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Bulletin No. 209

Legislation Hotline

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Editor's Note

This is an additional issue of the Corporate Law Bulletin. The Recent Corporate Law Decisions section of the Bulletin will return in February 2015.

Detailed Contents

1. Recent Corporate Law and Corporate Governance Developments

1.1 Research shows significant decline in US securities class action settlement amounts

NERA Economic Consulting has published research showing that US securities class action settlement amounts declined significantly in 2014. The research is published in NERA Economic Consulting's report Recent Trends in Securities Class Action Litigation: 2014 Full-Year Review (20 January 2015). Settlement amounts declined 38% to 61% in 2014, based on analysis of the cases included in NERA's calculations. The median settlement amount in 2014 was US$6.5 million, the lowest in ten years.

The decrease in settlement amounts was more marked after the much-anticipated US Supreme Court decision in *Halliburton v Erica P John Fund*, compared to the first part of 2014. On the other hand, filings of new securities class actions of the type addressed by the Court increased 14% after the decision was made, compared to the time in which the decision was pending.

More generally, 168 securities class actions involving alleged breaches of *Rule 10b-5*, s. 11, or s. 12 were filed in 2014, an 11% increase over 2013 and a 30% increase over 2010.

Further information is available on the NERA Economic Consulting website.

1.2 APRA releases final reporting requirements for superannuation - select investment options

On 16 January 2015, the Australian Prudential Regulation Authority (APRA) released final versions (updated 16 January 2015) of four reporting standards, reporting forms and instructions for APRA-regulated superannuation funds, and its associated response to submissions (16 January 2015).

APRA's new requirements relate to reporting information about certain non-MySuper investment options, known as "select investment options". The four reporting standards require the submission of quarterly information about investment performance, asset allocation and member flows, as well as structural information about these investment options.

The requirements in Reporting Standard SRS 533.1 Asset Allocation and Members' Benefit Flows (SRS 533.1) and Reporting Standard SRS 702.1 Investment Performance (SRS 702.1) will commence on 1 July 2015, with the changes to Reporting Standard SRS 001.0 Profile and Structure (Baseline) and Reporting Standard SRS 601.0 Profile and Structure (RSE) to commence on 30 June 2015. APRA will grant transition relief for 18 months to allow RSE licensees 35 calendar days to submit SRS 533.1 and SRS 702.1; from 1 January 2017, the forms will be due within 28 calendar days from the reporting due date.

Further information is available on the APRA website.

1.3 FRC reports on better compliance with UK Corporate Governance Code and need for improved adherence to the UK Stewardship Code

On 15 January 2015, the UK Financial Reporting Council (FRC) reported that levels of compliance with the UK Corporate Governance Code have continued to increase. Reporting has become more transparent and informative, with audit committee reports and diversity reporting particularly improved.

The FRC's annual review of developments in corporate governance and stewardship for 2014 has seen an increase in signatories to the Stewardship Code with signs of better engagement with large companies by investment managers. More needs to be done, however, to ensure asset owners and managers follow through on their commitment to the principles set out in the Code.

Governance and reporting

- Overall levels of compliance with the UK Corporate Governance Code continue to improve with full compliance by the FTSE 350 now at 61.2% and 93.5% complying with all but one or two provisions.
- There have been improvements in audit committee reports, with good examples of greater transparency and informative reporting. The Financial Reporting Lab "Reporting of Audit Committees" has been helpful to companies in this matter.
- There has been very good progress on reporting on diversity policies in the FTSE 100—85% now have a clear policy—but the FTSE 250, while having improved from 20% to 56%, have more to do.
- The UK is on course to reach Lord Davies's target of 25% FTSE 100 female directors in 2015, with 22.8% of directorships now held by women. The percentage of female executive directors has started to rise having stagnated at 5–6% for many years.
- Improving the executive pipeline in connection with the wider diversity issue remains a priority. The FRC is currently undertaking a project to identify and spread best practice for high quality succession planning.

Stewardship and engagement

- The UK Stewardship Code has almost 300 signatories; despite some increases in the quantity and quality of engagement, not all are following through on their stewardship responsibilities.
- There are some signs of improvement, with mandates increasingly referring to stewardship and reports of better proactive engagement by companies and investors over the 2014 AGM season.
- The FRC is concerned that signatories are not reporting effectively across the seven principles of the Code, with appropriate explanations a particular point of weakness, and are not keeping their statements against the Code up

to date. Disclosures on conflicts of interest also continue to be of concern.

- Increasing levels of concern have been expressed by companies and investors about the role of proxy advisors, particularly in terms of a perceived lack of engagement with companies and a box-ticking approach by them and investors.

In 2015 the FRC will continue to focus on the issue of company culture and behaviours, as well as the application of the Stewardship Code and the role of proxy advisors.

The report is available on the FRC website.

