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Legislation Hotline

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> WHAT'S NEW
> MODIFY MY NEWSFEEDS
> SEARCH NEWSFEED ARCHIVE
> RELEVANT STANDARDS
> SEARCH LEGISLATION
> ABOUT LEGISLATIVE ALERT
> MORE SERVICES
> ABOUT SAI GLOBAL

Detailed Contents

Editor's Note to Subscribers

This is an additional issue of the Corporate Law Bulletin. The Recent Corporate Law Decisions section of the Bulletin will return in the February 2018 issue.

1. Recent Corporate Law and Corporate Governance Developments

1. Recent Corporate Law and Corporate Governance Developments

1.1 Singapore Corporate Governance Council proposes changes to corporate governance code

16 January 2018 - The Singapore Corporate Governance Council (Council) has released a consultation paper on its recommendations to revise the *Code of Corporate Governance* (Code). The recommendations aim to support sustained corporate performance and innovation, and strengthen investor confidence.

The Council believes that a well-rounded board with the appropriate mix of skills, experience and independence is critical to good corporate governance. Hence, a key focus of the Code revisions is to reinforce board competencies through encouraging board renewal, strengthening director independence and enhancing board diversity. Other proposed Code revisions include greater emphasis on disclosures of the relationship between remuneration and value creation, and the need for companies to consider and balance the needs of all stakeholders.

Beyond Code revisions, the Council is also proposing to clarify the intent of the comply-or-explain regime and the expectations on listed companies' corporate governance disclosures.

The consultation paper is available on the Monetary Authority of Singapore website.

1.2 FinTech and market infrastructure

10 January 2018 - The World Federation of Exchanges (WFE), which represents more than 200 market infrastructure providers including exchanges and Central Counterparty Clearing Houses (CCPs), has published a position paper summarising the WFE's current views on FinTech and the regulatory environment surrounding it.

The purpose of the paper - entitled *FinTech in the Market Infrastructure Space* - is to support ongoing compliance efforts to ensure markets are resilient, stable and robust, and able to operate on a fair and level playing field with regards to FinTech.

The paper examines seven key areas, and identifies corresponding principles for markets authorities to consider when designing rules, standards and guidelines for FinTech in the market infrastructure space:

- market driven innovation: innovation should generally be market driven. Nevertheless, it is clear that authorities have a role to play in ensuring the system remains stable in the face of changing technology, and that some innovation may be prompted by regulatory initiatives (for example RegTech);
- the scope of existing regulations should be broadly sufficient: the WFE believes the scope of existing regulations should generally be sufficient to extend to many or most potential FinTech initiatives. Initiatives should be considered on a case-by-case basis and legislation, rules and practices should only be adapted if strictly required, and be technology neutral;
- any regulatory approach should encourage innovation whilst ensuring investor protection and system stability: the development of regulatory and/or legal standards should not prevent market and technological innovation. Authorities should remain focused on ensuring investor protection and the safety of markets whilst encouraging an environment that enables financial technology which improves capital markets;
- the implications of outsourcing: it is a well-established supervisory principle that responsibility for outsourced functions remains with the regulated entity. While the technology itself may present unique risks (operational,

cyber), this underlying principle remains appropriate, even when regulated entities are outsourcing new FinTech applications and solutions;

- it is important there is regular and open dialogue between regulators and the markets: authorities should proactively engage with the industry to identify the nature of the FinTech application, understand the technology which underpins it, and work with the market on an appropriate regulatory framework. Regulatory sandboxes and innovation hubs have proven useful and should be extended, where appropriate, to ensure collaboration and exchange of information between industry and regulators;
- it is also important - where possible - to coordinate regulatory thinking in this space at the global level: The WFE believes there should be collaboration at the international regulatory organisation level (e.g. the International Organization of Securities Commissions (IOSCO) to develop a common approach and understanding to FinTech, to ensure regulatory coherence. FinTech is innately international with global applications and uses, and therefore any regulatory principles and/or guidelines should be developed at that global level; and
- there should be consistency in the application of rules to both incumbents and new FinTech entrants: any regulatory framework should be consistent between non-financial companies that enter this market and traditional regulated entities such as exchanges and CCPs. This is essential for maintaining the integrity, stability and fairness of the financial system.

