

Governance News

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Diversity

United Kingdom | Beyond board diversity: The Investment Association has cautioned 63 FTSE 350 companies over lack of gender diversity not only on their boards but in their leadership ranks and called for details of the actions each plans to take to improve

Key Takeouts

- Nearly one in five FTSE 350 companies have been cautioned by the Investment Association (IA) over the lack of women in leadership roles (their board and executive committees). 63 companies have been asked to provide details of the actions they plan to take to drive progress.
- IA's Institutional Voting Information Service (the IVIS) plans to highlight companies that are not meeting investor expectations on diversity by 'Red Topping' (the highest warning level) any company in the FTSE 350 in which: a) women represent 20% or less of the board; b) there is one or less women on the board (unless it is a three person board); and c) where women represent 20% or less of the Executive Committees and their direct reports.

The UK Investment Association (IA) says that it has written to 63 FTSE 350 companies asking that they outline what action they are taking to improve the gender balance in their leadership teams to ensure the 33% female board representation target (Hampton-Alexander target) is met by the end of 2020.

Details

- The IA says that 24 FTSE 250 boards have been 'cautioned for having only one woman on their board'.
- 13 companies have received a letter encouraging them to take 'robust action' to address the lack of women in their top teams for a second year running, in 2019 and 2020.
- 35 FTSE 350 companies (4 FTSE 100 companies, and 31 FTSE 250 companies), have been contacted raising concerns about the lack of progress on appointing women to leadership teams. The IA says that it is the first time that companies with all male executive committees were contacted.

Next steps

The IA says that Investment managers will be 'keeping up the pressure on companies during the 2020 AGM season' to improve their gender diversity.

To 'reinforce the investors' commitment to improving diversity on boards', the IA's Institutional Voting Information Service will highlight companies that are not meeting investor expectations on diversity by 'Red Topping' (the highest warning level) any company in the FTSE 350 in which:

- women represent 20% or less of the board
- there is one or less women on the board (unless the one third target is achieved – ie unless the board is comprised of three directors)
- where women represent 20% or less of the Executive Committees and their direct reports

Calls for companies to take action

The IA quotes Sir Philip Hampton, Chair of the Hampton-Alexander Review, as commenting that 'leaders of FTSE 350 companies that are still adrift of the 33% minimum target, need to rise to today's challenge from the investment community and take swift action now to address the lack of women on the board and in their leadership teams.'

Business Minister, Lord Callanan, is quoted as saying that 'it is not just government calling for greater diversity at the top of our FTSE 350 firms, shareholders are taking action too. The message is clear – those businesses that fail to take diversity seriously, risk losing the confidence of their investors. The work of the Hampton-Alexander Review is crucial to making the UK the best place to work and grow a business.'



[Sources: IA media release 29/02/2020; [registration required] The FT 29/02/2020]

United Kingdom | Asset managers will reportedly vote against individual directors in an effort to encourage progress on gender diversity

The FT reports that asset managers, Columbia Threadneedle and RBC Global Asset Management (RBC GAM) have each announced plans to vote against board directors of businesses that are failing to promote women to leadership roles.

Details

According to The FT:

- **25% female board representation target:** RBC GAM plans to vote against all members of the nominating or governance committees at the annual meetings of businesses where women do not make up a quarter of the board. The policy will reportedly apply in the US, Canada, the UK, Ireland, Australia and New Zealand. Reportedly, RBC GAM plans to increase its threshold for women on boards to 30% by 2022.

According to The FT a number of large businesses do not meet this target. Reportedly ISS ESG research has identified about a third of companies in the S&P 500 have fewer than 25% women on their boards and that women currently make up less than a quarter of board directors at 66% of companies at Russell 3000.

- **Intention to vote against the Chair of diversity 'laggards':** Columbia Threadneedle has signalled its intention to vote against the Chair of nomination committees at any FTSE 350 company it considers to be too slow to address the lack of women in leadership roles. The FT comments that this is the 'first time a big asset manager has publicly taken such a tough stance'.

Reportedly Columbia Threadneedle is reviewing whether to roll out its new policy on senior executives globally. According to The FT, Columbia Threadneedle's approach currently varies by region with the company voting against companies where women do not make up a quarter of the board in the UK, while the threshold is 15% in the US.

[Source: [registration required] The FT 02/03/2020]

Shareholder Activism

Governance concerns? Elliott is reportedly pushing for changes at Twitter having taken a \$1bn stake

The FT reports that activist Elliott Management, which has taken a \$1bn stake in Twitter, has privately raised governance concerns with the Twitter board.

Elliott's concerns: According to The FT, Elliott is concerned that: a) Twitter CEO Jack Dorsey, who is also CEO of fintech company Square, is insufficiently focussed on Twitter; and b) by the reportedly high turnover rate among senior operating and financial executives at Twitter.

Reportedly, Mr Dorsey was named CEO in 2015, despite Twitter publicly stating that it would only accept a candidate who could commit to the role full time. Reportedly, investors have previously raised concerns that Mr Dorsey has 'more skin in the game' at Square, where he holds a 13% stake as compared with a 2% stake in Twitter.

Board nominations: According to The FT, Elliott has privately submitted four nominees to stand for election at Twitter's next annual shareholder meeting, scheduled to be held in May.

The FT adds that as yet, Elliott has not yet gone public with its Twitter campaign, in the hope that its behind-the-scenes engagement will push the company to act.

According to The FT, neither Mr Dorsey nor Twitter have as yet made any comment.

[Source: [registration required] The FT 02/03/2020]



SumofUs freedom of expression proposal defeated at Apple

The Apple shareholder meeting was held on 26 February.

Shareholders reportedly voted on six proposals, including three shareholder proposals, none of which were approved.

Freedom of expression shareholder proposal: The SumofUs, coordinated a shareholder proposal calling for Apple to report annually to shareholders on the company's policies on freedom of expression including providing a 'description of the actions Apple has taken in the past year in response to government or other third-party demands that were reasonably likely to limit free expression or access to information'. The supporting statement explains that the proposal is aimed at 'closing gaps' about Apple's policies and practices related to freedom of expression in the context of its operations/dealings with China.

Reportedly, Glass Lewis and Institutional Shareholder Services (ISS) recommended voting in favour of the resolution. According to media reports, the Apple board opposed the proposal, on the basis that Apple: a) already provides extensive information about when it takes down apps at the request of governments around the world; and b) that it follows the laws in countries where it operates.

Result: Reportedly, the proposal was not approved with 59.4% voting against and 40.6% voting in favour.

The FT suggests that the result is significant because of the increase in the level of support for the proposal as compared with the level of support for similar proposals — less than 10% — in 2016 and 2018. FT quotes campaigns manager at SumOfUs Sondhya Gupta as saying that the result sends a 'very clear message that Apple's shareholders want it to do better on human rights'.

Separately ITNews quotes senior fellow at Harvard Law School's Program on Corporate Governance Stephen Davis as saying that the result is a 'striking warning [to Apple] — and it must have come from big institutional investors, not just retail shareholders — that Apple's human rights policy in China has become a material risk for the company's reputation'.

Apple may be considering action? According to ITNews, despite the fact that the proposal was not approved, Apple may be considering taking action anyway. Reportedly in a letter sent to Access Now earlier in the month, Apple's senior privacy director, Jane Horvath, said that the company 'has and always will consider freedom of expression a fundamental human right' and that Apple 'will consider providing additional details on our commitment in the future.'

Other shareholder proposals: Two other shareholder proposals were also put to the meeting: 1) a proposal relating to sustainability and executive compensation (proposal to tie executive compensation to sustainability metrics) and 2) a shareholder proposal entitled 'Shareholder Proxy Access Amendments' (to allow shareholders to nominate more than one director to Apple's board). Neither proposal was approved.

[Sources: Apple SEC Filing: Form 8-K 27/02/2020; [registration required] The FT 27/02/2020; Reuters 26/02/2020; 9to5Mac 26/02/2020; Yahoo Finance 27/02/2020; SumofUs media release 10/02/2020; SumofUs proposal; ITNews 28/02/2020]

A second (potential) shareholder ESG proposal at QBE?

The Australasian Centre for Corporate Responsibility (ACCR) is encouraging QBE members to support a resolution coordinated by the Colong Foundation for Wilderness, calling on the company to develop a policy guaranteeing it will not invest in, insure or advocate for any projects or works that could result in negative impacts occurring within the boundaries of a World Heritage or Ramsar property.

The resolution requires the support of 100 or more shareholders.

[Note: Possible second shareholder resolution: On 17 February Market Forces announced its intention to lodge a shareholder resolution calling on QBE to align its underwriting and investment activities with keeping global warming below 1.5 degrees. Market Forces media release 17/02/2020]

[Sources: ACCR media release 02/03/2020; Full text of the proposed resolution]



In Brief | Market Forces is calling on GE shareholders to push the company to exit coal and switch to investing in clean energy instead

[Source: Market Forces media release 03/02/2020]

Institutional Shareholders and Stewardship

UniSuper members are reportedly calling on the fund to divest itself of fossil fuel stocks

According to media reports, Unisuper is facing pressure from members to divest itself of companies whose operations are incompatible with the goals of the Paris Agreement.

Reportedly, 10,000 members have signed a petition calling on fund to divest, and separately members, coordinated by Market Forces, have staged a protest against the fund's continued investment in fossil fuel companies.

Media reports have commented that HESTA is facing similar pressure from members.

[Source: Financial Standard 26/02/2020; The SMH 26/02/2020]

Markets and Exchanges

CHESS Replacement Tranche 2 Rule Amendments Consultation Paper released

The ASX has released a consultation paper outlining a raft of proposed amendments to the ASX Settlement Operating Rules (ASXSORs), ASX Clear Operating Rules (ASXCORs) and ASX Enforcement and Appeals Rulebook (ASXEARS) and associated Procedures to support the operation of the system that will replace CHESS.

The proposed amendments relate to the following functional elements of the new system: dividend and distribution reinvestment plan (DRP) and bonus share plan (BSP) elections; entitlement acceptances; real time gross settlement; takeovers and buybacks; diary adjustments; holding adjustments; and mFund.

The amendments are the second of three tranches of rule amendments that ASX will release for public consultation.

Timing and next steps:

Consultation closes on 3 April. ASX is planning to release a response to consultation feedback received on the second tranche of draft rule amendments by early-June 2020.

ASX is planning to release a third and final tranche of rule amendments for public consultation in early-April 2020, with consultation feedback expected to be due by mid-May. The tranche 3 rule amendments will relate to settlement, reporting and miscellaneous amendments. ASX plans to release a response to consultation feedback received on the third tranche of draft rule amendments by late-July 2020.

