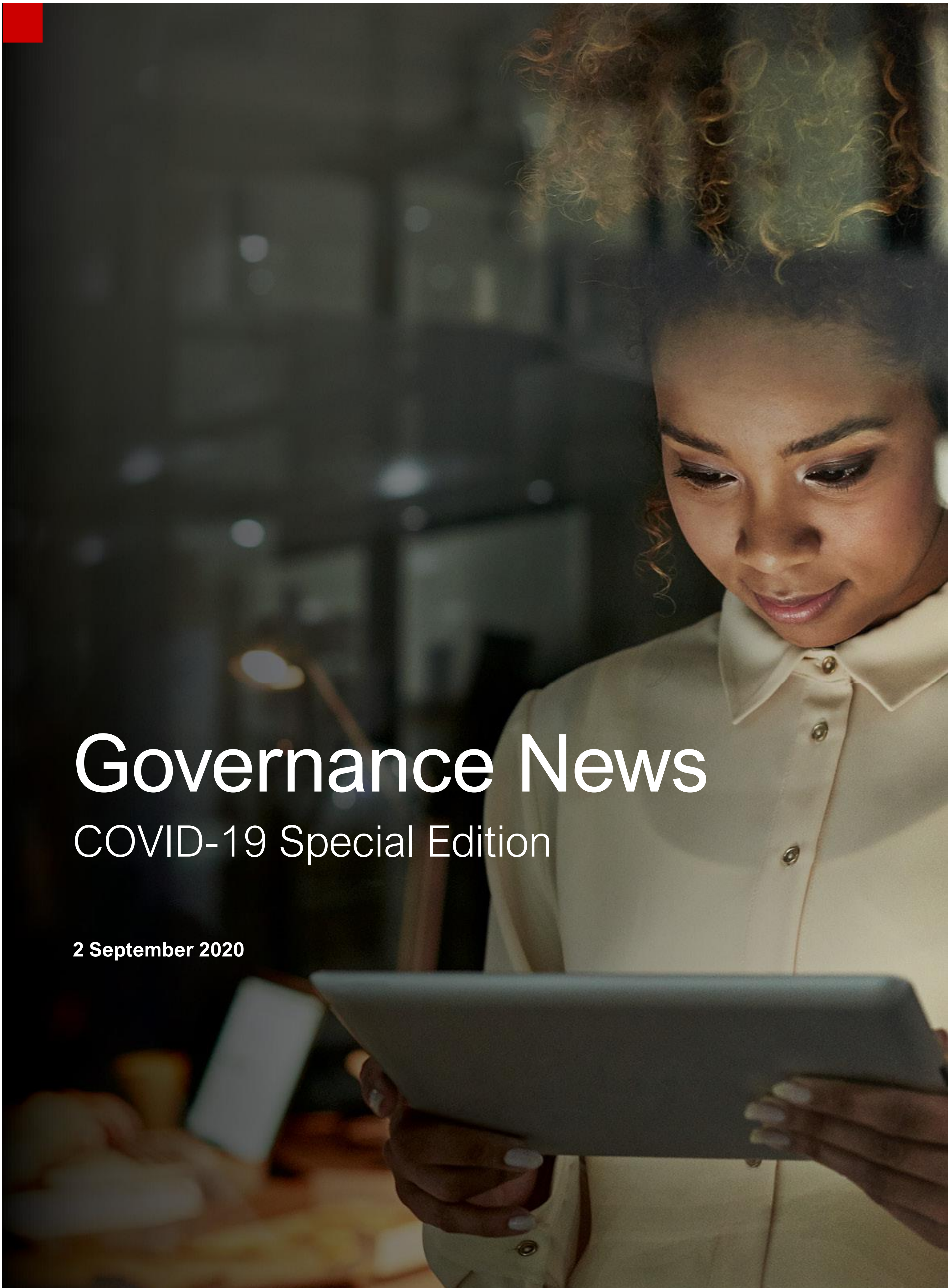


Governance News

COVID-19 Special Edition

2 September 2020

Contents

COVID-19 Key Developments

Top Story | COVID-19 and 'new normal': The role of purpose in the COVID-19 era and beyond

As economies adjust to the coronavirus and business considers what 'normal' might look like in the future, MinterEllison Managing Partner Annette Kimmitt, spoke with ANZ CEO Shayne Elliott about the role purpose can play in the COVID-19 era.

The discussion also touched among other things, on the ways in the pandemic has amplified debate around the role of business, stakeholderism and social licence.

Mr Elliott observed,

> 'There has been an accelerating conversation about the role of business and whether it is around the single pursuit of shareholder returns…I think people will be asking more questions about what the role of the company in the broader community. What is your role around environmental sustainability? What is your role around health and hygiene and a host of other factors? There will be more demand around social purpose and social licence. I think there is going to be a big debate in Australia and globally about social responsibility of business and social licence'.

A recording of the discussion as well as a summary of the key points are available on our website here.

Extension of the JobKeeper Scheme: The Coronavirus Economic Response Package (Jobkeeper Payments) Amendment Bill 2020 has passed both Houses

The Coronavirus Economic Response Package (Jobkeeper Payments) Amendment Bill 2020 passed both Houses having been amended in the Senate, on 1 September.

Broadly, the Bill proposes to:

- extend the JobKeeper scheme to 28 March 2021 in line with the government's previous announcements
- amend the relevant information sharing provisions to enable the ATO to share certain JobKeeper payment information with Commonwealth, state and territory government agencies. The explanatory memorandum states that such disclosures 'can only be made for a purpose relating to the Coronavirus'
- extend the temporary JobKeeper fair work provisions in part 6-4C of the Fair Work Act, except for those relating to annual leave until 28 March 2021. From 28 September 2020:
  - employers who remain eligible for JobKeeper payments will retain access to the full range of flexibility measures in part 6-4C in relation to employees for whom they are claiming the payment
  - legacy employers (employers who have previously received the JobKeeper scheme, but who no longer qualify after 28 September 2020), will be able to access a modified version of the JobKeeper provisions in relation to employees for whom they have previously received JobKeeper payments (subject to the employer holding a 10% decline in turnover test certificate).

In his second reading speech, Treasurer Josh Frydenberg also highlighted that a two tiered JobKeeper payment will also be introduced from 28 September. Employees who were employed for less than 20 hours a week on average in the four weekly pay periods ending before 1 March 2020 will receive a lower payment rate. Mr Frydenberg said that,

> 'The phasing down of the JobKeeper payment will ensure a smooth and gradual transition to economic recovery, while ensuring that those who most need support continue to receive it. The introduction of a two-tiered payment rate will also better align the JobKeeper payment with the pre-COVID incomes of recipients—particularly those who work part-time hours'.

Technical amendments

The Bill enables an eligible financial service provider to issue a written certificate (the 10% decline in turnover certificate) that states that, in the opinion of the eligible financial service provider, a particular employer satisfied the 10% decline in turnover test for the designated quarter applicable to a specified time . The terms 'eligible financial service provider' and '10% decline in turnover test' are defined in the Bill.

The Bill was amended in the Senate to

- 'remove 'registered company auditor' and 'tax (financial) adviser' from the definition of 'eligible financial service provider' to ensure that only those professionals with the most appropriate skills and expertise are able to issue a 10% decline in turnover certificate; and
- make it clear that the issuing of the certificate involves a declaration from an eligible financial service provider that relates to a specific employer and confirms that the employer satisfied the 10% decline in turnover test for the designated quarter applicable to a specified time. This requires the eligible financial service provider to confirm that the test has been met based on the information provided, and does not constitute an audit or assurance engagement. The amendment achieves this by removing the word 'opinion' from the relevant provision in the Bill'.

The supplementary explanatory memorandum states that these 'minor technical amendments' have been included 'to ensure that the policy intention of the provision is given effect'.

[Sources: Coronavirus Economic Response Package (Jobkeeper Payments) Amendment Bill 2020; Explanatory memorandum; Supplementary Explanatory Memorandum; Schedule of Amendments; Treasurer Josh Frydenberg second reading speech]

COVID-19: ABS data shows larger businesses are struggling less than small ones as a result of the pandemic

The Australian Bureau of Statistics (ABS) has released data from a COVID-19 survey conducted between 12 August and 19 August, measuring the impact of COVID-19 on businesses.

The survey found that:

- 35% of small businesses (0-19 employees) expect to find it difficult/very difficult to meet financial commitments over the next three months. In contrast, fewer large businesses (200+ employees) indicated that this was the case (18%).
- 41% of businesses reported that revenue had fallen over the last month and 22% had an increase in operating expenses
- 28% of businesses expect a decrease in revenue over the next month
- 23% of businesses reported they had decreased or cancelled their actual/planned capital expenditure compared to three months earlier. In most cases (59%) businesses made this decision due to uncertainty about the future state of the economy. In 40% of cases, the future expected customer demand for products/services was behind the decision.

The survey is part of a series of additional information the ABS is releasing measuring the impacts of COVID-19.

[Source: ABS media release 27/08/2020]

In Brief | According to Roy Morgan 10.4m employed Australians (67% of employees) have experienced some change to their working conditions because of COVID-19. The proportion of employees impacted has been highest in Tasmania (74%), Victoria (70%) and NSW (70%)

[Source: Roy Morgan media release 26/08/2020]

In Brief | In its pre-budget submission to the federal government, The Australian Financial Markets Association called for the introduction of a range of measures to 'support the vital role of financial markets' in the COVID-19 recovery. Among other things, AFMA proposes that the government establish a 'test case scheme' for ASIC (based on the ATO's test case scheme)

[Source: AFMA media release 26/08/2020]

Remuneration

Incorporating ESG metrics into executive remuneration plans: Semler Brossy analyses Fortune 200 companies' current approach

Analysis of the extent to which Fortune 200 companies incorporate ESG/sustainability metrics into executive remuneration plans and their approach to doing so, conducted by Semler Brossy has identified (among other things) that:

- Use of ESG metrics is fairly 'widespread': Around 62% of Fortune 200 companies currently include some form of stakeholder or ESG metrics in their executive remuneration plans.
- The metrics used tend to be tied to day to day operations (where the impact is more easily quantified) rather than to the achievement of longterm sustainability objectives (where the immediate impact is less easily quantified). Clear-cut measures such as product quality or workplace safety often have explicit weightings attached to them and a direct impact on incentives.
- Where sustainability metrics are used, for example objectives related to people management or culture they tend to be 'soft' metrics involving more judgement to assess performance. One result of this is that performance against them is often assessed as a discretionary element of incentives and often as part of a broader assessment of business/strategic considerations.
- The most prevalent sustainability/ESG metric currently incorporated into executive incentives is diversity and inclusion (D&I) with 38% of companies with ESG measures including a D&I metric in some form. The report comments that D&I metrics are rarely (in 10% of cases only) given a formal weighting, rather they are more usually included on a discretionary basis. The report attributes this approach both to reluctance on the part of companies to divulge hard diversity/inclusion targets, ie to 'boards' traditional hesitation to set and disclose formal targets around D&I initiatives, likely due both to general discomfort around setting "quotas" and optics as well as risks associated with disclosing performance that may be subject to external criticism'. In addition, the report observes that a number of companies recognise the limits of hard metrics in measuring the cultural aspects of inclusion.
- Calls for more accountability is likely to lead to more specific/explicit measures? The report suggests that demands for accountability around companies' D&I progress is likely to increase in light of the recent public outcry over racial inequality. On this basis, the report suggests that the prevalence and 'explicit measurement' of D&I in incentive plans is likely to increase though debate around the merits of incentivising representation statistics as the primary measure of progress is likely to continue.

