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Disclosure and Reporting

Climate change is 'a systemic risk that could impact an entity's financial prospects for future years' ASIC has released updated guidance on climate related disclosure

Key Takeouts

- ASIC has released updates to its guidance to clarify requirements for the disclosure of climate change related risks and opportunities
- Key changes include updating RG 228 to incorporate the types of climate change risk developed by the G20 Financial Stability Board's Taskforce on Climate Related Financial Disclosures (TCFD) into the list of examples of common risks that may need to be disclosed in a prospectus and updating RG 247 to highlight climate change as a systemic risk that could impact an entity's financial prospects for future years and that may need to be disclosed in an operating and financial review (OFR)
- The updated guidance follows the release of the Government's response to a Senate Economics References Committee report on carbon risk that encouraged ASIC to consider whether its high-level guidance on disclosure required updating. The updates also follow the release of report 593 in September 2018 which identified that climate risk disclosure could be improved.

The Australian Securities and Investments Commission (ASIC) has released updates to clarify the application of ASIC's existing regulatory guidance to the disclosure of climate change related risks and opportunities.

The updates are contained in:

- Regulatory Guide 228 Prospectuses: Effective disclosure for retail investors
- Regulatory Guide 247 Effective disclosure in an operating and financial review
- Information Sheet 203 Impairment of non-financial assets

Key Changes

Changes include the following.

- RG 228 has been updated to incorporate the types of climate change risk developed by the G20 Financial Stability Board's Taskforce on Climate Related Financial Disclosures (TCFD) into the list of examples of common risks that may need to be disclosed in a prospectus. The guidance now states that 'Transitioning to a lower-carbon economy may entail extensive policy, legal, technology and market changes to address mitigation and adaption requirements related to climate change. Depending on the nature, speed and focus of these changes, transition risks may pose varying levels of financial and reputational risk to companies (transitional risks of climate change). Physical risks resulting from climate change can be event driven (acute) or longer term shifts (chronic) in climate patterns. Physical risks may have financial implications for companies, such as direct damage to assets and indirect impacts from supply chain disruption'.

[Note: The fourth edition of the ASX Corporate Governance Council's Corporate Governance Principles and Recommendations, also encourages entities to improve climate and other non-financial risk disclosure by focusing on material environmental and social risks, including by reference to the Financial Stability Board's Task Force on Climate-related Financial Disclosures (TCFD). See: Governance News 04/03/2019]

- RG 247 has been updated to highlight climate change as a systemic risk that could impact an entity's financial prospects for future years and that may need to be disclosed in an operating and financial review (OFR) and to reinforce that disclosures made outside the OFR (such as under the voluntary TCFD framework or in a sustainability report) should not be inconsistent with disclosures made in the OFR.

- Information sheet 203 has been updated to highlight climate change and other risks that may be relevant in determining key assumptions that underlie impairment calculations.

Announcing the changes, ASIC commissioner John Price said that climate change is an area on which ASIC will continue to focus.

TCFD Framework

Mr Price said that the regulator 'welcomes the continuing emergence of the TCFD framework as the preferred market standard, both here in Australia and internationally, for voluntary climate change related disclosures. ASIC considers this to be a positive development and we again strongly encourage listed companies with material exposure to climate change to consider reporting voluntarily under the TCFD framework'.

ASIC will conduct surveillance of climate change disclosure of selected listed entities

ASIC said that in the coming year it will conduct surveillances of climate change related disclosure practices by selected listed companies.

The changes 'round out ASIC's response to the Senate Report on Carbon Risk'

The updates follow the recommendations of a Senate Economics References Committee report on Carbon Risk and the government's response which encouraged ASIC to review its guidance to ensure it provides 'appropriate principles and high level guidance that stakeholders can apply in meeting their disclosure obligations'.

ASIC's review of regulatory guidance also follows last year's publication of ASIC Report 593: Climate Risk Disclosure by Australia's Listed Companies (see: Governance News 21/09/2018).

ASIC Commissioner John Price said 'The updates to our regulatory guidance, together with the publication last year of Report 593, round out ASIC's response to the Senate Report on Carbon Risk. Our updates will help stakeholders to comply with their disclosure obligations in prospectuses and the operating and financial review for listed companies'.

[Note: For expert insights into the heightened expectations of climate related disclosure and assurance see: Heightened expectations of climate-related disclosure and assurance]

[Sources: ASIC media release 12/08/2019; Regulatory Guide 228; Regulatory Guide 247; INFO 203; ASIC Report 593; [registration required] The AFR 12/08/2019; Insurance Business Australia 12/08/2019; [registration required] The Australian 13/08/2019]

ASIC findings from 31 December 2018 financial reports: The largest number of inquiries related to impairment of non-financial assets and inappropriate accounting treatments

The Australian Securities and Investments Commission (ASIC) has announced the results of its review of the 31 December 2018 financial reports of 125 entities. The review of half-year reports focused on the application of major new accounting standards on revenue and financial instruments.

Some Key Points

- **Overall ASIC made inquiries of 26 entities on 40 matters.**
- **The largest number of inquiries related to impairment of non-financial assets and inappropriate accounting treatments**. ASIC said directors and auditors should continue to focus on values of assets and accounting policy choices in 30 June 2019 financial reports. In addition, ASIC said that there were instances where companies had made 'unrealistic and unsupportable assumptions about future cash flows'. ASIC reminded directors and audit committees of the guidance in Information Sheet 203 Impairment of non-financial assets: Materials for directors (INFO 203) which is intended to assist directors and audit committees in considering whether the value of non-financial assets shown in a company's financial report continues to be supportable.
- **ASIC has queried 3 entities about their tax accounting treatment.** ASIC said it made enquiries of three entities concerning their accounting for income tax, including the adequacy of tax expense, and

whether it is probable that future taxable income will be sufficient to enable the recovery of deferred tax assets relating to tax losses.

- **ASIC followed up 12 matters concerning the recognition of revenue, particularly contracts that involve multiple performance obligations** (eg sale of goods and provision of services) where one of more obligation is still to be met. In one instance, ASIC said it appeared that the tax effect of a change in revenue recognition had not been taken into account. ASIC also identified instances where revenue was not disaggregated with regard to how the nature, amount, timing and uncertainty of revenue and cash flows are affected by economic factors, as is now required for both full year and half year reports.
- **ASIC also observed that some entities could have provided a better explanation of the impact of adopting new accounting standards** on revenue recognition and financial instruments, particularly in half-year financial reports. This includes the nature and cause of any changes.

[Source: ASIC media release 08/08/2019]

APRA has fined Westpac (and two of its subsidiaries) for failing to meet data reporting requirements

- The Australian Prudential Regulation Authority (APRA) has served infringement notices on Westpac Banking Corporation (Westpac) and two of its subsidiaries (St George Finance Holdings Limited and Capital Finance Australia Limited) for failing to report data by the required deadline in breach of (Collection of Data) Act 2001 (FSCODA) requirements.
- Failure to submit monthly or quarterly returns within the timeframes specified by APRA's reporting standards is a strict liability offence. APRA says that Westpac was up to 20 days late in filing its report for the month ending 31 March 2019 and the two registered financial corporations missed the same deadline by up to 37 days. The two corporations were also up to 28 days late submitting their reports for the month ending 30 April 2019. Additionally the entities were all between 9 and 28 days late in filing their reports for the quarter ending 31 March, which were due on 10 May.
- Under the terms of the infringement notices, APRA requires the Westpac entities to pay a cumulative penalty of $1,501,500. This is the maximum financial penalty APRA can issue for infringement notices under FSCODA.
- The entities have until 6 September to pay the fines imposed by the infringement notices.

APRA Deputy Chair John Lonsdale said APRA's reporting standards were legally binding in the same way as its prudential standards. 'Access to accurate and timely data is critical for APRA to monitor effectively the safety and stability of the banking, insurance and superannuation sectors…By issuing these infringement notices, APRA wants to send a strong message to industry that compliance with our reporting standards is mandatory, and cannot be considered secondary to other business priorities'.

[Source: APRA media release 08/08/2019; [registration required] The Australian 09/08/2019]

United States | Moving towards a more 'flexible', principles-based approach to disclosure? The Securities and Exchange Commission has proposed amendments to disclosure requirements under regulation S-K

The Securities and Exchange Commission (SEC) has proposed rule amendments to 'modernise' the description of business, legal proceedings, and risk factor disclosures that registrants are required to make pursuant to Regulation S-K. The proposed amendments are intended to update the rules to improve disclosures for investors and to simplify compliance efforts for registrants.

The proposal will have a 60 day comment period following its publication in the Federal Register.

Modernisation of Regulation S-K Items 101, 103, and 105: The proposed amendments would revise Items 101(a) (description of the general development of the business), 101(c) (narrative description of the business), and 105 (risk factors) to emphasise a more principles-based approach to reflect the fact that businesses differ in terms of which aspects of these disclosures are material to them.

'Such a flexible approach, as opposed to prescriptive requirements, may elicit more relevant disclosures about these items' SEC writes.

Commenting on the proposed changes, SEC Chair Jay Clayton said that the proposal reflects 'significant changes' that have occurred since the rules were adopted, as well as 'the reality that there will be changes in the future'. In welcoming the effort by SEC staff to modernise and improve the disclosure framework, Mr Clayton particularly emphasises the move to recognise the importance of 'intangible assets' (in particular, human capital) as an 'important driver of value in today's global economy. The proposals reflect a thoughtful mix of prescriptive and principles-based requirements that should result in improved disclosures and the elimination of unnecessary costs and burdens' he said.

Further details of the proposed changes

The proposed amendment of Item 101(a) would:

- make it largely principles-based by providing a non-exclusive list of the types of information that a registrant may need to disclose, and by requiring disclosure of a topic only to the extent such information is material to an understanding of the general development of a registrant's business
- include as a listed disclosure topic, to the extent material to an understanding of the registrant's business, transactions and events that affect or may affect the company's operations, including material changes to a registrant's previously disclosed business strategy
- eliminate a prescribed timeframe for this disclosure
- permit a registrant, in filings made after a registrant's initial filing, to provide only an update of the general development of the business that focuses on material developments in the reporting period, and with an active hyperlink to the registrant's most recent filing that, together with the update, would contain the full discussion of the general development of the registrant's business

The proposed amendment of Item 101(c) would:

- clarify and expand its principles-based approach, by including disclosure topics drawn from a subset of the topics currently contained in Item 101(c)
- include, as a disclosure topic, human capital resources, including any human capital measures or objectives that management focuses on in managing the business, to the extent such disclosures would be material to an understanding of the registrant's business, such as, depending on the nature of the registrant's business and workforce, measures or objectives that address the attraction, development, and retention of personnel
- refocus the regulatory compliance requirement by including material government regulations, not just environmental provisions, as a topic

The proposed amendment of Item 103 would:

- expressly state that the required information about material legal proceedings may be provided by including hyperlinks or cross-references to legal proceedings disclosure located elsewhere in the document in an effort to encourage registrants to avoid duplicative disclosure; and
- revise the $100,000 threshold for disclosure of environmental proceedings to which the government is a party to $300,000 to adjust for inflation.

