that the focus is on the future purpose, use and 'vision' for the Consumer Data Right rather than on its current implementation or the sectors to which it should next be applied.
- **Write access:** A key focus of the inquiry is how the Consumer Data Right could be expanded beyond the current 'read' access to include 'write' access, which could enable customers to direct third parties

to apply for and manage products and services on their behalf. The Inquiry will consider potential benefits of, and barriers to, implementing write access, including regulatory compliance costs.

- **Timing:** The deadline for submissions is 23 April 2020.

**Context**: In January the Treasurer announced an Inquiry into Future Directions for the Consumer Data Right to be led by Scott Farrell.

Broadly, under its Terms of Reference, the Inquiry is tasked with making recommendations on options to: a) expand the functionality of the Consumer Data Right; b) ensure the Consumer Data Right promotes innovation in a manner that is inclusive of the needs of vulnerable consumers; c) leverage Consumer Data Right infrastructure to support the development of broader productivity enhancing standards and a safe and efficient digital economy; and d) leverage the development of the Consumer Data Right with other countries that are developing similar regimes, to enhance opportunities for Australian consumers, businesses and the Australian economy.

The Terms of Reference for the Inquiry are available on the Treasury website here.

**Issues paper released:** On 6 March 2020, the Inquiry released an Issues Paper — Issues Paper: Inquiry into Future Directions for the Consumer Data Right March 2020 — for consultation.

Issues on which the Inquiry seeks feedback include the following (among others):

- **Promoting 'switching':** The Inquiry seeks feedback on how the Consumer Data Right could be used to overcome behavioural and regulatory barriers to 'safe, convenient and efficient switching between products and providers, whether those barriers are sector-specific or common across industries'.

- **Expanding read access:** The Inquiry seeks feedback on expanding the scope of current 'read' access functionality and options for expanding it including: a) the potential to develop a 'consent taxonomy', using standardised language for consents across providers and sectors; b) how best to enable consumers to keep track of, and manage, their various consents; c) the promotion of industry cooperation on standards for 'voluntary' data sets; d) how the creation of a safe and efficient ecosystem of participants and service providers could be accelerated; e) the scope for use of tiered accreditation to promote broader access without increasing risk; and f) any other 'read' access functionality that the Inquiry should consider.

- **How the Consumer Data Right could be expanded to include write access:** The paper observes that 'write access' could enable customers to direct third parties to apply for and manage products and services on their behalf eg in the open banking context, by making payments and changing accounts, through application programming interfaces (APIs). The Inquiry seeks input on potential linkages and interoperability between the Consumer Data Right and existing (and future) frameworks and infrastructure including potential linkages and interoperability with other consumer-directed domestic and international data portability regimes, and accreditation frameworks that focus on data risk management.

- **Could Consumer Data Right infrastructure play a broader role in the digital economy:** The paper observes that the Consumer Data Right has established solutions to problems that may also exist elsewhere in the digital economy eg in relation to data portability and custodianship of data. The inquiry seeks feedback on the role that the legal, infrastructure or organisational arrangements that have been developed for the Consumer Data Right could play in the digital economy more broadly. For example, whether the Data Standards Body and accreditation regime be leveraged to support the development of productivity-enhancing initiatives within the digital economy more broadly.

- **Consumer protection:** The Inquiry seeks feedback on how to ensure that, the Consumer Data Right develops in an ethical and fair manner that is inclusive of the needs and choices of all consumers. This includes ways to encourage socially beneficial uses for the Consumer Data Right.

**Timing**: The due date for submissions is 23 April 2020.

*[Sources: Treasury consultation; Issues Paper: Inquiry into Future Directions for the Consumer Data Right March 2020]*

### United States | The CFPB has commenced proceedings against Fifth Third Bank in connection with (alleged) fake accounts

The Consumer Financial Protection Bureau (CFPB) has commenced proceedings against Fifth Third Bank, National Association (Fifth Third).