1.4 SEC adopts rules to increase transparency in security-based swap market

On 14 January 2015, the US Securities and Exchange Commission (SEC) adopted two new sets of rules that will require security-based swap data repositories (SDRs) to register with the SEC and prescribe reporting and public dissemination requirements for security-based swap transaction data. The SEC also proposed certain additional rules, rule amendments and guidance related to the reporting and public dissemination of security-based swap transaction data. The new rules are designed to increase transparency in the security-based swap market and to ensure that SDRs maintain complete records of security-based swap transactions that can be accessed by regulators. The rules implement mandates under Title VII of the *Dodd-Frank Wall Street Reform and Consumer Protection Act*.

The rules require an SDR to register with the SEC and set forth other requirements with which SDRs must comply. The rules also provide an exemption from registration for certain non-US SDRs when specific conditions are met.

Further information is available on the SEC website.

1.5 US Chamber of Commerce provides advice on proxy advisory firms

On 7 January 2015, the US Chamber of Commerce's Center for Capital Markets Competitiveness published a report advising public companies of issues relating to proxy advisory firms. The report is titled *Corporate Governance Update: Public Company Initiatives in Response to the SEC Staff's Guidance on Proxy Advisory Firms*. It highlights three main issues that public companies should focus on in light of the SEC guidance on proxy voting: communication with proxy advisory firms, managing proxy advisory firm conflicts of interest, and communication with institutional investors.

In particular, companies should:

- maintain a continuous dialogue with proxy advisory firms to correct erroneous or stale information or to address any troublesome recommendations that do not advance the best interests of shareholders;
- verify what proxy advisory firms are doing to identify, manage, remediate, disclose and respond to conflicts of interest and bring any deficiencies to the attention of the advisory firm, investors and, if necessary, the SEC; and

- continue to engage in year-round, regular communications with institutional investors to develop and maintain a relationship of trust and confidence and also provide an opportunity to bring concerns about the actions (or inaction) of proxy advisory firms to the attention of investors.

The report is available on the Chamber of Commerce website.

1.6 Gender balance on corporate boards: EU developments

In January 2015, the European Commission provided an update on gender balance on corporate boards in Europe. On average, 20.2% of board members of the largest publicly listed companies in the European Union (EU) are women. This marks a significant increase from 11.9% in 2010. There are only four countries—France, Latvia, Finland and Sweden—in which women account for at least a quarter of board members.

When looking at top executive positions, three in one hundred (3.3%) of the largest listed companies in Europe have a woman CEO (chief executive officer). This has not changed in the past three years.

On 14 November 2012, the European Commission put forward a proposal for a Directive establishing a procedural quota. The Commission proposal establishes an objective for a minimum of 40% of each sex among non-executive directors by 2020. On 20 November 2013, the European Parliament voted to approve the proposed Directive. The Directive is supported by the majority of Member States and is currently being discussed by the Council of the EU.

The update is available on the European Commission website.

1.7 US board practices report

In December 2014, Deloitte and the US Society of Corporate Secretaries and Governance Professionals published 2014 Board Practices Report: Perspectives from the boardroom (undated). The report is based on contributions from 250 US public companies represented in the Society's membership.

Analysis of the survey results reveals that:

- Strategy topped the list of board focus areas for the coming year, having been selected by 85% of survey respondents. This was followed by risk oversight, which is often viewed in tandem with strategy, and board composition, which continues to garner shareholder attention. To round out the top five, CEO succession planning and cyber security were also noted as board priorities for 2015.
- More than half of the respondents said their boards are discussing strategy at every board meeting. Further, almost all said the board is briefed on strategic alternatives and discusses risks associated with those strategies. A majority noted that the level of information provided to the board on strategic risk has been enhanced over the past year.
- A combined chairperson and CEO role exists in 60% of large cap boards,

and most of those have a lead director, while mid and small cap companies have combined roles 53% and 50% of the time, respectively.

- Common practices pertaining to board refreshment were also investigated. Approximately 50% of respondents said their most recent director joined the board during the past year. Age limits are the most prevalent mechanism triggering board turnover, and they continue to rise; director retirement is another reason for change in board composition at 53% of all companies.
- The three most sought-after board skills and backgrounds remain unchanged from the 2012 report: related industry experience, c-level experience, and international business exposure. One-third of small caps selected mergers and acquisitions experience, highlighting a focus area for these companies.
- The number of women on boards appears to be increasing; 18% of respondents increased the number of women on their board in the past year. This is particularly true among large and small caps where women comprise 26–50% of board composition. Similar trends, but on a smaller scale, can be found with respect to minority representation. Very few boards have directors aged 40 or younger.
- One-third of the companies surveyed educate their boards on big data and data analytics, and this is particularly true among the large cap companies (48%). Further, 28% said they are incorporating advanced analytics into company strategy and 7% are considering doing so.
- A slight majority, 55%, of the participants noted that their boards have discussed how to prepare for an activist shareholder.
- Boards are receiving education on a number of topics; the most common are company policies, fiduciary duties, insider trading, and industry-specific topics. Compared to the 2012 report, topics that have gained in popularity are ethics, company policies, and regulatory issues, with 12, 15, and 17 percentage point increases, respectively.