The proposed amendment of Item 105 would:

- require summary risk factor disclosure if the risk factor section exceeds 15 pages;
- refine the principles-based approach of that rule by changing the disclosure standard from the "most significant" factors to the "material" factors required to be disclosed; and
- require risk factors to be organized under relevant headings, with any risk factors that may generally apply to an investment in securities disclosed at the end of the risk factor section under a separate caption.

Explanation of the background to the proposed changes: On 13 August, Director of the Division of Corporation Finance at the US Securities and Exchange Commission posted to Harvard Law School Forum

on Corporate Governance and Financial Regulation a more detailed discussion/explanation of the proposed changes. The post can be accessed here.

[Source: SEC media release 08/08/2019]

United States | The risk of gun violence is emerging as a new risk factor in annual reports: The WSJ reports that several companies have added the possible financial impact of gun violence to their securities filings

The WSJ reports that 'a handful' of public companies — eg Dave & Buster's Entertainment Inc, Del Taco Restaurants Inc, Stratus Properties Inc, Cheesecake Factory Inc — have started to include the potential for gun violence to impact their financial performance as a material risk factor, in their latest annual reports.

Reportedly, the language in the disclosures varies by company, with most referencing how a shooting could impact the company's reputation and customer traffic.

Some examples listed by The WSJ include the following.

- Del Taco (a restaurant chain) reportedly said that 'Terrorist attacks or an active shooter could have a material adverse effect on consumer spending'. The WSJ observes that the company did not refer to this risk in previous annual reports
- Stratus Properties (whose holdings include the W Austin hotel and music venues) reportedly said that 'intentional or unintentional mass-casualty incidents' (should they occur), may require the company to cancel or reschedule events and could therefore affect the company's financial results

The WSJ observes that Walmart did not list the risk of 'active shooters' as potential risk in its most recent annual report but did include 'terrorist attacks' in a list of potential risks. Reportedly, a day after the El Paso Walmart shooting, the top federal prosecutor in southern Texas said the incident would be treated as a terrorist attack. .

The WSJ notes that the disclosures come as fatalities from mass public shootings have increased in recent years.

[Sources: [registration required] The WSJ 07/08/2019; CBS News 07/08/2019]

Regulators

APRA's appearance before the House of Representatives Economics Committee: The focus of the hearing was largely on progress towards implementation of recommended reforms and APRA's strategic priorities

Overview | APRA's appearance before the House of Representatives Economics Committee

Key Takeouts

- The Committee heard that APRA is well on track to deliver on the Financial Services Royal Commission recommendations (directed at APRA) within the timeframes originally announced by the regulator in February
- With respect to the recent Capability Review, the Committee heard that APRA supports all recommendations, but that implementation of some recommendations would require additional funding and/or changes to legislation/policy.
- The Committee heard that APRA is still considering how best to implement Recommendation 4.2 of the Capability Review (which recommended APRA embed CBA-style prudential inquiries into its supervisory approach)
- The Committee heard that APRA does not consider that the 'proposed 'veto' power' (recommended by the Capability Review (4.3)) was intended to make APRA the 'gatekeeper to every position, at both executive and director level, within the financial system'.

- A number of questions put to APRA related to its work in the superannuation sector. Among other things, the Committee heard that as part of efforts to improve member outcomes the regulator plans to publish 'metrics relative to a number of absolute and relative benchmarks to make clear the performance of individual entities' starting with default funds.
- The Committee heard that APRA's new corporate plan and updated strategy to be released later in the month, will focus on 1) lifting internal capabilities; 2) maintaining financial system safety and resilience; 3) improving outcomes for superannuation members; 4) improving cyber resilience across the financial system; and 5) 'overhauling governance, culture, remuneration and accountability within the financial sector'. These priorities will be included in APRA's new strategy.

APRA Chair Wayne Byres' Opening Statement

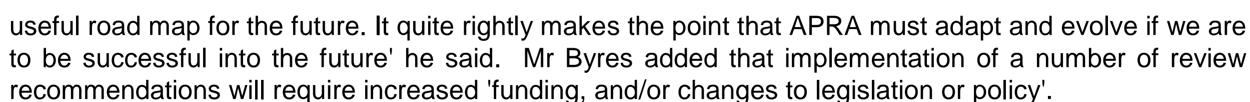
The Australian Prudential Regulation Authority (APRA) has released Chair, Wayne Byres' Opening Statement to the House of Representatives Economics Committee. The focus of Mr Byres' statement was on APRA's achievements over the past 12 months, and on APRA's priorities going forward in light of the recent Capability Review recommendations (among other review recommendations).

A high level overview of Mr Byres' statement is below.

- **Mr Byres said that the Australian financial sector remains financially sound and resilient**, though this should not be taken for granted given the 'range of vulnerabilities domestically and internationally' facing the system. 'There are a range of vulnerabilities domestically and internationally – macro (very low interest rates, inflated asset prices, slowing growth rates, high-debt levels), industry (cyber attacks, technological disruptions), and political risks (Brexit, and global political and trade tensions), just to name a few – that mean we need to remain vigilant' Mr Byres said.
- **APRA has been under 'unprecedented' review:** Mr Byres said that the past year has been one of 'unprecedented review and scrutiny of institutions and regulators'. More particularly, he said that six reviews have examined aspects of APRA's activities/operations which have delivered more than 100 recommendations for APRA to consider, in addition to a further 50 that potentially involve multi-agency work.
- **Key conclusion of the reviews?** Mr Byres said that though the focus of the reviews has been different, 'broadly they have found APRA to be – in the words of the Capability Review – "an impressive and forceful regulator" when examined in its traditional domain of financial risk. But they have noted that to be successful in the future significant new competencies and different approaches will be needed'.
- **Mr Byres also recapped APRA's main achievements of the past 12 months**. These included (among others): APRA's work in mortgage lending, information security, remuneration, member outcomes in superannuation, and the roll out of the Banking Executive Accountability Regime (BEAR).
- **Progress on implementation of the Financial Services Royal Commission recommendations**: With respect to implementation of the Financial Services Royal Commission recommendations, Mr Byres told the committee that APRA is well on track to deliver on them within the timeframes announced in February.

[Note: APRA's progress towards implementing the Financial Services Royal Commission's recommendations is covered in a separate post of this issue of Governance News in more detail.]

- **Enforcement:** With respect to APRA's new enforcement approach, Mr Byres said that though APRA is not primarily an enforcement agency like the Australian Securities and Investments Commission (ASIC) it has committed to using its existing and new enforcement tools more quickly, 'particularly on uncooperative institutions, and to make this action more transparent where appropriate'. To illustrate, he gave a number of examples of APRA's new more transparent and forceful approach including (among others) the imposition of additional capital requirements for three major banks in response to risk governance shortcomings and the fining an institution announced for failing to meet reporting requirements. You can expect to see other announcements along these lines in the future.
- **Capability Review Recommendations:** With respect to the recent Capability Review, Mr Byres reiterated that APRA supports all recommendations. 'The Capability Review represents an extremely



useful road map for the future. It quite rightly makes the point that APRA must adapt and evolve if we are to be successful into the future' he said. Mr Byres added that implementation of a number of review recommendations will require increased 'funding, and/or changes to legislation or policy'.

- **Revised corporate plan and strategy:** Mr Byres said that APRA's new corporate plan and updated strategy to be released later in the month, will focus on the activities/capabilities APRA requires to 'do our job well'. Priorities for the regulator, which Mr Byres said he expected that the Committee would wish to monitor include: 1) lifting internal capabilities; 2) maintaining financial system safety and resilience; 3) improving outcomes for superannuation members; 4) improving cyber resilience across the financial system; and 5) 'overhauling governance, culture, remuneration and accountability within the financial sector'. These priorities will be included in APRA's new strategy.

[Source: APRA Chair Wayne Byres' opening statement to the House of Representatives Economics Committee 09/08/2019]

Overview — Committee's questions to APRA

Questions to APRA members focused on (among other things): the implementation of Capability Review recommendations concerning leadership capability and monitoring within APRA; progress towards implementation of CBA-style prudential inquiries by the regulator (as part of its supervisory approach); the need for increased transparency; the adequacy of APRA's resourcing and APRA's work in the superannuation sector. A high level summary is below.

[Note: The transcript of the 9 August hearing is available here]

APRA's leadership

- **APRA leadership:** Referring to the findings of the recent Capability Review, APRA Chair Wayne Byres was asked whether there would be 'either a significant wholesale change of leadership or a massive cultural shift' within the regulator. Mr Byres responded that lifting APRA's leadership capability is a priority and that APRA has a 'range of steps in train to focus much more strongly on lifting leadership capability within the organisation'. Mr Byres also questioned the Committee's characterisation of the criticism in the Capability Review, stating that it should be read in the context of the report as a whole. He suggested that there is variability in leadership capability across all organisations, including APRA. Asked if he takes personal responsibility for the issues identified, Mr Byres accepted that 'the buck stops with me as Chair'.
- **A new 'leadership framework' in place at APRA:** Deputy Chair John Lonsdale told the Committee that APRA has a new 'leadership framework' in place to assess the performance of 'every person in APRA' designed to promote a culture of challenge/contestability within the organisation. 'We're expecting strategic initiative, we're expecting people to collaborate and work better together, and we're also expecting, as I said, contestability of ideas' Mr Lonsdale said.
- **Metrics used to assess performance:** Asked what metrics were being employed to measure performance against the new leadership benchmarks, Mr Lonsdale said performance would be assessed at 'multiple levels'. 'The broad process is the leadership of the organisation — particularly the four members — will make their expectations clear on what they're expecting from staff and from themselves. There are structured conversations between managers and people on expectations and on the delivery of that. Ultimately it's not a check-a-box, if you like; it is a subjective decision, like any performance or leadership framework' Mr Lonsdale said. In addition, APRA will apply the Banking Executive Accountability Regime (BEAR) to itself, which is expected to deliver 'greater ability to assess leadership led from the top'. APRA Deputy Chair Helen Rowell added that APRA utilises a number of tools to assess performance and leadership behaviours including: a regular program of 360-degree feedback, two yearly staff engagement surveys, and pulse surveys. In addition, she said that from this year, the regulator has changed its performance assessment framework to put a 50% weight on meeting behavioural expectations as part of its performance assessment processes.

Embedding CBA-style prudential inquiries as an ongoing part of APRA's supervisory toolkit?