The paper is available on the WFE website.

1.3 FSB publishes governance arrangements and implementation plan for the unique transaction identifier (UTI)

2 January 2018 - The Financial Stability Board (FSB) has published Governance arrangements for the unique transaction identifier (UTI): Conclusions and implementation plan. The UTI is a key global harmonised identifier for reporting over-the-counter (OTC) derivative transactions, in particular designed to facilitate effective aggregation of transaction reports. The final arrangements take account of stakeholder responses to a public consultation launched in March 2017, as well as an industry workshop.

G20 Leaders agreed at the Pittsburgh Summit in 2009, as part of a package of reforms to the OTC derivatives markets, that all OTC derivatives transactions should be reported to trade repositories (TRs). A lack of transparency in these markets was one of the key problems identified by the financial crisis. Trade reporting, by providing authorities with data on trading activity in OTC derivatives markets, helps them to identify and address financial stability risks. To use the data from trade reporting effectively, it is important for authorities not only to be able to consider institution-specific risks but to be able to aggregate reporting to consider system-wide risks.

The primary purpose of the UTI is to uniquely identify individual OTC derivatives transactions in reports to TRs. In particular, a UTI helps to ensure the consistent aggregation of OTC derivatives transactions by minimising the likelihood that the same transaction will be counted more than once (for instance, because it is reported by more than one counterparty to a transaction, or to more than one TR).

The FSB report sets out conclusions on the governance arrangements for UTI including:

- a recommendation that jurisdictions implement the UTI no later than end-2020;
- the designation of the International Organization for Standardization as the responsible body for publishing and maintaining the UTI data standard; and
- the designation of Committee on Payments and Market Infrastructures (CPMI) and IOSCO as the appropriate bodies to undertake the governance functions allocated to an International Governance Body relating to the UTI on an interim basis.

1.4 Consultation on Asia Region Funds Passport

21 December 2017 - The Australian government is seeking public comment on draft legislation for the Asia Region Funds Passport (Passport) and on the tax treatment of Corporate Collective Investment Vehicles (CCIVs).

The Passport is a common framework of coordinated regulatory oversight to facilitate cross border issuing of managed investment funds. Australia, Japan, Korea, New Zealand and Thailand are signatories to the Passport's Memorandum of Cooperation (MoC), which took effect on 30 June 2016.

The Revenue and Financial Services Minister Kelly O'Dwyer MP stated the Passport will allow Australian funds managers to offer their products into Asia without having to go through duplicative approval processes in each economy.

The proposed tax framework for the new CCIV has been designed to broadly align with the attribution tax regime for managed investment trusts (MITs). One of the key features of the CCIV tax regime is capital gains tax relief for attribution MITs that convert into CCIVs and meet the eligibility requirements for attribution tax.

There will be further consultations on the regulatory aspects of the CCIV framework in the first half of 2018. The federal government will also consult in early 2018 on technical amendments to ensure that the new tax system for MITs, which was enacted in 2016, operates as intended.

Following the signing of the MoC, it is necessary to reflect the Passport arrangements in Australian law through amendments to the Corporations Act 2001 No. 50 (Cth) (the Corporations Act), the Australian Securities and Investments Commission Act 2001 No. 51 (Cth) and related legislation. The Bill implements the following key changes:

- it establishes a mechanism for incorporating the *Passport Rules* in Annex 3 of the MoC into Australian law, and imposes an obligation on passport funds and operators registered in Australia as well as foreign passport funds and operators offering interests in Australia to comply with the *Passport Rules*;
- it establishes a new Chapter 8A in the Corporations Act which mainly implements the common regulatory arrangements in Annex 2 of the MoC. Chapter 8A among other things sets out the process whereby Australian CCIVs may be registered by ASIC as passport funds. It also sets out the process whereby foreign passport funds may notify ASIC of their intention to offer interests in the fund to Australian investors and the circumstances in which ASIC may reject such notifications; and
- it makes amendments to other parts of the Corporations Act clarifying how the obligations in those parts are to apply to foreign passport funds, as allowed under Annex 1 of the MoC. Key areas in which obligations are made to apply to foreign passport funds in this manner include financial reporting, licensing and disclosure.