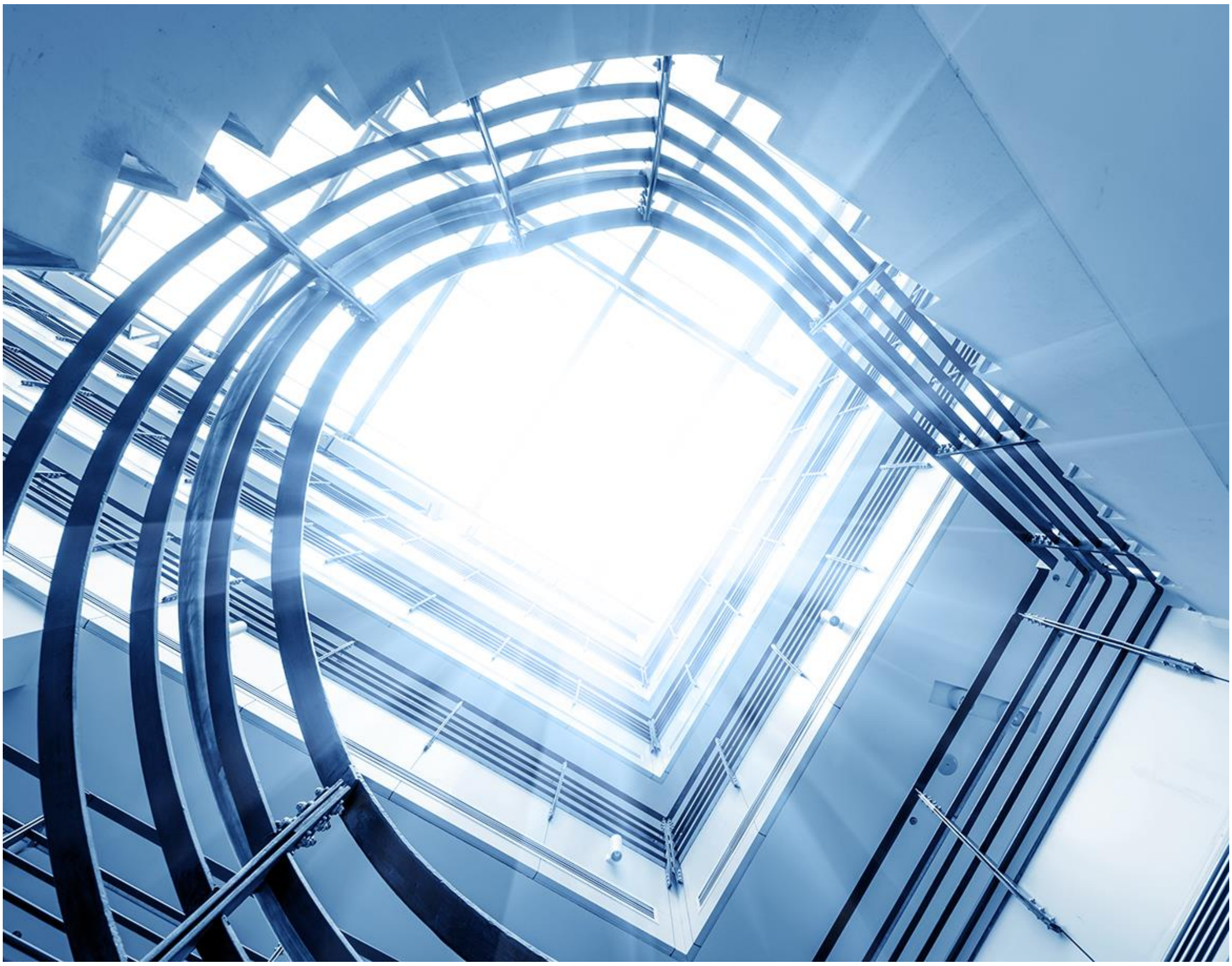
[Source: Harvard Law School Forum on Corporate Governance and Financial Regulation 29/08/2020]

In Brief | 'If you're getting taxpayer subsidies, the CEO should not be getting a bonus': Shadow Assistant Minister for Treasury and Charities Andrew Leigh has attacked the 'small number of firms' who are 'channelling' support payments to executive bonuses or into payment of dividends

[Source: Shadow Assistant Minister for Treasury and Charities Andrew Leigh, Executive salaries shouldn't be subsidised by taxpayers - Speech, House of Representatives 31/08/2020]

In Brief | Equal Pay Day in Australia was 28 August but drilling down it varies in different states. In NSW and QLD it's 4 September according to Workplace Gender Equality Agency data

[Source: WGEA media release 28/08/2020]



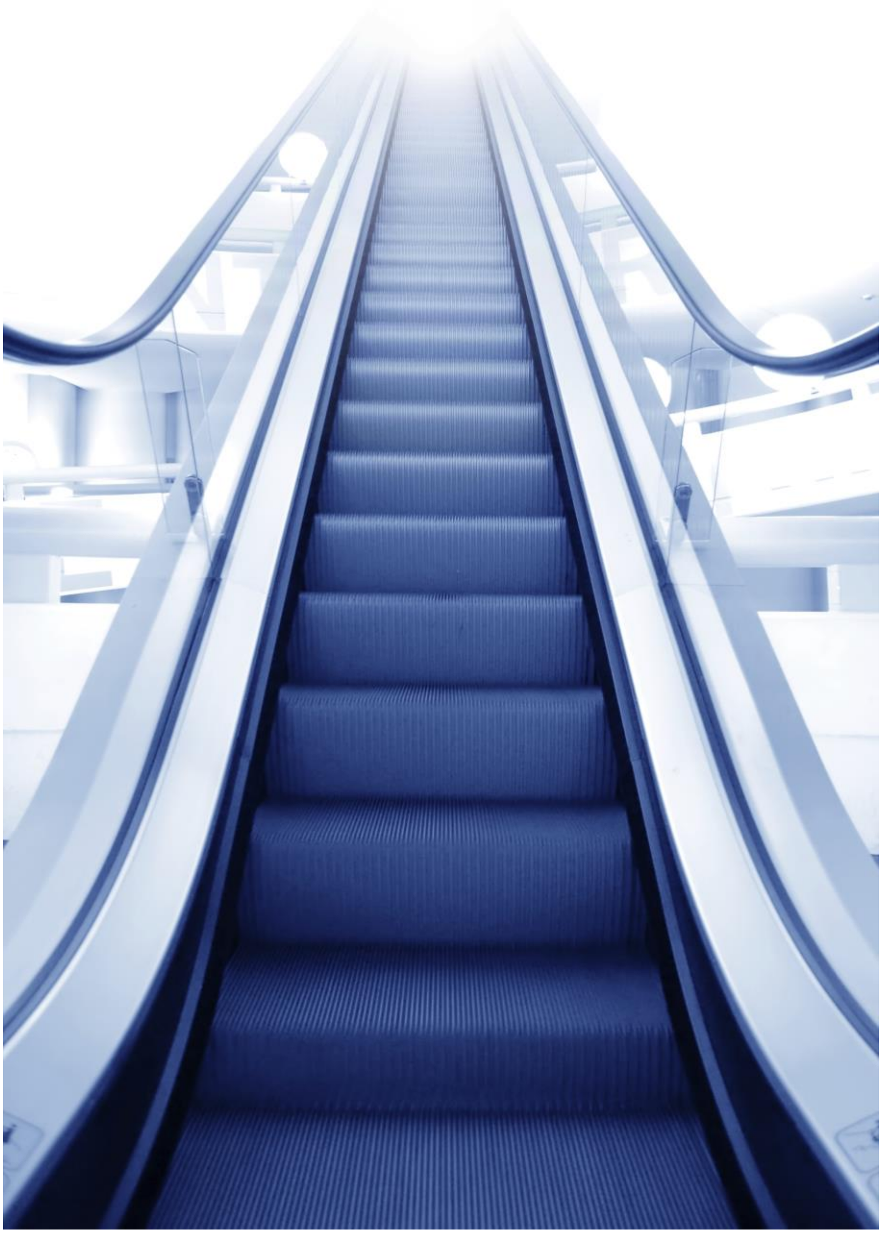
Disclosure and Reporting

RMIT/UNAA report finds that ASX 100 companies are increasingly reporting against the SDGs but that the quality and consistency of reporting needs improvement

A joint report from RMIT university and United National Association of Australia (UNAA) tracking the extent to which ASX 100 companies measure/disclosed their awareness of and commitment to progressing towards the Sustainable Development Goals (SDGs) has identified that awareness and use of the SDGs is increasing, but that overall the quality and consistency of reporting could be improved.

Lead author, Professor Nava Subramaniam observed that a lack of standardised guidelines for reporting on the SDGs was making it difficult to assess progress being made and to hold companies to account.

> 'There are a number of reporting frameworks and guidelines including the GRI standards that companies can adopt for sustainability reporting. However, the voluntary nature of reporting and the lack of a systematic approach to linking business goals with the SDGs results in little to no consistency in SDG prioritization and reporting across the board.'



