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Bulletin No. 233

Legislation Hotline

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Detailed Contents

1. Recent Corporate Law and Corporate Governance Developments

1.1 UK: Consultation on corporate criminal liability

13 January 2017 - The UK Ministry of Justice has announced a consultation on corporate criminal liability. The government will consider whether existing laws sufficiently hold companies to account for the criminal wrongdoing of their staff.

The call for evidence seeks views on:

- whether the need to prove the involvement of a "directing mind" in corporate offending is hindering the prosecution of companies for wrongdoing; and
- alternatives to proving "directing mind" complicity in corporate criminal conduct, including:
    - a US-style "vicarious" liability offence, making companies guilty through the actions of their staff, without the need to prove complicity;
    - the failure to prevent model, whereby a company is liable unless it shows it has taken steps to prevent offending; and
    - the benefits of strengthening regulatory regimes.

This call for evidence will run until 24 March 2017

1.2 Developments in corporate governance and stewardship: FRC report

11 January 2017 - The UK Financial Reporting Council (FRC) has published its annual report, Developments in Corporate Governance and Stewardship 2016, against what the FRC describes as a backdrop of falling public trust in business.

According to the report, compliance with the principles of the UK Corporate Governance Code remains high; however, when boards choose not to follow provisions too many explanations are of poor quality. The FRC believes more focussed reporting by boards on how they discharge their responsibilities is necessary and has asked for more oversight powers from Government to help achieve this.

The FRC's report includes analysis of the 2016 AGM season which showed generally reduced support for remuneration resolutions and concern about a lack of transparency in the link between executive pay and performance.

Some key highlights of the report include:

- Compliance - The number of FTSE 350 companies reporting full compliance with all provisions has increased from 57% to 62% with 90% reporting full compliance with all but one or two of the Code's provisions;
- Frequent non-compliance - The Code provision most often not complied with is for at least half the Board, excluding the Chairman, to be independent, non-executive directors - 26 FTSE 350 companies in 2016 compared to 42 in 2015;
- 2016 AGM Season - There was reduced investor support for remuneration resolutions, with concern noted over a lack of transparency about the link between executive pay and performance;
- Clawback and malus provisions - The majority of FTSE 350 have taken forward the 2014 Code recommendation for companies to put in place arrangements to enable them to recover or withhold variable pay. 91% now have implemented a clawback provision on the annual bonus and 78% on long-term plans; and
- Nomination Committees - According to the report, the committee must actively align board composition with company strategy to ensure that the board has the diverse skills to ensure long-term success.

1.3 Global M&A update

January 2017 - The International Institute for the Study of Cross-Border Investment and M&A (XBMA) has published its annual review for 2016.

Highlights:

- global M&A activity had a slow start and a strong finish in 2016, totalling nearly US$3.7 trillion, posting the second strongest year since the financial crisis (lower only than 2015);
- 2016 also accounted for the second highest cross-border deal volume (US$1.4 trillion) since the financial crisis, with cross-border deals announced in 2016 accounting for six out of the 10 largest deals of the year;
- 2016 had its share of "megadeals," albeit trailing 2015 levels, with 45 deals over US$10 billion (compared to 69 in 2015) and four deals over US$50 billion (compared to 10 in 2015);
- drivers of the robust activity - including large cross-border transactions - included consolidation in several sectors, increasingly scarce opportunities for organic growth, high acquirer stock prices, and the continued availability of low-cost acquisition financing. The slower pace relative to 2015 may have been attributable to political uncertainty arising from the US elections, the near-term possibility of US interest rate increases from their prolonged and historical lows, uncertainty about the economic impact of Brexit on the United Kingdom and the European Union, and the record volume of deals that were withdrawn or terminated due to regulatory issues;
- the Technology sector's share of deal volume has surged since 2012, approaching levels (nearly 15%) last seen in 2000. Technology drove a much larger share of cross-border deal-making in 2016 relative to prior years, jumping from approximately 5% to over 10%, and including such notable deals as SoftBank/ARM; and
- Q4 2016 was the second most active quarter since the financial crisis, with more than US$1.2 trillion in deals announced, including six of the ten largest deals of 2016, and two of the three largest deals of 2016. Q4 represented a nearly 50% surge over Q3 deal volume. Through the first three quarters of 2016, annualized M&A volume was trending lower than each of 2008 and 2014, before overtaking them in Q4 and transforming 2016 from a relatively moderate post-crisis year to the second most active.