Broadly, the CFPB alleges that that Fifth Third:

- inappropriately incentivised staff to open unauthorized accounts and enrol consumers in unauthorised products and services; and
- despite knowing since at least 2008 that employees were opening unauthorised consumer-financial products and services, took 'insufficient steps' to detect and stop misconduct and identify and remediate harmed consumers.

The CFPB is seeking an injunction to prevent Fifth Third's (alleged) unlawful conduct, redress for affected consumers, and the imposition of a civil money penalty.

**Response to the allegations:** The WSJ quotes Fifth Third as dismissing the allegations as 'unnecessary and unwarranted'. 'Fifth Third's compensation and employee incentive structure does not reward retail employees for opening unauthorized accounts, nor does it give them sales quotas or product-specific targets…Our controls are designed to prevent and detect unauthorized account openings' the bank is quoted as saying.

*[Sources: CFPB media release 09/03/2020; CFPB complaint; [registration required] The WSJ 09/03/2020]*

### In Brief | Consumer group CHOICE has cautioned consumers against 'panicking' about the impact of COVID-19 on the share market and more particularly, has said consumers should not make drastic changes to the superannuation because of COVID-19. Rather, CHOICE suggests it may be an opportunity for members to consider whether they are comfortable with the risk level of their super investments

*[Source: CHOICE media release 10/03/2020]*

### In Brief | The Super Guarantee Amnesty Bill — Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019 — received Royal Assent on 6 March. Employers have six months to take advantage of the amnesty (it is set to expire in six months' time)

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

### In Brief | Smaller banks risk being swamped by relentless banking reforms? COBA has called on the Federal government 'to reconsider the approaching wave of banking regulation as the low interest rate environment squeezes competition'. In light of the various 'sweeping changes' to the regulatory landscape, COBA asks that the government 'more systemically assess the cumulative cost burden of continuous regulatory change in banking, particularly on customer owned banking institutions' who would rather 'focus on customer service'

*[Source: COBA media release 06/03/2020]*

## Accounting and Audit

### Top Story | Climate Risk: Expert guidance on scenarios and assumptions that accountants and auditors might refer to in stress testing and scenario planning exercises

MinterEllison's experts, together with the University of Melbourne and Commonwealth Climate & Law Initiative have prepared a report for CPA Australia on the range of climate-related scenarios and assumptions that auditors might refer to in stress testing and scenario planning exercises for non-current assets. The full text of the paper can be downloaded here.

## The APESB has released a draft update to the auditor independence guide: feedback is due by 23 March

The Accounting Professional & Ethical Standards Board (APESB) is seeking feedback on a draft update to its independence guide — The Draft Independence Guide (5th Edition) — which sets out independence requirements for audits, reviews and other assurance engagements.

**Some Key Changes**

Major changes in the draft updated version include: a) applying the enhanced conceptual framework in the APES 110 Code of Ethics for Professional Accountants (including Independence Standards) (the Code) to existing examples of independence issues; b) including additional examples in Chapters 7 and 8 on the application of the enhanced conceptual framework to independence issues; and c) updating all references to parts, sections and paragraphs of the restructured Code.

**Timing:** The closing date for feedback on the proposed changes is 23 March 2020.

The draft guide includes proposed changes to align the content and examples with the restructured APES 110 (Code of Ethics for Professional Accountants), effective from 1 January 2020, and the enhanced conceptual framework.

*[Sources: APESB media release 06/03/2020; APESB: The Draft Independence Guide (5th Edition)]*

## Response to the PJC Audit Inquiry Interim Report recommendations: The AFR reports that there are mixed views on how best to prevent conflicts of interest and concerns (from some quarters) about introducing digital reporting

**Context:** The Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the regulation of auditing in Australia released an interim report on 27 February. The interim report makes ten 'substantive policy recommendations' aimed at raising audit quality standards and rebuilding trust/confidence in audit. Among other things:

- Recommendation three of the report recommends the development and introduction of a list of non-audit services that audit firms are explicitly prohibited from providing by the end of the 2020–21 financial year.
- Recommendation ten of the report recommends that digital financial reporting be made standard practice in Australia.
- Recommendation nine recommends that the external auditor report on management's assessment of the entity's internal control framework for financial reporting.