ASX plans to formally lodge the combined rules package with the Australian Securities and Investments Commission (ASIC) in early September 2020, and to release the final rule changes at least six months prior to go-live of the new system. ASX says that the 'final form' of the amendments will become effective at the time of the 'go-live of the new system'.

[Source: ASX Consultation paper: CHESS replacement Tranche 2 Rule amendments consultation paper 21/02/2020]

Related News: Concerns raised over the proposed implementation date of the replacement CHESS system

The AFR is reporting that concerns have been raised about the proposed April 2021 'go live' date for the replacement CHESS system.



The AFR quotes and ASX spokesperson as saying that 'some stakeholders may call for more time, others are very keen for the schedule to remain as it is. ASX is engaging and listening to all feedback. That's been our approach since the start of the project more than four years ago, and we'll continue to do so. Ultimately, we'll do what's best for the whole market. Our priority is to ensure transition to the new CHES system in an orderly and safe way, with the continued close oversight of our regulators.'

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

In Brief | The ASX issued an update to Guidance Note 8 Continuous Disclosure: Listing Rules 3.1 – 3.1B on 28 February. Among other things, the changes reflect the listing rule changes that came into effect on 1 December 2019, the fourth edition of the Corporate Governance Principles and Recommendations that came into effect on 1 January 2020 and a number of recent Federal Court decisions

[Note: A marked up version of the changes is available on the ASX website [here](#).]

[Source: Listed@ASX 03/02/2020]

Regulators

ACCC 2020 compliance and enforcement priorities

As previously reported in Governance News (see: Governance News 26/02/2020 at p9), Australian Competition and Consumer Commission (ACCC) Chair Rod Sims recently announced the ACCC's Compliance and Enforcement Policy and Priorities for 2020.

MinterEllison has prepared an article providing expert insight into the implications. The article can be accessed on the MinterEllison website here: [ACCC 2020 compliance and enforcement priorities](#)

Progress update on responding to Hayne Commission referrals and case studies and implementing Hayne recommendations: ASIC has released its latest regulatory and enforcement update

Key Takeouts

- **Progress update on Hayne Commission referrals and case studies:**
 - Of the 13 referrals made by the Hayne Commission, ASIC says that: seven remain under investigation; two are the subject of civil penalty litigation; one is being considered by the Commonwealth Director of Public Prosecutions (CDPP) for potential criminal action following ASIC's investigation; and it will take no further action on the remaining three.
 - ASIC says that no further action will be taken eight of the 32 case studies considered by the Commission. A further 17 case studies are currently under investigation. Two case studies are being considered by the CDPP for potential criminal action, four are the subject of civil penalty litigation and one civil penalty proceeding has been finalised.
- **Enforcement activity has increased overall:** As at 1 January 2020, ASIC had 316 investigations on foot covering a range of misconduct. According to the report, from January 2019 to January 2020, there has been a 10% increase in the number of ASIC enforcement investigations and a 52% increase in enforcement investigations involving certain large financial institutions (or their officers/subsidiary companies).
- **Progress on implementing/responding to Hayne recommendations and regulatory work:** Tables 1 and 2 in the report provide detailed summaries of ASIC's actions since September 2019 in response to the Hayne Commission's recommendations and ASIC's regulatory actions and publications during the period.

Overview: ASIC's latest enforcement update



The Australian Securities and Investments Commission (ASIC) has released the latest six-monthly update on its enforcement and regulatory work. The report outlines ASIC's work during the six month period from September 2019 to February 2020 and includes updates on:

1. ASIC's enforcement activities: Hayne Commission referrals and case studies as well as other enforcement work
2. ASIC's progress towards implementation of the recommendations of the Financial Services Royal Commission (FSRC) recommendations
3. ASIC's other regulatory activities
4. ASIC's enhanced supervision program and how it is making use of new regulatory tools and powers in identifying and addressing misconduct/poor consumer outcomes.

Hayne Commission referrals and case studies

- **Update on the referrals made by the Hayne Commission:** The Hayne commission made 13 referrals to ASIC. ASIC says that: it will take no further action on three referrals; two are the subject of civil penalty litigation and one is being considered by the Commonwealth Director of Public Prosecutions (CDPP) for potential criminal action following ASIC's investigation; and seven referrals remain under investigation.
- **Update on the 32 case studies examined by the Hayne Commission:** ASIC says that no further action will be taken on eight of the 32 case studies. A further 17 case studies are currently under investigation. Two case studies are being considered by the CDPP for potential criminal action, four are the subject of civil penalty litigation and one civil penalty proceeding has been finalised.

Other enforcement work

- According to the report, from January 2019 to January 2020, there has been a 10% increase in the number of ASIC enforcement investigations and a 52% increase in enforcement investigations involving CBA, NAB, Westpac, ANZ and AMP (or their officers or subsidiary companies).
- As at 1 January 2020, ASIC had 316 investigations on foot covering a range of misconduct including: directors' and officers' breaches; insider trading and market manipulation; auditor and liquidator breaches; and breaches of licensing obligations (including of Australian financial services (AFS) licence obligations).
- The report states that ASIC intends to 'continue to use the courts to clarify the law where there is uncertainty, and thereby support and guide industry to understand their obligations'.

ASIC's current enforcement priorities

In addition to the Hayne case studies/referrals, ASIC's Office of Enforcement is currently prioritising: 1) misconduct related to superannuation and insurance; 2) cases that engage ASIC's new powers or provisions that now carry penalties or higher penalties; 3) illegal phoenix activity; 4) auditor misconduct; and 5) new or emerging types of misconduct, including misconduct carried out online or with the use of emerging technologies.

In addition to the priorities listed above, ASIC says that it will also always prioritise taking action on certain types of misconduct including: a) significant market misconduct; b) misconduct that is serious either by its nature or extent of harm or that involves a large market participant or licensed entity; c) misconduct that involves a high risk of significant consumer harm, particularly involving vulnerable consumers; and d) misconduct by individuals, particularly criminal conduct, or governance failures at board or executive level.

Response to Hayne Commission recommendations and other regulatory activities during the period

[Note: Table 1 (at p18) of the report provides a detailed summary of ASIC's actions since September 2019 in response to the Hayne Commission's recommendations. Table 2 (at p25) of the report details ASIC's regulatory actions and publications during the period.]

Snapshot: Progress on implementing Hayne recommendations directed specifically at ASIC



The government's August 2019 implementation roadmap identified the following recommendations as being specifically directed at ASIC. A table summarising ASIC's actions in relation to each of these recommendations is below.

Recommendation	Status	Details of actions taken
Recommendation 2.5 (Life insurance commissions review)	In progress	<ul style="list-style-type: none"> Data collection project: Since 2018, ASIC has collected four rounds of data from the life insurance industry to help assess whether industry commission caps and clawbacks are being complied with, whether life insurance framework reforms are likely to be improving consumer outcomes (ie whether lapse rates and/or premiums rates are decreasing), and to identify unintended consequences. The project will continue until 2021 (with nine rounds of data to be collected in total). In 2020 ASIC plans to commence two new streams of work: 1) a review of a sample of life insurance advice; and 2) a review of underinsurance.
Recommendation 6.2 (ASIC's approach to enforcement)	Implemented	<ul style="list-style-type: none"> Office of Enforcement and 'Why not litigate?' approach: ASIC has established an Office of Enforcement to strengthen the governance and effectiveness of its enforcement work, and to expedite enforcement matters, including accelerating court-based enforcement, and leading the application of ASIC's 'Why not litigate?' approach.
Recommendation 6.10 (Co-operation memorandum)	Implemented	<ul style="list-style-type: none"> A revised Memorandum of Understanding (MOU) was released on 29 November 2019, accompanied by a revised engagement structure to strengthen cooperation on areas of common interest, including data, thematic reviews, governance and accountability.
Recommendation 6.12 (Application of the BEAR to regulators)	Implemented	<ul style="list-style-type: none"> ASIC published its Management Accountability Regime, including an accountability map and accountability statements for Executive Directors and Commissioners that identify core responsibilities and individual accountabilities.
Additional commitment in response to Recommendation 2.4 (End of Grandfathered commissions)	In progress	<ul style="list-style-type: none"> As directed by the Treasurer, ASIC is investigating the extent to which grandfathering is being voluntarily ended before 1 January 2021, including the extent to which the benefits are being passed on to affected clients. ASIC is due to report to the Treasurer by 30 June 2021. The report will also be released publicly. <p>ASIC says that it expects to provide an update on its investigation to the Treasurer and industry as appropriate during the review period.</p>

In addition, the report outlines a number of other examples of the work ASIC is doing to support the implementation of other Hayne recommendations.

Some examples of this work are included in the table below.



Recommendation	Status	Details of actions taken
Recommendations 1.8, 1.10, 1.13, 1.16 (Amendments to the Banking Code)	In progress	<ul style="list-style-type: none"> ▪ ASIC approved an updated version of the ABA's Banking Code of Practice, which will commence on 1 March 2020 ▪ Further changes in 2021: ASIC says that its decision to approve the March 2020 code is on the understanding that the ABA will make further changes to the Code in 2021, including changes relating to the informal overdrafts, as well as other stakeholder feedback. ▪ Definition of small business in the Code: To assist ASIC in assessing whether the current definition of small business is covering 'an appropriate proportion' of businesses, ASIC says that it is collecting quarterly small business loan data from ABA member banks, and that the ABA must commission an independent review of the definition by 1 January 2021.
Recommendation 4.9 (Enforceable provisions)	In progress	<ul style="list-style-type: none"> ▪ ASIC says it has provided input to the government's proposed legislative reform in relation to industry codes, scheduled to be introduced into Parliament before 30 June 2020. ▪ ASIC says it will continue to work with industry to give effect to the government's commitment to allow for greater sanctions to be imposed following a breach of an industry code of conduct.

ASIC's regulatory activities

ASIC says that it continues to focus on instances of harm or unfair outcomes for consumers and to take action to address these concerns using its full regulatory toolkit, consistent with its strategic priorities.

Remediation

Remediation is identified as one area of focus.

- **Many remediation programs are administered without ASIC's direct supervision:** ASIC says that it monitors some significant remediation programs including financial advice related remediation programs and insurance related remediation programs, but that due to the volume, size and complexity of the many programs on foot, many are administered by licensees without ASIC's direct supervision.
- **ASIC's powers are limited:** ASIC writes that it does not have an explicit power to direct that remediations be carried out or that they be conducted in a particular way, but rather is limited to seeking information from licensees about a remediation. Further, ASIC says that there is no general obligation for licensees to provide data about their remediation programs either to ASIC or to the public. ASIC says that improved transparency will be a focus of the upcoming consultation on revised Regulatory Guide 256 Client review and remediation conducted by advice licensees (RG 256).
- **Regulatory tools and obligations:** Noting that the government is consulting on a number of law reforms that create new obligations for licensees and enhance ASIC's ability to intervene in relation to remediation, ASIC says that it is 'providing assistance and advice to support draft legislation that would allow it to direct licensees to establish a remediation program in relation to misconduct, and new laws that would require licensees to investigate and remediate misconduct by financial advisers and mortgage brokers'.
- **Updated remediation regulatory guidance to be released 'before June 2020':** ASIC is reviewing and revising its existing remediation policy in RG 256. Updated guidance will be released for consultation before June 2020, informed by our recent monitoring of significant remediation programs.