View XBMA Annual Review 2016

1.4 IOSCO consults on order routing incentives

21 December 2016 - The Board of the International Organization of Securities Commissions (IOSCO) has published the Report on Order Routing Incentives for public consultation. The report provides an overview of the practices used by market regulators regarding incentives for order routing that may influence how intermediaries treat their clients.

The report examines the regulatory conduct requirements for brokers or firms to manage conflicts of interest associated with routing orders and obtaining best execution. It assesses how these requirements interact with market practices in different jurisdictions to shape order routing incentives and how these incentives influence the behavior of intermediaries towards their clients. Such incentives may include, for

example, discounts or rebates designed to direct order flow to one particular venue or to channel payments from one intermediary to another to receive their order flow.

Among various monetary and non-monetary order routing incentives, the report focuses on three primary types of incentive arrangements or commercial practices:

1. Monetary incentives paid or received by brokers to or from third parties;
2. Internalization and use of affiliated venues that may reap commercial benefits for a broker; and
3. Provision of goods and services bundled with execution by brokers, such as research.

1.5 IOSCO identifies risks to retail investors of OTC leveraged products

21 December 2016 - The International Organization of Securities Commissions (IOSCO) has issued a report that identifies various risks related to the marketing and sale of complex OTC leveraged products to retail investors, and describes how some regulators are responding to the challenges these products present.

The Report on the IOSCO Survey on Retail OTC Leveraged Products analyses offers of rolling-spot forex contracts, contracts for differences and binary options to retail investors. The fact-finding report is based on a survey of 21 IOSCO members regarding their experiences with leveraged OTC products, the firms that sell them, and current regulatory and supervision frameworks.

Leveraged OTC products have been subject to significant regulatory scrutiny in a number of jurisdictions. Survey respondents raised concerns that retail investors may not be able to assess the risks associated with these products or withstand the losses they may incur. Several studies show that a large majority of investors in these complex products lose money, giving rise to investor complaints regarding their sale. In addition to the poor performance of these products, survey respondents also highlighted difficulties related to the withdrawal of client funds and aggressive or misleading marketing and sales practices.

Survey respondents were also concerned by the cross-border offering of OTC leveraged products. Many firms use on-line advertising, social media, expert blogs and other cross-border marketing techniques to attract investors. Moreover, these cross-border promotional campaigns are often aggressive and/or misleading in some jurisdictions.

Several jurisdictions are particularly concerned about the cross-border business of firms located in countries that ban the sale of these products to domestic investors but take no regulatory action if the investors are foreign. In some cross-border cases, regulators struggle to identify or track unlicensed foreign firms that may provide false addresses or use anonymous domain registrations for their websites. The survey results indicate that many unlicensed firms are scams and regulators in several jurisdictions have taken enforcement actions against unregistered firms.

The report describes a variety of possible regulatory approaches and standards for mitigating the risks that OTC leverage products pose to retail investors. A small number of reporting jurisdictions have severely restricted or in some cases banned the sale of these products to retail investors. In all the reporting jurisdictions where such retail sales are allowed, only authorised or registered firms can legally make such sales to the general public, or such authorisation/registration is expected to become a requirement in the near future.

1.6 IOSCO report on growing use of automated advice tools to protect investors

21 December 2016 - On-line technology tools are having an important impact on the investment advice value chain, including services such as asset allocation, portfolio selection and trade execution, according to a report issued by the Board of the International Organization of Securities Commissions (IOSCO).

The Update to the Report on the IOSCO Automated Advice Tools Survey indicates that the market for automated investment advice has developed rapidly since IOSCO published in 2014 a survey report on the use of these tools by intermediaries and retail investors. The updated report concludes that the continued development of automated investment advice tools requires ongoing monitoring to help regulators understand its impact on the provision of investment advice to retail clients.