Further information is available on the Deloitte website.

1.8 Review of the OECD Corporate Governance Principles - submissions available

In November 2014 the OECD has announced a review of its Principles of Corporate Governance (see SAI Global Corporate Law Bulletin No. 208). The Principles of Corporate Governance are intended to assist governments and regulators in their efforts to evaluate and improve the legal, regulatory and institutional framework for corporate governance. They also provide guidance for stock exchanges, investors, corporations and others that have a role in the process of developing good corporate governance. The objective of the Principles is to contribute to economic efficiency, sustainable growth and financial stability. The rationale for the review is to ensure the continuing high quality, relevance and usefulness of the Principles, taking into account recent developments in the corporate sector and capital markets. The Principles are among the key standards for sound financial systems of the Financial Stability Board and the basis for the corporate governance component of the Report on the Observance of Standards and Codes of the World Bank.

The Principles cover six areas:

ensuring the basis for an effective corporate governance framework;
- the rights and equitable treatment of shareholders and key ownership functions;
- institutional investors, stock markets and other intermediaries;
- the role of stakeholders in corporate governance;
- disclosure and transparency; and
- the responsibilities of the board.

The 2014 draft of the Principles is available on the OECD website.

The OECD has now published the more than 70 submissions received. They are also available on the OECD website.

1.9 Reform of Chapter 11 of the US Bankruptcy Code recommended

Whether a version of Chapter 11 of the US Bankruptcy Code should be adopted in other countries is often debated. A key feature of Chapter 11 is its "debtor in possession" process, which allows a company to manage and direct its reorganisation.

In December 2014, the American Bankruptcy Institute (ABI) Commission to Study the Reform of Chapter 11 released its final report containing recommendations for modernising the Bankruptcy Code for Chapter 11 business reorganisations. "Chapter 11 works to rehabilitate companies, preserve jobs, and provide value to creditors only if distressed companies and their stakeholders actually use the Chapter 11 process to facilitate an in-court or out-of-court resolution of the company's financial distress", according to the Commission's final report. "Chapter 11 in turn needs to offer tools to resolve a debtor's financial distress in a cost-effective and efficient manner".

Some of the key proposals contained in the final report include:

- reducing barriers to entry by providing debtors more flexibility in arranging debtor-in-possession financing;
- clarifying lenders' rights in a Chapter 11 case;
- facilitating more timely and efficient diligence, investigation and resolution of disputed matters through an expanded role for examiners;
- incorporating checks and balances on the rights and remedies of creditors; and
- creating an alternative restructuring scheme for small and medium-sized enterprises that allows the company and court to more efficiently guide the company through Chapter 11.

The report is available on the ABI website.

1.10 CPMI and IOSCO issue an assessment methodology for the oversight expectations applicable to critical service providers

On 23 December 2014, the Committee on Payments and Market Infrastructures (CPMI) and the International Organization of Securities Commissions (IOSCO) published Principles for financial market infrastructures: Assessment methodology for the oversight expectations applicable to critical service providers (December 2014). The CPMI serves as a forum for central banks to monitor and analyse developments in payment and settlement arrangements as well as in cross-border and multicurrency settlement schemes.

The operational reliability of a financial market infrastructure (FMI) may be dependent on the continuous and adequate functioning of third-party service providers that are critical to an FMI's operations, such as information technology and messaging providers. The CPMI/IOSCO document establishes an assessment methodology and provides guidance for authorities in assessing an FMI's critical service providers.

Further information is available on the IOSCO website.

1.11 Revisions to the standardised approach for credit risk: Basel Committee releases consultative document

On 22 December 2014, the Basel Committee on Banking Supervision published the consultative document Standards - Revisions to the Standardised Approach for credit risk (undated).

The proposed revisions seek to strengthen the existing regulatory capital standard in several ways. These include:

- reduced reliance on external credit ratings;
- enhanced granularity and risk sensitivity;
- updated risk weight calibrations, which for purposes of this consultation are indicative risk weights and will be further informed based on the results of a quantitative impact study;
- more comparability with the internal ratings-based (IRB) approach with respect to the definition and treatment of similar exposures; and
- better clarity on the application of the standards.

The committee is considering replacing references to external ratings, as used in the current standardised approach, with a limited number of risk drivers that provide a meaningful differentiation for risk. These alternative risk drivers vary based on the particular type of exposure and have been selected on the basis that they are simple, intuitive, readily available and capable of explaining risk across jurisdictions.