Strengthened supervision



- **Onsite reviews:** During the period, ASIC has completed on-site reviews at the five major financial institutions (AMP, ANZ, CBA, NAB and Westpac) focusing on breach reporting and complaints handling. ASIC says that it plans to report 'shortly' on its key observations relating to incidence and issue management, internal dispute resolution and broader non-financial risk management.
- **ASIC is also focusing on audit quality** and has adopted a 'broader, more intensive supervisory and enforcement approach to our work program on audit, which includes: a) reviewing how conflicts of interest are managed in the six largest audit firms, as well as firm culture and accountability mechanisms in relation to audit quality; b) analysing the processes that underpin audit quality and the effectiveness of director oversight of financial reporting, in particular the use of root cause analysis in audit firms, as identifying the root causes of an adverse finding enables corrective action to be taken; c) increasing transparency by publishing the level of adverse findings for large audit firms, as well as broader measures and indicators of audit quality; and d) implementing its 'Why not litigate' approach in relation to auditor conduct matters.

Use of new regulatory tools and powers: some examples

- **Product intervention power:** ASIC used this power for the first time in September 2019 to ban a short-term credit model (see: Governance News 13/09/2019) and is consulting on further proposed interventions on a number of issues. ASIC says that following consultation it plans to 'shortly release guidance' on its approach to the exercise the product intervention power.
- **Design and distribution obligations:** ASIC is consulting on draft guidance for the new financial product design and distribution obligations, which come into effect in April 2021 (see: Governance News 15/01/2020). Consultation closes on 11 March.
- **Mortgage broker best interest duty:** ASIC is currently consulting on draft guidance on the new best interests duty and related obligations (see: Governance News 26/02/2020 at p15). The consultation closes on 20 March 2020.
- **New licensing and banning powers:** The Financial Sector Reform (Hayne Royal Commission Response—Stronger Regulators (2019 Measures)) Bill 2019 (see: Governance News 28/11/2019) which will strengthen ASIC's licensing and banning powers and also enhance its investigatory capability, received Royal Assent on 17 February. ASIC says it is incorporating the new powers into its supervision and enforcement processes and also providing input to Treasury on proposed legislation to implement additional Enforcement Review Taskforce reforms, including reforms to breach reporting and the introduction of a directions power for ASIC.

[Note: This appears to be a reference to the consultation on draft Bill, Financial Sector Reform (Hayne Royal Commission Response—Stronger Regulators (2020 Measures)) Bill 2020: FSRC rec 7.2 (ASIC directions) which was released with a raft of other Hayne Commission related draft legislation on Consultation on the 31 January. Consultation on the draft Bill closed on 28 February. For a summary see: Governance News 5 February at p27]


- **ASIC's response to natural disasters:** ASIC has established a dedicated working group to triage issues arising from natural disasters and events such as the recent bushfire crisis, and to coordinate its response to those issues that ASIC can assist with.

Some industry specific actions highlighted in the report

Superannuation

Actions highlighted in the report include the following.

- **Misconduct in the superannuation sector is a priority:** ASIC says that its Office of Enforcement is prioritising misconduct related to superannuation, and is using persistent underperformance as a key indicator to help target its work to identify misconduct
- **ASIC and APRA have welcomed reforms increasing ASIC's role in superannuation,** and ASIC is taking steps to ensure we are well-positioned to use this proposed expanded regulatory remit.
- **Completion of the review into financial advice provided through superannuation funds:** ASIC released the results of its review — Report 639 Financial advice by superannuation funds — into how



financial advice is provided through superannuation funds and the overall quality of this advice. The report found that less than 50% of personal financial advice by superannuation funds demonstrated full compliance with the best interests duty and related obligations, though members were at risk of suffering financial/non-financial detriment in only 15% of cases (see: [Governance News 04/12/2019 at p18](#)).

- **Review of member communications:** ASIC's review of member communications — Report 655 Review of member communications: Protecting Your Superannuation Package (PYSP) reforms — identified communications of varying quality and intervened to prevent further dissemination of problematic communications (see: [Governance News 19/02/2020 at p14](#)). ASIC says that it will continue to monitor communications and expects trustees to raise standards.
- **Implementation of the Insurance in Superannuation Voluntary Code of Practice:** ASIC Report 646 Insurance in superannuation: Industry implementation of the Voluntary found that there has been some improvement in practices as a result of the adoption of the code by a significant number of trustees, but further work needs to be done (see: [Governance News 18/12/2019 at p14](#)).
- **Updated RG 97:** ASIC released updated Regulatory Guidance 97 Disclosing fees and costs in PDSs and periodic statements (RG 97) to clarify disclosure obligations for superannuation trustees (see: [Governance News 04/12/2019 at p24](#)).

Insurance

ASIC says that it is focused on the design and sale of inappropriate products, particularly to vulnerable consumers, and on using its new regulatory powers to act on issues highlighted by the Hayne Commission

- **Add-on insurance/warranty products sold by car yards:** ASIC has proposed to use its product intervention power to reform the sale of add-on insurance and warranty products by car yards, to address ongoing concerns about consumer harms from the sale of these products.
- **TPD insurance:** Report 633 Holes in the safety net: A review of TPD insurance claims called on insurers and trustees to take steps to implement changes to their claims handling practices and to redesign TPD products so that they offer significantly better value for consumers (see: [Governance News 23/10/2020](#)).
- **Ban on cold calling life insurance sales:** Following consultation, ASIC implemented a ban on unsolicited telephone sales of direct life insurance and consumer credit insurance. The ban took effect on 13 January 2020.
- **Insurance sales litigation:** On 19 November 2019, ASIC announced that following concerns raised by ASIC, the Colonial Mutual Life Assurance Society Limited (trading as Commlnsure) conducted a remediation program refunding over \$12 million to Commonwealth Bank customers. Commlnsure also pled guilty to 87 counts of 'offering to sell insurance products in the course of unlawful, unsolicited telephone calls'.
- **Review insurer's policies following the passage legislation to extend UCT protections to insurance contracts:** Legislation to extend the unfair contract terms (UCT) regime to insurance contracts will take effect from 5 April 2021. ASIC says that it will review insurers' policies and consult with relevant stakeholders to identify key areas of concern. ASIC says that it expects insurers to take proactive steps to review their contracts.

Responsible lending and credit

- Following consultation, ASIC issued updated regulatory guidance: Regulatory Guide 209 Credit licensing: Responsible lending conduct (RG 209) in December (see: [Governance News 11/12/2019](#)).
- ASIC says that it is continuing to monitor the 'buy now pay later' sector, following the release of Report 600 Review of buy now pay later arrangements in 2018 (see: [Governance News 03/12/2019](#)) and will release an updated review shortly.

Financial advice

- **Acting to address adviser misconduct:** From 1 September 2019 to 14 February 2020, ASIC banned 14 financial advisers, suspended three AFS licences and cancelled one AFS licence.



- **Remediation:** Compensation paid or offered by six of Australia's largest banking and financial services institutions to customers who suffered loss or detriment because of noncompliant advice or 'fees for no service' misconduct totalled \$749.7 million as at 31 December 2019.
- **Tips for licensees and representatives to improve compliance:** Report 636 Compliance with fee disclosure statement and renewal notice obligations reported on the findings of compliance assessments of fee disclosures statements and renewal notices issued y 30 randomly sampled AFS licensees and their representatives. The report found that over half did not have effective processes to remind them when renewal notices were due/when to stop ongoing fees. The report includes 'tips' for licensees to improve compliance (see: [Governance News 04/12/2019 at p24](#)).
- **Investigations (and possible court action):** ASIC is investigating 'a number of advice licensees' for potential breaches of the fee disclosure statement and renewal notice obligations, and will determine whether court action is appropriate at the end of these investigations. ASIC adds that it commenced court action against NAB for fee disclosure statement and fee for no service issues in December.
- **Review of advice provided through superannuation:** ASIC reviewed — ASIC report 639 Financial Advice by Superannuation Funds — how advice is provided through superannuation funds and the overall quality of this advice.
- **Timeshare:** ASIC conducted an end-to-end examination of the experiences of consumers who received personal advice to purchase timeshare memberships from one of the five main points-based timeshare operators in Australia, and the findings were released in December in Report 642 Timeshare: Consumers' experiences (see: [Governance News 11/12/2019 at p16](#)). In addition, ASIC undertook a targeted review of personal advice given by timeshare operators, to inform its work on updating the regulatory settings for timeshare. ASIC plans to release an updated Regulatory Guide 160 Time-sharing schemes (RG 160) in the first half of 2020.

Market supervision and market infrastructure:

- **Licensing of trading platforms:** ASIC says that it has strengthened its supervision of wholesale market operators by completing the licensing of previously exempt operators of trading platforms. Seven such licences have been granted since September 2019.
- **Review of the practices of wholesale foreign exchange (FX) market participants:** ASIC Report 652 Wholesale FX practices in Australia outlined the findings of ASIC's review of the practices of wholesale foreign exchange (FX) market participants. The report highlighted some poor practices and called on participants improve their management of conduct risk.
- **Cyber resilience:** ASIC report 651 Cyber resilience of firms in Australia's financial markets: 2018-19 identified new and emerging trends, as well as challenges that have emerged over the past two years (see: [Governance News 15/01/2020 at p44](#)). ASIC says it will continue to monitor, assess and measure improvement over time.

ASIC communications, guidance and regulatory reports

Table 2 of the report outlines the work ASIC has completed in terms of communications, guidance and regulatory reports, since September 2019. have published

ASIC highlights the following three examples: 1) the release of the joint report with the Dutch Authority for Financial Markets (AFM) on Disclosure: Why it shouldn't be the default which ASIC says will assist financial services providers to meet their DDO obligations when they come into effect next year; 2) the release of the whistleblower guidance (RG 270 Whistleblower policies); and ASIC's work to raise audit quality standards including the release of Report 648 ASIC audit inspections 2018-2019 and Report 649 Audit quality measures, indicators and other information: 2018-2019.

Focus on improvement is 'unwavering'

Commenting on ASIC's activities during the period in his [Opening Statement to the Parliamentary Joint Committee on Corporations and Financial Services](#) ASIC Chair James Shipton said that 'across ASIC, our focus on improving the way we regulate remains unwavering. Whether we are addressing emerging issues—



for example, our coordinated response to the recent bushfire crisis, or implementing the Royal Commission recommendations, we are committed to achieving and exceeding expectations.'