Use of automated advice tools is expanding as intermediaries seek to provide advice in a more efficient and cost-effective manner. A growing number of retail investors, whether by preference or because they consider the services of traditional intermediaries too expensive or extensive for their needs, also prefer to manage their own portfolios using online tools. At the same time, the functionalities and analytics provided by automated advice tools are growing in range and sophistication, while the regulation of internet-based technology continues to evolve.

1.7 Review of tax and corporate whistleblower protections in Australia

20 December 2016 - The Australian Government is seeking public comments on the Review of tax and corporate whistleblower protections in Australia consultation paper, to assist the Government with the introduction of appropriate protections for tax whistleblowers and in assessing the adequacy of existing whistleblower protections in the corporate sector.

In the 2016-17 Federal Budget the Government announced the introduction of new arrangements to better protect tax whistleblowers as part of its commitment to tackling tax misconduct. In addition, as part of the Open Government National Action Plan, the Government has committed to ensuring appropriate protections are in place for people who report corruption, fraud, tax evasion or avoidance, and misconduct within the corporate sector. This consultation paper is also intended to complement the work of the recently established Parliamentary Inquiry into whistleblower protections in the corporate, public and not-for-profit sectors. The consultation paper will assist members of the public in making submissions to either or both processes as it:

- gathers together information about existing whistleblower provisions already operating in Australia, including those under the recent amendments to the Fair Work (Registered Organisations) Amendment Act 2016, and overseas in major comparable jurisdictions;
- includes critiques of existing Australian provisions;
- canvasses a range of options for reform of existing protections under the Corporations Act 2001 and similar provisions under other financial system legislation administered by ASIC and APRA which apply to corporations;
- canvasses a proposal for tax legislation to introduce specific protections for whistleblowers; and
- identifies the variety of legislative approaches that may be taken by the Government to broader reform in this area generally.

1.8 IOSCO issues guidance to improve quality of reporting on compliance with Benchmarks Principles

16 December 2016 - The Board of the International Organization of Securities Commissions (IOSCO) has issued guidance that seeks to increase the consistency and quality of reporting by Benchmark Administrators on their compliance with the IOSCO Principles for Financial Benchmarks, which were published in July 2013.

The Guidance on Statements of Compliance with the IOSCO Principles for Financial Benchmarks sets out reasonable expectations about the level of detail that should be included in these statements. The aim is to enable market authorities, users of benchmarks and other market participants and stakeholders to understand the extent to which an administrator has implemented the Principles.

The Principles form an integral part of IOSCO's efforts to enhance the integrity, the reliability and the oversight of benchmarks. They represent recommended practices for benchmark administrators and other relevant bodies in areas such as governance, benchmark quality, quality of methodology and accountability. They also provide a framework of standards that might be met in a variety of ways depending on the specificities of each benchmark. In particular, the application and implementation of the Principles should be proportional to the size and risks posed by each benchmark and/or administrator and the benchmark-setting process.

1.9 FSB consults on proposed guidance to support resolution planning and promote resolvability

16 December 2016 - The Financial Stability Board (FSB) has issued for consultation two proposals for guidance on the implementation of its resolution standards which form part of the overall policy framework to end "too-big-to-fail".

Consultation on Guiding Principles on the Internal Total Loss-Absorbing Capacity of G-SIBs (Internal TLAC)

G20 and FSB members made a commitment last year to the timely, full and consistent implementation of the FSB's standard on Total Loss-Absorbing Capacity (the TLAC standard) that was published in November 2015. The TLAC standard defines a minimum requirement for the instruments and liabilities that should be held by global systemically important banks (G-SIBs) and readily available for bail-in during a bank resolution. It also requires a certain amount of those loss-absorbing resources to be committed to subsidiaries or sub-groups that are located in host jurisdictions and deemed material for the resolution of the G-SIB as a whole (internal TLAC). The consultative document proposes a set of guiding principles to support the implementation of the internal TLAC requirement, covering in particular:

- the process for identifying material sub-groups;
- considerations relating to the determination of the size of the internal TLAC requirement, its composition and the trigger mechanism; and
- cooperation and coordination between G-SIB home and key host authorities.