The key aspects of the proposals are:

- Bank exposures: would no longer be risk-weighted by reference to the bank's external credit rating or that of its sovereign of incorporation, but would instead be based on two risk drivers: the bank's capital adequacy and its asset quality.
- Corporate exposures: would no longer be risk-weighted by reference to the borrowing firm's external credit rating, but would instead be based on the firm's revenue and leverage. Further, risk sensitivity and comparability with the IRB approach would be increased by introducing a specific treatment for specialised lending.
- Retail category: would be enhanced by tightening the criteria to qualify for a

preferential risk weight, and by introducing an alternative treatment for exposures that do not meet the criteria.

- Residential real estate: would no longer receive a 35% risk weight. Instead, risk weights would be based on two commonly used loan underwriting ratios: the amount of the loan relative to the value of the real estate securing the loan (the loan-to-value ratio) and the borrower's indebtedness (a debt-service coverage ratio).
- Commercial real estate: two options are currently under consideration:
  - treating the exposures as unsecured with national discretion for a preferential risk weight under certain conditions; or
  - determining the risk weight based on the loan-to-value ratio.

Further information is available on the Bank for International Settlements website.

1.12 Report on reforming standards in the financial services industry

On 19 December 2014, the Australian Parliamentary Joint Committee on Corporations and Financial Services (the Committee) published its report Inquiry into proposals to lift the professional, ethical and education standards in the financial services industry (December 2014).

The Committee has made the following recommendations:

- that the term "general advice" in the Corporations Act 2001 (Cth) (the Corporations Act) be replaced with the term "product sales information" to better reflect the nature of that information.
- that the term "personal advice" in the Corporations Act be replaced with "financial advice" to better reflect the nature of that advice.
- that, to provide "financial advice", an individual must be registered as a financial adviser.
- the government should bring forward legislation to protect the titles "financial adviser" and "financial planner" and require that to be eligible to use the title "financial adviser", an individual must be registered as a financial adviser.
- that the register of financial advisers:
  - include the information fields detailed in the government's announcement of the register on 24 October 2014;
  - have a unique identifier that follows every individual adviser throughout their career;
  - only list financial advisers on the register when a professional association (which has been approved by the Professional Standards Councils) advises that the adviser has completed the requirements of the Finance Professionals' Education Council approved professional year and passed the registration exam;
  - record any higher qualification awarded by a professional body to the adviser;
  - annotate any censure or limitation placed on a financial adviser by a professional body, ASIC or Australian Financial Services Licence holder; and
  - highlight that an adviser is no longer authorised to provide financial advice if the adviser has their membership of the nominated professional body suspended or revoked.
- that the government consider proposals to increase fees for organisational

licensees to reflect the scale of their financial advice operations, in the context of a broader review of ASIC's fees and charges.

- that the mandatory minimum educational standard for financial advisers should be increased to a degree qualification at Australian Qualification Framework level seven, and a Finance Professionals' Education Council should set the core and sector specific requirements for Australian Qualifications Framework level seven courses.
- that ASIC should only list a financial adviser on the register when they have satisfactorily completed a structured professional year and passed the assessed components, and passed a registration exam set by the Finance Professionals' Education Council administered by an independent invigilator.
- that the government require mandatory ongoing professional development for financial advisers set by their professional association in accordance with Professional Standards Council's requirements, and that achieves a level of cross-industry standardisation recommended by the Finance Professionals' Education Council.
- that the professional associations establish an independent Finance Professionals' Education Council that:
  - is controlled and funded by professional associations which have been approved by the Professional Standards Councils;
  - comprises a representative from each professional association (which has been approved by the Professional Standards Councils), an agreed number of academics, at least one consumer advocate, preferably two who represent different sectors and an ethicist;
  - receives advice from ASIC about local and international trends and best practices to inform ongoing curriculum review;
  - sets curriculum requirements at the Australian Qualifications Framework level seven standard for core subjects and sector specific subjects (e.g. self-managed superannuation fund services, financial advice, insurance/risk or markets);
  - develops a standardised framework and standard for the graduate professional year to be administered by professional associations;
  - develops and administers through an external, independent invigilator a registration exam at the end of the professional year; and
  - establishes and maintains the professional pathway for financial advisers including recognised prior learning provisions and continuing professional development.
- that professional associations representing individuals in the financial services industry be required to establish codes of ethics that are compliant with the requirements of a Professional Standards Scheme and that are approved by the Professional Standards Council.
- that financial sector professional associations that wish to have representation on the Finance Professionals' Education Council and to be able to make recommendations to ASIC regarding the registration of financial advisers, should be required to establish Professional Standards Schemes under the Professional Standards Councils, within three years.
- that any individual wishing to provide financial advice be required to be a member of a professional body that is operating under a Professional Standards Scheme approved by the Professional Standards Councils and to meet their educational, professional year and registration exam requirements.

Further information is available on the Parliament of Australia website.

1.13 Business set-up, transfer and closure - Productivity Commission inquiry

On 19 December 2014, the Australian Productivity Commission released Issues Paper - Business Set-up, Transfer and Closure (December 2014) for public comment.