[Sources: ASIC media release 26/02/2020; ASIC update: September 2019 to February 2020; [registration required] The Australian 27/02/2020]

Three FSRC recommendations implemented in full and seven more progressing: APRA has provided an update on progress towards implementing Hayne recommendations and acting on Hayne referrals

The Australian Prudential Regulation Authority (APRA) has released its first edition of 'APRA Insight' for 2020. Among other things, the publication includes: a) an update on APRA's progress towards responding to the ten Hayne Commission recommendations directed at APRA as well as the regulator's progress towards responding to the 12 Hayne referrals; b) a summary of APRA's 'evolving approach' to supervision of risk culture; c) APRA's new approach to quarterly reporting; and d) a short statement on the increased cooperation between the Australian Securities and Investments Commission (ASIC) and APRA.

APRA's progress on the ten Hayne recommendations directed at it

APRA says that it has made 'significant headway' in responding to the 10 recommendations directed to it and to date, has addressed three recommendations — recommendations 1.2, 6.10 and 6.12 — in full. The table below provides further detail.

Hayne recommendation	Status	Details
1.12 (valuations of land)	Implemented in full	APRA says that it strengthened APS 220 Credit Risk Management by including new requirements in relation to the independent valuation of collateral, as well as additional specification of issues that should be taken into account in valuations, particularly of agricultural land.
6.10 (co-operation memorandum)	Implemented in full	A new MoU was agreed and published in November 2019.
6.12 (application of the BEAR to regulators)	Implemented in full	APRA released its Governance and Senior Executive Accountabilities documentation in December 2019.
5.1 (supervision of remuneration (principles, standards and guidance)) 5.2 (supervision of remuneration (aims)) 5.3 (revised prudential standards and guidance)	In progress	APRA released draft prudential standard CPS 511 Remuneration for consultation last year and is now considering the feedback received. APRA says that it intends to announce its response to the consultation feedback in the 'next couple of months'.
5.7 (supervision of culture and governance)	In progress	APRA published an information paper outlining its agenda for transforming governance, culture, remuneration and accountability (GCRA) across the industries it regulates in November 2019.
4.14 (additional scrutiny for related party engagements) 4.15 (status attribution to be fair and reasonable)	In progress	APRA says that changes to SPS 250 Insurance in Superannuation, to strengthen the trustee requirements when selecting an insurer, particularly in cases where they are dealing with a related party, will address both recommendations 4.14 and 4.15. APRA says that it is aiming to finalise SPS 250 and the supporting prudential guidance SPG 250 Insurance in Superannuation by the middle of the year.



Hayne recommendation	Status	Details
1.17 (BEAR product responsibility)	In progress	APRA says that 'for completeness and efficiency' the task of developing a framework for product responsibilities under BEAR, is being pursued as part of the broader legislation to give effect to the Financial Accountability Regime (FAR).

ASIC/APRA cooperation

In addition to entering into a revised Memorandum of Understanding (recommendation 6.10), APRA says that it is currently working with ASIC, the government and the Treasury on legislation to implement Hayne Recommendation 6.9, which will create a statutory obligation on ASIC and APRA to cooperate, share information and notify each other of suspected breaches of laws administered by the other.

APRA says that the legislation will further formalise the agencies' commitment to closer collaboration and information sharing.

Progress on responding to Hayne referrals

APRA says that it has also been undertaking detailed reviews of the 12 formal case referrals involving nine APRA-regulated entities that it received from the Hayne Commission.

The 'bulk' of referrals relate to historical misconduct: APRA says that given 'the bulk of the referrals APRA received related to historic conduct which has largely been remediated, and as such cannot be subject to civil penalties', it is using its supervisory powers to ensure that 'underlying prudential issues and root causes are addressed'.

APRA's actions to date include imposing additional conditions on the licences of RSE Licensees and using the new directions power provided in the Superannuation Industry (Supervision) Act 1993.

APRA says that it has also decided to undertake two thematic reviews into the industry practices, covering: a) collecting shelf-space fees; and b) distributing tax surpluses to related entities. These reviews, ASIC says, will provide further information on conduct identified by the Commission as being potentially inconsistent with members' interests.

Other work to support the outcomes of the Hayne Commission

In addition to work directly in response to Hayne Commission recommendations, APRA has been undertaking other projects to support the outcomes of the Commission. This includes the release of the first iteration of APRA's superannuation heatmap and the release of the post-implementation review of APRA's superannuation prudential framework.

APRA says that further work is being undertaken to increase the effectiveness of the cooperation between APRA and ASIC, especially in relation to the superannuation sector. 'APRA and ASIC are already working together to lift industry practices and to achieve better outcomes for members, and we will continue to enhance regulatory co-operation' APRA states.

APRA's approach to supervising risk culture

APRA says that, consistent with the approach outlined in its November 2019 information paper, and as emphasised in its 2019-2023 Corporate Plan, it is intensifying its approach to the supervision of governance, culture, remuneration and accountability (GCRA) within regulated entities by further developing the tools available to assess them.

Examples of APRA's work in this area include the following.

- Commitment to increased transparency about its approach by sharing its supervisory approach and findings
- 'Strengthening' CPS 220 to ensure it remains 'fit for purpose'



- Increasing the internal resources and the size of the specialist risk culture team. APRA says that the team will have trained 155 supervisors in how to use the new framework for assessing risk culture across APRA-regulated entities by the end of March 2020
- The development of a 'scalable and effective approach for conducting risk culture deep dive reviews' which has been used to undertake two risk reviews 'in recent months'. APRA says that the approach will be refined and enhanced as more reviews are completed.
- The development of an 'industry-wide tool to benchmark risk culture across industry sectors and cohorts of entities'

APRA says that this approach 'represents a significant enhancement — in the resourcing, capability and intensity — of APRA's supervisory focus on GCRA issues, and responds to the recommendations from the Royal Commission and the 2019 APRA Capability Review'.

[Source: APRA Insight 2020 28/02/2020]

The Standing Committee on Economics tabled its report into the review of APRA's 2019 annual report

The Standing Committee on Economics tabled its report into the review of the Australian Prudential Regulation Authority's (APRA's) 2019 annual report on 2 March.

Some Key Points

- In his foreword to the report, Committee Chair Tim Wilson said that 'the public expects and deserves better than a financial sector lacking in moral leadership and motivated by greed. The community expects the big banks and other financial institutions to be held to account and to fear their regulator'.
- The Committee noted APRA's progress on implementing the Hayne Commission recommendations and the APRA Capability Review recommendations. Mr Wilson said that this work will "continue to strengthen APRA as a regulator and enable it continue to ensure the raising of standards of governance, culture, remuneration, and accountability across the financial services sector'.
- Mr Wilson said that the committee will continue to scrutinise APRA's performance, particularly its ongoing implementation of the Royal Commission recommendations and the Capability Reviews recommendations as well the ongoing strengthening of APRA's capability.

[Source: Review of the Australian Prudential Regulation Authority Annual Report 2019 04/03/2020]

Guidance on how to produce documents to ASIC released

The Australian Securities and Investments Commission (ASIC) has released an information sheet — Information Sheet 242 Document production guidelines (INFO 242) — to assist people to understand how to produce documents to ASIC.

Broadly, the information sheet outlines ASIC's: a) powers to compel the production of original books and copies of books in hard copy (hard copy books) and electronic form (electronic books); b) preferred methods for producing books; c) the benefits of producing books in accordance with the guidelines (reduction in time and costs); d) the consequences of not following the guidelines (ASIC may request that the books be produced again following the guidelines); and e) how ASIC requests books to be produced when using a litigation support system.

ASIC notes that the information sheet addresses requirements in the Australian Securities and Investments Commission Act 2001; the National Consumer Credit Protection Act 2009; the Superannuation Industry (Supervision) Act 1993; and the Insurance Contracts Act 1984 and was developed following consultation with law firms and financial institutions.

[Sources: ASIC media release 02/03/2020; Information Sheet 242 Document Production Guidelines]

Financial Services



Senate Committee recommends the Bill proposing to ban cash payments of \$10,000 be passed, subject to acting on other recommendations

Context: The Currency (Restrictions on the Use of Cash) Bill 2019 proposes to: a) establish a cash payment limit on businesses and individuals that make or accept payments that involve cash payments of \$10,000 or more and b) introduce offences for entities that make or accept cash payments of \$10,000 or more from 1 January 2020.

In his second reading speech, Assistant Treasurer and Minister for Housing Michael Sukkar said that the cash payment limit 'sends a strong signal to the community that the government will protect the rights of honest businesses and their families from unfair competition from those who want to avoid their obligations'. Mr Sukkar said that the proposed measures are aimed at 'cash payment limit not only targets those avoiding their tax, but more importantly, and more crucially, it helps to fight organised crime syndicates...These gangs launder the cash from the proceeds of manufacturing and selling drugs and other serious crimes through the legitimate economy. The cash limit will make it harder for them to do so. The government is committed to providing our intelligence agencies with the tools and laws that enable them to disrupt these activities'.

Senate Report released: On 19 September 2019, the Senate referred the provisions of the Currency (Restrictions on the Use of Cash) Bill 2019 [Provisions] to the Economics Legislation Committee for inquiry and report by 7 February 2020.

The Committee made eight recommendations, including that the Bill be passed (subject to actioning the other recommendations).

Recommendations

Subject to the government:

1. **reviewing existing powers and trends in the digital economy** to assess whether the Bill is the most effective response to the Black Economy;
2. **reviewing the penalty provisions**, particularly in relation to one-off breaches as opposed to repeated offences, which are more likely to be money laundering and tax evasion, to ensure they are not overly harsh;
3. **responding to concerns raised by the Australian Small Business and Family Enterprise Ombudsman, and others, regarding the availability of electronic banking services (ATMs and internet banking) in remote and regional Australia**, including during natural disasters, and whether there will be a detrimental economic impact on those areas;
4. **assessing the impact of the Bill on particular migrant communities**, particularly in relation to funerals, to determine if there are potential negative impacts;
5. **developing and putting in place a communications strategy** 'to assist in dispelling some of the unsubstantiated claims regarding the Bill' prior to the Bill's commencement to allow sufficient time to inform the public and businesses of their responsibilities;
6. **including an exemption for payments relating to personal and private transactions** being provided for directly in the Bill; and
7. **extending the proposed 1 January 2020 commencement date** (the new commencement date to be informed through consultation with business)

the committee recommends that the Bill be passed.

The majority of submissions opposed the passage of the Bill: The majority of the 2,659 submissions to the inquiry opposed the passage of the Bill.