Consultation on Guidance on Continuity of Access to Financial Market Infrastructures (FMIs) for a Firm in Resolution

A key objective of resolution planning is to ensure the continuity of a firm's critical functions in resolution. To maintain continuity of critical functions in resolution, it is necessary to ensure the parallel continuity of the services that underpin them, including those provided by FMIs. The proposed guidance seeks to address the risk of a bank in resolution being unable to maintain access to the clearing, payment,

settlement and custody services provided by FMIs that are necessary to continue the provision of a firm's critical functions in resolution.

1.10 FSB Task Force consultation on recommendations for climate change disclosure

14 December 2016 - The Financial Stability Board (FSB) Task Force on Climate-related Financial Disclosures (TCFD) has published a consultation paper with recommendations for disclosure of climate-related financial risks.

The Task Force was asked by the FSB to develop a set of voluntary disclosure recommendations for use by companies in providing information to investors, lenders, and insurance underwriters about the financial risks companies face from climate change. The TCFD framework includes disclosures about the way firms consider the impact of climate change as part of their governance, risk management and strategy and sets out metrics and scenarios that firms should consider disclosing.

View Recommendations of the Task Force on Climate-related Financial Disclosures

1.11 Report on improvement of remuneration reporting

13 December 2016 - PwC and the Group of 100 have released a report, 'Streamlining Remuneration Reporting', which illustrates how improvements can be made to Australian remuneration reports and calls for regulatory change to improve reporting requirements.

According to the report, remuneration reports are critical in helping explain remuneration strategies but they are often too unwieldy for business, investors and the public to understand them. In part this is driven by the current legislative requirements.

The PwC and Group of 100 report includes four key recommendations to rationalise the reporting requirements:

- allow flexible presentation by focusing on the objective of the disclosure rather than prescribing the disclosure of details that may not satisfy the objective. Also allow information to be "included" by cross referencing other sections of the annual report and provide companies with the ability to post standing information online;
- delete regulations that duplicate requirements of accounting standards or other regulations;
- reconsider the volume of detailed information that is required by users of the report in light of the overriding objectives of the disclosure. Too much unnecessary information can clutter or obscure relevant information;
- the regulations can prescribe a standard measure which is most useful to investors. The provision of alternative remuneration tables suggests there may be a better way to meet investor needs. Consultation with investors and drafters might encourage a pragmatic solution.

View the Streamlining Remuneration Reporting paper.

1.12 Consultation on accountability of financial product issuers and distributors

13 December 2016 - Minister for Revenue and Financial Services, the Hon Kelly O'Dwyer MP, has released a consultation paper seeking feedback on two key proposals from the Financial System Inquiry. The first is the introduction of design and distribution obligations on issuers and distributors. The second is a product intervention power for ASIC, which would enable the regulator to intervene where a product is identified as creating a risk of significant consumer detriment.

According to the Minister, the design and distribution measures will make product issuers and distributors more accountable for the products they sell and are consistent with similar action already undertaken in other jurisdictions. The product intervention power will empower ASIC to take direct action to address problems with financial products.

The paper sets out a series of proposals to provide stakeholders with an indication of how the measures could operate in practice.

The consultation paper is available on the Treasury website.

1.13 Liability for foreign bribery: report

9 December 2016 - The OECD has launched a report on the liability of legal persons for foreign bribery.

The report presents a chronology and a "mapping" of the features of the systems for liability of legal persons found in the 41 Parties to the *OECD Anti-Bribery Convention*. An effective framework for corporate liability is a cornerstone of the Convention - article 2 requires states parties to establish the liability of legal persons for the bribery of a foreign public official. The OECD Working Group on Bribery's Phase 3 monitoring process saw these corporate liability frameworks analysed in detail for the first time, including emerging case law.

View Liability of Legal Persons for Foreign Bribery: A Stocktaking Report

2. Recent ASIC Developments

2.1 Consultation on consolidating ASIC market integrity rules

24 January 2017 - ASIC has released a consultation paper proposing to consolidate and clarify Australia's market integrity rules, CP 277 Proposals to consolidate the ASIC market integrity rules.

There are currently 14 market integrity rule books that set out obligations and prohibitions applying to activities and conduct on eight licensed financial markets. Collectively, these rule books amount to more than 1,300 pages of regulation, and a further five regulatory guides set out guidance on ASIC's approach to regulating these markets.