For high level summary of the Interim Report see: Governance News 04/03/2020.

**Response to the interim report recommendations**

**Conflicts of Interest**

The AFR reports that responses to recommendation three of the report have been mixed.

**The right way to address conflicts:** The AFR reports that former Australian Competition and Consumer Commission (ACCC) Chair Graeme Samuel has expressed support for the Committee's approach to preventing conflicts of interest, and more particularly the decision by the Committee against recommending structural separation of audit from non-audit services.

Mr Samuel is quoted as saying 'the separation remedy is a constant refrain from those who believe that the only way to deal with these issues [conflict issues] is to have a structure that makes it easy to perceive that there can be no conflict. But it is a harsh measure, devised to diminish the regulator's burden of oversight. The committee has done that particularly by asking the FRC to prepare a definition of audit related and non-audit related services which will define the restrictions on cross-servicing in very clear terms.'

**Imposing more rules is unlikely to be effective**: The AFR reports that Macquarie University accounting Professor James Guthrie has questioned whether the recommendations, and more particularly recommendation three, will be effective in preventing conflicts, given that existing legal requirements are regularly 'flouted'. Professor Guthrie is quoted as saying that 'the Corporations Act already requires certain disclosures regarding statutory audit fees and non-audit fees which is being flouted…To date the issue is the accounting profession, regulators or other interested bodies have not audited the auditors' practices and disclosures as per the ethics requirements and Corporations Act.'

Instead, Professor Guthrie has reportedly called for the Australian Securities and Investments Commission (ASIC) to 'undertake substantially more work' looking at the ethics requirements and practice of audit by the big four firms and for additional financial resourcing to enable ASIC to perform its work.

*[Source: [registration required] The AFR 11/03/2020]*

**Digital reporting**

The AFR reports that The Group of 100 (G100), which is the peak body for CFOs, has raised concerns about recommendation ten of the report (ie the recommendation to make digital reporting standard practice) on the basis that the introduction of digital reporting will limit flexibility in reporting results. Chair of the G100 and CFO of the REA Group Janelle Hopkins is quoted as saying, 'digital financial reporting is easier in jurisdictions such as the US with its quarterly reporting requirements and far more standardised reports… In Australia, companies have had more flexibility to report their results — whilst always in accordance with the relevant Accounting Standards — in ways that best suits them, the industry that they are in and the needs of their stakeholders… Such reporting is more difficult to be 'shoe-horned' into digital templates. It can be done, but larger listed companies will still need to present their reports in a way that meets their and their stakeholder needs, and more cost and time may be incurred in populating such templates and explaining why surface comparisons are perhaps not relevant.'

**Proposal for auditors to report on management's assessment of internal control systems**

The AFR reports that Ms Hopkins has queried whether the recommendation that auditors report on the accuracy of management's assessment of the adequacy/efficiency of their internal financial reporting systems is necessary given that the ASX Corporate Governance Guidelines already recommend that a listed company's board should declare its financial reporting systems and internal controls are properly maintained and working.

If it is implemented, Ms Hopkins reportedly said that the recommendation would 'take some time to work through – what the scope of the extension of the audit will be, what the standards and guidelines will be in terms of the type of audit work that will need to be done, how will it actually be reported on and what should the report actually say. This may lead to some increased cost to shareholders but may well provide additional comfort to them and to boards and audit committees as long as the cost and potential disruption does not outweigh the benefits'.