The Committee states that 'the majority of submitters raised objections to the bill; however, the committee notes that a number of the arguments raised within these submissions were based on hypothetical scenarios, such as a negative domestic interest rate environment coupled with a cashless society, and future choices the Parliament may or may not make, such as reducing the cash payment limit below the proposed legislated amount of \$10,000. The committee considered these objections to the extent that they related to the provisions



of the bill. The committee acknowledges the bill has raised concerns with sections of the community; however, the committee rejects the conspiracy inherent in some of the contributions on the bill. In particular, the committee rejects the 'cash ban' nomenclature'.

The Committee went on to say that 'contrary to a number of inquiry participants' claims, cash will remain legal tender within Australia if the Bill is passed by the Parliament and the cash payment limit comes into effect. Hence, cash will remain a legal store of value and transaction payment method for all Australians to utilise' and further, 'contrary to evidence provided to it, the cash payment limit does not, in any way, reduce the capacity of individuals and businesses to withdraw money, in any denomination, from their bank accounts and hold it outside the financial system. Likewise, the Bill does not affect the ability to deposit cash with a financial institution'.

Dissenting Report

In a dissenting report, Greens senator Peter Whish-Wilson recommended against the passage of the legislation on the basis that the 'cure is worse than the cash'. 'This Bill is a classic case of the cure being worse than the disease. By criminalising the use of legal tender, and by taking a rose-coloured view of a world without cash, this government is blithe to the fundamental freedoms provided by hard currency, and is instead laying down a path towards surveillance capitalism and negative interest rates. This government should drop this Bill and start doing what is needed to tackle the wholesale tax avoidance and money laundering that makes anything that this bill might stop look like child's play' the report states.

[Sources: Senate Standing Committee on Economics: Currency (Restrictions on the Use of Cash) Bill 2019 [Provisions] Report 28/02/2020; [registration required] ABC 28/02/2020]

'Just trust us' isn't enough says CHOICE: CHOICE has announced plans to petition the Treasurer to act to standardise definitions in insurance contracts, including the definition of 'fire', to provide greater certainty to policy holders

Issue identified: Currently there is no standard definition of 'fire' in home and contents insurance policies. CHOICE said that a review of the definition of 'fire' in 26 insurance policies identified 'problems' with the definition in 70% of cases, and 'major issues with 25% of policies'. 'There are too many examples of insurers with terms that are unnecessarily complex, with confusing exclusions or terms that CHOICE considers to be downright unfair' CHOICE states.

Industry unwilling to adopt a standard definition? According to CHOICE engagement with industry on the issue has been unproductive in that 'industry played down the problem'. CHOICE writes that industry 'didn't dispute our analysis. Instead it defended its position, saying that no claims had yet been denied. Essentially, they said "just trust us".' CHOICE is unsatisfied with this response because it considers that it does not provide sufficient certainty to policy holders. 'We need to be able to rely upon more from our insurers than a "just trust us" approach. While in these current circumstances insurance companies may play nice, people living in bushfire-affected communities want the certainty that comes with a clear policy that covers them for fire – no ifs and buts' CHOICE states.

Petition the Treasurer to intervene: CHOICE plans to present Treasurer Josh Frydenberg with a petition calling for clarity on the definition of terms including 'fire' in insurance contracts, and ask him 'to fix this problem'. CHOICE is recommending the Government model reform based off of the successful introduction of a standard flood definition in 2012.

The statement adds that in 2017, a Senate Inquiry recommended that insurance policies have standard terms so policyholders could better understand what is and isn't covered. More recently, in December 2019, a report from the ACCC also recommended standard terms in insurance policies.

Self-regulation is not enough: The statement concludes by saying that 'self-regulation and goodwill won't be enough – nor should we settle for it. If the industry won't even acknowledge there's a problem, the government needs to intervene'.

[Sources: CHOICE media release 26/02/2020; 26/02/2020]

Industry response?



Prior to CHOICE's announcement, The **Insurance Council of Australia** had issued a [statement](#) 'on assertions made about household insurance and bushfire cover' by CHOICE in which it raised 'concerns' that CHOICE's statements may be causing 'unnecessary and unjustified fear' for policy holders in the wake of the bushfires. The statement adds that: a) 'no concerns about policy wording as suggested by CHOICE have been raised with the ICA'; b) CHOICE has not 'been able to provide any examples' of detrimental consumer outcomes/findings; c) the ICA considers that household policies are responding appropriately to claims relating to the bushfires; and d) the ICA is concerned that CHOICE's assertions could discourage property owners from taking out policies. The statement concludes by saying that should customers have concerns about policy wording they should contact their insurer.

[Source: ICA Media release 05/02/2020]

In Brief | The Banking Code Compliance Committee has issued a reminder that the 2019 Banking Code of Practice which addresses a number of Hayne Recommendations commenced 1 March 2020. It is a condition of ABA membership that member banks with a retail presence in Australia are Code signatories. ABA CEO Anna Bligh said that the industry has fulfilled its commitment to bolstering its Banking Code of Practice by implementing Commissioner Hayne's recommendations

[Source: Banking Code Compliance Committee media release 02/01/2020; ABA media release 29/02/2020]

In Brief | Win for ASIC: The Federal Court has found that AGM Markets Pty Ltd, OT Markets Pty Ltd and Ozifin Tech Pty Ltd engaged in systemic unconscionable conduct while providing over-the-counter derivative products to retail investors in Australia

[Sources: Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liquidation) (No 3) [2020] FCA 208; ASIC media release 27/02/2020]

In Brief | Overreach? The AFR is reporting that Professor Pamela Hanrahan has raised concerns about the scope of the government's proposed FAR regime on the basis the proposals go 'much further than the Commissioner recommended'. In particular, The AFR quotes Professor Hanrahan as raising concerns about the proposed penalties under the regime, as well as concerns that the ability for the minister to determine which organisations are subject to the regime could mean that 'potentially 53,000 small businesses' will be affected

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

In Brief | The fintech sandbox Bill — Treasury Laws Amendment (2018 Measures No 2) Bill 2019 — received Royal Assent on 26 February

[Source: Treasury Laws Amendment (2018 Measures No 2) Bill 2019]

Accounting and Audit

Top Story | Audit Review update: The PJC's interim audit report makes ten 'substantive policy recommendations' to raise audit quality standards

The Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the regulation of auditing in Australia has released an [interim report](#) which makes ten 'substantive policy recommendations' to raise audit quality standards ahead of the release of the final report in September.

Key Takeouts

- **Committee Chair James Paterson said that 'no new empirical evidence of systemic audit failure' has been found**
- **The interim report includes ten 'substantive policy recommendations'** aimed at addressing the 'trust deficit' in audit. These include (among others): a) banning audit partners from receiving incentives for selling non-audit services to audit clients; b) that ASIC conduct a review of its audit inspection

program and reporting; c) the publication by ASIC of individual inspection reports; d) new mandatory tendering requirements; and e) that digital financial reporting be made standard practice in Australia.

- **Why release the recommendations ahead of the release of the final report in September?** Mr Paterson said that the committee has released the recommendations on an interim basis 'because the policy lessons have been clear from the hearings already conducted' and there should be 'no delay' in acting on them.
- **The report makes no recommendation that audit firms be structurally split**, though recommendation 3 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.
- **Positive response to the recommendations:** The Chartered Accountants Australia and New Zealand (CA ANZ) has issued a statement welcoming the release of the interim report and the recommendations, and encouraging the 'government, organisations and regulators to press forward with making these improvements in the framework'. According to The AFR, the big four consulting firms are 'openly pleased' that many of their ideas were adopted by the Committee.
- **Timing of the Final Report:** The Committee is due to present its final report on 12 September.

Overview: Interim Report

The Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the regulation of auditing in Australia released an [interim report](#) on 27 February.

Announcing the release of the interim report, Committee Chair James Paterson said that so far, the Committee had found no 'new empirical evidence of systemic audit failure', but that it was clear from the hearings and from the submissions received so far, that there is a 'lack of trust in the audit industry that must be remedied'.

The report makes ten 'substantive policy recommendations' aimed at addressing this 'trust deficit' which the committee 'expects the government and various regulatory agencies to respond to in a timely manner'.

Ten Recommendations

1. **ASIC to review its audit inspection program and reporting:** The committee recommends that ASIC: a) formally review the manner in which it publicly reports the periodic findings of its audit inspection program, giving appropriate consideration to approaches used internationally; and b) based on this review, develop and implement, by the end of the 2020–21 reporting period for its audit inspection program, a revised framework for reporting inspection findings, with a focus on the transparency and relative severity of identified audit deficiencies. (Recommendation 1)
2. **ASIC to publish individual inspection reports:** The committee recommends that the Australian Government introduce, by the end of the 2020–21 financial year, through appropriate legislation, a requirement that ASIC publish all future individual audit firm inspection reports on its website once ASIC has adopted a revised reporting framework referred to in Recommendation 1. (Recommendation 2)
3. **New fee disclosure requirements and a clear list of services audit firms cannot provide:** The committee recommends that the Financial Reporting Council, in partnership with ASIC, by the end of the 2020–21 financial year, oversee consultation, development and introduction under Australian standards of: a) defined categories and associated fee disclosure requirements in relation to audit and non-audit services; and b) a list of non-audit services that audit firms are explicitly prohibited from providing to an audited entity. (Recommendation 3)
4. **New requirement to declare that no prohibited non-audit service has been provided:** The committee recommends that the Corporations Act 2001 be amended so that an auditor's independence declaration is expanded to require the auditor to specifically confirm that no prohibited non-audit services have been provided. (Recommendation 4)



5. **Banning audit partners from receiving incentives for selling non-audit services to audit clients:** The committee recommends that the Australian Professional and Ethical Standards Board consider revising the APES 110 Code of Ethics to include a safeguard that no audit partner can be incentivised, through remuneration advancement or any other means or practice, for selling non-audit services to an audited entity. (Recommendation 5)
6. **Disclosure of auditor tenure:** The committee recommends that the Financial Reporting Council, by the end of the 2020–21 financial year, oversee the revision and implementation of Australian standards to require audited entities to disclose auditor tenure in annual financial reports. Such disclosure should include both the length of tenure of the entity's external auditor, and of the lead audit partner. (Recommendation 6)
7. **Mandatory tendering requirements:** The committee recommends that the Corporations Act 2001 be amended to implement a mandatory tendering regime such that entities required to have their financial reports audited under the Act must: a) undertake a public tender process every ten years; or b) if an entity elects not to undertake a public tender process, the entity must provide an explanation to shareholders in its annual report as to why this has not occurred. The committee further recommends that such a tender process be implemented by 2022 for any entity that has had the same auditor for a continuous period of ten years since 2012. (Recommendation 7)
8. **Formal review of the adequacy of existing reporting requirements in relation to the prevention detection of fraud:** The committee recommends that the Financial Reporting Council oversee a formal review, to report by the end of the 2020–21 financial year, of the sufficiency and effectiveness of reporting requirements under the Australian standards in relation to: a) the prevention and detection of fraud; and b) management's assessment of going concern (Recommendation 8).
9. **Internal control framework requirement:** The committee recommends that the Corporations Act 2001 be amended such that entities required to have their financial reports audited under the Act must establish and maintain an internal controls framework for financial reporting. In addition, such amendments should require that: a) management evaluate and annually report on the effectiveness of the entity's internal control framework; and b) the external auditor report on management's assessment of the entity's internal control framework. (Recommendation 9).
10. **Digital financial reporting:** The committee recommends that the Australian Government take appropriate action to make digital financial reporting standard practice in Australia (Recommendation 10)

No need for 'structural separation of audit firms'?