In preparation for a detailed review of the market integrity rules, ASIC proposes to consolidate 13 of the 14 market integrity rule books into four, covering the:

- ASX, Chi-X, IR Plus, NSXA, and SSX securities markets, and competition between securities markets;
- ASX 24 and FEX futures markets, and competition between futures markets;
- capital requirements for ASX, Chi-X, SSX and NSXA securities markets; and
- capital requirements for ASX 24 and FEX futures markets.

In consolidating the rules, ASIC also proposes to clarify existing obligations for:

- management requirements and responsible executives;
- dealing "as principal";
- block trades and large portfolio trades;
- disclosures to wholesale clients about derivatives market contracts; and
- record-keeping requirements for market operators.

2.2 Consultation on proposed guidance for registered liquidators

19 January 2017 - ASIC has released a consultation paper covering proposals to reissue its guidance in *Regulatory Guide 186 External administration: Liquidator registration* (RG 186) and *Regulatory Guide 194 Insurance requirements for registered liquidators* (RG 194), reflecting changes to the law enacted by the Insolvency Law Reform Act 2016 No. 11 (Cth).

Consultation Paper 276 Registered liquidators: Registration, discipline and insurance requirements (CP 276) sets out the proposals. A draft of the proposed regulatory guide is attached to CP 276.

- view Consultation Paper 276
- view Attachment to CP 276 - draft regulatory guide

2.3 ASIC to allow a wider range of managed investment products for the mFund settlement service

22 December 2016 - ASIC has issued ASIC Corporations (Amendment) Instrument 2016/1212 to amend *Class Order [CO 13/1621]* to allow for a broader range of managed investment products that retail clients can apply for and redeem through mFund Settlement Service.

The mFund settlement service is a facility jointly operated by ASX Ltd (ASX) and ASX Settlement Pty Ltd (ASX Settlement) where requests for the issue or redemption of interests in unlisted managed investment schemes can be made, and holdings recorded through the ASX group's electronic register system CHESS. It is not a trading facility.

Previously, retail investors could only apply for and redeem interests in simple managed investment schemes that have a shorter PDS through mFund. The revision in the Class Order is to facilitate a wider range of managed investment products to be issued and redeemed through mFund.

The ASX has made an application to ASIC for this expansion, and its consultation with mFund issuers and brokers indicated general support for the expansion and the proposed amendment to the Class Order.

The expanded products (including certain hedge funds) in the mFund settlement service are those that under the ASX Operating and Settlement Rules comply with certain criteria, including rules relating to liquidity of scheme property and redemption of the units.

The key aspects of the class order are:

- it exempts responsible entities of managed investment schemes available through the mFund settlement service from only issuing interests in response to an application form that was included in or accompanied a PDS; and
- REs will generally be allowed to issue on the basis of an electronic message through the mFund settlement service indicating that the investor has been given the current version of the PDS and any supplementary PDS that apply to the particular fund.

The sender of the electronic message must be an Australian financial services (AFS) licensee or an authorised representative of an AFS licensee and must not send an electronic message unless the investor has been given the latest product disclosure statement (PDS) and any supplementary PDS for the managed investment products.

2.4 Licensing exemption for fintech businesses

15 December 2016 - ASIC has released class waivers to allow eligible financial technology (fintech) businesses to test certain specified services without holding an Australian financial services or credit licence.

ASIC has also released Regulatory Guide 257 Testing fintech products and services without holding an AFS or credit licence (RG 257), which contains information about Australia's "regulatory sandbox" framework.

That framework is comprised of:

- existing flexibility in the regulatory framework or exemptions already provided by the law or ASIC which mean that a licence is not required. Examples include existing ASIC relief for non-cash payment products like stored value cards and regulations meaning that a licence is often not required for certain foreign exchange services;
- ASIC's fintech licensing exemption provided under *ASIC Corporations (Concept Validation Licensing Exemption) Instrument 2016/1175* and *ASIC Credit (Concept Validation Licensing Exemption) Instrument 2016/1176*; and
- tailored, individual licensing exemptions from ASIC to facilitate product or service testing - individual exemptions of this nature are similar to the "regulatory sandbox" frameworks established by financial services regulators in other jurisdictions.