The draft legislation and supporting materials are available on the Treasury website.

1.5 Release of the review of the external dispute resolution framework supplementary final report

21 December 2017 - The Australian Government has released the supplementary final report of the expert panel reviewing external dispute resolution and complaints arrangements in the financial system.

The panel, comprising Professor Ian Ramsay (Chair), Ms Julie Abramson and Mr Alan Kirkland, was tasked with reviewing Australia's external dispute resolution framework to ensure it is effective in resolving disputes between consumers and small businesses and financial institutions.

The federal government received the panel's final report in April 2017 and accepted all 11 recommendations.

The federal government has introduced legislation into Parliament, which has now passed the Senate, to establish the Australian Financial Complaints Authority (AFCA), a one-stop shop external dispute resolution scheme to hear and determine all financial and superannuation disputes. The AFCA will replace the Superannuation Complaints Tribunal, the Financial Ombudsman Service and the Credit and Investment Ombudsman. It will operate under significantly higher monetary limits and compensation caps, and will be a flexible scheme, able to respond quickly to the ever-changing financial services landscape.

The panel has prepared the supplementary report to address two matters in the amended terms of reference given to it by the government. The amended terms of reference required the panel to make recommendations on the establishment, merits and potential design of a compensation scheme of last resort and to consider the merits and issues involved in providing access to redress for past disputes. In relation to a compensation scheme of last resort, the panel notes that the Corporations Act 2001 No. 50 (Cth) and the National Consumer Credit Protection Act 2009 No. 134 (Cth) impose an obligation on licensees to have arrangements for providing compensation where certain specified losses occur. As a result, consumers and small businesses have a reasonable expectation that they will receive compensation in these circumstances. There is, however, clear evidence that current arrangements are failing to meet this expectation, with some consumers and small businesses not receiving compensation that has been awarded to them. To fill what the panel regards as a gap in the dispute resolution framework, the panel recommends that a limited and carefully targeted compensation scheme of last resort be introduced for future unpaid compensation in the area of financial advice failures as this is where there is evidence of a significant problem of compensation not being paid. The panel identifies the key design features of this scheme.

In relation to providing access to redress for past disputes, while the panel identifies a range of circumstances where there may be merit in considering providing access to redress for past disputes, the panel also identifies a number of issues that make this particularly challenging. In many cases the financial firm whose misconduct has resulted in the loss is not available to bear the costs (for example, due to insolvency).

As a result, in order to provide access to redress the costs of considering disputes and paying compensation arising from any misconduct will fall to the broader financial services industry or the Australian taxpayer. Adding to this complexity is the lack of data on the scale and scope of these past disputes and the potential value of compensation that could be sought. Without an accurate quantification of the size, scale and nature of the potential claims it is not possible to fully assess the merits and issues in this area. The panel identifies four possible options for providing access to redress for past disputes.

The supplementary final report is available on the Treasury website.

1.6 Improving outcomes for financial consumers: design and distribution obligations and product intervention power

21 December 2017 - The federal government has announced the key features of two reforms for consumers of financial products.

The Design and Distribution Obligations will require issuers of financial products to:

- identify target markets for their products, having regard to the features of products and consumers in those markets;

- select appropriate distribution channels; and
- periodically review arrangements to ensure they continue to be appropriate.