The issues paper is part of the Productivity Commission's investigation of:

- the nature and the scale/extent of barriers to entry and exit that currently exist for businesses and their impact on economic performance; and
- appropriate options for reducing these entry and exit barriers, including but not limited to advice on the potential impacts of:
  - the regulation of product and service markets;
  - transfers and subsidies to businesses, including import barriers;
  - regulations affecting the ease of starting, operationalising or closing a business;
  - time spent on and cost of complying or dealing with government regulation, licensing and bureaucracy; and
  - the personal/corporate insolvency regimes on business exits.

In relation to corporate insolvency, the Productivity Commission asks:

- To what extent do the existing insolvency arrangements facilitate or hinder business closure? Are these arrangements a disincentive to business set-up? How do these arrangements affect the choice of business structure?
- Is the underlying incentive structure within corporate insolvency able to effectively and efficiently facilitate business closure without discouraging new business set-ups? Where should the balance lie between creditors and debtors in the arrangements? Are there feasible alternatives to the existing corporate insolvency arrangements? Is the use of safe harbour provisions for firms seeking to restructure a feasible alternative?
- Are the insolvency arrangements able to transfer assets and capital effectively? Are insolvency procedures timely to ensure assets do not become "stranded" and unable to be used elsewhere?
- Is the insolvency process unnecessarily costly and lengthy? How might this additional cost be measured? Is it simply a transfer between participants in the process or does it represent a loss in the overall efficiency of the economy?
- Are there legal impediments to reforms in this area, such as relying on alternative forms of dispute resolution (appellable administrative decisions, tribunals or alternative dispute resolution based solutions) for simple or uncontested matters? Are there any barriers to innovation by insolvency practitioners?

Further information is available on the Productivity Commission website.

1.14 Revised New Zealand corporate governance principles and guidelines handbook

On 19 December 2014, the New Zealand Financial Markets Authority (FMA) published a revised version of its handbook *Corporate Governance in New Zealand - Principles and Guidelines*. The handbook is intended as a reference guide for directors, executives and advisers, to help them decide how best to apply the nine key corporate governance principles.

Some of the changes include:

- clarification of the distinction between the principles, guidelines and commentary;
- specific reference to risk management;
- updated guidance on audit partner and audit firm rotation for listed issuers; and
- greater emphasis on the importance of shareholder participation.

The handbook is available on the FMA website.

1.15 Research papers on high frequency trading

Regulators and industry bodies have recently published several research papers on high frequency trading. On 17 December 2014, the European Securities and Markets Authority (ESMA) published an economic report looking into the extent of high-frequency trading (HFT) activity in the European Union's equity markets. This is the first study into HFT across major venues in the EU. The report finds that HFT activity ranges from 24% to 43% of equity value traded, using alternative methodologies.

The report is available on the ESMA website.

Also on 17 December 2014, the Investment Industry Regulatory Organization of Canada (IIROC) published three research papers assessing the impact of high frequency trading (HFT) and related activity on Canadian equity markets.

The first paper *High frequency market making to large institutional trades* examines the behaviour of HFT firms during times of market stress where the execution of large institutional trades, particularly those trades that comprise a high percentage of trading volume, is used as a proxy. The authors compare the behaviours of HFT firms and traditional Designated Market Makers and examine how these relate to the execution costs of large trades.

The second paper *Market integration and high frequency intermediation* examines the role of HFT firms in liquidity provision, risk management and information transmission across multiple trading venues.

The third paper *The market quality effects of the 2012 UMIR amendments to the short selling rules in Canada* examines the effects of the relaxation of short sale restrictions on market liquidity, stability, and price discovery on Canadian securities markets.

The papers are available on the IIROC website.

1.16 Global insurance market report

On 17 December 2014, the International Association of Insurance Supervisors (IAIS) released its 2014 Global Insurance Market Report. The report discusses the global insurance sector from a supervisory perspective, focusing on the sector's performance as well as key risks faced by it.
Chapter 1 of the report analyses the overall macroeconomic and financial environment while Chapter 2 focuses specifically on global insurance market developments. Chapter 3 examines the low interest rate environment. Chapter 4 then offers specific insights into the work on insurance related macroprudential surveillance and tools with a specific focus on IAIS-based activities.

The report is available on the IAIS website.

2. Recent ASIC Developments

2.1 ASIC provides relief for 31-day notice term deposits

On 22 December 2014, ASIC issued a class order to facilitate term deposits that are only breakable on 31 days' notice.

The ASIC Class Order [CO 14/1262] (further information) gives relief for 18 months to enable 31-day notice term deposits of up to five years to be given concessional regulatory treatment as basic deposit products under the Corporations Act 2001 (Cth) (the Corporations Act). This is intended to give government the opportunity to consider law reform.