*[Source: [registration required] The AFR 11/03/2020]*

### In Brief | Introducing a version of the Sarbanes-Oxley regime in the UK? The FT reports that the UK government is planning to launch a second consultation on implementing the Kingman Report recommendations including introducing new requirements for company directors to be responsible for certifying the accuracy of financial statements and expanding the definition of a public interest entity. No timeframes for the consultation are given

*[Source: [registration required] The FT 09/03/2020]*

# Risk Management

## Whistleblowing

### United States | The CFPB is pushing for the establishment of a whistleblower award program

The Consumer Financial Protection Bureau (CFPB) has announced a three step strategy to further its priority of preventing consumer harm, including pushing Congress to enact legislation to enable the CFPB to pay an award to whistleblowers for reporting wrongdoing.

**Details: Three step plan**

1. **Implementing an advisory opinion program:** the program will provide guidance (in the form of advisory opinions) to assist companies in better understanding their legal and regulatory obligations

2. **Amending and reissuing its responsible business conduct bulletin:** The updated bulletin identifies four categories of responsible conduct: self-assessing, self-reporting, remediation, and cooperation. It makes clear that if an entity 'meaningfully engages in these activities, the Bureau will favorably consider it, along with other relevant factors, in addressing violations of Federal consumer financial law in supervisory and enforcement matters'.

3. **Whistleblower award program:**

   - **The CFPB says that it will engage with Congress to advance proposed legislation** that would authorise it to pay whistleblowers who voluntarily report violations of Federal consumer financial law and award for doing so (where the information reported by the whistleblower leads to a successful enforcement action). The award would be based on a percentage of the monetary sanctions collected in the enforcement action.

   - **The CFPB has submitted proposed legislative language** to US Speaker Nancy Pelosi, Senate President Michael Pence and the Chairs and Ranking Members of the authorising committees in both chambers.

Commenting on the CFPB's plan overall, CFPB Director Kathleen L Kraninger said that 'these steps reinforce the Bureau's commitment to preventing consumer harm. Advisory opinions will ensure that companies know what compliance entails and what constitutes a violation. We also want to incentivise whistleblowers to contact us if they believe their employer is not complying with the law'.

*[Source: CFPB media release 06/03/2020; [registration required] The WSJ 09/03/2020]*

## Cybersecurity, Technology and Privacy

### OAIC has commenced civil proceedings against Facebook in connection with its role in the Cambridge Analytica scandal

The Australian Information Commissioner (OAIC) has commenced proceedings against Facebook in the Federal Court, alleging the social media platform has committed serious and/or repeated 'interferences with privacy' in contravention of Australian privacy law.

Broadly, OAIC alleges that:

- during the period March 2014 to May 2015, Facebook disclosed the personal information of Australian Facebook users to This Is Your Digital Life, in breach of Australian Privacy Principle 6. OAIC alleges that most of the users did not install the app themselves, and their personal information was disclosed via their friends' use of the app.

- Facebook did not take reasonable steps during the period to protect its users' personal information from unauthorised disclosure, in breach of Australian Privacy Principle 11.

[Note: The Concise Statement and Statement of Claim (excluding material asserted to be confidential by Facebook, set out the allegations in more detail.]

OAIC says that these actions 'left the personal data of around 311,127 Australian Facebook users exposed to be sold and used for purposes including political profiling, well outside users' expectations'.

**Relief sought:** OAIC is seeking:

1. declaratory relief under s 21 of the Federal Court of Australian Act 1976 (Cth);

2. orders that Facebook pay civil pecuniary penalties under s 80W of the Privacy Act (as applicable for contraventions that occurred during the Relevant Period); and

3. costs.

OAIC states in the Concise Statement that it considers that each alleged contravention within the relevant period constitutes a contravention of s13G(a) and/ (b) of the Privacy Act (each contravention attracts a maximum penalty of $1,700,000).

Commissioner Falk is quoted as saying that OAIC considers that 'these were systemic failures to comply with Australian privacy laws by one of the world's largest technology companies'.