Fintech licensing exemption

ASIC's fintech licensing exemption allows eligible businesses to test specified services for up to 12 months with up to 100 retail clients, provided they also meet certain consumer protection conditions and notify ASIC before they commence the business.

The fintech licensing exemption was initially proposed in Consultation Paper 260 'Further measures to facilitate innovation in financial services (CP 260)'. ASIC has amended its proposal in light of the feedback received, including extending the testing period and expanding the products in relation to which services can be tested.

Information about the services covered by the fintech licensing exemption, is available in an ASIC infographic, as well as in RG 257.

Businesses that are not eligible for the fintech licensing exemption are able to seek an individual exemption. ASIC's policy on exemptions is available in *Regulatory Guide 51 Applications for relief* (RG 51).

Other measures to facilitate innovation

ASIC has also released updated guidance to licensees on satisfying the requirements to maintain competence in Regulatory Guide 105 Licensing: Organisational competence (RG 105) and Regulatory Guide 206 Credit licensing - Competence and training (RG 206). These updates are also based on feedback received to proposals in CP 260.

The updated guidance in RG 105 provides greater flexibility for some "small-scale, heavily automated businesses" seeking to nominate a responsible manager. These businesses may now nominate a responsible manager without day-to-day involvement in the business to provide regular sign-off on the licensee's processes and systems and the quality of financial services provided.

2.5 ASIC releases new instrument for buy-backs for ASX-listed schemes and updates guidance for scheme buy-backs

15 December 2016 - Following public consultation, ASIC has released a new legislative instrument regarding on-market buy-backs of ASX-listed schemes, replacing the class order due to expire (sunset) on 1 April 2018.

ASIC has replaced *Class Order [CO 07/422]* with the new legislative instrument *ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016/1159*. *Class Order [CO 07/422]* has been repealed by *ASIC Corporations (Repeal) Instrument 2016/1209*.

ASIC has also updated *Regulatory Guide 101 Managed investment scheme buy-backs* (RG 101) to include ASIC's broader policy on managed investment scheme buy-backs, in addition to ASIC's policy on market buy-backs by ASX-listed schemes.

The new instrument and updated regulatory guidance follows a public consultation released 12 October 2016. In Consultation Paper 269, Remaking ASIC class order on managed investment scheme buy-backs and updating related guidance, ASIC sought feedback on its proposals to remake, without significant changes, *Class Order [CO 07/422]* and on draft updates to Regulatory Guide 101. ASIC did not receive any responses to its consultation.

View:

- ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016/1159
- ASIC Corporations (Repeal) Instrument 2016/1209
- Consultation Paper 269 Remaking ASIC class order on managed investment scheme buy-backs and updating related guidance
- Regulatory Guide 101 Managed investment scheme buy-backs

2.6 Report on corporate insolvencies 2015-16

14 December 2016 - ASIC has published its annual overview of corporate insolvencies based on statutory reports lodged by external administrators for the 2015-16 financial year.

Report 507 Insolvency statistics: External administrators' reports (July 2015 to June 2016) (REP 507) is ASIC's eighth report and provides information on the nature of corporate insolvencies, supplementing the monthly statistics that ASIC publishes on its website.

The report summarises information from 9,465 reports that ASIC received from external administrators during the 2015-16 financial year and includes ASIC's response to their reports of alleged misconduct.

REP 507 includes information about the profile of companies placed into external administration, including:

- industry types;
- employee numbers;
- causes of company failure;
- estimated number and value of a company's unsecured creditor debts; and
- estimated dividends to unsecured creditors.

REP 507 shows small to medium size corporate insolvencies again dominated external administrators' reports. Of note, 86% had assets of $100,000 or less; 79% had less than 20 employees; and 46% had liabilities of $250,000 or less.

97% of creditors in this group received between 0-11 cents in the dollar, reflecting the asset/liability profile of small to medium size corporate insolvencies.

3. Recent ASX Developments

3.1 ASIC report on ASX equity market outage in September 2016

21 December 2016 - ASIC has released a report on the findings of its review of the ASX outage that affected the operation of the Australian equity market on 19 September 2016. It provides a whole-of-market perspective, with observations on how ASX and other important stakeholders responded on the day.

The outage highlighted the fact that despite considerable market developments in Australia in recent years, ASX's trading system remains pivotal to the functioning of the equities markets.