As part of the Basel III reforms, the Australian Prudential Regulation Authority (APRA) implemented the liquidity coverage ratio (LCR) requirement from 1 January 2015, as set out in *Prudential Standard APS 210 Liquidity* (APS 210).

Term deposits that require 31 days' notice for early withdrawal will receive favourable liquidity treatment under APS 210. The new class order will provide industry with certainty that these sorts of term deposits will be treated as basic deposit products, subject to meeting the relief conditions.

The class order formalises ASIC's previous conditional no-action position on 31-day notice term deposits. The relief conditions are about ensuring consumers can make confident and informed decisions when investing in the new type of term deposit.

They also help consumers understand the new requirement to give 31 days' notice to "break" their term deposit and ensure this is considered when the term deposit rolls-over.

ASIC will continue to work with industry to help ADIs meet the relief conditions, including carryover of arrangements from the previous no-action position to the class order, while ensuring consumer protection.

Background

The definition of basic deposit product in s. 761A of the Corporations Act does not specify the period of notice an ADI may require a depositor to give in order to make an early withdrawal from a term deposit of up to two years.

It is therefore unclear what notice period for withdrawal could be imposed that is consistent with the characterisation of a term deposit of up to two years as a basic deposit product. ASIC's view is that a notice period as long as 31 days for early withdrawal is unlikely to meet the definition of basic deposit product.

Section 761A of the Corporations Act provides that term deposits of between two and five years must allow an early withdrawal without prior notice in order to meet the basic deposit product definition (except for the special provision for mutual ADIs contained in r. 7.1.03A of the Corporations Regulations 2001 (Cth)).

2.2 Consultation on disclosure and APRA reporting requirements for superannuation trustees

On 19 December 2014, ASIC released Consultation paper 227 - Disclosure and reporting requirements for superannuation trustees: s29QC (December 2014) (CP 227) aimed at improving the comparability of information about superannuation products for consumers.

ASIC is seeking feedback on options proposed for dealing with the uncertainty about how to achieve consistency between the disclosure requirements administered by ASIC and the data that is required to be reported under APRA's reporting standards. These consistency requirements were introduced under reforms aimed at improving the comparability of superannuation products by requiring consistency in how information is calculated.

CP 227 raises issues around the treatment of investment objectives and return targets and asset allocation information.

Section 29QC of the Superannuation Industry (Supervision) Act 1993 (Cth) requires disclosure to align with APRA data reporting requirements in some circumstances. ASIC has deferred the operation of s. 29QC until 1 July 2015 and is using the deferral period to address this uncertainty.

ASIC previously issued Information Sheet 167 - Disclosure requirements for superannuation trustees: s29QC (updated 24 December 2014) (INFO 167) to give guidance about the implications of the new consistency requirements. In March 2014, ASIC issued a joint letter with APRA to RSE licensees, also outlining its views on s. 29QC.

Other relief available

ASIC has extended interim class order relief in two areas of superannuation:

- Extension of the interim relief in ASIC Class Order [CO 13/1420] exempting a trustee of a regulated superannuation fund from having to provide a periodic statement to its members that includes the separate reporting of Low Income Superannuation Contribution (LISC) under r. 7.9.20(2A). The class order will now apply to reporting periods that end on or before 30 June 2015. The relief is still conditional on the trustee meeting one of two conditions. For full detail of the exemption and conditions attaching to it see ASIC Class Order [CO 13/1420].
- Extension of the interim relief provided in the Second Exemption of ASIC Class Order [CO 13/1534] exempting a trustee of a regulated

superannuation fund from having to include the latest superannuation product dashboard in a periodic statement and enabling the dashboard to be included in the statement via a hyperlink. The interim relief now applies to periodic statements issued for reporting periods ending before 1 July 2015. For further information see ASIC Class Order [CO 13/1534].

3. Recent ASX Developments

3.1 Consultation Paper - Enhanced derivatives account segregation and portability

On 15 December 2014, ASX released the consultation paper Enhanced Derivatives Account Segregation and Portability - Consultation on amendments to the Operating Rules of ASX Clear and ASX Clear (Futures) for recognition in the European Union (December 2014) for public comment.

ASX is seeking feedback from Clearing Participants and their Clients on ASX's proposed amendments to the Operating Rules of the ASX Group central counterparties, ASX Clear and ASX Clear (Futures) (ASX CCPs), which will enable excess customer collateral for derivatives to be held directly with the ASX CCPs and attributed to an individual client account. ASX is introducing the enhancements to comply with regulatory guidance of the Reserve Bank of Australia, so that the ASX CCPs can gain recognition in the European Union.

The consultation paper is available on the ASX website.

3.2 Reports

In January 2015, ASX released:

- the ASX Group Monthly Activity Report;
- the ASX Group Compliance Monthly Activity Report; and
- the ASX Group Monthly Volume and Open Interest Report

for December 2014.