Committee Chair James Paterson said that the committee considered international experience in making the recommendations and that this informed the Committee's digital reporting recommendation. However, he said that the committee found 'no evidence to support radical measures which have been abandoned or discounted internationally, such as mandatory structural separation of audit firms.'

Response to the interim report

The **Chartered Accountants Australia and New Zealand** (CA ANZ) issued a statement welcoming the release of the interim report and the recommendations, and encouraging the 'government, organisations and regulators to press forward with making these improvements in the framework'.

CA ANZ Reporting & Assurance Leader Amir Ghandar said 'we believe these measures will improve confidence and quality in audit, as well as provide cover for the risks facing Australians'.

Seemingly commenting on recommendation 1, Mr Ghandar said that CA ANZ is 'optimistic that a holistic review of ASIC's audit inspection program, including more graduated insights on the severity of findings, will lead to better outcomes and constant improvement in audit quality. Australians have a fair and reasonable expectation that auditing and other lines of defence will protect them from risks and shocks in their financial and consumer lives, and provide confidence, integrity and transparency in business.'



Big four firms: The AFR reports that the big four firms are 'openly pleased' that many of their ideas were adopted by the Committee.

[Sources: Parliamentary Joint Committee on Corporations and Financial Services, Regulation of Auditing in Australia Interim Report 27/02/2020; Senator James Paterson media release 27/02/2020; [registration required] The Australian 28/02/2020; [registration required] The AFR 27/02/2020; 02/03/2020; CA ANZ media release 28/02/2020]

The FRC has called on the UK's largest audit firms to voluntarily move to ring-fence their accounting functions from their consulting functions

The Financial Reporting Council (FRC) has announced that it has written to the UK's largest audit firms setting out its expectations for 'operational separation to bring about audit quality improvement and audit market resilience'.

FRC Director of Audit Firm Monitoring and Supervision Claire Lindridge, said that the regulator's focus is 'to ensure audit firms put audit quality front and centre, with new independence and financial transparency guidelines to support this. We expect the firms to put in place independent governance for the audit practice and ensure that the audit practice is appropriately ring fenced from the rest of the firm so that financial results are clear and transparent.'

No further details, and no timeframe were specified in the FRC's statement.

The FT comments that the FRC's announcement comes almost 12 months after the Competition and Markets Authority (CMA) recommended that the government legislate to require audit firms to split their accounting function from their consulting functions, but that to date there are no signs of the legislation.

[Note: Recommendation 3 of the CMA's statutory audit services market study final report recommended an operational split between the audit and non-audit practices of the big four to 'ensure auditors' full focus is on conducting high quality audits, without their incentives being affected by the much greater revenue and profits from the non-audit side of the firm'. See: [Statutory Audit Services Market Study Final Report at p187.](#)]

Response from audit firms? Reportedly EY has said it is reviewing the FRC's proposals and the implications, KPMG and Deloitte declined to comment and PwC did not immediately respond.

[Sources: FRC media release 27/02/2020; [registration required] The FT 28/02/2020]

Accounting associations commit to global pledge calling on accountants across the world to use their skills and status in the fight against climate change

The Prince's Accounting for Sustainability Project (A4S) Accounting Bodies Network, which collectively represents over 2.5 million accountants worldwide has called on accountants globally to 'commit to the fight against climate change' by: a) integrating climate change risk into organisational strategy, finance, operations, and communications; b) supporting sustainable decision-making; and c) providing sound advice and services.

The 14 signatories to the initiative include (among others) The Institute of Chartered Accountants in England and Wales (ICAEW), CPA Australia and Chartered Accountants Australia and New Zealand as well as other large professional accounting associations.

In a statement, ICAEW said that accountants 'have both a responsibility to act in the public interest and the skills and expertise to help organisations deliver meaningful change with the urgency and scale required. ICAEW pledges to provide support to help its members fulfil this role'.

Commenting on the pledge, ICAEW CEO Michael Izza said that it is 'crucial we chartered accountants use our unique position as advisers to business and policymakers to make the case for sustainability'.

ICAEW's statement adds that 2020 is a 'significant moment for action' given the scale of the action required to limit global warming to 1.5°C above pre-industrial levels, and in the UK context, the challenge of meeting the government's net zero emissions target by 2050.

[Note: The call for action follows the launch of the Financial Reporting Council's review into the reporting and auditing of climate change impacts including the extent to which companies are reporting in accordance with the TCFD framework. See: [Governance News 26/02/2020 at p25.](#)]



[Sources: ICAEW media release 25/02/2020; Joint statement CPA Australia and Chartered Accountants Australia and New Zealand 25/02/2020; Accounting for stability: Accounting bodies network; The Guardian 25/02/2020]

In Brief | First 'significant sale' of an advisory unit by a Big Four accountant? The FT reports that KPMG has completed the disposal of its UK pensions practice in response to enhanced scrutiny by regulators on auditing conflicts

[Source: [registration required] The FT 02/03/2020]

Risk Management

Cybersecurity, Privacy and Technology

Human error is still a problem: OAIC's latest Notifiable Data Breach report finds cyber-attacks are the leading cause of notifications, but that in many cases the attacks include a human element

The Office of the Australian Information Commissioner (OAIC) has released its latest statistical report on the Notifiable Data Breaches (NDB) scheme covering the period July to December 2019.

Some Key Points

- 537 breaches were notified under the scheme, up from 460 in the previous six months
- The leading cause of notifications was malicious or criminal attacks (including cyber incidents) accounting for 64% of notifications. The OAIC received 230 notifications under this category, with phishing, malware, ransomware, brute-force attack and compromised or stolen credentials the main source of the data breaches. OAIC comments that many breaches resulting from cyber incidents included a human element, in that the malicious actor often required their target to do something such as clicking on a phishing email or disclosing passwords.
- Data breaches resulting from human error accounted for 32% of all breaches (170 breaches), which was a slight decrease on the last reporting period when human error accounted for 34% of breaches.
- System faults accounted for 4% of breaches (24 breaches) notified during the period.
- The health sector was again the highest reporting sector, notifying 22% of all breaches (117 breaches reported during the period). Most of these (43%) were caused by human error. In contrast, compared to an average of 32% across all notifications
- Finance was the second highest reporting sector, accounting for 14% (or 77) of all notified breaches, followed by education (49 breaches), legal, accounting and management services (40 breaches) and personal services (23 breaches).
- Most data breaches affected less than 100 individuals, in line with previous reporting periods
- Contact information — an individual's home address, phone number or email — remains the most common type of personal information involved in a data breach accounting for 77% of breaches notified under the scheme during the period.
- Identity information ie information used to confirm an individuals identify such as passport number, driver licence number, accounted for almost a third of breaches

[Sources: OAIC media release 28/02/2020; Notifiable Data Breaches Report: July–December 2019]

Climate Risk

The FT reports that Barclays, HSBC and Standard Chartered could potentially face litigation if they do not phase out financing for fossil fuel projects

The FT reports that TCI hedge fund manager Christopher Hohn has written to the Chairs of Barclays, HSBC and Standard Chartered calling on them to phase out financing of fossil fuel projects. Reportedly the letters



ask the three banks to publicly disclose their coal loan exposures and to re-evaluate the risks of financing fossil-fuels projects.

In addition, The FT reports that in an interview, Mr Hohn has said that banks could face a potential legal challenge from the Children's Investment Fund Foundation (the charity co-founded by Mr Hohn), which would be financed by TCI, for neglecting their fiduciary duty to their shareholders if they continue to finance risky fossil-fuel projects.

'My reputation as an activist is well known and we are able to fund litigation' Sir Christopher is quoted as saying.

The FT comments that TCI does not own any shares in Barclays, HSBC or Standard Chartered and that it is therefore unclear whether the letters will have any influence over the bank's climate-risk policies.

[Source: [registration required] The FT 02/03/2020]

'Climate trigger' Bill referred to the senate for inquiry

Context: The Environment Protection and Biodiversity Conservation Amendment (Climate Trigger) Bill 2020 proposes to introduce a 'climate trigger impact assessment' into the Environment Protection and Biodiversity Conservation Act 1999 to ensure Australia fulfils its obligations under the Climate Change Conventions. The Bill also proposes to introduce civil penalties for a person undertaking emissions-intensive actions if the action has, will have or is likely to have a significant impact on the environment. The Explanatory Memorandum accompanying the Bill states that an emissions-intensive action is an action that involves mining operations, drilling exploration, land clearing or is specified in the regulations.

Referred to Committee: On 27 February 2020, the Senate referred the Environment Protection and Biodiversity Conservation Amendment (Climate Trigger) Bill 2020 to the Senate Environment and Communications Legislation Committee for inquiry and report by 14 October 2020.

The closing date for submission is 21 May 2020.

Greens Environment Spokesperson Senator Sarah Hanson-Young, who introduced the Bill, issued a statement emphasising the importance and the urgency of the measures which she characterised as 'a common sense, reasonable step towards getting this country on the right track for dealing with climate change'.

[Sources: Greens Senator for South Australia Sarah Hanson-Young 24/02/2020; Senate Standing Committee on Environment and Communications: Environment Protection and Biodiversity Conservation Amendment (Climate Trigger) Bill 2020]

Scope 3 emissions Bill introduced: On 24 February independent MP Andrew Wilkie introduced a private members Bill which proposes, among other things to amend existing carbon emissions reporting requirements

On 24 February independent MP Andrew Wilkie has introduced a private members Bill — the National Greenhouse and Energy Reporting Amendment (Transparency in Carbon Emissions Accounting) Bill 2020 — which proposes to:

1. amend the National Greenhouse and Energy Reporting Act 2007 (NGER Act) to ensure that the Minister tables Australia's national greenhouse gas inventory estimates in Parliament each quarter; and
2. amend existing carbon emissions reporting requirements to capture scope 3 emissions (ie emissions that occur as a consequence of the activities of a facility, but from sources not owned or controlled by that facility's business) in all reporting obligations.