Some interesting insights from the report

- **Awareness of the SDGs is increasing:** Between 2018 and 2019 the proportion of ASX 150 companies mentioning the SDGs in their reports has increased from 37% to 48%. The report welcomes this as an indication of the 'growing interest in the SDGs'. However, UNAA (NSW) Director of Strategic Partnerships, Ben Woltmann, also commented that Australian companies are still behind their European peers, 75% of whom report on sustainability.
- **More companies than previously are reporting against the SDGs:**

Between 2018 and 2019, the number of companies disclosing how they are prioritising selected SDGs also increased from 25% to 45%..

- Governance oversight: 63% of companies disclosed having a 'distinct sustainability oversight committee' in 2019 up from 41% in 2018. Disclosure of board members specifically having expertise in sustainability or the SDGs also increased from 9% in 2018 to 27% in 2019. The report welcomes this as an indicator of increased commitment and expertise at board level to sustainability and the SDGs.
- Most commonly prioritised SDG goals in 2019: The top five most commonly prioritised goals were: 1) SDG13 Climate Action; 2) SDG8 Decent Work and Economic Growth; 3) SDG5 Gender Equality; 4) SDG12 Responsible Consumption and Production, and 5) SDG9 Industry, Innovation and Infrastructure. According to the report, this is an indicator of the issues businesses consider to be most important. That is, the report suggests that this is an indicator that Australian companies are primarily concerned about 'economic sustainability, industry innovation and responsible practices, particularly in relation to gender equality, sustainable consumption and production'.
- More businesses are prioritising one or more SDGs: The number of companies that prioritised one or more SDGs almost doubled over the period 2018 to 2019, from 25% in 2018 to 45% in 2019. Of the 67 companies prioritising SDGs, 30% targeted between 1 to 5 goals, 42% of the companies between six to ten SDGs, and 25% targeted 11 to 16 goals. Only two companies (3%) referred to all 17 goals.
- Going backwards on some measures
  - The number of companies embedding SDGs into their materiality analysis fell between 2018 and 2019 from 48% of companies in 2018 to 43% in 2019. Seven companies that reported materiality analyses in 2018, did not do so in 2019. Only two companies undertaking a materiality analysis specified targets for the prioritised SDGs.
  - Only 9% of CEO/Chair messages in sustainability reports mentioned the SDGs, in 2019 down from 11% in 2018. Moreover, though five CEOs mentioned SDGs for the first time in 2019, eight CEOs who mentioned the SDGs in 2018 did not do so in 2019.
  - Target setting: 48% of companies prioritising SDGs aligned their prioritised SDGs with business performance targets and indicators up from 16% in 2018. However, only 14% (five companies) set quantitative or qualitative targets for the SDGs linked to their business goals indicating, the report suggests, a lack of commitment.

[Sources: RMIT media release 26/08/2020; SDG Measurement and Disclosure 2.0: A study of ASX150 companies]

In Brief | Making temporary changes to continuous disclosure laws permanent is unjustified and would undermine confidence in the market? The AFR reports that activist funds oppose the proposal to permanently insert a fault element into disclosure laws

[Source: [registration required] The AFR 01/09/2020]

Institutional Investors and Stewardship

Top Story | Mandatory climate risk governance and TCFD reporting requirements for pension funds: UK government consultation launched

Key Takeouts

- **Consultation on the roll out of new mandatory climate risk management and reporting requirements:** The UK Department of Work and Pensions is seeking feedback on proposed plans to roll out new requirements for trustees of larger occupational pension schemes and authorised schemes to: 1) have in place 'effective governance, strategy, risk management and accompanying metrics and targets for the assessment and management of climate risks and opportunities'; and 2) to disclose these arrangements in line with the Task Force on Climate-related Financial Disclosures (TCFD) recommendations.
- **Phased roll-out:** It's proposed that schemes with £5 billion or more in assets, authorised master trusts and collective money purchase schemes be required to implement new climate governance requirements from October 2021 and to report on these in line with the TCFD's recommendations by the end of 2022. The requirements would be extended to schemes with £1 billion or more in assets in the following year. Further extension of the scheme would be considered in 2024, as part of a review of operation of the scheme. .
- **Paris Agreement?** In his Ministerial Foreword Minister for Pensions and Financial Inclusion Guy Opperman comments that it is not proposed, at this stage, to mandate 'Paris alignment reporting', though the government intends to 'consult on mandatory Paris alignment reporting soon'. Mr Opperman says that the reason that the consultation does not cover this, is that there is 'there is substantial work being undertaken by industry to refine methodologies and enable consistent, comparable, and robust reporting'.
- **Timing:** The deadline for submissions on the proposals is 7 October.

Consultation on proposals to roll out new mandatory requirements

On 26 August, the Department of Work and Pensions released proposals for consultation, seeking feedback on plans for how and when certain pension schemes should be required to adopt new climate governance requirements and to report in line with the Task Force on Climate-related Financial Disclosures (TCFD) recommendations. The deadline for submissions is 7 October.

'Building back better': an opportunity for pension schemes to contribute to the COVID-19 recovery

In his foreword to the consultation, Minister for Pensions and Financial Inclusion Guy Opperman make clear that he considers it important that the government push forward with the proposed changes now, despite the disruption caused by the pandemic. Mr Opperman states,

> 'I recognise too that these proposals come as trustees are dealing with the impact of the COVID-19 pandemic. However, this is also a time of opportunity - as we "build back better", trustees must turn their minds to the transition to the low carbon economy. And we must ensure that pension scheme governance is as robust as possible to withstand the potential shocks that climate change and our response to it will bring. Acting now to manage climate risks, and to take advantage of the opportunity of the low-carbon transition, will put schemes in a stronger position for the future. I believe that the proposals are proportionate, especially in light of the size and urgency of the threat – and the magnitude of the opportunities – posed to pension investments by climate change. I welcome trustees' and all other stakeholders' views and I ask that we all rise to the challenge'.

Ending 'tick box' disclosures

Another and related aim of the proposed changes flagged in the report, is discouraging 'tick box' disclosures. The report states, 'High quality TCFD reporting will represent an essential element of good scheme governance, regardless of a requirement to publish. With that in mind, the proposals in this consultation do not seek to be simply another disclosure requirement. We propose that our policy, and our eventual regulations, will make clear that these changes concern governance decisions, and the disclosure requirements should instead be viewed as part of a wider, robust governance process'.

What's being proposed

Broadly the proposals fall into three categories:

1. New climate risk governance and reporting requirements:
   - The introduction of new climate risk governance requirements and targets for the assessment and management of climate risks and opportunities.
   - New TCFD disclosure requirements.
2. Application (which trustees should fall into scope of the new obligations) and the proposed timing
3. Penalties for non-compliance.

New climate risk governance and reporting requirements

Broadly, the proposed requirements support the 11 TCFD recommendations and therefore reporting against them. Proposed new requirements include the following (among others).

- Integrate management of climate risk into the overall risk management framework: It's proposed that trustees be required to 'adopt and maintain processes for identification, assessment and management of climate-related risks', to integrate this into their overall risk management and to disclose these processes.
- Role of trustees in managing climate risk: It's proposed that regulations should require trustees to: 1) 'adopt and maintain oversight of climate risk and opportunities'; and 2) 'establish and maintain processes by which trustees, on an ongoing basis, satisfy themselves that persons managing the scheme, are assessing and managing climate-related risks and opportunities'. In addition, it's proposed that regulations should require trustees to describe both: 'a) the role of trustees in ensuring oversight of climate-related risks and opportunities; b) the role of those managing the scheme in assessing and managing climate-related risks and opportunities, only insofar as this relates to the scheme itself and the processes by which trustees satisfy themselves that this is being done'.
- Disclosure of climate risks over the short, medium and long term: It's proposed that regulations will require trustees to 'identify and disclose the climate change risks and opportunities relevant to their scheme over the short, medium and long term, and to assess and describe their impact on their investment and funding strategy'.
- Conduct scenario analysis: It's proposed that regulations should require 'trustees to assess the resilience of their assets, liabilities and investment strategy and, in the case of defined benefit (DB), funding strategy, as far as they are able, in at least two climate-related scenarios, one of which must be a 2°C or lower scenario and to disclose the results of this assessment'.
- Assess and disclose how climate risk is impacting the scheme's assets: It's proposed that regulations should require trustees to: 'select at least one greenhouse gas (GHG) emissions-based metric and at least one non-emissions-based metric to assess the scheme's assets against climate-related risks and opportunities and review the selection on an ongoing basis; b) obtain the Scope 1, 2 and 3 GHG emissions of the portfolio, and other non-emissions-based data, as far as they are able; and c) calculate and disclose metrics (including at least one emissions-based metric and at least one non-emissions-based metric) used to quantify the effects of climate

change on the scheme and assess climate-related risks and opportunities'. Where emissions data that is estimated does not cover all asset classes, an explanation should be provided as to why.

- Set and disclose climate targets: It's proposed that regulations will require trustees to set 'at least one target' to manage climate related risks and to disclose this; and to calculate performance against the target(s) 'as far as trustees are able and disclose that performance'.
- TCFD disclosure requirements: It's proposed that:
  - All schemes in scope be required to provide free access to their TCFD report on a publicly available website
  - Trustees be required to include a link to the full text of the TCFD report in the Annual Report and Accounts
  - Trustees be required to notify all members via the annual benefit statement, of the website address for accessing the full TCFD report
  - Trustees be required to report the location of their published Statement of Investment Principles (SIP), Implementation Statement and excerpts of the Chair's Statement by including the corresponding website address or addresses in their scheme return.

Application and proposed timing

- Schemes with £5 billion or more in net assets, trustees of master trust or collective money purchase schemes would be subject to new governance requirements from 1 October 2021, and required to publish a TCFD report by 31 December 2022.
- Trustees of schemes with £1 billion would have an additional twelve months to implement the governance requirements (1 October 2022) and to report in line with the TCFD recommendations (31 December 2023).
- Subject to the government adopting the governance/reporting requirements proposed in the consultation, a review would be conducted in 2024 to assess whether the measures should be extended to schemes with less than £1 billion in net assets. In addition, it's proposed that a any regulations/statutory guidance be reviewed at the same time to assess whether it needs strengthening/updating.