In addition, distributors of financial products will be required to:

- put in place reasonable controls to ensure products are distributed in accordance with the identified target markets; and
- comply with reasonable requests for information from the issuer in relation to the product's review.

The Design and Distribution obligations will apply to products that are sold to retail clients (with some exceptions) and ASIC will also have the power to exempt a product, or a class of products, on a case-by-case basis.

The Product Intervention Power will enable the Australian Securities and Investments Commission (ASIC) to intervene in the distribution of a product where it perceives a risk of significant consumer detriment. The actions ASIC could take include:

- requiring the amendment of product marketing and disclosure materials;
- imposing consumer warnings and labelling changes;
- restricting how a product is distributed; and
- banning products.

ASIC will also be empowered to ban aspects of remuneration practices, where there is a direct link between remuneration and distribution of the product.

Before it uses the new power, ASIC will be required to consider a range of relevant factors, to consult prior to making an intervention, and to publically release a statement of reasons for any intervention.

ASIC will be able to make an intervention for a period of up to 18 months. During this time, the federal government will consider whether the intervention should be made permanent.

The reforms respond to two recommendations of the Financial System Inquiry (FSI) to introduce:

- design and distribution obligations to ensure financial products are targeted at the right people; and
- a temporary product intervention power for ASIC, when there is a risk of significant consumer detriment.

In addition to these stand-alone measures recommended by the FSI, the total ambit of ASIC's enforcement powers and penalties for corporate misconduct have been reviewed by the ASIC Enforcement Review Taskforce, the findings of which are being considered by the federal government.

1.7 Review of Australian Charities and Not-for-profits Commission (ACNC) legislation

20 December 2017 - Charities have annual revenue of $143 billion, or over 8% of Australia's GDP. They employ more than 1.3 million people and engage 3 million Australians in volunteering their time and effort to helping others. This could increase to 6 million volunteers when the broader not for-profit sector is considered. A recent assessment identified approximately 257,000 non-profit organisations operating in Australia.

Australia's 55,000 registered charities are regulated by the Australian Charities and Not for Profits Commission (ACNC) under the current not-for-profit regulatory framework. This framework does not extend to other not-for-profits.

The federal government is required to undertake a review of the Australian Charities and Not for profits Commission Act 2012 No. 168 (Cth) and the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012 No. 169 (Cth) after their first five years of operation. The review presents an opportunity to evaluate the performance of the legislative framework, the regulation of the sector and to identify any improvements that can be made.

The terms of reference for the review are available on the Treasury website.

1.8 Position statement of the Investment Association on virtual-only AGMs

December 2017 - The Investment Association is the trade body that represents UK investment managers. Its 240 members collectively manage over £6.9 trillion on behalf of clients in the UK and around the world.

The Investment Association has stated that virtual-only AGMs are not in the best interests of all shareholders and should not be used by investee companies, as their use could be detrimental to Board accountability.

According to the Investment Association, AGMs provide an important mechanism for the Board to be publicly accountable to all their shareholders, both institutional and retail. At these meetings, shareholders can make statements and ask questions of the Board.

Given the large number of AGMs over a short period of time, it is often difficult for institutional investors to attend AGMs in person. However, institutional investors view the physical AGMs as invaluable opportunity to raise particular concerns with the Board in a public forum, and use this mechanism as part of their stewardship activities, in conjunction with other methods of engagement.

Investors agree that using technology, such as webcasting the meeting, to complement the physical AGM could be beneficial, and could increase retail and institutional investor participation. However, investors believe that such technology should only be used in parallel with the in-person meeting, and should not lead to companies adopting a 'virtual-only' approach.

Investment Association members will not support amendments to the Articles of Association in relation to electronic meetings if they allow for virtual-only AGMs. They expect any amendments to the Articles of Association to confirm that a physical meeting will be held alongside an electronic meeting element.