Referring to Recommendation 4.2 of the Capability Review (which recommended APRA embed CBA-style prudential inquiries into its supervisory approach), the Committee asked what progress had been made towards implementing the recommendation. Mr Lonsdale said that APRA is considering how best to

implement the recommendation. More particularly, he said that APRA is considering 'whether a CBA type of inquiry is fit for every entity or whether we might tailor that a little bit; when we might use it; and how we might complement it with other reviews we will do, having more thematic reviews across organisations as well as deep-dive reviews'. Mr Lonsdale added that APRA is looking at revising 'at least two prudential standards going to governance and risk framework' and that the team responsible would lift capability in this area.

Is there a need for APRA to be more transparent?

Asked whether there was a need for the regulator to be more transparent, Mr Lonsdale agreed that 'there's no doubt' of it. This is reflected he said both in APRA's approach to enforcement and in its approach to supervision. Mr Lonsdale added, 'I think it's pretty clear now, from the Capability Review and from our acceptance of it, that we're moving to a more transparent footing, so going forward we will need to be very clear with entities about what we'll be doing'. Mr Lonsdale said that APRA's strategy will reflect this.

Proposed 'veto' power?

Referring to recommendation 4.3 of the Capability Review, which proposes to give APRA 'a veto power around disqualification of directors' the Committee asked 'To what extent is APRA seeking to embrace that as part of its responsibility, and how would it go about seeking to implement such a responsibility?'

Mr Byres said that APRA accepts the recommendation, but that it is important to note that the way in which the recommendation was 'framed is quite careful…it's not a general approval power necessarily to be applied to every organisation in every instance'. Mr Lonsdale went on to say that though the detail of implementing the recommendation needed to be worked through, 'what is not intended is that APRA would all of a sudden be the gatekeeper to every position, at both executive and director level, within the financial system. What the government have said, and I think this is the right way to approach it, is that they will look at this issue in the context of the extension of the BEAR regime. There's an opportunity to come back and look at the BEAR regime as it's extended beyond banking, and I think that's absolutely the right way to approach it.'

APRA's work on superannuation

A number of questions focused on APRA's work in the superannuation sector. These included questions on the following issues.

- **Approach to enforcement/supervision of the sector:** The Committee asked, in light of the findings of the Capability Review, that APRA provide statistics on the regulator's enforcement activities in the sector and to confirm that it would use the 'full suite of tools and powers' available. The Committee heard that there had been a 'big change over the last six months' and a shift in APRA's enforcement appetite from enforcement as a 'last resort' to one that is 'constructively tough'. Mr Lonsdale explained that this means that 'where we see wrongdoing, or an uncooperative entity, we will let them know. But we won't write one letter and then another letter and then another letter and then another letter; we'll write a letter and then we'll escalate up the toolkit that we have'. He added that APRA is primarily a 'safety regulator' and that in consequence it does not regard itself as an 'enforcement agency'.
- **Costs of superannuation:** A number of questions focused on fees. Mrs Rowell was asked whether she agreed with the Productivity Commission's view that costs in superannuation are too high. Mrs Rowell said that 'there are certainly areas in the superannuation industry where there is room for greater efficiency and, hence, cost reductions. There has been some progress in that regard over the last five years, but there's clearly further to go'. Mrs Rowell added that an 'undue focus on cost that drives costs down to the point where the system is not operating robustly with the right controls, systems and processes in place is not a good thing. These is a limit, I think to the degree of focus and emphasis that should be placed on costs'. Asked to provide research suggesting a positive correlation between fees and returns, Mrs Rowell said that she would take the request on notice. Mrs Rowell went on to say that high-fee products and options are of 'concern' to APRA and that APRA has been undertaking 'significant' work in 'getting all trustees to look at their offerings and the different elements of those offerings' including fees, 'with a view to identifying where there are outliers in terms of costs or poor performance and addressing that.' 'Our expectation is very much that those high-fee products are being dealt with, and they are'.

- **'Best in show' recommendation?** Asked for his views on the Productivity Commission's 'best in show recommendation', Mr Lonsdale said that it is a policy issue for the government to address. 'I have views on them, yes, but they are fundamentally issues for government to address. Should there be a more efficient superannuation sector? I think the answer's undoubtedly yes. That's been looked at by a number of inquiries over recent years.'
- **Improving member outcomes in superannuation:** Asked how the Committee could assess how successful APRA had been in driving better member outcomes, Mr Lonsdale invited the Committee to hold APRA to account 'through the statement of expectations that the government makes to us and the powers that we use to make sure we achieve the outcomes that we need to achieve in a general sense.' Mrs Rowell added that APRA plans to enhance the information published around performance and member outcomes though reporting metrics relative to a number of absolute and relative benchmarks to make clear the performance of individual entities. Mrs Rowell said that this project will start with MySuper default products (because that is where APRA has the 'best information') and then expand to Choice products, as more data becomes available. 'We are also looking at the degree to which we can leverage other data sources to add to our own data collection to provide, again, a better and more transparent view of industry performance' Mrs Rowell said.

  The AFR reports that APRA plans to use a system of traffic light colours to clearly communicate superannuation fund performance. According to The AFR, APRA will rate performance in four key areas: 1) net returns; 2) fees and costs; 3) insurance; and 4) sustainability (this measure will consider fund features such as demographics, and inflows versus outflows).
- **APRA's skills for management or regulation around superannuation**: Noting the Capability Review documented 'internal doubt' about APRA's capacity/skills for management or regulation around superannuation, the Committee asked whether this is a concern for APRA in terms of its responsibility for the sector into the future. Mr Byres responded that a key challenge is the ability to compete with financial sector salaries, but that building capability is a priority for the regulator, especially as some expertise has been lost over time. Mrs Rowell added that APRA is in the process of creating a separate superannuation division (as recommended by the Capability Review) and that as part of this, APRA is also looking to increase resources focused on superannuation. She echoed Mr Byres' statements concerning the difficulty of competing with financial sector salaries.

Additional funding?

Asked what additional resources would enable APRA to do (that it is not already doing) Mr Lonsdale gave CBA-style prudential inquiries as an example. Additional funding would allow 'deep dives for particular entities on governance and culture issues like in the CBA' he said. The Committee heard that this activity is 'very expensive to do, and so one of the things we'll be going to government with is a proposal to talk about how we should do that, how many of those we should do and how that fits in with our broader strategy'. Asked to clarify whether APRA's ability to implement one of the Financial Services Royal Commission's 'core recommendations' (around addressing culture in the financial services sector) is 'constrained' by lack of funding, Mr Lonsdale agreed that this is 'partly' the case. 'This is one element and it's an element that's not contingent on funding immediately, but it is one that we will be going to government on' Mr Lonsdale said. Mr Byres added that the 'Capability Review and indeed the other reviews…have us a range of recommendations on things that we should do more of, or do more intensively or do more frequently. Unfortunately no one has come up with suggestions on things we should do less of… We're happy to take that challenge on, but, inevitably, it raises some resource questions.'

Mr Byres added that there is a limit to 'how thin we can spread our resources, given the Capability Review also said, quite strongly that we shouldn't jeopardise the core tasks that we've traditionally done well around financial safety and resilience.'

Cybersecurity

The Committee heard that APRA considers cybersecurity to be an 'important area' and is building its cybersecurity capability.

Asked to assess APRA's current cybersecurity capability in terms of APRA's own cybersecurity and the protection of information as a body to oversee and monitor the cybersecurity standards of other agencies, Mr

Summerhayes said that he considers that APRA, 'benchmark well' noting that the latest audit had highlighted no areas for 'particular concern', though it did give the regulator some 'homework'.

Asked whether additional resourcing would be required in this area (ie monitoring and overseeing cybersecurity standards set for firms', APRA member Geoff Summerhayes said that, as was flagged in the Capability Review, additional resourcing is required.

Executive remuneration

Noting the 'disquiet within the financial services sector' with respect to APRA's proposed draft standard, and the reported difficulty (by industry) in complying the proposed approach, the Committee asked for APRA's view. Mr Lonsdale responded that the approach being put forward 'is very much a discussion paper' and that constructive comments are welcome. The proposal he said, is very much aimed at providing 'greater accountability for executives in this regulated sector'.

Response to the Financial Services Royal Commission?

Asked whether APRA is satisfied that the major banks and insurers are responding adequately to the Financial Services Royal Commission, Mr Lonsdale said that they 'certainly are'.

Progress update on the 12 matters referred by the Commission?

Asked for a progress update on the 12 matters referred to APRA by the Financial Services Royal Commission, Mr Lonsdale said that APRA is 'examining them very closely'. He added that additional documents had been requested from the entities at the beginning of the year and that APRA is now 'compiling those documents' and 'seeking external legal advice' on 'whether or not a case exists and whether or not a case exists that we can take to court'. Mr Lonsdale added that APRA expects that it will come to a view on whether to go forward on the 'bulk' of cases 'around September, certainly before the end of the year.'

Mr Lonsdale observed that though there 'are various issues and potential contraventions of Acts within the 12', the 'vast majority' attract no penalty. Mr Lonsdale said that where cases overlap with ASIC's work, APRA is in dialogue with ASIC.

[Sources: Transcript House of Representatives Standing Committee on Economics Australian prudential Regulation Authority Annual Report 2017-2018 09/08/2019; [registration required] The Age 10/08/2019; [registration required] The AFR 09/08/2019; Source: [registration required] The AFR 13/08/2019]

APRA's six monthly update on progress towards implementing the Financial Services Royal Commission Recommendations: on track to meet the original timelines set in February

Key Takeouts

- The Australian Prudential Regulation Authority (APRA) has provided a six-month update on the delivery of the ten Financial Services Royal Commission (FSRC) recommendations directed at it and has advised it is on track to meet its self-imposed deadlines
- APRA is on track to meet the original self-imposed deadlines set in February: APRA said in its 11 February announcement, that nine of ten recommendations would be completed by the end of 2020; and that of those, four would be completed in 2019.
- FSRC referrals: APRA's examination of each of the 12 matters in relation to individual entities that were referred to it 'is advanced' and APRA will continue to liaise with the Australian Securities and Investments Commission (ASIC) and other relevant agencies to 'promptly address the matters identified'.