In his second reading speech Mr Wilkie said that the Bill is necessary to ensure transparency. 'This bill will ensure transparency and accountability in the Australian government's national emissions accounting and is an essential step towards rapid and urgent emissions reduction. With this bill, the government could no longer downplay the importance of Australia urgently reducing its carbon emissions' Mr Wilkie said.

Centre Alliance MP Rebekha Sharkie has expressed support for the Bill.

[Source: National Greenhouse and Energy Reporting Amendment (Transparency in Carbon Emissions Accounting) Bill 2020]



A Bill proposing to make 'major emitters' liable for climate change damage introduced into the House

The Greens introduced a Bill — the *Liability for Climate Change Damage (Make the Polluters Pay) Bill 2020* — into the House of Representatives on 24 February which proposes to:

1. make 'major emitters' (including fossil fuel producers) liable for climate change damage if their emissions are greater than 1 million tonnes in any 12 month period that began on or after 1 September 1990;
2. enable a person who suffered climate change damage, the Attorney-General of the Commonwealth, or of a State or Territory, to bring an action against a major emitter. The Federal Court of Australia would have the ability to: grant an injunction requiring the major emitter reduce or cease activities that may cause climate change damage in the future; and determine the amount of damages the major emitters is liable for.

According to the Explanatory Memorandum, the purpose of the Bill is to 'give victims of climate change, such as the recent bushfire survivors, the right to bring an action against thermal coal, oil and gas companies for climate change damage'.

In his *second reading speech*, Leader of The Australian Greens Adam Bandt MP said that the Bill puts 'beyond legal doubt that the thermal coal, oil and gas companies are liable for the climate damage they have contributed to...this bill is about justice. It's about bushfire survivors and tourism businesses. It's about protecting those whose livelihood depends on fertile soils, reliable water flows and a healthy Great Barrier Reef. It's about making sure that companies who have knowingly profited from the pollution that they have emitted pay for the damage that they cause'.

[Source: Liability for Climate Change Damage (Make the Polluters Pay) Bill 2020]

JP Morgan Chase reportedly plans to stop lending to Arctic oil drillers and coalminers

JP Morgan Chase has reportedly announced a range of new climate initiatives to investors.

According to media reports, the company plans to: a) restrict loans for coal mining and coal fired power; b) stop providing loans for oil and gas developments in the Arctic; c) join Climate Action 100+ and d) facilitate \$200bn in transactions to support sustainable projects and advance the United Nations' sustainable development goals.

Response

- Reportedly **Majority Action** has said that the steps outlined do not go far enough and called on JP Morgan to disclose its climate impact and realign its lending with the global 1.5 degree target. 'These steps pale in comparison to JP Morgan Chase's responsibility to confront the climate crisis and the systemic risks it poses to investors and global financial stability' a Majority Action spokesperson is quoted as saying.
- Reportedly **ShareAction** described JP Morgan's announcement as 'at best an anticlimax and at worst dangerously dismissive of a huge part of the coal market'. ShareAction reportedly added that the announcement also demonstrates that climate change is now a mainstream issue. 'Even the world's largest fossil fuel financier has no choice but to listen to its shareholders and civil society on climate change' a spokesperson is quoted as saying.
- **Rainforest Action Network** reportedly welcomed the bank's restrictions on financing coal companies but said the bank could further restrict lending, 'particularly in terms of phasing out their fossil financing'.
- **As You Sow** President, Danielle Fugere is quoted as saying that overall 'investors applaud' the announcement as a welcome and significant 'first step'. The 'announcement is a long-awaited signal that JP Morgan Chase may be ending its outsized level of fossil fuel financing in the face of growing climate concern...This first step is significant. Funding of new coal, including coal-fired power plants, is incompatible with the goal of maintaining global temperature rises at 1.5 degrees Celsius' she reportedly said. 'Having taken this first important step, investors are looking to JPMorgan to rapidly transition the full range of its fossil fuel financing, including oil and gas, in line with Paris goals' Ms Fugere reportedly said.

[Sources: The Guardian 25/02/2020; Reuters 25/02/2020; InvestorDaily 26/02/2020]



Reuters reports that Catholic religious order, the Jesuits in Britain has committed to divest itself of its fossil fuel stocks by the end of 2020

Reuters reports that Catholic religious order Jesuits in Britain will divest itself of its fossil fuel stocks by the end of 2020. Reportedly the group is already 50% of the way through the process of selling its holdings in BP, Shell and Total.

According to Reuters, the group has considered divestment for a decade but had until now elected only to restrict investment. However, due to the inadequacy of fossil fuel companies' response to the climate threat, the group shifted strategy. Stephen Power, a Brother in the Society of Jesus, which manages the group's ethical investing strategy is quoted as saying 'our trustees took the decision to completely divest from oil, gas and coal-producing companies because they felt these companies were not making enough progress towards better solutions'.

[Source: Reuters 27/02/2020]

Rio Tinto has announced plans to invest \$1 billion over the next five years to support the delivery of its new climate change targets and a company objective for net zero emissions from operations by 2050

Rio Tinto has announced plans to invest around \$1 billion over the next five years to support the delivery of its new climate change targets and a company objective for net zero emissions from operations by 2050.

No commitment to set targets for reducing Scope 3 emissions? The SMH comments that Rio Tinto has ruled out following BHP in setting Scope 3 emissions targets.


Details

- **The new targets for 2030** are: a) a further 30% reduction in Rio Tinto's emissions intensity from 2018 levels; and b) a further 15% reduction in Rio Tinto's absolute emissions from 2018 levels. According to Rio Tinto's announcement, this will mean that Rio Tinto's overall growth between now and 2030 will be carbon neutral.
- **The achievement of Rio Tinto's emissions targets is linked to executive remuneration:** According to the statement, the CEO's Short Term Incentive Plan includes delivery of the group's strategy on climate consistent with the new targets. These are cascaded down to relevant members of the Executive Committee and other members of senior management.
- **How the net-zero emissions by 2050 target will be achieved:** Rio Tinto's second climate report outlines out how it plans to achieve its ambition of net-zero emissions by 2050 through action in four areas: 1) producing materials (including aluminium, copper and high-grade iron ore) essential to the transition to a low carbon economy; 2) reducing the carbon footprint of operations by enhancing productivity and efficiency, as well as exploring alternative sources of energy and developing pathways to reduce emissions; 3) partnering to reduce the carbon footprint across the value chain eg partnering with China Baowu Steel Group and Tsinghua University to develop solutions to help address the steel industry's carbon footprint and improve environmental performance. In 2018; and 4) enhancing resilience to physical climate risks.

Rio Tinto chief executive J-S Jacques said 'Climate change is a global challenge and will require action across nations, across industries and by society at large'. Mr Jacques went on to say that the 'pathway' to addressing the challenge is not clear and that doing so, will necessarily involve challenging decisions. 'The ambition is clear but the pathway is not and the challenge for the world, and for the resources industry, is to continue the focus on poverty reduction and wealth creation, while delivering climate action. This will require complex trade-offs which means we all need to face up to some challenging decisions and have an honest conversation. For Rio Tinto, it is about setting a long-term ambition and establishing stretching, but achievable targets, like we have done for 2030 and 2050. We are fully committed to meeting that challenge and being part of the solution' Mr Jacques is quoted as saying.

Response

- The SMH reports that **AustralianSuper**, which owns shares in Rio Tinto, has welcomed the announcement. AustralianSuper is quoted as saying that the initiative is a 'great demonstration of



constructive engagement resulting in genuine outcomes on climate change. These are issues that AustralianSuper as a lead investor has been engaging with Rio on for more than two years as part of the Climate Action 100+ initiative," said Andrew Gray, AustralianSuper's director of environmental, social and governance. We look forward to continuing to engage with Rio to fulfil these commitments.'

- **Market Forces** executive director Julien Vincent is quoted in the SMH as saying that the group is disappointed that the plan did not address Scope 3 emissions, which account for the majority of the company's carbon footprint. 'If they are not doing anything to manage the massive structural shift to the operations as we work towards the Paris agreement, that should be ringing alarm bells for investors' Mr Vincent is quoted as saying.

[Note: A shareholder resolution calling on Rio Tinto to set targets for reducing Scope 3 emissions has been filed. The full text of the resolution is available on the ASX website [here](#).]

- **Shadow Minister for climate change has called on the government to commit to net zero emissions by 2050:** In a statement responding to Rio Tinto's announcement Shadow Minister for climate change and energy Mark Butler said that it was the latest move by business globally to commit to the target, and that on this basis, the government should make a similar commitment. 'Rio Tinto now joins Australia's largest miner, BHP, in its commitment to net zero emissions by 2050. They also join seventy-three nations, every Australian state government, Australia's largest airline, our biggest bank, our biggest telecommunications provider, and other leading businesses. Scott Morrison has now found himself completely out of step with Australian business, other governments and the community' Mr Butler said.

[Sources: Rio Tinto media release 26/02/2020; The SMH 26/02/2020; [registration required] The FT 27/02/2020; The Guardian 26/02/2020; The Australian 27/02/2020; Shadow Minister for climate change and energy Mark Butler Media release 27/02/2020]

BP will reportedly exit lobby groups over differences in climate stance

The AFR is reporting that BP will leave three US petroleum industry trade groups due to differences over climate change policy.

BP will reportedly cease to be a member of the American Fuel & Petrochemical Manufacturers (the main US refining lobby group) and will not renew its membership of Western States Petroleum Association and Western Energy Alliance.

The AFR quotes BP CEO Bernard Looney as saying, 'BP will pursue opportunities to work with organisations who share our ambitious and progressive approach to the energy transition. And when differences arise we will be transparent. But if our views cannot be reconciled, we will be prepared to part company'.

[Source: [registration required] The AFR 27/02/2020]

In Brief | The Bank of England has released its COP 26 agenda: The Bank said that the objective is 'that every professional financial decision will need to take climate change into account...to achieve net zero, every company, bank, insurer and investor will need to adjust their business models for a low carbon world'

[Source: Bank of England media release 27/02/2020; [registration required] The FT 02/03/2020]

In Brief | The Greens have introduced a Climate Emergency Declaration Bill. In his second reading speech, Greens Leader Adam Bandt said that the Bill 'declares that we commit to secure a prosperous, jobs-rich future for ourselves and our children. This bill is an explicit acknowledgement of how much danger we are in... But this bill will be more than a declaration. All Public Service agencies will be responsible for acting in accordance with the declaration when developing, implementing, providing and evaluating policies. Agencies will be required to report on their compliance each reporting period. The bill will also establish a climate emergency war cabinet to guide the country through the rapid society wide and economywide response to the climate crisis'. Independent MP Zali Steggal seconded the Bill

[Sources: Climate Emergency Declaration Bill 2020; second reading speech: Greens Leader Adam Bandt 02/03/2020; Independent MP Zali Steggal second reading speech]



Other Developments

Financial regulators are prepared to meet the COVID-19 threat: ASIC says it has processes in place, APRA has reportedly asked entities to provide copies of their contingency plans

Key Takeouts

- ASIC has told the Parliamentary Joint Committee on Corporations and Financial Services that the regulator has processes in place to deal with pandemic events
- APRA has asked entities to provide copies of their contingency plans for dealing with the COVID-19 threat

ASIC Chair James Shipton says that the regulator has processes in place to deal with pandemic events

In his [opening statement](#) to the Parliamentary Joint Committee on Corporations and Financial Services, Australian Securities and Investments (ASIC) Chair James Shipton provided brief updates on ASIC's: a) response to the referrals and recommendations made by the Hayne Commission; b) 'renewed governance and accountability framework; and c) enhanced risk management and workforce capabilities.