1.9 Study of new CEOs in Australia's top 200 companies

19 December 2017 - PwC's has published its annual *CEO Succession* study which examines CEO succession at the world's 2,500 largest public companies, including all companies listed in the ASX 200. The study shows the number of incoming female CEOs in Australia decreased sharply from 9.1% to 4.3% between 1 January 2016 and 31 December 2016.

Despite the decline, ASX200 companies continue to host a higher share of incoming female CEOs compared to the global average when looking at the previous five year period, with a 6.0% average between 2012-2016 compared to the 3.8% global average.

The study also shows that the share of forced CEO successions in Australia declined for a fourth consecutive year and is the lowest in 15 years, with a record low of 13% (excluding M&A), compared to 19% globally.

In addition, it shows more incoming CEOs in Australia were hired from outside a company (52%), despite insider CEOs delivering more value in Australia between 2012-2016 (insiders' median total shareholder return of 0.25% compared to outsiders' of -2%).

Moreover, the share of international incoming CEOs in Australia was the highest of any region, at 43% in 2016 compared to the global average of only 5%. Incoming CEOs in Australia with prior public company CEO experience was also at least 24 % higher than any other country in the region.

The study is available on the PwC website.

1.10 APRA proposes measures to strengthen superannuation member outcomes

13 December 2017 - The Australian Prudential Regulation Authority (APRA) has released a consultation package on measures aimed at assisting APRA-regulated superannuation licensees to be better positioned to deliver sound outcomes for their members.

The package outlines proposed changes to the prudential framework designed to enhance strategic and business planning, oversight of fund expenditure and the assessment of outcomes for members of registrable superannuation entities (RSEs).

The consultation package proposes measures including:

- changes to the existing prudential standard *SPS 220 Risk Management* relating to strategic and business planning and fund expenditure policies and processes;
- a new prudential standard, *SPS 225 Outcomes Assessment*, requiring all RSE licensees to annually assess the outcomes provided to members using a broader range of measures;
- new prudential practice guides to assist RSE licensees with their strategic and business planning and the outcomes assessment; and
- amending *SPS 250* to require RSE licensees to provide straight-forward processes for opting-out of all insurance products.

The proposed changes are intended to complement APRA's supervisory focus on RSE licensees' delivery of member outcomes, including increased engagement with those licensees identified as not consistently delivering quality outcomes.

The consultation package is available here.

1.11 SEC whistleblowing report

12 December 2017 - In its seventh annual report to congress, the US Securities and Exchange Commission (SEC) says whistleblowers have provided great value to its enforcement efforts.

Chief of the Office of the Whistleblower (OWB), Jane Norberg, notes that since the SEC's whistleblowing program's inception in 2010, the SEC has ordered wrongdoers to pay over US$975 million in total monetary sanctions.

Since the SEC agency issued its first award in 2012, the SEC's whistleblower program has also awarded more than US$175 million to 49 whistleblowers. In the 2017 fiscal year, whistleblower awards of nearly US$50 million were made to 12 individuals.

Whistleblowers may be eligible for an award when they voluntarily provide the SEC with original, timely, and credible information that leads to a successful enforcement action. Awards can range from 10% to 30% of the money collected when the monetary sanctions exceed US$1 million.

1.12 Investors and directors' views on governance issues

8 December 2017 - Russell Reynold Associates has published a study of the results of interviews it has conducted with institutional and activist investors, pension fund managers, public company directors, proxy advisors, and other corporate governance professionals in five jurisdictions (the United States, the European Union, Japan, India, and Brazil) regarding the trends and challenges that public company boards will face in 2018. The study is titled *Global and Regional Trends in Corporate Governance for 2018*.

According to Russell Reynolds, an overriding theme was the importance of board quality and composition, and the components that go into both. In addition, it is likely that investors also will pay closer attention to cybersecurity, climate change risk, and corporate culture in 2018.

Russell Reynolds has identified seven key global trends based on the interviews. They are: better investor stewardship, board quality and composition, executive remuneration, activist investing, environmental, social and governance risk, cybersecurity and human capital.

The study is available on the Russell Reynolds website.