Penalties for non-compliance

It's proposed that:

- Where The Pensions Regulator (TPR) deems TCFD reports to be inadequate in meeting the requirements in the regulations', it's proposed that the TPR will be given power to administer discretionary penalties. Penalties would not be mandatory 'except in instances of total non-compliance where no TCFD report is published'.
- Failure to notify members via the Annual Benefit Statement or to include a link to the TCFD report from the Annual Report would be subject to the existing penalty regime in Regulation 5 of the Disclosure Regulations.
- Otherwise, penalties would be modelled on those in regulations 26 to 33 of the Occupational Pension Schemes (Charges and Governance) Regulations 2015.

[Source: UK Department of Work and Pensions media release 26/08/2020; Consultation documents]

In Brief | ESG and the role of institutional investors: PRI has released an interview with Rodrigo Garcia, Deputy State Treasurer and Chief Investment Officer for the Illinois State Treasury, which was the first treasury in the US to become a PRI signatory, on the role of investors in addressing social issues and how ESG fits into investors' fiduciary obligations

[Source: PRI blog post 20/08/2020; PRI Interview with Rodrigo Garcia]

In Brief | The Guardian reports that CBUS has committed to zero emissions across its entire portfolio by 2050, though the fund has reportedly stopped short of ruling out absolutely, new investments in thermal coal

[Source: The Guardian 31/08/2020]

Regulators

Top Story | ASIC has released its 2020-2024 strategic plan: enforcement remains a key priority

Key Takeouts

- **A 'two-pronged approach':** In the immediate term, ASIC will continue to focus on the five strategic priorities identified in the regulator's interim corporate plan which are aimed at addressing impact of the COVID-19 pandemic. In addition to, and alongside these focus areas, ASIC will progress a range of longer term projects, including implementation of the recommendations of the Hayne Commission over the next four years.
- **Longer term focus areas:** ASIC's seven key priorities over the next four years are: '1) promoting confident participation in the financial system to support long term economic recovery; 2) deterring poor behaviour and misconduct through our 'Why not litigate?' discipline and driving cultural change using all of our regulatory tools; 3) improving entities' management of key risks to prevent and mitigate harms to consumers and promote a healthy financial system and economic growth; 4) addressing consumer harm as a result of elevated debt levels and hardship, with a particular focus on predatory lending; 5) reducing poor product design and restricting mis-selling; 6) reducing misconduct by company directors and professional service providers; and 7) delivering as a conduct regulator for superannuation'.
- **Climate remains a focus (despite the pandemic):** Among other things, the plan flags that disclosure of climate risk and governance practices will continue to be a focus for ASIC in 2020/21. For example, ASIC plans to 'conduct surveillance to assess the extent to which product issuers are engaging in "greenwashing" that results in consumer harm' and review the extent to which listed companies have adopted 'appropriate governance structures to identify and manage climate related risks'.

ASIC's strategic priorities 2020-24

The Australian Securities and Investments Commission (ASIC) has released its corporate plan for 2020-24. The plan states that ASIC will pursue a 'two-pronged approach', continuing to focus on the five strategic priority areas guiding ASIC's response to the pandemic which were identified in ASIC's interim plan in the near term (or for as long as is appropriate), while concurrently resuming work on longer term strategic projects that were disrupted as a result of COVID-19.

ASIC will remain somewhat flexible in its approach and adapt to the changing environment. ASIC stating that it will 'continually assess and prioritise our focus areas as threats and harms evolve across our regulated sectors' as well as continue to engage stakeholders 'to help maintain the proper functioning of the financial system'.

Announcing the release of the plan, ASIC Chair James Shipton said that ensuring confidence in the financial system remains ASIC's key purpose.

> 'Our core purpose is to ensure confidence in a financial system that, even under stress, can remain fair, strong and efficient. Confidence is the bedrock of the economic recovery process. This is the purpose of all our work, both in the immediate context of the pandemic and beyond it. We will continue to respond rapidly and strategically to the threats arising in an uncertain environment.'

Two executive changes

ASIC has made two senior organisational changes to support the execution of the plan.

Warren Day has been appointed Chief Operating Officer (Mr Day was formerly Executive Director, Assessment and Intelligence) and Zack Gurdon has been appointed to the new position of Chief Risk Officer.

ASIC's priorities 2020/21 – the five priorities in the interim plan will remain a key focus

In the short term, ASIC will continue to focus on the five key priorities identified in ASIC's interim corporate plan 2020-21. Namely: 1) 'protecting consumers from harm at a time of heightened vulnerability; 2) maintaining financial system resilience and stability; 3) supporting Australian businesses to respond to the effects of the COVID-19 pandemic; 4) continuing to identify, disrupt and take enforcement action against the most harmful conduct; and 5) continuing to build our organisational capacity in challenging times'

The projects falling under each of these is outlined at pages 9-18 of ASIC's 2020-24 Strategic plan.

'Continuing and new' projects 2020/21

Continuing and new projects flagged for implementation in 2020/21 include the following:

- The establishment of 'new ASIC-wide working groups' to tackle (including through taking enforcement action) the issues of: false and misleading advertising; scams and unlicensed advice.
- Conducting 'long-term pandemic scenario analysis' to understand the 'pandemic-driven impact of different long-term economic and environmental scenarios on consumers, investors and the markets we regulate, and assess the best regulatory responses to those scenarios.'
- Various governance projects including: a) conducting a targeted governance review of 'a select company to assess shortcomings in culture, governance and accountability frameworks'; b) conducting a review of whistleblower policies/engaging with 'selected companies' to review the effectiveness of their whistleblower programs; and c) examining 'whether disclosures in corporate governance statements are effective in promoting a more informed market and better and transparent governance practices'. Under ASIC's close and continuous monitoring program (CCM program) ASIC will: continue to engage with financial institutes to ensure they are prioritising improving consumer outcomes; monitor how they are responding to the findings of reviews into breach reporting practices and internal dispute resolution; and recommence 'targeted thematic reviews' of how their systems, processes and behaviours impact consumer outcomes.

Climate Risk

Among other continuing projects, the plan flags that climate risk disclosure and governance will remain a focus for the regulator in 2020/21. ASIC states that it will:

- 'Conduct surveillance to assess the extent to which listed companies have adopted appropriate governance structures to identify and manage climate-related risks, and to which climate related disclosure is useful in investor decision making'
- 'Identify key challenges faced by companies in this area'
- 'Conduct surveillance to assess the extent to which product issuers are engaging in 'greenwashing' that results in consumer harms'
- 'Represent Australia on IOSCO's Sustainable Finance Task Force and IOSCO's Asia Pacific Regional Committee Sustainable Finance Working Group'

ASIC's priorities over the four years to 2024

The plan also identifies seven core priorities that ASIC will pursue, in addition to the workstreams related to its response to the pandemic, for the next four years.

These priorities are:

1. 'promoting confident participation in the financial system to support long term economic recovery
2. deterring poor behaviour and misconduct through our 'Why not litigate?' discipline and driving cultural change using all of our regulatory tools;
3. improving entities' management of key risks to prevent and mitigate harms to consumers and promote a healthy financial system and economic growth;
4. addressing consumer harm as a result of elevated debt levels and hardship, with a particular focus on predatory lending;
5. reducing poor product design and restricting mis-selling;
6. reducing misconduct by company directors and professional service providers; and
7. delivering as a conduct regulator for superannuation'.

Enforcement

From an enforcement perspective, ASIC's priorities over the next four years include:

- the case studies/referrals arising from the Hayne Commission
- 'matters that engage ASIC's powers or provisions that carry new or higher penalties'
- misconduct by individuals, particularly criminal conduct or governance failures, at a board or executive level
- significant market misconduct
- serious misconduct involving large market participants
- phoenix activity
- auditor misconduct
- new/emerging types of misconduct (eg misconduct using new technologies)
- misconduct that involves high risk of 'significant consumer harm' especially where it impacts vulnerable consumers
- misconduct in the superannuation and insurance contexts: ASIC intends to focus on: a) provision of inappropriate products to superannuation fund members that either provide little benefit or offer poor value for money; b) inappropriate disclosures or practices concerning fees; and c) trustees failing to act in the best interests of members.

Page 26 of the report outlines a number of 'continuing' actions under this initiative that ASIC is prioritising over the period 2020/21.

Superannuation

ASIC identified three key priorities in the context of its work towards becoming the 'primary conduct regulator for superannuation'. Namely: 1) 'provision of inappropriate products to superannuation fund members that either provide little benefit or offer poor value for money'; 2) 'inappropriate disclosures or practices concerning fees'; and 3) 'trustees failing to act in the best interests of members'.

[Sources: ASIC media release 31/08/2020; ASIC Strategic Plan 2020-2024]

Top Story | Adjusting to the changed environment: APRA has released an updated corporate plan

Key Takeouts

- APRA's key priority over the next 12-18 months is to maintain financial system resilience: The plan states that in light of the changed operational environment and the 'increasing risk of failure of one or more APRA-regulated institutions, APRA's priority over the next 12-18 months is to maintain financial system resilience by protecting the safety and soundness of APRA-regulated institutions, fostering their operational resilience during a period of significant disruption and enhancing contingency plans for adverse events'.
- Adjusted outlook: APRA's focus on the four focus areas in the previous plan (2019-2013 Corporate Plan) and its commitment to implementation of the Hayne Commission's recommendations and the recommendations of the capability review is unchanged as is its commitment to lifting its internal capabilities. However, in light of the changed environment, APRA has adjusted priorities and timelines.

APRA's plan for the next four years: Mitigating against immediate risks and working to progress other key community outcomes

The Australian Prudential Regulation Authority (APRA) has released an updated Corporate Plan – Corporate Plan 2020-24 – incorporating adjustments to priorities and timelines made in response to the changed external environment including the financial and economic impacts of COVID-19.

APRA's key priority over the next 12-18 months is maintaining financial sector resilience

In light of the changed operational environment and the 'increasing risk of failure of one or more APRA-regulated institutions, APRA's priority over the next 12-18 months is to maintain financial system resilience by protecting the safety and soundness of APRA-regulated institutions, fostering their operational resilience during a period of significant disruption and enhancing contingency plans for adverse events'.