4. Recent Takeovers Panel Developments

4.1 KBL Mining Limited - Panel declines to conduct proceedings

On 19 January 2015, the Takeovers Panel announced that following the release of further information to the market, the Panel has declined to conduct proceedings on an application dated 9 January 2015 from KBL Mining Limited (KBL Mining) in relation to its affairs.

The application concerned deficiencies in substantial holding notices filed by one of KBL Mining's largest shareholders, Kidman Mining Pty Ltd (Kidman Mining), and a former shareholder, Capri Trading Pty Ltd (Capri) and the control of KBL

Mining.

On 12 November 2014, Kidman Mining acquired 37,925,836 shares (approximately 9.64%) in KBL Mining from Capri. Kidman Mining also acquired all the shares in a subsidiary company of Capri which held a $12.6 million loan payable by KBL Mining. The consideration for the shares in the subsidiary company was notes in Kidman Mining.

Kidman Resources Ltd, Kidman Mining's parent company, subsequently lodged a substantial holding notice disclosing the substantial holding it had acquired in KBL Mining. Capri also lodged a substantial holding notice indicating that it ceased to hold a substantial holding in KBL Mining. A copy of the sale agreement was not attached to either of the substantial holding notices.

Following Kidman Mining's acquisition of shares in KBL Mining, it issued a s. 249D notice to KBL Mining and requisitioned a general meeting of shareholders to consider the removal of all of KBL Mining's existing directors and the election of three Kidman Mining nominees. The s. 249D notice was subsequently withdrawn and the meeting cancelled.

The Panel noted the withdrawal of Kidman Mining's s. 249D notice. The Panel considered there to be deficiencies in the disclosures provided by Kidman and Capri's substantial holding notices. While there was a summary of the key terms of the sale agreement including reference to the right of Kidman Resources to re-transfer the KBL Mining shares to Capri contained in an announcement by Kidman Resources on 11 November 2014, no details of the notes were included.

The Panel was minded to conduct proceedings if the sale agreement was not disclosed to the market in its entirety. Kidman and Capri agreed to release the sale agreement to the market, including the terms of the notes, which was released to ASX on 16 January 2015.

The Panel therefore concluded there was no reasonable prospect that it would make a declaration of unacceptable circumstances. Accordingly, the Panel declined to conduct proceedings.

The Panel noted that it is open to the parties to make a fresh application if new circumstances arise due to developments relating to the control of KBL Mining.

The Takeovers Panel has made available its Reasons for Decision (23 January 2015).

4.2 Careers Australia Group Limited 03 - Panel declines to conduct proceedings

On 8 January 2015, the Takeovers Panel announced that it had declined to conduct proceedings on an application from Jiggi Investments Pty Ltd and others in relation to the affairs of Careers Group Australia Limited (Careers).

The applicants sold their Careers shares into a bid made by Cirrus Business Investments Limited (Cirrus). The bid closed on 23 July 2013 with Cirrus having a relevant interest in 99.99% of Careers' shares. The applicants submitted that, following a review of information in Careers' 2013-14 accounts, statements in the bidder's statement and target's statement were misleading.

Given the time that has elapsed since Cirrus's bid closed, the information gathering and forensic analysis that would be required, the fact that the subject matter of the application can be addressed in another forum, and that it appears that the court is a more appropriate forum, the Panel concluded there was no reasonable prospect that it would make a declaration of unacceptable circumstances. Moreover, the application is out of time and the Panel would not in all the circumstances extend time. Accordingly, the Panel declined to conduct proceedings.

The Takeovers Panel has made available its Reasons for Decision (13 January 2015).

5. Recent Research Papers

5.1 Bondholders and securities class actions

Prior studies of US corporate and securities law litigation have focused almost entirely on cases filed by shareholder plaintiffs. Bondholders are thought to play little role in holding corporations accountable for poor governance leading to fraud. This article challenges this conventional view in light of new evidence that bond investors are increasingly recovering losses through securities class actions. From 1996 through 2000, approximately 3% of securities class action settlements involved a bondholder recovery. From 2001 through 2005, the percentage of bondholder recoveries increased to approximately 8% of all securities class action settlements. Bondholders were involved in four of the five and 19 of the 30 largest securities class action settlements, and tended to recover in frauds associated with a credit downgrade. By 2005, almost half of all securities class actions alleged claims on behalf of all public investors, not just shareholders. The rise in bondholder recoveries is evidence that securities fraud has increased in severity over time, causing harm to a broader range of corporate stakeholders. Certain frauds can be understood as transferring wealth from bondholders to shareholders. In providing a remedy for such transfers, bondholder class actions are an example of the continuing evolution of the securities class action.

The paper is available on the SSRN website.