1.13 House of Representative Standing Committee on Economics review of ASIC annual report

7 December 2017 - The House of Representative Standing Committee on Economics has published its review of the 2016 annual report of the Australian Securities and Investments Commission.

The matters examined in the report include:

- **Surveillance and enforcement**:
  - banks claiming interest rate rises are due to regulatory requirements;
  - Australian Financial Complaints Authority;
  - competition in the banking sector;
  - mortgages based on factually inaccurate information;
  - non-compliant financial advisors in the life insurance industry;
  - bank bill swap rate investigations; and
  - director appointments.
- **Regulatory framework**:
  - Regulatory Guide 97 (which provides guidance on how to disclose fees and costs in Product Disclosure Statements (PDSs) and periodic statements; and
  - ASIC industry funding.
- **Risk management**
  - AUSTRAC allegations against Commonwealth Bank of Australia;
  - Banking Executive Accountability Regime; and
  - climate change.

The report is available on the [Committee's website](#).

1.14 Survey of US company directors on governance issues

28 November 2017 - the US National Association of Corporate Directors (NACD) has published the results of its annual survey of public company directors. The survey addresses issues such as:

- key business trends and critical board priorities;
- the board's role in overseeing the company's culture;
- the state of board risk oversight, specifically cyber risk; and
- the growing challenge of activist investors.

The executive summary is available on the [NACD website](#).

1.15 Study of global M&A in 2017

The International Institute for the Study of Cross-Border Investment and M&A has published its study of global M&A in 2017.

The key findings are:

- global deal volume in 2017 exceeded US$3.6 trillion, just US$80 billion shy of 2016's volume. 2015, 2016, and 2017 have been the three strongest years of deal-making since the financial crisis, with 2015 representing the high water mark of US$4.4 trillion.
- consistent with the trend over the previous two years, global M&A accelerated in Q4, as deal volume exceeded US$1.1 trillion, an increase of almost US$300 billion (or approximately 33%) versus Q3. The acceleration of M&A activity in Q4, driven by robust global economies, tax reform in the US, and strategic responses to disruptive technologies, provides momentum for continued robust deal-making in 2018, including cross-border M&A;
- cross-border M&A activity exceeded US$1.2 trillion in 2017, accounting for approximately 35% of global M&A volume, consistent with recent historical proportions, and accounted for five of the ten largest deals of 2017;
- the US continued to claim the largest share of global deal volume in Q4 and in full-year 2017. Over 46% of global M&A volume (more than US$500 billion) in Q4 consisted of deals involving US targets. For full-year 2017, US targets accounted for $1.4 trillion (40%) of deal volume, with approximately 18% of US deals involving non-US acquirors;
- deals for European targets remained the second most active segment in Q4, constituting almost 20% of global M&A volume (but less than the recent historical average of 24%). The market for Chinese targets also continued to demonstrate strength, accounting for more than 17% of global deal volume in Q4 (up from its recent historical average of 15%);
- global M&A volume in 2017 was led by the Real Estate sector, which topped US$525 billion for the year, driven by a strong Q4. The Energy & Power and High Technology sectors were also among the most active sectors in 2017, with US$482 billion and US$462 billion in deal volume, respectively; and
- cross-border deals were an especially large component of activity in the Telecommunications sector and the Consumer Products sector, in which cross-border deals accounted for nearly 51% and 45% of global M&A volume, respectively, in 2017. In other sectors, the shares of global M&A volume attributable to cross-border deals ranged from 24% to 39%.

The Annual Review is available on the XBMA website.

2. Recent ASIC Developments

2.1 License of first crowd-sourced funding intermediaries

11 January 2018 - The ASIC has licensed the first crowd-sourced funding (CSF) intermediaries under the new CSF regime.

Seven companies have been issued with Australian Financial Services (AFS) licence authorisations to act as intermediaries able to provide a crowd-sourced funding service. With the grant of these new authorisations eligible public companies will now be able to use the CSF regime to raise capital by making offers of ordinary shares to investors via the on-line platform of one of these intermediaries.