The four key focus areas identified in the previous plan are unchanged

APRA states that the revised plan continues to be grounded in the delivery of the same four community outcomes that underpinned the previous plan (Corporate Plan 2019-23) over the longer term, namely: 1) 'maintaining financial sector resilience; 2) improving outcomes for superannuation members; 3) transforming governance, culture, remuneration and accountability across all regulated institutions; and 4) improving cyber resilience across the financial system'.

In addition, APRA states that its commitment to implementation of the Hayne Commission recommendations and the recommendations of the capability review 'as soon as is practicable' remains unchanged as is its commitment to lifting its internal capabilities.

APRA states that it will continue to respond to approximately 40% of remaining recommendations from various reviews in the immediate term, with the remainder implemented over the full period of the plan.

An infographic at p15 of the report provides a snapshot of how APRA's immediate and longer term priorities fit together.

Further detail: Some key actions and timeframes

In his introduction to the plan, APRA Chair Wayne Byres comments that due to the current level of uncertainty, the plan is 'pays particular attention to clearly articulating the immediate priorities over the next 12-18 months' with more flexibility factored into the timing of deliverables in 2022-23. In addition, the regulator will continue to review its priorities 'to ensure APRA remains responsive to risks and vulnerabilities in the financial system that could impact financial institutions and the broader Australian community'.

> [Note: The report includes a 'roadmap for change' (at p26) identifying some specific actions under each of the four focus areas and giving indicative milestones/completion timeframes. This can be accessed on the APRA website: APRA 2020-2024 Corporate Plan]

1. Maintain financial system resilience

Overall, APRA is looking to achieve three outcomes under this objective: 1) that APRA-regulated institutions maintain their 'balance sheet strength'; 2) to keep the number of failed APRA-regulated institutions low; 3) for APRA-regulated institutions to be in a position to participate of institutions in the economic recovery.

Banking

- The key risk areas on which APRA will focus include: capital, liquidity and finding, credit and operational risk.
- To protect the stability of the broader financial system, APRA will assess the impact of loan repayment deferrals and 'determining appropriate regulatory responses'.
- APRA will also improve transparency by providing data and insights on the Australian banking sector.

Insurance

- The key risk areas on which APRA will focus include: capital, the sustainability of insurance products and 'responding to material risks and issues that could impact the viability/solvency of insurers'.
- 'APRA will continue to focus on influencing the direction of the insurance industry in Australia to address sustainability and affordability issues and poor customer outcomes'.
- Finally, APRA will continue to review reinsurance arrangements by undertaking an analysis of the impact of COVID-19 and the associated economic downturn on the stability of reinsurers. APRA states that it will take regulatory action were required.

Superannuation

- APRA will focus on 'key areas of liquidity and investment risk, defined benefit funds, vulnerabilities arising from loss of member accounts and changing member activity and the operational resilience of key service providers including superannuation administrators'.
- APRA will also assess the impact of the pandemic on funds and their members through undertaking industry-wide data collection and monitoring the impact of the early release of superannuation scheme.

Specific actions and indicative completion dates under this objective

By (roughly) the end of 2021, APRA plans to:

- Address material risks/issues resulting from COVID0-19 at regulated entities as well as issues at 'industry hot spots'
- Review APRA's prudential framework in the immediate term in line with policy priorities published in August 2020
- Collect industry wide data and monitor the impacts of early release of superannuation benefits

In the longer term APRA plans to:

- Finalise the ADI capital regime (July 2022 – June 2023)
- Release a framework on sustainable life insurance products and transform APRA's life insurance data collection (end of 2022)
- Have recovery/merger plans in place for all private health insurers (end of 2022)
- Continue to undertake regular stress testing (June 2024)

2. Improve outcomes for superannuation fund members

Key focus areas under this objective include:

- Enhancing the prudential framework and strengthening a number of prudential standards applicable in the superannuation context including standards relating to insurance, investment governance and operational risk;
- 'Sharpen[ing]' the supervisory focus (eg through conducting thematic reviews) into key issues such as outsourcing and conflicts of interest; trustee board capabilities and governance and unlisted asset valuations conducting thematic reviews
- Pushing ahead with transforming data collections to address gaps in coverage and quality issues with the information being reported
- Publishing heatmaps and benchmarking fund performance in key areas including: investment performance, fees, and insurance
- Facilitating the 'resolution or exit of persistently underperforming superannuation funds by using data driven insights and effective supervision'.

Specific actions and indicative completion dates under this objective

- Developing an implementation plan for the review of trustee board capability and unlisted asset valuations and completing the thematic review of outsourcing is planned for the second half of 2021.
- Publishing the enhanced MySuper heatmap, Insurance heatmap and Choice Heatmap is planned for the first half of 2022
- The release reporting standards and delivery of phase one of the data transformation project is planned for July 2022
- Strengthening SPS 250 Insurance and SPS 530 Investment Governance is planned for the end of 2022.

3. Improving cyber resilience across the financial system

In line with this objective APRA has been developing its 2020-2024 Cyber Security Strategy which is aimed at 'influencing the financial system more broadly' rather than being limited to APRA-regulated entities. APRA seeks (resource levels permitting) to progress from its current focus on cyber supervision to this more 'expansive approach'.

In the short term APRA will prioritise: executing the existing program of work/activity and translating its 2020-2024 Cyber Security Strategy into an actionable work program.

Indicative timeline: APRA observes that improving cyber resilience will necessarily be an ongoing task, with no end-state but that there are a number of actions that can be taken to reduce the impact of cyber incidents and the financial system, with the aim of 'continuously strengthening cyber resilience'.

The plan indicates that APRA intends to have implemented its new and more expansive strategy by the end of 2024.

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

Key short term actions under this objective include:

- Improving accountability through working with the government to extend the Financial Accountability Regime to all APRA-regulated institutions in line with timelines to be advised by Treasury
- Finalising and implementing Prudential standard CPS 511 Remuneration (the indicative timeframe for release of the standard is the first half of 2021)
- Undertaking a risk culture survey with a pilot group of regulated institutions in the first half of 2021, with the aim of developing a 'tool to benchmark and assess trends in risk culture across regulated institutions'.
- Continuing risk culture 'deep dives' at large Australian financial institutions, undertaking risk governance self-assessment follow up work and 'regular' prudential engagements (the indicative timeframe given is the end of the plan, June 2024).

Lifting APRA internal capability

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

However, due to the changed environment, APRA has revisited and adjusted its priorities with a view to creating to 'capacity for APRA to deliver on its immediate priorities in response to the economic, financial and social impacts of COVID-19'. Accordingly, APRA is focused in the short term on improving 'resolution capability and transforming leadership, culture and ways of working'.

Performance measures

Chapter 4 of the plan sets out the measures against which APRA will report on its own performance. This can be accessed on the APRA website: APRA 2010-2024 Corporate Plan.

[Sources: APRA media release 01/09/2020; 2020-2024 Corporate Plan]

COVID-19 has been a 'real world test' of the operational resilience of Australia's financial sector: APRA reflects on how the sector has performed and the key 'lessons' from a supervisory perspective to emerge from the crisis to date

The operational resilience of the financial sector is strong

The Australian Prudential Regulation Authority's (APRA) considers that the Australian financial sector has overall 'weathered the COVID-19 storm well'. APRA considers that this is due to its ongoing focus on operational resilience practices within firms - for example in the areas of risk management, business continuity, management of service providers including cloud computing, data management, and information security - has resulted in APRA-regulated entities being better positioned to deal with COVID-19 than they otherwise would have been.

Room for improvement: Areas where practices could be strengthened

Having said this, APRA considers that the pandemic has also highlighted several areas where practices could be improved. Among other examples, APRA highlights risks associated with the rapid shift the transition to employees working from home; challenges associated with overseas lockdowns/associated impact on business operations; and business continuity and disaster recovery testing as areas for improvement. On the issue of business continuity and disaster recovery testing, APRA observes that a number of entities have advised that they are unable to meet CPS 232's business continuity requirements.

Eight 'important lessons' to emerge from the pandemic

APRA highlights eight 'important lessons' concerning the ongoing maintenance of 'sufficient operational resilience' and the risk factors that can undermine otherwise strong operational risk practices that have emerged from the financial sector's response to COVID-19 so far.

1. The importance of 'agile risk governance'. APRA observes that 'entities need to thoroughly understand their business process/value chain before and after the disruption, to adequately cover the required changes to risk and controls. They also need to be aware of any potential impact on compliance to regulations; have data that is accurate, reliable and can be produced in a timely manner for decision-making; while simultaneously responding to the potential for increased cyber-attacks'.
2. The need for entities to consider a broader range of plausible disruptions in the context of business continuity planning for example, overseas lockdowns and the effect on offshore providers as well as the possibility of an 'extended work from home situation'.
3. The need for effective contingency planning for 'critical suppliers' given that they may not be able to provide services for a period
4. The need to 'assess the strategic impact' of disruptions on business operating models eg shifts towards wholesale branch closures, and the on-shoring of previously offshoring processes.
5. The need to rapidly implement changes in workforce planning eg to meet the need to onboard/train new staff, while maintaining work from home arrangements
6. The ongoing need to maintain a focus on ongoing operational stability, for example the need to consider whether implementing delays to implementation or 'change freezes' could increase the risk of system outages in future
7. The importance of engaging in 'frequent and effective communication' with internal and external stakeholders to 'manage and direct health and organisational change, and to manage financial services and impacts on customers, shareholders and other external stakeholders'.
8. The need to be able to make rapid decisions on customer relief and ensure they are communicated clearly, and reflected in supporting systems.

APRA states that it will apply these lessons to 'improve its supervision practices' going forward.

[Source: APRA Insight Issue Three 2020 26/08/2020]

Financial Services

Engagement with debt management representatives: ASIC issues clarification on the circumstances in which it is appropriate for financial firms not to engage

Further to the updated complaints handling guidance in Regulatory Guide 271 Internal Dispute Resolution (RG 271), the Australian Securities and Investments Commission (ASIC) has released an article clarifying the circumstances in which it considers it appropriate for financial firms not to engage with paid debt management representatives.

These circumstances include where:

- a financial firm 'reasonably believes' that a paid representative is not acting in a consumer's best interests
- where the representative has been excluded by AFCA, from representing a consumer in relation to a complaint under the AFCA rules

Where firms stop engaging with a paid representative, ASIC expects firms to: a) inform the consumer directly and clearly explain why; and b) give the consumer a 'reasonable time' to respond.