Details

The table below sets out each of the recommendations directed at APRA, the government's initial response, and APRA's progress update and the timeline for completion (where available). The full text of APRA's response can be accessed here

Financial Services Royal Commission Recommendation	Government's response	APRA progress update and timeframe for completion
Recommendation 1.12 - Valuations of Land APRA should amend Prudential Standard APS 220 to: a) require that internal appraisals of the value of land taken or to be taken as security should be independent of loan origination, loan processing and loan decision processes; b) provide for valuation of agricultural land in a manner that will recognise to the extent possible: ◦the likelihood of external events affecting its realisable value; and c) the time that may be taken to realise the land at a reasonable price affecting its realisable value.	The government has said it supports the Australian Prudential Regulation Authority (APRA) acting on this recommendation.	APRA released proposed revisions to APS 220 in March 2019. Consultation closed on 28 June. The proposed implementation date for the reforms (given In APRA's consultation paper) was 1 July 2020. [Note: For a summary of the proposed revisions to APS 220 see: Governance News 27/03/2019] The final version of the standard will be issued by the end of 2019.
Recommendation 1.17 - Banking Executive Accountability Regime (BEAR) product responsibility	The Government supports APRA acting on this recommendation. The Government has also agreed to extend the BEAR to other APRA-regulated entities in its response to Recommendation 6.6.	APRA released proposed requirements for consultation proposed requirements in June 2019 (see: Governance News 03/07/2019) The new requirements will be finalised by the end of 2019.
Recommendation 4.14 - Additional scrutiny for related party engagements APRA should amend Prudential Standard SPS 250 to require registrable superannuation entity (RSE) licensees that engage a related party to provide group life insurance, or who enter into a contract, arrangement or understanding with a life insurer by which the insurer is given a priority or privilege in connection with the provision of life insurance, to obtain and provide to APRA within a fixed time, independent certification that the arrangements and policies entered into are in the best interests of members and otherwise satisfy legal and regulatory requirements.	The Government supports APRA acting on these recommendations.	In response to 4.14 and 4.15, APRA states that its post-implementation review, which contained a number of proposed enhancements to strengthen the prudential framework, was published in April 2019. APRA says that it will be consulting on proposed changes to the prudential framework later this year with a view to finalising them in 2020. In addition, APRA notes that in March 2019, it wrote to all RSE Licensees indicating that it would be good practice for trustees for which Recommendation 4.14 is applicable to commission an independent review as soon as possible.
Recommendation 4.15 - Status attribution to be fair and reasonable	The Government supports APRA acting on these recommendations.	
Recommendation 5.1 - Supervision of remuneration - principles, standards and guidance In conducting prudential supervision of remuneration systems, and revising its prudential standards and guidance about remuneration, APRA should give effect to the principles, standards and guidance set out in the Financial Stability Board's publications concerning sound compensation principles and practices. Recommendations 5.2 and 5.3 explain and amplify aspects of this Recommendation.	The Government supports APRA acting on these recommendations.	In response to recommendations 5.1 and 5.2 APRA says that it released for consultation a draft prudential standard, Prudential Standard CPS 511 Remuneration, in July 2019. APRA intends to release the final prudential standard in early 2020. . APRA adds that work is underway to devise new information collections that will allow APRA to better assess how remuneration frameworks work in practice.

Financial Services Royal Commission Recommendation	Government's response	APRA progress update and timeframe for completion
Recommendation 5.2 - Supervision of remuneration - aims	The Government supports APRA acting on these recommendations.	
Recommendation 5.3 - Revised prudential standards and guidance In revising its prudential standards and guidance about the design and implementation of remuneration systems, APRA should: a) require APRA-regulated institutions to design their remuneration systems to encourage sound management of non-financial risks, and to reduce the risk of misconduct; b) require the board of an APRA-regulated institution (whether through its remuneration committee or otherwise) to make regular assessments of the effectiveness of the remuneration system in encouraging sound management of non-financial risks, and reducing the risk of misconduct; c) set limits on the use of financial metrics in connection with long-term variable remuneration; d) require APRA-regulated institutions to provide for the entity, in appropriate circumstances, to claw back remuneration that has vested; and e) encourage APRA-regulated institutions to improve the quality of information being provided to boards and their committees about risk management performance and remuneration decisions.	The Government supports APRA acting on these recommendations.	APRA will release proposed revisions to Prudential Standard CPS 510 by mid-2019 which will address this recommendation. This will incorporate the Royal Commission's recommendations, recent lessons from APRA's supervisory activity, the CBA Prudential Inquiry as associated self-assessments by other entities, and relevant international guidance. APRA's intention is to have a final standard determined in 2020. This work will include the design of new information collections that will allow APRA to better assess how remuneration frameworks work in practice.
Recommendation 5.7 - Supervision of culture and governance In conducting its prudential supervision of APRA-regulated institutions and in revising its prudential standards and guidance, APRA should: a) build a supervisory program focused on building culture that will mitigate the risk of misconduct; use a risk-based approach to its reviews; b) assess the cultural drivers of misconduct in entities; and c) encourage entities to give proper attention to sound management of conduct risk and improving entity governance.	The Government supports APRA acting on these recommendations	Building on additional resourcing provided by the Government in the 2019 Budget, the recommendations of the Royal Commission, and the recommendations of the Capability Review, APRA is developing an enhanced approach to the supervision of governance, culture, remuneration and accountability within regulated institutions. APRA intends to publish a statement of its approach by the end of 2019.
Recommendation 6.10 - Co-operation memorandum ASIC and APRA should prepare and maintain a joint memorandum setting out how they intend to comply with their statutory obligation to co-operate. The memorandum should be reviewed biennially and each of ASIC and APRA should report each year on the operation of and steps taken under it in its annual report.	The Government supports ASIC and APRA continuing to work together to update their existing memorandum of understanding to ensure that it clearly sets out how they will comply with their statutory obligation to co-operate.	APRA and ASIC are progressing work on the updated MOU, which is on track to be published by the end of 2019. More formal arrangements for inter-agency coordination are also being established to ensure maximum alignment of activities in areas of common interest.

Financial Services Royal Commission Recommendation	Government's response	APRA progress update and timeframe for completion
Recommendation 6.12 - Application of the BEAR to regulators In a manner agreed with the external oversight body (the establishment of which is the subject of Recommendation 6.14 below) each of APRA and ASIC should internally formulate and apply to its own management accountability principles of the kind established by the BEAR.	The Government agrees that APRA and ASIC should be subject to accountability principles consistent with the BEAR. The Government notes that the Financial Conduct Authority in the UK has adopted a similar regime to enhance its own internal accountability.	Subject to finalisation of its new organisational structure, APRA is developing accountability statements of the kind required under BEAR. These will be published before the end of 2019.

[Sources: APRA media release 07/08/2019; Progress update on Recommendations — August 2019]

Self-Regulation is not dead? APRA Chair Wayne Byres has said he considers that self-regulation remains the optimal model but that work is needed to restore the system to health

In his address to the 2019 Banking and Finance Oath Conference, APRA Chair Wayne Byres reflected on the current state of self-regulation and the future of self-regulation in the financial services sector.

Mr Byres said that despite fact that it is 'certainly not in peak physical condition', he considers that self-regulation remains the optimal model for financial regulation.

Having said this, Mr Byres said that work would be required to 'restore' to health, including: a) a 'healthy degree of self-regulation' in the form of industry codes of practice with 'genuine force'; b) stronger frameworks of governance and accountability within companies, and c) a commitment by 'individuals to seek to operate with ethical restraint'. On this basis, he urged industry to 'embrace that challenge'.

[Sources: APRA Chair Wayne Byres speech at the 2019 Banking and Finance Oath Conference, Is self-regulation dead? 08/08/2019; [registration required] The AFR 08/08/2019; Investor Daily 09/08/2019]

Hong Kong | SFC latest quarterly report released

The Securities and Futures Commission (SFC) has released its latest Quarterly Report summarising key developments from April to June 2019. Key figures from the report include the following:

- In enforcement, the SFC highlights the following.
  - Disciplinary actions: The SFC disciplined five licensed corporations and four representatives during the quarter, resulting in fines totalling $39.5 million. Amongst them, China Merchants Securities (HK) Co, Limited was reprimanded and fined $27 million for failings in its sponsor work in the listing application of China Metal Recycling (Holdings) Limited.
  - Restriction notices: The SFC issued restriction notices to 19 brokers prohibiting them from dealing with or processing assets held in client accounts related to suspected market manipulation.
  - Market surveillance: The SFC made 2,579 requests for trading and account records from intermediaries triggered by untoward price and turnover movement
- The SFC conducted 82 on-site inspections of licensed corporations to review their compliance with regulatory requirements.
- The SFC issued section 179 directions to gather additional information in 40 cases and wrote to detail its concerns in seven transactions.
- The number of licensees and registrants totalled 47,239, up 4.7% year-on-year, and the total number of licensed corporations increased 8.7% to a record high of 3,017.

- 2,799 collective investment schemes were authorised by the SFC as of 30 June.
- The SFC reviewed 105 new listing applications, up 25% from the previous quarter.

[Sources: SFC media release 12/08/2019; Quarterly Report: April-June 2019]

In Brief | How should organisations respond to an SFO probe? The UK Serious Fraud Office has released guidance outlining the steps organisations should take if they decide to cooperate with the agency in an investigation. The WSJ questions whether the guidance could revive tensions with lawyers over legal privilege

[Source: SFO Cooperation Guidance 06/08/2019; FCPA Blog 07/08/2019; [registration required] The WSJ 06/08/2019]

Financial Services

Top Story | The Federal Court has dismissed ASIC's responsible lending test case against Westpac and ordered the regulator to pay the bank's costs

Overview | Australian Securities and Investments Commission v Westpac Banking Corporation (No 2) [2018] FCA 751

Key Takeouts

- **Loss for ASIC:** The Federal Court has dismissed the Australian Securities and Investments Commission's (ASIC's) responsible lending case against Westpac and ordered the regulator to pay the bank's costs. ASIC said in a statement that it is 'reviewing the judgment carefully' and has not ruled out an appeal. Some media reports have suggested that the regulator may now push for law reform.
- **Clarification of the boundaries of responsible lending obligations:** Justice Perram found that a lender 'may do what it wants in the assessment process' and is not obliged under the NCCP Act to take into account a prospective borrower's actual/declared expenses when assessing whether a loan will be unsuitable to consumers
- **Test case:** ASIC has said 'it took on the case against Westpac because of the need for judicial clarification of a cornerstone legal obligation on lenders, this is why ASIC refers to this case as a "test case". As a regulator, it is our role to test the law'

On 13 August, Justice Nye Perram handed down his landmark decision on the boundaries of responsible lending obligations in Australian Securities and Investments Commission v Westpac Banking Corporation (No 2) [2018] FCA 751. The case, brought by the Australian Securities and Investments Commission (ASIC) as a 'test case' has received a high level of media coverage, especially in the context of ASIC's proposed updates to its responsible lending guidance and in light of the Financial Services Royal Commission.

ASIC's case

The National Consumer Credit Protection Act 2009 (Cth) (NCCP Act) requires lenders to assess whether loans will be unsuitable for consumers. The litigation related to Westpac's home loan assessment process during the period December 2011 and March 2015, during which approximately 260,000 home loans were approved by Westpac's automated decision system.

ASIC alleged that Westpac breached its responsible lending obligations under the NCCP Act because its automated decision system:

1. did not have regard to consumers' declared living expenses when assessing their capacity to repay home loans (instead relying on the Household Expenditure Measure (HEM)); and that
2. Westpac used the incorrect method when assessing a consumer's capacity to repay a home loan at the end of the interest-only period. ASIC alleged that Westpac was required to have regard to the

higher repayments at the end of the interest-only period in assessing home loans of this kind but, did not do so.