**Facebook's response:** The FT reports that Facebook has said it has been engaging with OAIC over its two year investigation. The FT quotes Facebook as stating, 'We've made major changes to our platforms, in consultation with international regulators, to restrict the information available to app developers, implement new governance protocols and build industry-leading controls to help people protect and manage their data. We're unable to comment further as this is now before the Federal Court'.

*[Source: OAIC media release 09/03/2020; Concise statement; Statement of claim (excluding material asserted to be confidential by Facebook); The Guardian 09/03/2020; [registration required] The FT 09/03/2020]*

### Time to work together to counter cyber-crime: Managing Director of Toll Thomas Knudsen has reportedly called for cooperation to address the growing threat

Managing Director of Toll, Thomas Knudsen has reportedly cautioned other firms that they are not impervious to cyber attacks like the Mailto attack recently directed at Toll, suggesting that it is only a matter of time before other businesses are targeted.

Reportedly Mr Knudsen has called for greater collaboration between business, government and regulators to tackle the escalating global threat.

'I've been telling people for the last couple of years that it's not a question of if you will be hit by a cyber attack, it's when it will happen to you, and then the question becomes how impactful will it be? The risk of cyber crime is one of the largest that I see going forward, and it means we need to be working as one – government, industry, regulators, etc – to counter what is an existential threat ... Toll has both a duty and opportunity to contribute to the collective response' Mr Knudsen is quoted as saying.

*[Source: [registration required] The AFR 10/03/2020]*

### TAFE data breach reportedly exposes 55,000+ student and staff files

ITNews reports that the personal information, health and financial data of 50,000+ Melbourne Polytechnic students, staff and suppliers has been accessed in a data breach which occurred sometime between September and December 2018. Melbourne Polytechnic is reportedly one of Victoria's largest TAFEs.

According to ITNews:

- the TAFE was notified of the data theft in October 2019 and has been working since then to determine the extent and scale of the breach.
- the TAFE has started to contact affected individuals whose personal data was accessed in the breach.
- The individual allegedly responsible for the breach has reportedly been charged by police.

ITNews quotes Melbourne Polytechnic CEO Frances Coppolillo as apologising to all groups impacted by the breach and for the length of time it has taken to communicate it, 'In sharing your information, you expected us to keep it safe and I am sorry that we were not able to do so. We are deeply sorry for the impact that the theft of this personal data might have' Ms Coppolilo reportedly said.

*[Source: IT News 11/03/2020]*

## Climate Risk

### The FT reports that ExxonMobil has reaffirmed plans to push forward with oil and gas projects and resisted calls to set emissions targets

The FT reports that Exxon Mobil CEO Darren Woods has reaffirmed the company's commitment to push forward with oil and gas projects at the company's annual investor day. Reportedly, Mr Woods said that the continued investment in the projects would yield bumper profits when commodity markets tighten. 'We want to ensure that we're well-positioned for the inevitable upswing as growth in demand outstrips current supply' Mr Woods reportedly said.

According to The FT, Mr Woods also rejected calls to set carbon-emissions targets. 'Individual companies hitting targets and then selling assets to another company so that their portfolio has a different carbon intensity has not solved the problem for the world. It hasn't made a dent in it. And in some cases, if you're moving to a less effective operator, you've actually made the problem worse' Mr Woods is quoted as saying.

Asked about BlackRock CEO Larry Finks annual CEO letter in which Mr Fink cautioned that a 'significant reallocation of capital' is likely as investors respond to the risks of climate change, Mr Woods reportedly said that he had met with Mr Fink and had discussed it. According to Mr Woods his view is that the transition to a low carbon economy will take time, and that 'what at was missing from the letter I think explicitly is the time dimension'.

Reportedly Chevron is of a similar view. The FT quotes Chevron CEO Michael Wirth as saying that 'you could change the carbon footprint of your profile by changing your asset mix, and you could move higher emission assets to less responsible operators that won't have commitments to reduce the intensity of those operations. And guess what, the world hasn't reduced greenhouse gas emissions'. On this basis, the company will not 'play a shell game with our portfolio' to meet climate goals, Mr Wirth reportedly said.