ASIC states that 'firms can continue to communicate with a consumer directly, even if the consumer still expresses an intention to retain the paid representative'.

RG 96 to be updated to ensure alignment with RG 271

ASIC states that it is 'currently considering technical updates' to regulatory guide 96 Debt Collection Guideline: for collectors and creditors. The update will including ensuring that the section on 'when a debtor is represented' aligns with RG 271. 'In the interim, financial firms can engage with paid representatives in a manner that is consistent with RG 271 and the approach set out in this article' ASIC states.

[Source: ASIC media release 27/08/2020]

Uptick in reported breaches of the Banking Code of Practice: The Banking Code Compliance Committee has released its latest report into Code compliance

The Banking Code Compliance Committee requires banks to self-report their compliance with the Banking Code of Practice (Code) every six months. On 31 August, the BCCC released its latest report on Code subscribing banks' compliance with the Code for the period July to December 2019.

Some Key Points

Increase in the number of breaches reported (possibly due to improved identification/reporting practices)

- Banks reported 20,863 Code breaches for the period July to December 2019. In contrast, for the 2018 to19 12-month period, banks reported 15,597 breaches.
- The report comments that the overall increase in reported breaches for the July to December 2019 period is due to significant increases in the number of breaches reported by two banks, which together accounted for 72% of the total number of breaches. The report states that the banks in question explained the uptick to changes in their reporting practices adopted in response to guidance/feedback from the BCCC.
- Commenting on the increase in reported breaches generally, the Committee declines to attribute it definitely to any specific cause, though the report suggests that it may be attributable to improved practices. The report comments, 'We are still unable to conclude definitively whether the increase in breaches reported each year represents a deterioration in bank conduct, or is a demonstration that banks are better able to identify and fix problems. The Committee considers that the latter explanation remains the more likely explanation'.

- The report calls on banks to ensure that they are reporting all Code compliance breaches to the BCCC (rather than doing so based on an assessment of the breach's significance')

Data quality concerns

The report flags that the quality of data being reported to the BCCC could be improved. The report states,

> 'Some banks appear to be copying data directly from internal systems without proper curation or regard for reporting requirements. We recognise the BCCC's reporting requirements are extensive, but the data provided must sufficiently explain what has occurred, and the steps taken to remediate customers and prevent recurrence. Thorough and accurate breach reporting is a demonstration of a customer-focused culture and a bank's commitment to embedding the Code. We will pay close attention to whether banks are taking their obligations seriously and we strongly encourage banks to ensure that sufficient resources and time are applied to the BCCC's reporting requirements'.

The BCCC also states that it will provide individual feedback about data quality issues to relevant banks and expects that 'the issues are addressed for future reporting'.

The most common categories of breaches reported

The most common category of breaches, accounting for 53% of reported breaches overall (10,957 breaches) involved a breach of Part 2 of the Code. Part 2 includes obligations to 'protect a customer's privacy and confidentiality, to train staff to understand the Code and to engage with customers in a fair, reasonable and ethical manner'. Two banks accounted for 78% of the breaches reported under Part 2

Part 2 breaches include (among others): charging incorrect fees; providing data to the wrong party; delays in directing complaints to the appropriate complaints handling team; keeping inaccurate or incomplete file notes; and interest or discount errors.

The next most common category of breaches, accounting for 19% of reported breaches overall (3,949 breaches) involved a breach of Part 9 of the Code. Part 9 includes obligations to assist customers experiencing financial difficulty as well as provisions regarding deceased estates, debt collection and the sale of debt. Part 9 breaches include (among others): failing to meet timeframes for communications or decisions on financial difficulty applications; failures to comply with the Debt Collection Guidelines by either contacting customers 'inappropriately or too frequently'; failure to cease charging fees after receipt of a death certificate/or probate; and failing to refund fees charged after notification of a customer's death.

Most breaches continue to be attributed to human error

- The majority of breaches (60%) were attributed to human error alone. A further 8% of breaches were caused by human error in combination with another cause.
- 13% of breaches involved process deficiencies, control, training or resourcing failure.
- 13% of breaches involved a system error.

Commenting on this, the report states that the fall in the number of reported breaches attributed to human error (previous reports attributed 90% of breaches to this cause) is a welcome indicator that banks may be looking more deeply for the 'root causes' of issues. 'The BCCC encourages banks to continue to look beyond human error alone and identify underlying causes, including those related to systems, processes, training and culture' the report states.

Breach identification

The most common methods of breach identification were: 1) self-identification by staff members (30% of incidents); 2) through a customer complaint, query or feedback (27%); and 3) 'line 1' quality assurance activities including call monitoring (23%).

The BCCC says that it is 'encouraged that the most common method of breach identification is by staff themselves identifying Code breaches in the first instance' as it may be an indication of increased Code awareness/Code obligations among employees.

Customer Impacts

Breaches impacted 4.4+ million customers with a total financial impact of $100 million.

The most common actions taken by banks to address breach impacts on individual customers were:

- taking some form of corrective action eg updating details, and requests for information be destroyed, deleted or returned (30% of incidents)
- refunding/compensating/making a goodwill payment (18% of cases)
- communicating/corresponding with the customer (12%) of cases
- issuing an apology to the customer (7% of cases)

Banks reported there was no customer remediation provided or customer remediation was not required for 20% of incidents.

Preventing recurrence of issues – response to breaches

- The most common actions taken by banks to prevent recurrence of issues was one or more of the following actions: a) provision of additional staff training, coaching, feedback (59% of cases); b) reviewing/improving processes (12% of cases); c) implementing a system fix (12% of cases); d) enhanced monitoring or controls (4% of cases) and e) disciplinary action against staff/review of staff performance (5%).
- Banks reported that they did not take actions to prevent recurrence or no action was required for 2% of incidents

Going forward?

- The BCC states that it has granted banks additional time and reduced the scope of information requested under the next Compliance Statement to ensure they are able to focus on supporting customers during the COVID-19 pandemic.
- The BCCC plans to 'shortly publish' the findings of research into how banks can build organisational capability to support Code compliance.

[Sources: Banking Code Compliance Committee media release 31/08/2020; Report: BCCC Report: Banks' compliance with the Banking Code of Practice – July to December 2019]

COVID-19: So far funds have paid out $32.2bn under the government's early release of superannuation scheme, the data indicates that the number of applications coming through continues to slow

The Australian Prudential Regulation Authority (APRA) has released industry-level and fund-level data on the early release of superannuation scheme for applications received during the period 20 April (inception of the scheme) to 23 August.

- Total payments made since the inception of the scheme have taken an average of 3.3 business days to process, with 95% of payments made within five business days.
- The volume of applications continues to slow: Over the week to 23 August, superannuation funds received 59,000, down from 70,000 applications the previous week.
- Of the applications received in the week to 23 August, 35,000 were initial applications bringing the total number of initial applications received to date to 3.1 million since inception of the scheme.
- 24,000 applications received in the week to 23 August were repeat applications, bringing the total number of repeat applications to 1.2 million since the inception of the scheme.
- Over the week to 23 August, superannuation funds made payments to 75,000 members worth $0.57 billion (down from $0.6 billion in the previous week).
- Funds have made approximately 4.2 million payments since the inception of the scheme worth a total of $32.2 billion. This figure represents 98% of applications received since inception of the scheme.

[Source: APRA media release 31/08/2020]

Superannuation guarantee hike in doubt? Survey finds that only 29.5% of economists believe that the planned superannuation guarantee increase should proceed as planned

A survey of 44 of the Economic Society's member panel has found that most economists do not support the legislated increase in the superannuation guarantee proceeding.

According to the survey:

- 45.5% of respondents believe that the legislated increase should be deferred
- 20.5% believe it should be abandoned entirely
- 29.5% believe it should proceed as planned
- 68% believe that if the legislated increase goes ahead it will put downward pressure on wage growth which is currently the 'lowest on record' at 1.8%. Some respondents also believe that it will negatively impact hiring practices.

The writers comment that the retirement income review, which has not yet been publicly released by the government, examined these issues in some detail.

[Source: The Conversation 30/08/2020]

Delay being considered?

- The AFR reports that Treasurer Josh Frydenberg has said that the government is considering delaying the legislated increase in light of the changed operational environment, and in light of reports/feedback from various stakeholders that calls into question whether increasing the superannuation guarantee at this time, is the best course of action.
- Separately, the Federal Opposition has accused the government of 'laying the groundwork to break their election promise to safeguard Australians' retirements despite recommitting to the SG increases multiple times since the election'. The Federal Opposition has also called on the government to immediately release the Retirement Income Review.

[Sources: [registration required] The AFR 31/08/2020; Shadow Treasurer Jim Chalmers, and Shadow Assistant Treasurer Stephen Jones media release 30/08/2020]

COVID-19 Early release of superannuation scheme: Report finds that the gender superannuation gap is set to widen for women who have accessed their savings early under the scheme

Joint analysis of more than 750,000 withdrawals under the first tranche of the government's early release of superannuation scheme, conducted by the Australian Institute of Superannuation Trustees (AIST) and Women in Super (WIS) concludes that the scheme has 'compounded the structural inequities' in the existing superannuation system for women who have accessed their savings early.

For example, according to WIS/AIST's analysis the existing gap between women's retirement balances and men's retirement balances widened for every age category as a result of the early access scheme.

- The gap between women's starting balances before accessing the early release scheme and men's retirement balances before accessing the scheme ranged from a 21% gap for women in the 25-34 age bracket to 44% for women in the 55-59 age bracket.
- After withdrawing their savings early, this gap widened for women in every category. For women in the 25-34 age group the gap increased from 21% to 46%.

To help address this gap, both the AIST and WIS have called on the Federal government to implement a range of measures including: proceeding with the legislated increase to the superannuation guarantee; mandating payment of the superannuation guarantee on government paid parental leave and the removal of the $450 monthly threshold for payment of the superannuation guarantee.

[Source: AIST media release 27/08/2020]

Senator Jane Hume has called on the super industry to invest in raising financial literacy levels among women

In her address to the Women in Super – Women's Super Summit, Assistant Minister for superannuation, financial services and financial technology Jane Hume made four key points.