Justice Perram rejected ASIC's case on both grounds

Why did ASIC's case fail?

ASIC's case failed on the first ground both on the facts 'and as a matter of statutory construction'

On the first ground, Perram J rejected ASIC's case on the basis that as a matter of fact, 'Westpac did have regard to…declared living expenses'. Justice Perram on to observe that even if this were not so, 'the Act does not operate as ASIC alleges'.

No requirement to use a prospective borrower's declared living expenses

Justice Perram observed that 'the Act requires a credit provider to ask itself only whether "the consumer will be unable to comply with the consumer's financial obligations under the contract" or, alternatively, whether the consumer "could only comply with substantial hardship" [the s 131(2)(a) Questions]. Further, though the Act 'requires a credit provider to ask the consumer about their financial situation (s 130(1)(b)) and, in turn, to ask itself—and to answer—the s 131(2)(a) Questions' there is no 'further consequence that the credit provider must use the consumer's declared living expenses in doing so'.

In fact, Perram J observes that the Act is 'silent on how a credit provider is to answer the s131(2)(a) Questions. The Act 'contains neither an express statement that a credit provider must use the consumer's declared living expenses in doing so nor, in my opinion, can such a requirement be discerned from its terms as a matter of necessary intendment'.

Justice Perram went on to state that the only way that one or more declared living expenses can be shown to be necessarily relevant to the issue of whether the consumer can afford to make the repayments is by identifying some living expenses 'which simply cannot be foregone or reduced beyond a certain point'. In illustration, Perram J observed, 'I may eat Wagyu beef everyday washed down with the finest shiraz but, if I really want my new home, I can make do on much more modest fare. Knowing the amount I actually expend on food tells one nothing about what that conceptual minimum is. But it is that conceptual minimum which drives the question of whether I can afford to make the repayments on the loan'.

Ultimately, Perram J took the view that 'A credit provider may do what it wants in the assessment process, so far as I can see; what it cannot do is make unsuitable loans. ASIC's argument creates a whole new range of implied rules which appear altogether unnecessary'.

Use of the Household Expenditure Measure (HEM) benchmark?

ASIC did not allege that Westpac was entirely prohibited by the NCCP Act from using the HEM benchmark in assessing whether a loan was unsuitable (ie answering the s 131(2)(a) Questions). Rather, ASIC's case was that Westpac was obliged not to place sole reliance on it (and instead was required to take into account the consumer's declared living expenses). Given Justice Perram's rejection of this view, he observed that the use of the HEM 'was of marginal relevance' by the conclusion of the trial.

'ASIC is either right or wrong in its contention that Westpac was obliged to base its assessment of unsuitability on the consumer's declared living expenses. If ASIC is right about that, it is irrelevant whether the HEM benchmark is a good, bad or indifferent proxy for substantial hardship because, regardless, this can have no impact on the fact that Westpac failed to take into account any of the declared living expenses. If, on the other hand, ASIC is wrong about that, the qualities of the HEM benchmark also do not matter because they have no impact on the result. This is because ASIC will, on that hypothesis, already have failed. Consequently, the capacity of the HEM benchmark to serve as a proxy for substantial hardship is not an issue which is actually live in the litigation' Perram J states.

Justice Perram went on to say that could see 'no utility in resolving the issue. Beyond the fact that the HEM benchmark appears to be a mechanism for assessing hardship and Westpac thought it to be such, I see no relevance to this material'.

ASIC's case also failed on the second ground

Justice Perram also rejected ASIC's argument that Westpac breached the NCCP Act in the manner in which it answered the s 131(2)(a) Questions in the case of loans having an initial interest only period before payment of principal was required.

'Westpac's legal obligation was to ask and answer the s 131(2)(a) Questions. The fact that it did so as if the loan did not involve an initial interest only period does not mean that it did not ask and answer those questions. ASIC alleges that Westpac contravened the Act in this way on 154,351 occasions across the same period as its first allegation (these loans are a subset of the 261,987 loans which figure in ASIC's primary case). ASIC's case on these loans fails too' Perram J found.

Westpac has welcomed the clarity provided by the decision

In a short statement, Westpac acknowledging the responsible lending ruling Westpac Chief Executive (Westpac Consumer Division) David Lindberg, said: 'Westpac has always sought to lend responsibly to customers and takes its lending obligations very seriously. This is an important test case for the industry, and we welcome the clarity that today's decision provides for the interpretation of responsible lending obligations'.

The statement adds that 'Westpac aims to build and maintain constructive and trusted working relationships with its regulators, including when we have a genuine difference of opinion. When this occurs, our preference is to resolve the difference in an open, transparent and respectful way'.

ASIC's response: 'as a regulator, it is our role to test the law and its ambit'

In a statement, ASIC Commissioner Sean Hughes said that 'ASIC took on the case against Westpac because of the need for judicial clarification of a cornerstone legal obligation on lenders, this is why ASIC refers to this case as a "test case". As a regulator, it is our role to test the law and its ambit. The obligation to assess loan applications builds on the requirement for banks to make inquiries about a borrower's financial circumstances and capacity to service a loan and to verify the information that borrowers give banks'. He added that 'ASIC is reviewing the judgment carefully'.

Commenting on the impact of the decision on ASIC's proposed updates to its responsible lending guidance, The AFR quotes Mr Hughes as saying that he does not believe that the decision 'in and of itself in any way undermines our [ASIC's] additional guidance and if anything cements why we need guidance in the first place'.

Broader Context: ASIC's proposed updates to its responsible lending guidance

On 14 February, ASIC released proposed changes to responsible lending guidance (CP 309 Update to RG 209: Credit Licensing: Responsible Lending Conduct) for consultation. Consultation closed on 20 May (see: Governance News 20/02/2019). ASIC subsequently released submissions received in response to the consultation paper and announced that it would hold public hearings (12 August and 19 August) to 'robustly test' some of the issues/views raised in submissions.

A number of submissions raised concerns about ASIC's proposed approach. The Australian Banking Association raised concerns that ASIC's move away from a 'principles based approach that embeds appropriate flexibility' would negatively impact competition and cautioned that 'the broader economic and regulatory environment impacts the speed and availability of credit for consumers and should be considered as part of the review of RG209'.

ASIC has not yet made available a transcript of the public hearing held on 12 August. According to media reports, lenders (CBA and Westpac) reiterated concerns raised in submissions, including that the shift towards a more prescriptive approach would increase interest rates, reduce competition and expose banks

to further disruption. Reportedly, Westpac CEO Brian Hartzer has previously commented that overly prescriptive regulators pose a risk to economic growth by curtailing bank's ability to lend to households and businesses.

Separately, ANZ CEO Shayne Elliott has also reportedly said that history had shown banks had done a 'pretty good job' with 'extremely few' customers negatively impacted. 'The economy works when you have reasonable access to credit and people can make mistakes and start businesses that sometimes will fail. That is an integral part of a well-functioning ... economy' he reportedly said.

Still a live issue?

(Possible) push for law reform? The Financial Services Royal Commission's Final Report made no express recommendation to ban the use of the Household Expenditure Measure (HEM) or the use of other benchmarks to verify prospective borrowers' ability to service a loan. However, Commissioner Hayne noted with approval the shift by industry away from using such benchmarks. 'I consider…steps taken by banks to strengthen their home lending practices and to reduce their reliance on the HEM – are being taken with a view to improving compliance with the responsible lending provisions of the NCCP Act'.

Noting the decision above was then still pending, he added that should this interpretation of the content of the obligation be successfully challenged, that the law should be altered. 'If the court processes were to reveal some deficiency in the law's requirements to make reasonable inquiries about, and verify, the consumer's financial situation, amending legislation to fill in that gap should be enacted as soon as reasonably practicable'.

[Note: For Commissioner Hayne's discussion of the use of benchmarks see: Financial Services Royal Commission Final Report, Volume 1 at p57-59. See also: FSRC Final Report: Lending implications]

The AFR suggests that in light of Commissioner Hayne's comments, ASIC has 'no option' but to push for legislative reform 'such that the regulator's view of responsible lending is better reflected in the law of the land'.

Only limited clarity?

Other media reports suggest that the decision is welcome because it provides a measure of clarity for lenders (and the regulator), some reports have described it as a 'win for common sense' on the basis that 'it should be up to individual lenders to decide how they assess a borrower's repayment capacity'.

A number of reports observe that ASIC has not ruled out appealing the decision, and is yet to finalise its updates on responsible lending guidance and that the boundaries of responsible lending obligations are yet to be settled.

[Sources: Australian Securities and Investments Commission v Westpac Banking Corporation (No 2) [2018] FCA 751; Westpac media release 13/08/2019; ASIC media release 13/08/2019; The ABC 13/08/2019; The SMH 13/08/2019; [registration required] The AFR 30/07/2019; 12/08/2019; 12/08/2019; 13/08/2019; 13/08/2019; 13/08/2019; 13/08/2019; 14/08/2019; The Guardian 13/08/2019; The Age 13/08/2019; 14/08/2019; 14/08/2019]

The ABA and Bauer Media have launched a campaign to stop elder abuse: the group has called on governments to establish a national online register of Power of Attorney Orders, standardise laws and legislate a designated safe place to report elder financial abuse

The Australian Banking Association (ABA) has released a statement announcing that it is joining forces with Bauer Media to expand its campaign to end elder financial abuse.

The ABA says that recent research shows that: a) almost 57% of Australians are worried that someone they know will be the victim of this insidious abuse; and b) 87% of Australians wanting their government to do more to stop elder financial abuse.

The campaign specifically calls on governments across Australia to act to establish:

1. Power of Attorney laws which are the same across the country and protect people from this kind of abuse.
2. A National Power of Attorney (POA) register to check if POA documents are legitimate and current.
3. Somewhere to report abuse in each state that can investigate and act.

The joint campaign is also part of Bauer's Financially Fit Females initiative, aiming to improve the financial literacy of Australian women across the country.

[Sources: Australian Banking Association media release 07/08/2019; The SMH 07/08/2019]

United Kingdom | The Financial Conduct Authority has released the findings of its review into the embedding of the Senior Managers and Certification Regime in the banking sector

On 5 August, the Financial Conduct Authority (FCA) released the findings of its review into the embedding of the Senior Managers and Certification Regime (SM&CR) in the banking sector in the three years since it was introduced.