A general lack of confidence on the day resulted in trading drying up, with very little liquidity shifting to Chi-X's competing market. A key benefit of market competition is the availability of an alternative market when ASX is unavailable. As part of the review ASIC identified changes that will better assist confident trading to continue as soon as possible when one part of the market is not performing as expected.

ASIC's review found that, in responding to the outage, ASX broadly adhered to its existing procedures for incident management. There are, however, some areas where ASX could enhance its arrangements to support technology resilience and the robustness of the wider Australian equity market. In some important areas, market participants can also take action to support these improvements.

The report makes a number of recommendations - for both ASX and market participants - designed to improve the resilience and robustness of the wider market and to promote confidence that any future incidents will be managed effectively.

They include recommendations for ASX to:

- map the dependencies that stakeholders have on ASX (e.g. listing function) and mitigate the effect of system failures on these stakeholders;
- review when it is appropriate for all or a subset of securities to be available for trading and consider whether the open rotation process is still necessary;
- strengthen business continuity and IT disaster recovery, including system testing and recovery procedures, and a repository of documentation;
- implement comprehensive and robust technology status monitoring, including automated data-integrity checking processes and system-monitoring alerts;
- enhance its key enterprise architecture documentation to more fully describe "current" and "target" states for business processes, systems, data and information flows;
- review its communication strategy, including mechanisms to communicate the status of infrastructure that other market operators are dependent on and for a "single source of truth" for the wider market; and
- review ASX's operational risk arrangements, including the "four eyes" principle, pre-open period and trade cancellation policy.

ASIC also identified areas where market users could contribute to a more resilient and robust market. Market participants should:

- review their arrangements for dealing with market outages, including the operation of best execution policies, algorithms and smart order routers, and arrangements for undertaking and reporting crossings; and
- review their own system-preparedness for managing market outages, including participation in market operators' business continuity testing.

ASIC will undertake a wider review in 2017 of the operational and technological risk management arrangements across ASX Group.

ASIC's report also foreshadows an intention to consult in 2017 on making market integrity rules on the technological and operational performance of market operators.

The Report is available here.

3.2 Listed@ASX Compliance Update no 11/16: Admission rule changes

On 2 November 2016, ASX released its Response to Consultation on the proposed changes to ASX's admission requirements for listed entities and a package of changes to a number of Listing Rules and Guidance Notes. The changes came into effect on 19 December 2016 (apart from certain measures highlighted in the Response to Consultation that came into effect immediately).

The Notice is available here.

3.3 Framework to facilitate Austraclear's compliance with the Common Reporting Standard

Effective 1 January 2017, ASX has amended the Austraclear Regulations to support Austraclear's compliance with the Common Reporting Standard. The amendments introduce new eligibility criteria for Participants that are authorised to hold Deposited Securities in the Austraclear System.

The Notice is available here.

3.4 ASX's replacement of CHESS for equity post-trade services: Supplementary business requirements questionnaire

This questionnaire supplements ASX's recent consultation paper titled "ASX's Replacement of CHESS for Equity Post-Trade Services: Business Requirements (September 2016)". The supplementary questionnaire was requested by the Code of Practice - Business Committee at the most recent committee meeting held in December 2016.

Response to the questionnaire is optional and due by Tuesday 14 February 2017.

The Questionnaire is available here.

3.5 Reports

On 5 January ASX released the ASX Monthly Activity Report for December 2016.

4. Recent Takeovers Panel Developments

4.1 Revised Guidance Note 4 - Remedies General

30 January 2016 - The Takeovers Panel has published a revised Guidance Note 4 Remedies General.

The Panel issued a consultation paper in relation to the proposed amendments of Guidance Note 4 on 2 September 2016. The Panel received one submission in response from ASIC, has taken ASIC's comments into account and made further changes to the Guidance Note.

4.2 Kasbah Resources Limited - Panel declines to conduct proceedings

On 19 December 2016, Kasbah announced a placement of its issued capital to Pala Investments Ltd, amounting to 19.9% of Kasbah. The applicants submitted in their initial Panel application, among other things, that Pala was associated with Lion Selection Group Ltd and the placement would contravene s.