1. **Superannuation gender gap:** Senator Hume said that the government is 'acutely aware' of the superannuation gender gap for women and of the shortcomings in the design of the current superannuation system. For example, the fact that the system does not account for career breaks/working part time due to caring responsibilities. Senator Hume then outlined a number of measures implemented by the government to 'directly assist women' to increase their superannuation savings for example, introducing the Low Income Superannuation Tax Offset (LISTO) and making it easier for people without access to salary sacrifice arrangements to make additional concessional contributions.
2. **Early release of superannuation scheme:** Touching briefly on the early release of superannuation scheme, Senator Hume said is 'proud' of the scheme and regards it as a success. Ms Hume also welcomed the approach industry has taken. 'Allowing temporary, flexible access to super shows the system can also help Australians during this crisis. I'm proud of the regulators and agencies, who worked swiftly and collaboratively to create a process with simplicity and integrity, and I'm proud of the many CEO's and chairs of super funds themselves – from all parts of the system - who approached me directly and said – how can we help? How can we make this work? We're here to work with you'.
3. **The need to raise financial literacy standards among women and the role for industry in doing so:** Senator Hume also spoke about the need to raise financial literacy levels among women, observing that various studies indicate that 'women trail men' in this area. She said that one outcome of the COVID-19 pandemic is that superannuation members are taking a greater interest in their superannuation, and that this is an opportunity for industry to take a leading role in raising financial literacy levels among women. Senator Hume said,

   > 'Many of you, I know, emphasise the roll you play in workplace education of your funds – and some of that is good but is it enough? There is more that can be done and with exciting new technology, innovative ideas and renewed engagement, now is the time for a step change. If you are genuine about your desire for gender equity in super – and I believe you are -it is incumbent on the superannuation industry to do more to support the financial literacy of Australian women. Investing in the financial education of Australian women is an investment in not only in the industry's future but also in our society's prosperity – it is an investment in our daughters and their futures'.

4. **The 2018 Women's Economic Security Statement will be 'refreshed':** Senator Hume said that the 2018 statement will be 'refreshed' later in 2020 and will 'play an important part in supporting women's workforce participation' in the COVID-19 recovery. Senator Hume also reiterated the government's commitment to two measures in the 2018 statement that are still being progressed:
   - the development of an electronic information sharing mechanism between the ATO and the Family Law Courts to streamline the process of identifying the superannuation assets of parties in family law proceedings; and reduce the costs of doing so.
   - creating a new a new ground for early release of super for victims of family and domestic violence. . Since the Statement was released, we've published a consultation paper.

   [Source: Assistant Minister for Superannuation, Financial Services and Financial Technology Jane Hume, Address to the Women in Super – Women's Super Summit 26/08/2020]

APRA is pushing ahead with its multi-year superannuation data collection project: final consultation package on phase one released

The Australian Prudential Regulation Authority (APRA) has released the final consultation package for phase one (breadth) of its longer term project to expand its superannuation data collection.

Phase one is aimed at addressing the highest priority gaps in APRA's data protection particularly for choice products and investment options.

Announcing the consultation, APRA Deputy Chair Helen Rowell said that the data transformation project is an 'essential component of APRA's strategic focus on improving member outcomes', enabling APRA to understand the outcomes funds are delivering to members and identifying areas for improvement. Ms Rowell added that 'enhanced superannuation data collection is also important for industry' as trustees 'should already be using this type of data to help them fulfil existing regulatory requirements'.

Scope: The consultation package contains topic papers, draft reporting standards and data collection templates covering four areas: 1) fees and costs; 2) insurance arrangements; c) expense reporting; and d) asset allocation.

Timing: The deadline for submissions is 25 September.

[Source: APRA media release 28/08/2020]

AIST Governance Code: Delay in review timetable announced

The Australian Institute of Superannuation Trustees (AIST) has postponed the triennial review of AIST Governance Code until late calendar year 2021 in light of delays to implementation of Hayne recommendations. The AIST notes that this has no impact on the 30 September due date for FY 2020 fund reports.

[Source: AIST policy news 27/08/2020]

ICA data shows insurers have paid out $3.85bn to customers impacted by the summer bushfires, floods and hailstorms

The Insurance Council of Australia (ICA) has released data on insurance claims received in connection with four ICA declared catastrophes during the 2019-2020 summer.

According to the ICA:

- Insurers received more than 297,780 claims from four ICA-declared catastrophes during the 2019-2020 summer.
- Insurers have already paid $3.85 billion to affected customers in property repairs and rebuilding works, emergency accommodation and support, replacement of contents, new and repaired vehicles, plant and equipment, and financial settlements.
- Citing the high claims closure rate (83%) for bushfire related claims, ICA CEO Rob Whelan said that the data shows that industry is 'well ahead of its normal natural disaster response'.

Commenting on the data overall, Mr Whelan said,

> 'This was the worst natural disaster season I have experienced in my 10½ years as chief executive of the Insurance Council. The industry's efforts to help their customers through the emotional, physical and financial blows caused by these catastrophes is the best I've seen, despite the complications of COVID-19, and insurers continue to fine-tune their response. The insurance industry will continue to work to assist affected communities and policyholders and work through the remaining open claims to help people move on and rebuild their homes and lives.'

[Source: ICA media release 27/08/2020]

ASIC has confirmed that it will not proceed with any enforcement action against CBA in connection with AUSTRAC proceedings

AUSTRAC commenced proceedings against the CBA on 3 August 2017, for alleged AML/CTF breaches.

The CBA has issued a short statement announcing that following an investigation, the Australian Securities and Investments Commission (ASIC) has confirmed that it will not take any enforcement action against CBA or CBA's directors in connection with matters raised in the AUSTRAC proceedings.

[Source: CBA ASX Announcement 26/08/2020]

Hayne superannuation referral: APRA issues directions and imposes RSE licence conditions, but finds no breach of the SIS Act

Following an investigation into matters referred by the Hayne Commission, The Australian Prudential Regulation Authority (APRA) has issued directions and imposed additional registrable superannuation entity (RSE) licence conditions on NULIS Nominees (Australia) Limited to improve its governance and control environment, and to ensure members' best interests are prioritised in its decision-making.

APRA states that its investigation concluded that NULIS did not breach the Superannuation Industry (Supervision) Act 1993 (SIS Act), but did raise concerns about the adequacy of NULIS's internal processes for demonstrating how members' best interests were considered and prioritised.

The APRA directions and licence conditions require NULIS to record how it considers members' best interests and priority covenants when making decisions that materially affect their interests. NULIS will also be required to implement improvements in its governance and appoint an independent expert.

[Source: APRA media release 27/08/2020]

In Brief | Treasury Laws Amendment (More Flexible Superannuation) Bill 2020 which will (if passed) enable individuals aged 65 and 66 to make up to three years of non-concessional superannuation contributions under the bring forward rule, has passed the House of Representatives and progressed to second reading stage in the Senate

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

Corporate Misconduct and Liability

ALRC Corporate Criminal Responsibility Inquiry Final Report tabled in parliament

Key Takeouts

- The ALRC's final report Corporate Criminal Responsibility (Report 136 2020), was tabled in Parliament on 31 August 2020. The report makes 20 recommendations to both 'strengthen and simplify the Commonwealth corporate criminal responsibility regime'.
- Addressing gaps in individual liability for corporate misconduct: The final report concludes that in light of the introduction of the proposed Financial Accountability Regime, it would be inappropriate to introduce further reform at this time and accordingly makes no formal recommendation to tighten individual accountability mechanisms. However, the report does recommend (recommendation 18) that the government should undertake a review of the effectiveness of individual accountability mechanisms for corporate misconduct within five years of the commencement of the Financial Accountability Regime. The report also suggests that the extension of the FAR into other highly regulated sectors could also be considered at a future date.
- Some other interesting proposals include: the introduction of a new offence for systemic misconduct; and giving courts power to dissolve a corporation convicted of an indictable offence.

Context

Following the release of the Final Report of the ASIC Enforcement Taskforce in December 2017, the Financial Services Royal Commission's Final Report, the Australian Law Reform Commission (ALRC) was asked to undertake a comprehensive review of the corporate criminal responsibility regime, with a particular focus on the need for effective laws to hold corporations to account for criminal misconduct. Broadly, the Terms of Reference tasked the ALRC with reviewing Part 2.5 of the Commonwealth Criminal Code and considering options for reforming it or other relevant legislation to strengthen and simplify it. The terms of reference are here. Our summary is here.

In November 2019, the ALRC released a discussion paper seeking feedback on 23 proposals. The discussion paper is here. Our summary of some of the key proposals is at page 24 of Governance News 20/11/2019.

The ALRC's final report Corporate Criminal Responsibility (Report 136 2020), was tabled in Parliament on 31 August 2020. The report makes 20 recommendations to both 'strengthen and simplify the Commonwealth corporate criminal responsibility regime'. The full text of the report is here.

Announcing the release of the report ALRC President Justice SC Derrington said that the recommendations will 'ensure that the criminal law is appropriately calibrated to address corporate wrongdoing that cannot be effectively regulated by the civil law'.

Changes to individual accountability?

The Discussion Paper included two proposals (proposals 9 and 10) which were intended by the ALRC to 'simplify the imposition of individual liability and to address concerns that accountability was not sufficiently focused on management as opposed to boards'.

> *Proposal 9 was that the Corporations Act be amended to provide that, when a corporation commits an offence, any officer in a position to influence the conduct of the corporation in relation to that offence is subject to a civil penalty, unless that officer took reasonable measures to prevent the conduct of the corporation.*
>
> *Proposal 10 was to introduce an offence of engaging intentionally, knowingly, or recklessly in conduct the subject of the civil penalty provision created in accordance with Proposal 9.*

The ALRC states that the vast majority of submissions to the consultation did not support these proposals. Concerns raised in submissions included (among others): a) uncertainty around the potential application of the term 'officer in a position to influence' in relation to a relevant offence; b) uncertainty around what would be considered to amount to 'reasonable measures' to defend a claim (especially without further guidance); c) concern that there was insufficient justification for reversing the onus of proof; and d) concern about potential overlap with the banking executive accountability regime (BEAR) and the proposed Financial Accountability Regime (FAR) and the difficulty of imposing two new regimes on those corporations simultaneously.