Scope of the Review

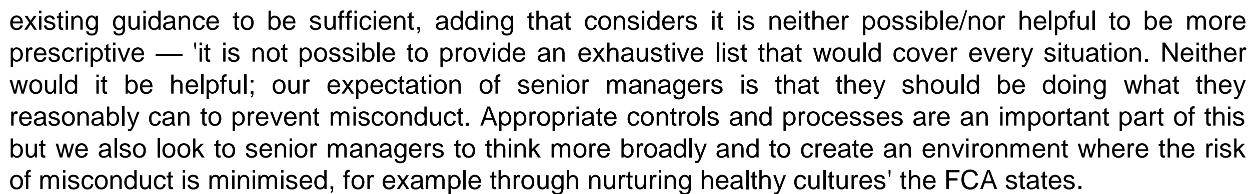
- The review was based on interviews with 45 people at 15 banking sector firms (including large and small wholesale and retail banks and building societies) as well as trade associations, the Banking Standards Board, the FCA and the Prudential Regulation Authority (PRA) who have worked with SM&CR
- The review covered a wide range of themes, including: a) senior manager accountability; b) certification; c) regulatory references; d) conduct rules; e) impact on culture; f) unintended consequences; and g) embedding and overcoming initial implementation issues.
- The FCA states that it found a high level of commonality across the interviews which it considers is an indication that the results are likely to be broadly representative of the sector.
- Though not a 'full post-implementation review', the review focused on identifying any issues requiring more focus from firms or the FCA, to assist firms in developing their approach to embedding the SM&CR and to help focus FCA communications and supervision. The FCA states that it does not 'propose to make any policy changes' based on the findings of the review.

Some Key Findings

Overall, the FCA found that industry has made a concerted effort to implement the regime. Most firms were found to be taking actions to move away from basic rules-based compliance towards embedding the regime in the organisation.

Senior manager accountability

- **Individuals were clear on their own accountability:** Senior managers appeared to be clear on what accountability means in the context of their jobs/day to day activities and could explain how they were accountable for their own actions and their responsibilities as leaders within their organisations.
- **Concern about potential blurring of non-executive and executive director roles:** Some non-executive directors were concerned the regime expected too much from the board and there was a perceived risk of blurring between non-executive and executive roles as board members become more involved in business operations. Commenting on this, the FCA says that the SM&CR does not seek to redefine the roles of non-executives and there is no expectation that non-executives act more like executive directors. 'Indeed, we see the oversight role of non-executive directors and their ability to challenge management as a key safeguard for the interests of firms' stakeholders' the FCA states. Having said this, the FCA writes that especially in larger firms, the responsibilities of SMF non-executive directors will often be considerable.
- **Looking to the regulator for guidance:** Many senior managers expressed concern around understanding the meaning of 'reasonable steps' in the context of their business, were 'reluctant to state what they believe good looks like and inclined to look to the regulators' expectations, often seeing the answer as being further guidance from the FCA'. Commenting on this the FCA writes that it considers


existing guidance to be sufficient, adding that considers it is neither possible/nor helpful to be more prescriptive — 'it is not possible to provide an exhaustive list that would cover every situation. Neither would it be helpful; our expectation of senior managers is that they should be doing what they reasonably can to prevent misconduct. Appropriate controls and processes are an important part of this but we also look to senior managers to think more broadly and to create an environment where the risk of misconduct is minimised, for example through nurturing healthy cultures' the FCA states.

Certification

- **Progress has been made:** With respect to certification, the FCA found that firms had taken steps to implement processes to: oversee the certification population; ensure frameworks are robust with checks and balances in place to support the competence assessment and provision of training; and that firms had broadened their approach to assessment of staff beyond technical skills. Managers were also assessed to be in a 'better position to assess the behaviours of certified staff'.
- **Assessment approach is lacking?** Having said this, the FCA found that most firms were unable to demonstrate the effectiveness of their assessment approach, use of subjective judgement of how they ensure consistency. 'We did not see evidence in general that firms had made significant changes to their performance assessment processes other than incorporating expected behaviours' the FCA states. For instance, it is not clear that firms are using the Certification Regime to evaluate if managers of certification staff (who are themselves certified) are competent managers.

Regulatory References ('rolling bad apples')

All firms were positive about the concept of regulatory references and its intention to address the potential issue of 'rolling bad apples' ie where people with poor conduct records are able to move to new employers.

However, the majority felt that the industry had some way to go to improve the quality and timeliness of references. For example, respondents said that the approach to recording breaches of the Conduct Rules is inconsistent across firms. In addition, some firms were more inclined, depending on their size, risk appetite and on where they recruit senior managers/certification staff to rely on references than others.

Room for improvement? Conduct Rules

Despite the fact that respondents believed staff generally understood the conduct rules, the FCA found that there was insufficient evidence to be confident that firms have clearly mapped the conduct rules to their values. Further, 'many firms were often unable to explain what a conduct breach looked like in the context of their business'.

Training required: The FCA comments in relation to this that it considers the conduct rules to be a critical foundation for firms' culture and the conduct of individuals and that firms are legally required to: a) notify all relevant persons of the conduct rules that apply in relation to them; and b) take all reasonable steps to secure that those persons understand how those rules apply in relation to them. The FCA states that this 'must include the provision of suitable training'.

Impact on Culture: The link between the SM&CR and culture remains unclear?

Many firms described the work undertaken to promote a strong culture within their organisation eg the promotion of a speak up culture, the stronger 'tone from the top' and emphasis on expected behaviours. Further, the FCA head that the SM&CR is having an impact on the mindset of senior managers.

However, the SM&CR is perceived to be primarily enabling firms to improve their controls environment, which they expect to lead to improved behaviours.

It is not clear, the FCA concludes, to what extent the regime has been linked to culture.

Firms also reported that there were finding the task of measure challenging.

Unintended consequences

- **For most firms, SM&CR did not lead to significant unintended consequences**. The unintended consequences that arose for a few firms were specific to their respective businesses.

- **Some firms reported that there was a 'culture of fear' during the early days of the regime** but that this has now large dissipated due to firms working to develop an environment of healthy challenge and openness; and the collaborative approach adopted by regulators to achieve positive outcomes.
- **More risk averse around innovation initiatives?** The FCA observes that there is evidence that processes and controls on approvals of new products and businesses have been tightened and that this has 'potentially contributed to firms being more risk averse and considered around innovation initiatives'. The FCA comments that 'if firms get the balance right, we don't see this as a negative outcome'.
- **In addition the FCA said that there is some evidence of 'recruitment challenges'**, particularly for candidates from outside the financial services industry considering certification or SMF roles but this was not universal. Most firms mentioned the additional staff and work required to administer the regime. The FCA comments that 'this was seen by many as part of creating a robust governance environment within their firm'.

Embedding and overcoming initial implementation issues

Overall, the FCA considers that initial implementation issues have now been overcome. 'Firms described the initial stages of implementation as challenging but came to see clear definition of accountability as beneficial'.

- **Larger firms more mature in their approach:** Most firms are continuing to embed the regime, particularly below the senior manager level, with a focus on the spirit of the regime and ensuring their approach is proportionate. Generally, the larger banks, with more resources and exposure to the regulators, are more mature in their approach.
- **Room for improvement?** Some firms seem to have been less successful in embedding the regime below the senior manager level. There is some room for further progress at the certification level and potentially more significant weaknesses in the implementation of the conduct rules for other staff.

Increased supervisory focus on the conduct rules

The FCA has said that it will increase its supervisory focus on the conduct rules.

The FCA's expectation is that all SM&CR firms ensure that they are embedding the conduct rules in their businesses to meet their obligations under the regime. In addition, the FCA says that it will continue to build on the links between the SM&CR and firm culture. 'The Senior Managers and Certification Regime is an important way to establish a culture of accountability for conduct and aligns with our cross-sector business priority to continue to work on firm culture and governance' the FCA states.

[Source: FCA media release 05/08/2019]

In Brief | APRA has announced that it will apply an additional $250 million capital requirement to Allianz Australia Limited (Allianz) to reflect the issues identified in the insurer's risk governance self-assessment. APRA has advised Allianz that the extra $250 million capital requirement will remain in place until it completes remediation work underway to strengthen risk management, and closes gaps identified in its self-assessment. APRA comments that Allianz is the fifth APRA-regulated entity to have an additional capital requirement imposed due to heightened operational risk: APRA applied a $1 billion capital adjustment to CBA last May following the final report of the Prudential Inquiry, and last month imposed additional $500m capital requirements each on ANZ, National Australia Bank and Westpac

[Sources: APRA media release 14/08/2019; [registration required] The AFR 14/08/2019]

In Brief | The CBA has provided an update on its prudential inquiry remedial action plan: As of 30 June 2019, CBA has submitted on time to the Independent Reviewer all of the 75 milestones that were due. 65 milestones have been assessed as 'complete and effective' and the assessment of the remaining 10 by the Independent Reviewer is in progress. The CBA writes that the independent reviewer has noted the 'solid progress' being made and has said that CBA remains 'on track' to deliver on the plan

[Source: CBA media release 08/08/2019]

In Brief | Australian Financial Markets Association (AFMA) CEO, David Lynch, has been elected Chair of global securities industry body the International Council of Securities Associations (ICSA). Mr Lynch is the first Australian representative to hold the position

[Source: [registration required — accessed via LexisNexis Capital Monitor] AFMA media release 07/08/2019]

In Brief | Leadership changes at FINSIA announced: Professional non-executive director, Victoria Weekes has been elected as the new President of the Financial Services Institute of Australasia (FINSIA). The appointment, comes as part of a series of board level changes Three new board directors appointed during May and June are: Westpac Chief Risk Officer David Stephen; National Australia Bank Executive General Manager, Growth Sector Cameron Fuller; and Commonwealth Bank of Australia Executive General Manager, Regional and Agribusiness Banking Grant Cairns

[Source: FINSIA media release 07/08/2019]

Accounting and Audit

In Brief | Australia should follow the UK's example? Graeme Samuel has reportedly said that accounting firms should be prevented from selling consulting services to their audit clients given the inherent conflict of interest in a company hiring their auditor to provide general consulting advice. Reportedly Mr Samuel expressed support for proposed UK rules preventing the big firms offering almost any other service to their audit clients

[Source: [registration required] The AFR 08/08/2019; [registration required] The Australian 13/08/2019]

Risk Management

Privacy, Technology, Cybersecurity

Top Story | ACCC calls for competition reforms that will impact digital platform operators and beyond

The Australian Competition and Consumer Commission (ACCC) recently concluded its long-running Inquiry into digital platforms in Australia. It set out its findings and a detailed set of recommendations in its final report released on 26 July 2019. MinterEllison has released an article providing expert insights into the implications of the report.

The full text is available here: https://www.minterellison.com/articles/accc-calls-for-competition-reforms-that-will-impact-digital-platform-operators-and-beyond

Top Story | ACCC calls for privacy law reform and a move towards GDPR-style privacy laws

The Australian Competition and Consumer Commission (ACCC) recently concluded its long-running Inquiry into digital platforms in Australia. Although the ACCC's review was aimed at digital platforms, its proposed reforms of the Privacy Act would have a broader economy-wide impact. The ACCC found that current Australian privacy laws do not adequately protect consumers or act as an effective deterrent. The ACCC has recommended changes that would bring Australia closer to a GDPR-style regime.