The 'enormity' of the challenge for ASIC (and for industry)

Mr Shipton emphasised the scale of the challenge for ASIC and for industry in creating a 'fair, strong and efficient financial system' in light of 'the underlying issues in Australia's financial system. For example, Mr Shipton noted that there was a 40% increase in complaints to the Australian Financial Complaints Authority compared to predecessors and a 100% increase in breach notifications following the Hayne Commission.

Mr Shipton said that 'it is clear to me, corporate Australia did not invest in the systems, processes and management of non-financial risk to the same extent that the rest of the world did last decade. Indeed, the Royal Commission exposed this underinvestment. So, there is a period of significant catch up'.

[Note: In his statement to the Committee, Mr Shipton tabled ASIC's latest six monthly update on progress towards implementing the Hayne Commission recommendations, and acting on the case studies and referrals from the Commission. The update can be accessed on ASIC's website [here](#). A summary is included in a separate post in this issue of Governance News.]

Strengthening ASIC's risk management

Mr Shipton told the Committee that better identifying and managing risk across the agency is a key outcome of ASIC's new governance framework and to support this aim, ASIC is in the process of appointing its first Chief Risk Officer.

Strengthening ASIC's workforce capabilities

Mr Shipton said that ASIC is using additional funding to enhance its legal, investigative and surveillance capabilities. For example, ASIC is 'accelerating its data analytics capability' and has appointed a Chief Data and Analytics Officer.

Pandemic Events

In addition, Mr Shipton said that the regulator has processes 'to deal with specific risks - for example, monitoring and planning for potential consequences of pandemic events'.

Mr Shipton said that ASIC:

1. has an internal pandemic response plan in place in relation to the Coronavirus;
2. has contacted 'significant market participants to ascertain what business continuity arrangements they have in place'.
3. is monitoring the continuous disclosure of listed entities as a result of changing market sensitivities and volatility.



Mr Shipton added that ASIC is working closely with fellow regulators, both domestically and overseas to monitor the situation.

[Source: Opening statement by ASIC Chair James Shipton, Parliamentary Joint Committee – Corporations and Financial Services, 28/02/2020; [registration required] The AFR 28/02/2020]

APRA has reportedly called on industry to provide copies of their contingency plans for dealing with the COVID-19 threat

The Australian is reporting that following the Prime Minister's decision to activate the government's pandemic response plan, the Australian Prudential Regulation Authority (APRA) has written to APRA regulated financial institutions requesting that they provide copies of their contingency plans for dealing with the fallout from the emerging threat.

According to The Australian, a number of the largest health insurers, superannuation funds and lenders have implemented measures already in response to threat including, in the case of lenders imposing travel bans on employees, requiring returning employees to self-isolate for two weeks prior to returning to work.

[Source: [registration required] The Australian 28/02/2020]

How should business respond to the COVID-19 threat? McKinsey has released a suggested checklist of actions for business to consider implementing

McKinsey and Co has released a 'briefing note' outlining its assessment of the implications of the spread of COVID-19 at the present time, and setting out seven suggested actions which may assist companies to manage/respond to the threat posed by the spread of the virus. McKinsey has said that it will update the article as the 'outbreak evolves'.

[Note: Exhibit 3 at the end of the article is a checklist of suggested immediate actions for business to respond to the COVID-19 threat. This can be accessed [here](#). A more detailed checklist can be accessed at p15 [here](#).]

Suggested actions for businesses to consider in response to the spread of COVID-19

<p>1. Employee support/protection</p>	<p>The report states that 'business as usual is not an option'. McKinsey suggests that businesses should consider:</p> <ul style="list-style-type: none"> ▪ Developing and executing a plan to support employees that is consistent with the most conservative guidelines that might apply and which includes trigger points for policy changes. McKinsey says that some companies are benchmarking their efforts against others to determine the appropriate policies/levels of support. ▪ Leaders should communicate with employees with the right level of specificity and frequency.
<p>2. Establish a cross-functional COVID-19 response team</p>	<ul style="list-style-type: none"> ▪ McKinsey suggests that companies should establish a cross-functional COVID-19 response team. The leader should be an executive with a direct reporting line to the CEO and the team should include representatives from every business function. McKinsey suggests that in most cases, team members will need to step out of their day-to-day roles and dedicate most of their time to virus response. ▪ McKinsey suggests that the team should be split into the following sub-teams/workstreams: a) employees' health, welfare, and ability to perform their roles; b) financial stress-testing and development of a contingency plan; c) supply-chain monitoring, rapid response, and long-term resiliency; d) marketing and sales responses to demand shocks; and e) coordination and communication with relevant constituencies.



	<ul style="list-style-type: none"> Each workstream should define specific goals for the next 48 hours, adjusted continually, as well as weekly goals, all based on the company's agreed-on planning scenario. No room for pointless meetings: McKinsey emphasises that the response team should 'install a simple operating cadence and discipline that focuses on output and decisions, and does not tolerate meetings that achieve neither'.
3. Ensure they have plans in place to 'weather the storm'	<ul style="list-style-type: none"> Businesses should define scenarios tailored to their company's context. Companies should model their financials (cash flow, P&L, balance sheet) in each scenario and identify triggers that might significantly impair liquidity. For each such trigger, companies should define moves to stabilise the organization in each scenario (optimizing accounts payable and receivable; cost reduction; divestments and M&A).
4. Stabilise the supply chain in the immediate term, and going forward	<ul style="list-style-type: none"> Companies should define the extent and likely duration of their supply-chain exposure to areas that are experiencing community transmission. McKinsey notes that most companies are currently focused on immediate stabilisation in light of the fact that most Chinese plants are 'currently in restart mode'. However, it's suggested the companies should look beyond this including by giving consideration to: a) rationing critical parts; b) prebooking rail/air-freight capacity; c) using after-sales stock as a bridge until production restarts; and d) gaining higher priority from their suppliers. It's also suggested that companies start planning how to manage supply for products that may, as supply comes back on line, see unusual spikes in demand due to hoarding. McKinsey says that in some cases, medium or longer-term stabilisation may be warranted, which will mean companies need to update demand planning, further optimise networks and search for and accelerate qualification of alternate suppliers.
5. Stay close to your customers	<ul style="list-style-type: none"> McKinsey suggests that companies should invest in online sales channels including ensuring the quality of goods sold online. 'Customers' changing preferences are not likely to go back to pre-outbreak norms' McKinsey writes.
6. Practice the plan	<ul style="list-style-type: none"> It's suggested that companies use tabletop simulations to define and verify their activation protocols for different phases of response (contingency planning only, full-scale response, other). The simulations should: a) clarify decision owners; b) ensure that roles for each top-team member are clear; c) call out the "elephants in the room" that may slow down the response; and d) ensure that the actions needed to carry out the plan are fully understood and the required investment readily available.
7. Demonstrate purpose	<ul style="list-style-type: none"> Companies should determine how to support response efforts eg by providing money, equipment, or expertise.

[Source: McKinsey and Company, COVID-19: Implications for business March 2020]

In Brief | The RBA cut interest rates to 0.5%: In a statement the RBA said it took this decision to support the economy as it responds to the global coronavirus outbreak and will continue to monitor



developments and to assess the implications of the virus for the economy. The statement adds that the board is prepared to 'ease monetary policy further to support the Australian economy'

[Source: RBA media release 03/03/2020]

In Brief | The AFR reports that Attorney General and Minister for Industrial Relations Christian Porter has flagged plans to 'issue a discussion paper on the general issue of award complexity' in the 'coming months' in response to business concerns over the new timesheet rules for salaried workers

[Source: [registration required] The AFR 02/03/2020]

Corporate Liability and Misconduct

Backing away from proposals to strengthen the corporate criminal responsibility regime? The Australian is reporting that the ALRC has scrapped proposed changes to individual director liability

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.

Proposed changes to strengthen individual accountability for corporate misconduct scrapped?

The Australian reports that the ALRC has decided not to proceed with recommending proposals nine and ten in its final report.

The Australian quotes ALRC principal legal officer Matt Corrigan as saying that the decision was made in light of the proposed new Financial Accountability Regime (FAR) which will extend the Banking Executive Accountability Regime (BEAR) scheme (and its enhanced accountability measures) to all APRA and ASIC regulated entities.

The Australian suggests that the shift in stance will be welcomed by 'the corporate community', who reportedly 'overwhelmingly' view existing accountability mechanisms as adequate.

[Source: [registration required] The Australian 27/02/2020]

UK's first trial of bank executives for misconduct during the 2008 Financial Crisis: Former Barclays executives have been cleared of all fraud charges in connection with capital raising arrangements agreed with Qatar Holding LLC and Challenger Universal Ltd in June and October 2008

The Serious Fraud Office (SFO) has announced that former Barclays executives Roger Jenkins, Thomas Kalaris and Richard Boath have each been acquitted of fraud in the UK's first trial of bank executives for misconduct during the 2008 Financial Crisis.



The executives were charged with conspiracy to commit fraud in relation to allegedly misleading investors and the markets over capital raising arrangements agreed with Qatar Holding LLC and Challenger Universal Ltd in June and October 2008.

Commenting on the outcome, an SFO spokesperson said that the regulator's 'prosecution decisions are always based on the evidence that is available, and we are determined to bring perpetrators of serious financial crime to justice. Wherever our evidential and public interest tests are met, we will always endeavour to bring this before a court'.

Media reports have suggested that the result calls into question the ability of the SFO to prosecute corporate crime. The FT describes the result as a 'stunning setback' for the regulator that is likely to make the task of bringing future fraud cases more difficult.

[Sources: SFO media release 28/02/2020; [registration required] The FT 29/02/2020; BBC News 28/02/2020; The Guardian 28/02/2020; Law Society Gazette 28/02/2020; Bloomberg 28/02/2020; Organised Crime and Corruption Reporting Project 28/02/2020; [registraiton required] The WSJ 28/02/2020]