The proposed FAR

The Final Report concludes that the proposed FAR is likely to address many of the ALRC's concerns that were intended to be addressed by proposals 9 and 10, and also reflects a number of principles that it considers to be important in this context. These include that: a) obligations under the proposed FAR are differentiated according to the size of the corporation/corporate group 'focusing compliance efforts where the problems in enforcement are most acute'; b) 'accountable persons' responsibilities extend to compliance with licensing obligations within their area of responsibility, and capture customer-related issues including end-to-end product management'; and c) civil penalties can be imposed on accountable persons who breach their obligations to take reasonable steps to ensure entity compliance within their area of responsibility.

In addition, the ALRC observes that the proposed FAR is likely to address many of the concerns raised in submissions.

Accordingly the report accepts, in line with many submissions, that 'it would be 'inappropriate to introduce a significant further reform to individuals' legal obligations and liability concurrently. It therefore considers that a reasonable period of time should be provided for implementation and operation of the FAR before considering any further significant changes to individual liability in this sector'.

Ultimately, the ALRC concludes that,

> 'Given the potential for significant legislative development and judicial clarification in this area, the ALRC does not recommend any specific law reform at the present moment. However, addressing individual liability for corporate misconduct is an area in which there do appear to be gaps in accountability, and the effectiveness of new mechanisms such as the proposed FAR should be kept under review. If the new and existing mechanisms do not operate to hold directors and senior managers liable when appropriate for corporate misconduct, further law reform may be required'.

Suggestions

The report suggests, but does not formally recommend that the government consider amending the proposed FAR to include a specific prohibition on executives and directors giving an accountable person a direction contrary to the person's obligations under the FAR.'

The report also suggests (but does not formally recommend) that given the 'difficulties associated with holding individuals within large corporations liable in relation to corporate misconduct' outside the financial services sector, the government 'could consider' subject to the success of the proposed FAR, 'introducing similar schemes in other highly-regulated sectors with large corporate actors and demonstrated accountability deficits, or with potential for significant public harm'.

Formal recommendation that the government undertake a review of the effectiveness of individual accountability mechanisms for corporate misconduct within five years

The report comments that 'although the ALRC has concluded the time is not yet ripe for rationalisation of individual liability, developments over the next six years may tend in that direction'.

Accordingly, the report recommends (recommendation 18) that the government undertake a 'wide-ranging review of the effectiveness of individual accountability mechanisms for corporate misconduct within five years of the entry into force of the proposed Financial Accountability Regime or equivalent'.

The review should consider the effectiveness of: 'accessorial liability of individuals for corporate crimes and civil contraventions; directors' and officers' duties; specific duties imposed on directors and senior management of corporations to take reasonable measures or exercise due diligence to comply with or secure corporations' compliance with statutory obligations; sector-specific accountability-mapping regimes such as the Banking Executive Accountability Regime and the proposed Financial Accountability Regime; and extended management liability provisions, including deemed liability and failure to prevent provisions'.

Some other interesting recommendations

[Note: The 20 recommendations explained at length in the 574 page report are available as a separately on the ALRC website here.]

'Principled criminalisation'

The report includes a number of recommendations aimed at promoting 'a principled approach to the use of the criminal law against corporations that contravene the law'.

The report observes that

> 'Labelling regulatory breaches as "criminal" where there is no inherent criminality dilutes the expressive power of the criminal law that makes it such a powerful regulatory tool…Recognising civil regulation is currently the default mechanism for regulating corporate conduct, the ALRC recommends that the criminal law be used in a principled way in order to ensure that the criminal law retains its distinctive force'.

Recommendations include:

- Recommendation 2 is that conduct should be regulated primarily by civil regulatory provisions. A criminal offence should be created in respect of a corporation only where certain conditions are met. Namely, when: a) 'denunciation and condemnation of the conduct constituting the offence is warranted'; b) 'imposition of the stigma that should attach to criminal offending would be appropriate'; c) 'the deterrent characteristics of a civil penalty would be insufficient'; d) 'it is justified by the level of potential harm that may occur as a consequence of the conduct'; or 'it is otherwise in the public interest to prosecute the corporation itself for the conduct'. One effect of this, is that 'the majority of existing low-level criminal offences (assessed against the principles in Recommendation 2) would be transformed into civil penalty provisions. A criminal offence would only be created if the criteria set out in Recommendation 2 were satisfied'.
- Consistent with this approach, Recommendation 3 is that infringement notices should not be available as an enforcement response for criminal offences as applicable to corporations.
- New offences criminalising 'contraventions of prescribed civil penalty provisions that constitute a system of conduct or pattern of behaviour by a corporation' should be introduced (recommendation 8). This measure is intended to 'make corporations less likely to view civil penalties as merely a 'cost of doing business'.

Increase the range of penalty and sentencing options available

- Recommendation 12 is that legislation should be amended to enable courts to make a broader range of orders when sentencing a corporation that has committed a Commonwealth offence, or where a Corporation has contravened a civil penalty provision.

- Recommendation 13 is that The Crimes Act 1914 (Cth) should be amended to provide that the court may make an order dissolving a corporation where: 'the corporation has been convicted on indictment of a Commonwealth offence; and the court is satisfied that dissolution represents the only appropriate sentencing option in the circumstances.

Making Australian corporations criminally responsible if they fail to prevent an associate from committing certain crimes overseas on their behalf

Recommendation 19 is that the Australian Government should consider applying the failure to prevent offence in the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 to other Commonwealth offences that might arise in the context of transnational business.

[Sources: ALRC media release 31/08/2020; Full text of the report: Corporate Criminal Responsibility (Report 136 2020); Summary Report; Recommendations]

Risk Management

OAIC corporate plan released: Encouraging and supporting the proactive release of government held information to be a key priority in 2020/21

The Office of the Australian Information Commission (OAIC) has released its Corporate Plan for 2020-2021 which sets out OAIC's priorities for the next four years.

Announcing the release of the plan, OAIC Commissioner Angelene Falk said,

> 'This year's Corporate Plan sets out how the OAIC will achieve our core purpose in the context of a vastly different environment to that of a year ago. The COVID-19 pandemic has brought enormous social and economic impacts. It has also focused attention on the right to privacy, and the need for transparency across both personal information handling and government decision-making. Through both the pandemic and our recovery, public health and economic outcomes can be supported by promoting and upholding privacy and information access rights. It is this objective that my office seeks to achieve.'

Four key priorities

The plan includes four strategic priorities and sets out actions and 'indicators' under each. The four priorities are:

1. to advance online privacy protection for Australians
2. influence and uphold privacy and information access rights frameworks
3. encourage and support the proactive release of government held information
4. 'contemporary approach to regulation'.

The table below highlights some of the actions under each of OAIC's four strategic priorities. The report includes an overview of the key actions and priorities at page 40.

PRIORITY	KEY ACTIONS
to advance online privacy protection for Australians	Three key activities are identified under this priority. 5. Influence development of privacy policy and legislation 'to help ensure that privacy policy and legislation are globally interoperable, address contemporary risks to online privacy protections for Australians, including people with particular needs, and support the Australian economy'. 6. Oversee the development of a code of practice for digital platforms: OAIC will work with stakeholders to develop a binding code of practice for online platforms and social media that provides stronger privacy protections. 7. Identify and take appropriate regulatory action to protect personal information online. This will include: increasing entities' awareness of their obligations; auditing compliance; engaging with regulated entities about new projects or initiatives that have privacy impacts; and taking appropriate regulatory action to address identified deficiencies. OAIC will also raise public awareness of online privacy risks and mitigation strategies.
influence and uphold privacy and information access rights frameworks	Four key activities are identified under this priority. 1. Influence policy and legislative change to ensure frameworks align with the contemporary environment and enhance information access rights through: a) influencing global regulatory developments to advance the national interest; and b) engaging with the Attorney General's Department and other stakeholders in the review of the Privacy Act.

PRIORITY	KEY ACTIONS
	2. Identify and take appropriate regulatory action in the context of regulating community access to government held information under the FOI Act and the handling of personal information by organisations and agencies. OAIC States that it will 'continue to promote and uphold these rights and regulatory frameworks through delivery of our core functions.' OAIC flags that over the coming year it will monitor and provide guidance/advice to 'mitigate action that impacts on the public's right to access government held information and have their personal information protected'. In addition, OAIC plans to conduct awareness and education activities to assist people to access government held information and manage privacy risks. 3. Regulate the consumer data right: OAIC will work with the Australian Competition and Consumer Commission (ACCC) to ensure the effective regulation of the CDR delivers consumers 'greater choice and control over the use and disclosure of their data'. OAIC will provide: a) 'clear guidance for both consumers and participants about their rights and obligations' under the CDR system; b) an effective complaints handling service for individual and small business consumers; c) undertake 'strategic enforcement' in relation to the protection of privacy and confidentiality including conducting Commissioner initiated investigations and assessments of compliance with privacy safeguards/rules. 4. Monitor the COVIDSafe system: OAIC will ensure the statutory privacy safeguards for the COVIDSafe app data protect personal information with the COVIDSafe system.
Encourage and support the proactive release of government held information	Two key activities are identified under this priority: 1. Develop government capability: OAIC will work with government agencies to ensure 'high quality, timely decision making under the FOI Act'. OAIC will provide guidance through updated FOI guidelines and through interaction with agencies to promote increased access to government held information. OAIC will review and update its resources to assist agencies and ministers to apply the FOI Act and actively promote the Information Publication Scheme to support government transparency initiatives. 2. Influence information management framework: OAIC will 'engage with ministers and agencies to promote understanding of the FOI Act and help FOI policy and practice meet the expectations of the Australian community'. OAIC will also continue to work as part of the Open Government Forum and contribute to the development of the Open Government National Action Plan. OAIC will also engage with domestic/international peer organisations to promote information access rights.
'contemporary approach to regulation'.	Two key activities are identified under this priority: 1. OAIC will review its regulatory approach to 'ensure it aligns with government and public expectations of domestic regulators and that the necessary statutory powers are in place to meet those expectations. This will include the strategic consideration of all available regulatory responses to significant privacy and access to information risks in order to influence the behaviour of the regulated community'. 2. Build internal capability: OAIC will enhance its internal capability in governance, information and people management including through training and recruitment. OAIC states this it will be 'guided by our staff capability map, together with input from the leadership group, in building our internal capability'.

[Source: OAIC media release 31/08/2020; OAIC Corporate Plan 2020-2021]

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