MinterEllison has released an article providing expert insights into this aspect of the report. The full text is available here: https://www.minterellison.com/articles/accc-calls-for-privacy-law-reform-and-a-move-towards-gdpr-style-privacy-laws

The ACCC has launched legal action against online health booking platform, HealthEngine for allegedly of misusing patient data and manipulating reviews

The Australian Competition and Consumer Commission (ACCC) instituted proceedings in the Federal Court against online health booking platform HealthEngine Pty Ltd (HealthEngine) for (alleged) misleading and deceptive conduct in connection with: a) the alleged manipulation of patient reviews; and b) the sharing/selling of data to insurance brokers.

Details

- **Alleged manipulation of reviews/failure to publish negative reviews:** The ACCC alleges that between 31 March 2015 to 1 March 2018, HealthEngine manipulated 3000 patient reviews by removing negative aspects of reviews and/or 'embellishing' them. In addition, its alleged that Health Engine did not publish 17,000 negative reviews.

  The ACCC further alleges that HealthEngine misrepresented to consumers why reviews were not published for some health practices. Commenting on this, ACCC Chair Rod Sims said that the ACCC 'considers that the alleged conduct by HealthEngine is particularly egregious because patients would have visited doctors at their time of need based on manipulated reviews that did not accurately reflect the experience of other patients'.

- **Allegedly selling 135,000 patient's data to insurance brokers**: The ACCC also alleges that from 30 April 2014 to 30 June 2018, HealthEngine sold the personal data of 135,000 patients (phone numbers, names, email addresses and dates of birth) private health insurance brokers without adequately disclosing to consumers it would do so. 'We also allege that patients were misled into thinking their information would stay with HealthEngine but, instead, their information was sold off to insurance brokers' Mr Sims said.

The ACCC is seeking penalties, declarations, corrective notices and an order for HealthEngine to review its compliance program. The ACCC is also applying for an order from the Court that would require HealthEngine to contact affected consumers and provide details of how they can regain control of their personal information.

Caution to businesses: The ACCC's statement includes the following caution to businesses, 'Issues of transparency and adequate disclosure when digital platforms collect and use consumer data is one of the top priorities at the ACCC…Businesses who are not upfront with how they will use consumer data may risk breaching the Australian Consumer Law and face action from the ACCC.'

Mr Sims added that the ACCC's recent Digital Platforms Inquiry Final Report includes recommendations to strengthen consent and notification requirements under the Privacy Act, including a recommendation that obtaining consent for different purposes of data collection, use or disclosure, must not be bundled.

[Note: The recommendation referred to appears to be recommendation 16, and possibly refers to recommendation 16c (at p35 of the Final Report) which recommends that 'any settings for data practices relying on consent must be pre-selected to "off" and that different purposes of data collection, use or disclosure must not be bundled.' The government has said that the precise form of the recommended reforms and a detailed government response to the report recommendations will be informed by a 12 week public consultation process closing on the 24 October (see: Governance News 07/08/2019) after which the government will finalise its response by the end of the year. For a summary of the proposed reforms see: Governance News 31/07/2019. Articles providing expert insights into the ACCC's final report, are available on the MinterEllison website here: https://www.minterellison.com/articles/accc-calls-for-competition-reforms-that-will-impact-digital-platform-operators-and-beyond; and here https://www.minterellison.com/articles/accc-calls-for-privacy-law-reform-and-a-move-towards-gdpr-style-privacy-laws]

[Sources: ACCC media release 08/08/2019; The New Daily 08/08/2019; [registration required] The Australian 09/08/2019]

In Brief | Record losses expected? The ACCC has cautioned that Australians are set to lose a record amount to scams in 2019, with projections from losses reported to Scamwatch and other government agencies so far expected to exceed $532 million by the end of the year, surpassing half a billion dollars for the first time. The ACCC, along with over 100 campaign partners from government and industry, is urging consumers to test their scams knowledge and refresh their scam protection and detection skills

[Source: ACCC media release 12/08/2019]

Whistleblowing

ASIC is consulting on new guidance for companies on whistleblowing policies

Overview | ASIC Consultation Paper: CP 321 Whistleblower Policies, draft regulatory guide

The Australian Securities and Investments Commission (ASIC) consulting on proposed guidance to assist companies to comply with new whistleblowing provisions in the Corporations Act 2001 (Cth). Public companies, large proprietary companies and proprietary companies that are trustees of registrable superannuation entities are required to have a compliant whistleblower policy and to make it available to their officers and employees by 1 January 2020.

ASIC proposes to provide guidance to assist entities to establish, implement and maintain a whistleblower policy that complies with their legal obligations.

Proposed Guidance

- ASIC proposes to provide guidance on: the matters that must be addressed by an entity's whistleblower policy under s1317AI(5) of the Corporations Act 2001 (Cth); and some 'good practice guidance' (which is not mandatory) on establishing, implementing and maintaining a whistleblower policy.
- The proposed guidance is intended to capture all stages of the whistleblowing process from providing advice to individuals who are considering making a disclosure to ensuring oversight and monitoring by the entity's board.
- Not only is the guidance intended to provide a potential structure from which to develop a whistleblower policy, it is also intended to:
  - help listed entities that have previously implemented a whistleblower policy —in line with the 'if not, why not' approach of the ASX Corporate Governance Principles and Recommendations — to review their policy and update it where necessary;

[Note: Recommendation 3.3 of the fourth edition of the ASX Corporate Governance Council's Corporate Governance Principles and Recommendations recommends a listed entity should have and disclose a whistleblower policy and ensure that the board or a committee of the board is informed of any material incidents reported under the policy. See: Governance News 04/03/2019]

  - help entities that would like to establish mechanisms for managing disclosures on a voluntary basis in light of the fact that whistleblower protections under the Corporations Act are available to any discloser who makes a disclosure that qualifies for protection — regardless of whether the entity that is the subject of the disclosure must have a whistleblower policy.

- ASIC also seeks feedback on whether public companies that are small not-for-profits or charities should be exempted from the requirement to have a whistleblower policy. Further, if an exemption is considered appropriate, ASIC seeks feedback on the most appropriate size threshold that should apply.

Announcing the consultation, ASIC Commissioner John Price said that 'Transparent whistleblower policies are essential to good risk management and corporate governance. They help uncover wrongdoing that may not otherwise be detected. Implemented appropriately, whistleblower policies will help companies to comply with their legal obligations to protect whistleblowers from being identified and to protect whistleblowers from detriment. Whistleblower policies help ensure those who put their personal and financial lives at risk to report wrongdoing can access their rights and protections under the law.'

Timeline: The deadline for submissions is 18 September.

[Sources: ASIC media release 07/08/2019; ASIC Consultation Paper: CP 321 Whistleblower policies; Draft Regulatory Guide: CP 321; Independent Financial Adviser 08/08/2019]

Five steps to better whistleblowing policy and practice: Griffith University (and partners) have released a guide for organisations and policy makers based on the findings of a largescale research project into management of whistleblowing

Griffith University and partners have released a report — Clean as a whistle: a five step guide to better whistleblowing policy and practice in business and government — outlining key actions to assist in the effective implementation of whistleblowing policies.

This guide is intended to act as a companion to new regulatory requirements, formal guidance and standards for whistleblowing policies and programs. It is based on the findings of a largescale study into management of whistleblowing across business and government entitled: Whistling While They Work 2: Improving managerial responses to whistleblowing in public and private sector organisations.

Five steps to better whistleblowing policy and practice

The guide includes steps for both organisations and for policy makers.

The first three steps focus on lessons for the design and implementation of whistleblowing programs by organisations – especially with respect to the critical challenges of making the right first responses to disclosures, creating a supportive environment for whistleblowing, and ensuring clear and effective roles and responsibilities.

Steps four and five focus on key actions for policymakers, to achieve best practice regulatory arrangements including ensuring that public disclosure rights and media freedom continue to play their vital role in integrity and good governance.

Steps for organisations

1. **Recognising and assessing whistleblower disclosures**

   The researchers found that making an initial correct assessment of the reported issues is 'crucial' to the outcome. More particularly, the research showed that the most complex cases (eg where concerns arrive with workplace grievances or management conflicts 'already in tow', or are described by managers simply as such, when in fact, integrity issues may be involved) were often the ones likely to be met with 'management avoidance or denial' unless plans are in place to ensure otherwise.

   The researchers suggest the following steps may assist.

- organisational policy should include procedures which communicate clearly to managers the case flow to be followed
- Training and guidance should be provided for all managers on the types of wrongdoing reports that must be confidentially referred to skilled and independent staff as soon as they are made
- There should be training to prepare key managers and specialist governance staff, before disclosures arise, for taking on investigations and cases which encompass different types of wrongdoing response (including practical experience in identifying integrity and misconduct issues that may be contained in other types of conflicts, grievance and workplace disputes
- There should be clear duties and procedures for assessing the risks to a reporter from the point of first report, using a risk matrix customised to the organisation, with emphasis on the proactive action and monitoring to be taken to address risks in each case
- There should be a strategy for ensuring wrongdoing concerns are fully assessed for the subjects potentially involved, by appropriately experienced staff, before allocation for response; with oversight and coordination by a sufficiently senior staff member

2. **Supporting and protecting whistleblowers**

The researchers found that the majority (82.4%) of whistleblowers (reporters) experienced at least some type of repercussion and this was most likely to take the form of an 'informal' or 'collateral' impact eg stress, impacted performance and isolation, that then formal reprisals. The researchers observe that a failure to foresee and manage the informal or 'collateral' effects of whistleblowing may have serious and direct

detrimental effects for organisations (as well as the individual). The first step in addressing this, is for organisations to assess and develop responses to 'repercussion' risk rather than 'reprisal' or 'retaliation' risk.

More particularly, it's suggested organisations should take the following steps.