The FT comments that Exxon's stance is at odds with a number of peer organisations. For example, a number of other companies have made commitments to reduce the amount of carbon dioxide they emit. BP in February pledged net-zero carbon emissions from the oil and gas that it produces by 2050. Eni, the Italian energy group, last week pledged to cut its greenhouse gas emissions by 80% by 2050 and said its oil and gas production would peak in 2025.

*[Source: [registration required] The FT 06/03/2020]*

## Independent MP Zali Steggal plans to introduce the Climate Change Bill as a private member's Bill on 23 March

**Context:** Broadly, the Bill which is modelled on legislation already in place in the UK, proposes to: a) commit Australia to a net-zero emissions target by 2050; b) mandate a national climate risk assessment and a national adaptation program; and c) establish an independent Climate Change Commission.

[Note: The full text of the Bill is available here.]

In a short email update sent 5 March, Ms Steggal said that:

- **The Bill has community support:** Ms Steggal says that more than 67,000 people have signed up to support her Climate Change Bill via the climateactnow.com.au website. In addition, the Bill has received support from Atlassian, The Australian Business Council, WWF, Celeste Barber and her husband Api Robin and journalist Sarah Wilson (among others).
- **Timing:** Ms Stegall plans to introduce the Bill as a Private Member's Bill into the house of Representatives on 23 March.

*[Source: Community Update 05/03/2020]*

## In Brief | EU to be climate neutral by 2050? The European Commission has proposed a new Climate Law which would: a) set a binding target of net zero greenhouse gas emissions by 2050; b) require EU Institutions and the Member States to take the necessary steps to meet the target; c) include measures to keep track of progress and adjust actions accordingly; and d) mandate a five year progress review in line the global stocktake exercise under the Paris Agreement

*[Sources: EU Commission press release 04/03/2020; [registration required] The FT 06/03/2020; [registration required] Business Green 04/03/2020]*

## COVID-19

### APRA's assessment of the impact of COVID-19 on APRA regulated entities and on the broader financial system: APRA Chair Wayne Byres' opening statement to the Senate Economics Legislation Committee included the regulator's current assessment of the impact of the threat

Australian Prudential Regulation Authority (APRA) has released APRA Chair Wayne Byres' opening statement to the Senate Economics Legislation Committee. Mr Byres said that APRA's work in recent months has been predominantly focussed, on the resilience of the financial system in the face of natural disasters and the emergence of COVID 19.

**Some Key Points**

**Impact of recent extreme weather events**

Mr Byres said that current estimates for total insured losses as a result of recent disasters is projected to be in the order of $5 billion and that 'pleasingly' the financial position of the insurance sector means it is well-placed to cover these claims. Mr Byres added that the insurance industry's ability to respond to the recent disasters underlines 'the importance of the work APRA undertakes in relatively benign times to build and maintain strength in the financial system. Insurers have the capital strength and liquidity to meet their claims and, very importantly, remain well capitalised to respond to further events that may occur – especially as, for example, we are not yet through the Australian cyclone season'.

Mr Byres said that despite this, 'the summer's events will undoubtedly have an impact on the price and, in some cases, availability of insurance into the future'.

**Potential impact of COVID-19**

Mr Byres said that another area of focus for APRA has been on understanding the potential impact of COVID-19 on the financial system. APRA has been monitoring this over 'three dimensions':

1. **APRA's internal preparations**: APRA initiated its own crisis management arrangements and 'began to take steps to protect our own operations and staff' over a month ago;
2. **Reviewing industry preparedness**: APRA has been engaging with regulated institutions to understand how the virus might affect their operational ability, using the Pandemic Planning guidance as a benchmark to assess their readiness levels. APRA is now undertaking 'targeted testing of those plans'.