606 of the Corporations Act 2001. On 23 December 2016, the initial Panel declined to conduct proceedings (the reasons for the decision are available on the Takeovers Panel website) and Pala was issued the placement shares.

The applicants submitted a review application and stated, among other things, that there was further information which suggested that Pala and Lion Selection were associates resulting in a contravention of s. 606. Following a review of the material before the initial Panel and further material requested from parties, the review Panel considered that there was insufficient material to justify making further enquiries. Accordingly, the review Panel announced on 17 January 2017 that it had declined to conduct proceedings.

The reasons for the decision of the review Panel are available on the Takeovers website.

5. Recent Research Papers

5.1 Deal structure and minority shareholders

Takeover transactions are often the most significant activity affecting corporations and their shareholders. Accordingly, there are intense debates about the value and impact of takeovers and the extent to which law should regulate such transactions. One area of focus for takeover regulation has been the potential impact of takeovers on minority shareholders. The focus on minority shareholders is not surprising as research suggests that laws which protect minority shareholders are associated with stronger financial markets.

This paper discusses three methods of effecting a takeover, focusing on tender offers, schemes of arrangement, and triangular mergers, and assesses both the theoretical and empirical literature on their impact on minority shareholders of bidders and targets. The chapter primarily focuses on how two common law jurisdictions, the United States (US), the United Kingdom (UK), govern such transactions. In each jurisdiction, lawmakers, regulators and courts have attempted to address the potential for harm to minority shareholders under various deal structures. At times, regulators have arrived at different sets of rules for different types of transaction structures. These rules often provide different rights for shareholders of bidders and targets, and vary among various transaction structures, even when economically similar transactions are undertaken.

Deal Structure and Minority Shareholders

5.2 Investor behaviour in crowdinvesting

Using hand collected and one of the most comprehensive datasets on one of Germany's largest crowdinvesting portals, this paper analyses the investment behavior of over 15,400 investors on the crowdinvesting platform Companisto. While outlining the profiles of investors based on over 42,900 investment decisions, it shows that paramount contributions come in the form of strategic investments. Further analysis reveals that investors categorised as strategic investors invest less frequently. Moreover, strategic investors are less likely to have invested in a venture that ultimately failed. This significantly furthers the comprehension of crowdinvesting by showing that the crowd is not a homogenous community, whilst also providing numerous revelations for policy makers, crowdinvesting platforms, as well as entrepreneurs.

Investor Behaviour in Crowdinvesting

5.3 Corporate control around the world

The authors examine the patterns of corporate control and ownership concentration in a dataset covering more than 40,000 listed firms from 127 countries over 2004-2012. Employing a plethora of original and secondary sources, big data techniques, and applying the Shapley-Shubik algorithm to quantify shareholder's voting power they trace ultimate controlling shareholders from the complex, pyramidal, and often obscure corporate structures.

First, they show that there are large differences in the type of corporate control (widely held firms with and without significant equity blocks, firms controlled by families, governments, and other public-private firms) across and within continents. Corporate structures appear persistent as the recent global financial crisis did not affect them much.

Second, they examine the role of legal traditions on corporate control. There are economically large differences on corporate structure across legal families, with the share of controlled (widely-held) firms being the highest (lowest) in French civil-law countries, followed by German and then Scandinavian civil law countries. State ownership and control by individual/families via complex corporate structures is pervasive in civil-law countries. And while equity blocks are commonplace across widely-held firms all around the world and across all legal families, the share of widely-held firms with large blocks is the highest in French civil-law countries. Moreover, ownership concentration is considerably higher in French civil-law (and to a lesser extent in German civil-law) countries as compared to common-law countries. These patterns apply to very large, big, medium-sized and small listed firms and are not driven by regional differences, the level of economic development, or industrial structure, suggesting that legal origin has sizable long-lasting consequences on corporate structure.

Third, as legal origin may affect corporate control via multiple channels, the authors examine the role of some likely mechanisms. They find that shareholder protection rights against self-dealing activities of insiders correlate strongly with corporate control and ownership concentration. Legal formalism and creditor's rights do not seem to play a role. Yet, the "reduced-form" link between legal origin and corporate control (and ownership concentration) is also driven by entry and labour market regulation.

Corporate Control around the World

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.