- ensure all staff with support responsibilities understand the range of detriment support policies are trying to prevent, including informal and 'collateral' repercussions in addition to direct reprisals; informed by the risk assessment
- develop a plan to support the reporter and other parties as soon as a report is made, including implementing the risk assessment, with responsibilities for support clearly assigned, independently of investigation functions
- ensure all parties work to maximise reporter confidentiality as a protective factor and developing alternative support and protection steps for when needed
- task trained individuals (independently of the management chain) to act as case manager for support, including assisting line managers in the support offered, providing or organising direct support where needed, and upward reporting to ensure support is maintained even under management pressure.
- organise support resources to assist in the provision of timely efficient, professional and independent case responses
- actively recognise and enhance managers' ethical leadership and reinforcement of ethical behaviour, so as to support whistleblowing processes and outcomes, by: a) recruiting and incentivising leaders who demonstrate and communicate that they encourage the reporting of wrongdoing and know how to support employees who blow the whistle; b) integrating ethics-related incentives and sanctions into human resources performance management programs for managers; and c) internally communicating lessons and success stories on the role of employee-reported wrongdoing, including the successful support actions of managers and leaders
- detail the procedures to be followed by managers and key personnel responsible for delivering support and protection to disclosers (and subjects of disclosure), and support them with active training

3. Roles, responsibilities and oversight

For whistleblowing to be effective, and for executives and boards to have confidence that their organisation is appropriately responding to wrongdoing, there needs to be functional separation between many key roles (in practice) with independence for those entrusted with investigating and resolving disclosures, as well as those tasked with ensuring support. There also needs to be a clear understanding of how reports should be referred and who should be involved for assistance and support. Further, there needs to be organisational procedures clearly outlining responsibility for the range of 'backroom roles' on which successful case handling depends, and mechanisms in place to monitor that systems are operating effectively.

The researchers suggest that a best practice approach includes active board oversight as part of culture, conduct, ethics and risk activities and — subject to confidentiality protections as needed —– a systematic flow of information to the board or its committee on: a) the numbers, nature and status of staff concerns (along with other conduct metrics); b) confirmation that risk assessments and responses have occurred and remain effective; and c) outcomes and actions, including reasons for cases being closed or no action taken.

In addition, there must also be organisational commitment to dealing with reports of wrongdoing promptly and thoroughly, with appropriate resourcing.

Suggested actions for organisations include:

- developing and implementing a strategy for ensuring all employees are aware of the organisation's policy and their roles, including clear responsibilities and advice to potential reporters on how to report and how their report will be handled
- appropriately resourcing an independent, specialist, internal function with leadership, coordination and case support for all key whistleblowing process roles, irrespective of where performed
- educating each person with a role on its requirements and limits, including on all duties to report as well as the overall approach

- ensuring the professional and legal obligations of all staff, particularly governance professionals are recognised and respected by management as forming part of their role
- providing specialist training on the skills to lead and coordinate management of whistleblowing in the organisation
- developing a framework that: a) meets internal and external reporting obligations, b) reviews outcomes for reporters at the top level of the organisation; c) takes advantage of the information provided from employee reporting d) monitors the speak up culture of the organisation; and e) protects the independence of key staff

Steps for policy makers

The suggested steps for policy makers reflect the importance of: a) the 'three tiered' legislative frameworks which recognise the roles of internal, regulatory and public whistleblowing in modern society; b) requirements for organisations to have quality whistleblowing programs; and c) the need to prevent harm to organisation members who speak up about wrongdoing, and to ensure institutions act positively on their concerns.

4. The regulatory role: meeting new challenges

The guide calls on policy makers to:

- Establish a fully resourced whistleblower protection authority to support reports and organisations including advice, support, coordination and enforcement roles
- Bring whistleblower protection laws up to/above the standard of Australia's Corporations Act provisions, including Australia's public sector and New Zealand laws
- Revise civil and employment remedies to better recognise the range and types of detrimental acts/omissions for which managers and organisations should be responsible
- Ensure there is consistency in principles for access to civil and employment remedies including recognition of the duty to support and protect, a reversal of the onus of proof, and access to workplace tribunals as an alternative to the courts
- Actively educate companies and organisations to reinforce awareness of best practice policy approaches including risk assessment and appropriate management of cases involving both disclosable conduct and workplace grievances

5. Public interest: respecting whistleblowing's 'third tier' (public whistleblowing)

Step five focuses on the need to respect public whistleblowing. Suggested actions include the following.

- The establishment of simple, consistent and workable criteria for when whistleblowers may go public and remain protected
- The revision of definitions of 'intelligence information' and 'inherently harmful information' to extend protection to all disclosures of wrongdoing in public interest circumstances other than information that poses 'genuine risk of harm'
- Availability of a general public interest defence in all criminal cases of alleged unauthorised disclosure
- Stronger legislative protection for journalists' use of whistleblower information for public interest purposes

[Source: Clean as a Whistle — a five step guide to better whistleblowing policy and practice in business and government 06/08/2019]

Climate Change

The Commonwealth bank has committed to exit thermal coal by 2030, climate lobby group Market Forces has welcomed the move

Market Forces has welcomed the Commonwealth Bank of Australia's (CBA) plan to completely exit from thermal coal by 2030. In a statement, Market Forces said that CBA's decision has 'massive' implications. 'Earlier this year, two major insurers — Suncorp and QBE — committed to be out of thermal coal by 2025

and 2030 respectively. Anyone wanting to run a thermal coal mine or power station beyond 2030 now needs to contend with being unable to get insurance from an Australian insurer, or finance from our country's biggest bank'. Market forces has now called on the other big banks to follow suit.

[Sources: Market Forces media release 07/08/2019; [registration required] The AFR 08/08/2019]

Related news: Is coal becoming uninsurable?

A recent article in the Conversation suggests that the announcement by Suncorp that it will no longer insure new thermal coal projects is the latest signal that coal projects in Australia (and globally) may be becoming uninsurable, as insurers globally weigh up the risk of potential litigation holding fossil fuel companies responsible for climate-related damage. 'They need to protect themselves against what they can see coming' Professor Quiggin argues.

[Source: The Conversation 13/08/2019]

World first for the retail property sector: NAB has arranged the world's first climate bond-certified green bond to be issued by a retail property landlord

National Australia Bank (NAB) priced a $300 million green bond that will help improve the environmental performance of shopping centres owned by QIC Shopping Centre Fund (QSCF), one of the largest shopping centre landlords in Australia.

The QSCF green bond is the world's first Climate Bond-certified green bond to be issued by a retail property landlord. It will fund the continued improvement in the environmental performance of Toowoomba's Grand Central, Robina Town Centre on the Gold Coast and Eastland in Melbourne.

NAB Chief Customer Officer Corporate and Institutional Banking David Gall said the bond is an important milestone for sustainable investments. 'This transaction has created a new way for commercial property owners such as QIC to diversify funding sources and drive improvements in environmental sustainability of their buildings…NAB is proud to help QIC finance its transition towards a low carbon economy and bring yet another market first green bond to the Australian market'.

Other companies are tipped to follow suit? A whitepaper from bfinance has found that the appetite for green bonds is increasing globally, and has doubled since January 2017, as investors look towards 'impact' strategies. The Australian suggests that more Australian companies are expected to issue green bonds going forward given the interest from Australian investors and from investors further afield (eg Asia).

[Sources: NAB media release 08/08/2019; Bfinance whitepaper: Green Bonds — Sector in Brief; [registration required] The Australian 12/08/2019]

In Brief | The Guardian reports that the UK environmental audit committee (EAC) has called for the City of London to face mandatory climate reporting within the next three years to avoid jeopardising pension savings

[Source: The Guardian 12/08/2019]

Other Developments

Reportedly seventeen current and former Goldman Sachs executives have been charged in connection with alleged embezzlement of state funds

According to media reports, Malaysia has filed criminal charges against 17 current and former executives of three Goldman Sachs subsidiaries (Goldman Sachs International, Goldman Sachs Asia and Goldman Sachs Singapore) in connection with alleged embezzlement of funds from state investment fund 1MDB prior to its collapse. Reportedly, the Malaysian government is attempting to recover billions of dollars allegedly missing from the fund.

Reportedly Attorney General Tommy Thomas has said that the individuals had been charged under the Capital Markets and Services Act, which allows for senior staff to be held responsible for offences committed by their organisations. 'They occupied the highest executive positions' in three Goldman Sachs subsidiaries

'and exercised or ought to have exercised decision-making authority over the transactions of those bodies corporate' Mr Thomas is quoted as stating.

Mr Thomas reportedly indicated that criminal fines and custodial sentences would be sought against the individuals in light of the 'severity of the scheme to defraud and fraudulent misappropriation of billions in bond proceeds, the lengthy period over which the offences were planned and executed . . . and the relative value of the fees and commissions paid to Goldman Sachs'.

According to media reports, the charges mark an escalation of the latest phase of a probe into 1MDB and its founder (and former Prime minister) Najib Razak. The bank is also reportedly under investigation by the US Department of Justice.

Reportedly, Goldman Sachs has consistently denied wrongdoing and said certain members of the former Malaysian government and 1MDB lied to Goldman Sachs, outside counsel and others about the use of transaction proceeds.

[Sources: Reuters 09/08/2019; The New York Times 09/08/2019; Bloomberg 10/08/2019; The Guardian 09/08/2019; [registration required] The FT 09/08/2019]

Other News

The Parliamentary Joint Committee on Intelligence and Security has commenced two reviews into the three new national security Bills and has called for submissions

The Parliamentary Joint Committee on Intelligence and Security has commenced two reviews into the three national security Bills (following their reintroduction after they lapsed upon the calling of the Federal Election).

- The Identity-matching Services Bill 2019 is intended to facilitate the secure, automated and accountable exchange of identity information between the commonwealth and state and territory governments, pursuant to the objectives of the Intergovernmental Agreement on Identity Matching Services (IGA), agreed by COAG in October 2017.
- The Australian Passports Amendment (Identity-matching Services) Bill 2019 amends the Australian Passports Act 2005 (Passports Act) to provide a legal basis for ensuring that the Minister is able to make Australian travel document data available for all the purposes of, and by the automated means intrinsic to, the identity-matching services to which the Commonwealth and the States and Territories agreed in the IGA.
- The Counter-Terrorism Legislation Amendment (2019 Measures No 1) Bill 2019 (CTLA Bill) contains a range of amendments intended to strengthen Australia's counter-terrorism legislative framework. The measures in the Bill fall into two broad categories – amendments relating to restrictions on bail and parole under the Crimes Act 1914 , and amendments relating to the continuing detention order (CDO) scheme in Division 105A of the Commonwealth Criminal Code Act 1995 (Cth).

Timeframe: The deadline for submissions on the identify matching Bills is 23 August. The deadline for submissions on the CTLA Bill is 6 September.

[Source: Parliamentary Joint Committee on Intelligence and Security Review of Identify Matching Services Bill 2019 and the Australian Passports Amendment (identify Matching Services Bill 2019) Inquiry Home Page; media release 09/08/2019]

In Brief | Failing of the political process? In a recent speech, the Hon Kenneth Hayne AC QC has suggested that the proliferation of Royal Commissions is indicative of the loss of trust in the political process, and that the 'increasingly frequent calls for royal commissions in this country cannot and should not be dismissed as some passing fad or fashion'

[Sources: The Hon Kenneth M Hayne AC QC Speech to the Melbourne University, CCCS Constitutional Law Conference 2019, On Royal Commissions 26/07/2019; [registration required] The Australian 08/08/2019; [registration required] The SMH 08/08/2019; The ABC 08/08/2019; [registration required] The Age 08/08/2019]