5.2 Risk management, board effectiveness and firm value: Evidence from S&P/ASX200 companies

Risk management has become a significant part of firm management after the recent financial crisis. In this study the authors examine risk management at enterprise level (enterprise risk management or ERM), the effectiveness of audit and risk committees and the relation of ERM implementation to firm performance and firm value for a sample of S&P/ASX200 companies. ERM is the focus of all strategic management efforts as it gives a long run competitive advantage to businesses. Prior studies show mixed evidence on the performance effects of ERM for companies. Though various committees and corporate governance councils (e.g. the ASXCG Council) recommend firms adopt ERM, its implementation and resulting benefits are inadequate. Prior literature on corporate governance supports the view that stronger governance mechanisms are needed for an effective implementation of management strategies. The authors test the effectiveness of the board in risk management implementation. They test the audit and risk committee effectiveness of their sample firms, using independence, power, size, and expertise of directors in the committee and compliance level of firms as the core stimulating factors of effectiveness, and the influence of effective committees on firm performance and firm value. Though the results show a negative impact of ERM on firm performance and firm value, for firms with effective audit and risk committees, ERM implementation has positive and significant outcomes on firm performance and value. There is evidence that firms have increased awareness of the benefits of effective risk management after the financial crisis compared to the pre-crisis period. The results present further evidence that for firms with effective committees, this positive impact on firm value is more pronounced in the period after the recent global financial crisis.

The paper is available on the SSRN website.

5.3 Making it easier for directors to "do the right thing"?

Some scholars argue that managers should take constituencies other than stockholders into account when running a corporation, and refuse to put short-term profit for stockholders over the best interests of the corporation's employees, consumers, and communities, as well as the environment and society generally. In other words, they argue that managers should "do the right thing", while ignoring that in the current corporate accountability structure, stockholders are the only constituency given any enforceable rights, and thus are the only one with substantial influence over managers. Few commentators have proposed real solutions that would give corporate managers more ability and greater incentives to consider the interests of other constituencies.

This article posits that benefit corporation statutes have the potential to change the accountability structure within which managers operate. These statutes create incremental reform that puts actual power behind the idea that corporations should "do the right thing". Certain provisions of the Delaware benefit corporation statute are discussed as an example of how these statutes can create a meaningful shift in the balance of power that will in fact give corporate managers more ability, and impose upon them an enforceable duty to "do the right thing".

But this article acknowledges that several important questions must be answered to determine whether benefit corporation statutes will have the durable, systemic effect desired. First, the initial wave of entrepreneurs who form benefit corporations must demonstrate a genuine commitment to social responsibility to preserve the credibility of the movement. Second, because the benefit corporation model relies on stockholders to enforce the duties to other constituencies, socially responsible investment funds must be willing to vote their long-term consciences instead of cashing in for short-term gains. To that end, it is crucial that benefit corporations show that doing things "the right way" will be profitable in the long run. Third, benefit corporations must pass the "going public" test. Finally, subsidiaries that are governed as benefit corporations must honour their commitments and grow successfully, if the movement is to grow to scale.

The paper is available on the SSRN website.

5.4 The rise of sovereign wealth funds: Definition, organisation and governance

This paper addresses the difficulties of accurately defining a sovereign wealth fund (SWF), discusses the evolution of the original SWFs from stabilisation to wealth funds, and examines how SWFs are organised and funded. The authors also detail the key measures developed to assess the operational and informational transparency and institutional quality of different fund by comparing the organisational structures, corporate governance systems, and investment patterns observed for SWFs with those documented empirically for other internationally active institutional investors.

The paper is available on the SSRN website.

5.5 Disruptive technology and securities regulation

Nowhere has disruptive technology had a more profound impact than in financial services—and yet nowhere more do academics and policymakers lack a coherent theory of the phenomenon, much less a coherent set of regulatory prescriptions. Part of the challenge lies in the varied channels through which innovation upends market practices. Problems also lurk in the popular assumption that securities regulation operates against the backdrop of stable market gatekeepers like exchanges, broker dealers and clearing systems—a fact scenario increasingly out of sync in 21st century capital markets.

This article explains how technological innovation not only "disrupts" capital markets—but also the exercise of regulatory supervision over securities issuances and trading. It argues that an array of technological innovations in speed, interconnectivity and processing power are facilitating what can be understood as the disintermediation of the traditional gatekeepers that regulatory authorities have relied on (and regulated) since the 1930s for investor protection and market integrity. Effective securities regulation will thus require understanding the new market ecosystem, and 20th century administrative processes will have to be upgraded to account for a computerised (and often virtual) market microstructure that is subject to accelerating change. To provide context, the paper examines two basic categories of disruptive innovation: (1) the automated financial services that are transforming the meaning and operation of market liquidity and (2) the private markets—specifically, the dark pools, ECNs, 144A trading platforms, and crowdfunding websites—that are creating an ever-expanding array of alternatives for both securities issuances and trading.

The paper is available on the SSRN website.

6. Contributions

If you would like to contribute an article or news item to the Bulletin, please email it to law-cclsr@unimelb.edu.au.

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