   At present, Mr Byres said, APRA considers that 'the regulated institutions at the core of the financial system are very alert to the risks to their businesses – both financial and operational – and initiating contingency planning to deal with a range of scenarios'.

   The Australian reports that APRA has commenced interviewing senior executives (typically CFOs and COOs) and has asked entities to proactively notify it of any material changes to their business activities resulting from the outbreak.
3. **Broader impacts:** APRA has been assessing the potential for any specific or broader economic impacts to the Australian financial system, given recent volatility and stress in global financial markets. In addition, APRA has been in regular contact with domestic and international peer organisations.

   Mr Byres said that at present, APRA considers that 'the financial system is positioned to handle short-term volatility in financial markets, but navigating any period of extended stress is inevitably something that will warrant considerable vigilance'.

**Recap of APRA's recent activities and initiatives**

Mr Byres concluded by highlighting a number of recent activities/initiatives.

- **Progress towards implementing Hayne Recommendations/acting on Hayne referrals**: Mr Byres said that APRA has made 'significant progress in responding to the 10 recommendations of the Royal Commission directed to us' having implemented three recommendations in full and being 'on track to finalise the remaining seven' by the end of the year. Mr Byres said that APRA has been undertaking detailed reviews of the 12 case referrals involving nine APRA-regulated entities received from the Hayne Commission and is working to finalise its response to all cases by the end of the year.

- **Transparency**
  - **Publication of superannuation heatmaps:** Mr Byres said that APRA published its first heatmap providing data on the performance of every MySuper superannuation product in December 2019 and is now 'consulting on a significant revamp of our data collections for superannuation to, amongst other things, support the extension of the heatmap concept to choice products and options'.
  - **Publications:** Mr Byres said that APRA has also released a number of publications designed to provide more insight to its activities and actions including: a) the release of the information paper setting out APRA's enhanced approach to regulating and supervising governance, culture, remuneration and accountability (GCRA) risks; b) updating the memorandum of understanding between ASIC and APRA; c) publishing APRA's governance arrangements and accountability statements for senior executives; and d) releasing the Year in Review and policy and supervision priorities documents.
- APRA remains focused on delivering the objectives in its corporate plan: Mr Byres said that APRA remains focused on: 1) maintaining financial system resilience; 2) improving outcomes for superannuation members; 3) improving cyber-resilience in the financial sector; and 4) transforming GCRA across all APRA-regulated institutions as outlined in its latest corporate plan. Mr Byres emphasised that 'while we are currently redirecting significant resources towards understanding and responding to the impact on the financial system of natural disasters and COVID-19, we are not losing sight of these longer-term goals'.

*[Sources: Opening Statement to Senate Economics Legislation Committee 06/03/2020; [registration required] The Australian 11/03/2020]*

**In Brief | ASIC has announced that due to 'the uncertain availability of international and interstate speakers and delegates and the evolving situation surrounding the novel coronavirus (COVID-19)' it has decided to postpone the ASIC Annual Forum and Annual Dinner 2020. ASIC says that it is 'working to reschedule' and will provide more information in the 'coming weeks'**

*[Source: ASIC media release 11/03/2020]*

## Other Developments

**In Brief | The Human Rights Commission's final report into Sexual Harassment in Australian Workplaces — Respect@Work — makes 55 recommendations to change the way in which government, employers and the community prevent and respond to sexual harassment in the workplace, including an overhaul of the current legal framework**

*[Sources: Australian Human Rights Commission media release 05/03/2020; Executive Summary; Respect@Work: Sexual Harassment National Inquiry Report (2020)]*

# Other News

**In Brief | On 6 March the government's response to the 30 recommendations of the Australian Charities and Not-for-profits Commission legislation review was released. The government support 19 of the Review recommendations, notes a further 2 recommendations and does not support 8 recommendations**

[Note: The government's response to each of the recommendations is summarised in a table at p7 of the government's response document.]

*[Source: Government's response to Australian Charities and Not for Profits Commission Legislation Review 06/03/2020]*