The CSF regime is designed to provide start-ups and small to medium sized companies with a new means to access capital to develop and grow. CSF offers are subject to fewer regulatory requirements than other forms of public fundraising.

ASIC has previously highlighted the importance of investors understanding both the benefits and risks of investing via crowd-sourced funding. Further information regarding crowd-funding can be found on ASIC's MoneySmart website.

2.2 Release of guidance on sell-side research

21 December 2017 - ASIC has released regulatory guidance on managing conflicts of interest and handling inside information by Australian Financial Services (AFS) licensees that provide sell-side research.

Regulatory Guide 264 *Sell-side research* (RG 264) looks at the key stages of a capital raising transaction and provides specific guidelines on how an AFS licensee should appropriately manage conflicts of interest during each of these stages, including the preparation and production of investor education reports. RG 264 also provides general guidance for AFS licensees on the identification and handling of inside information by research analysts, and about the structure and funding of sell-side research teams.

The guidance addresses uneven market practice that has developed since the publication of Regulatory Guide 79 *Research report providers: Improving the quality of investment research* (RG 79) in 2004. It also responds to industry requests for more detailed guidance on sell-side research and supplements guidance in RG 79.

RG 264 takes into account feedback from stakeholders following public consultation, see Report 560 *Response to Submissions on CP 290 Sell-side research* (REP 560).

While RG 264 does not extend the regulatory framework in RG 79, ASIC will give industry six months to 1 July 2018 to make sure their compliance measures conform to the expectations set out in the guide.

Download

- Regulatory Guide 264 *Sell-side research*
- Report 560 *Response to Submissions on CP 290 Sell-side research*

Consultation Paper 290 *Sell-side research* and non-confidential submissions

2.3 Exchange traded products: guidelines for market licensees

ASIC has released Information Sheet 230 *Exchange traded products: Admission guidelines* (INFO 230). It sets standards for all licensed exchanges seeking to admit exchange traded products (ETPs) - including managed funds, exchange traded funds (ETFs) and structured products - to their market.

ASIC and the Australian Securities Exchange (ASX) have also agreed an admission process for ETPs on the ASX market where ASX will take full responsibility for the day-to-day admission process as it does with the admission of listed companies

The guidelines in INFO 230 largely reflect ASIC's existing expectations and current exchange market practice relating to approving ETP issuers, pricing of underlying assets of ETPs, exposure to derivatives, disclosure of portfolio holdings, liquidity provision and market making, securities lending, ongoing supervision of ETPs and issuers, waivers, product-naming considerations, and other types of ETPs.

2.4 Findings from 30 June 2017 financial reports

15 December 2017 - ASIC has announced the results from its review of the 30 June 2017 financial reports of 220 listed and other public interest entities.

Arising from that review, ASIC has made enquiries of 50 entities on 54 matters, seeking explanations of accounting treatments.

ASIC issued Information Sheet 203 *Impairment of non-financial assets: Materials for directors* (INFO 203) in June 2015 to assist directors and audit committees in considering whether the value of non-financial assets shown in a company's financial report continues to be supportable.

ASIC's risk-based surveillance of the financial reports of public interest entities for reporting periods ended 30 June 2010 to 31 December 2016 has led to material changes to 4% of the financial reports of public interest entities reviewed by ASIC. The main changes related to impairment of assets, revenue recognition and expense deferral.

The inquiries made by ASIC from reviews of the 30 June 2017 financial reports relating to different matters is presented in a table here. Inquiries of individual entities will not necessarily lead to material restatements. Matters involving 18 of the entities have been concluded without any changes to their financial reporting.

2.5 Marketplace lending survey

14 December 2017 - ASIC has released a report into its second survey of the marketplace lending industry, which has shown steady growth in both borrowing and lending activity in Australia across these platforms.

Marketplace lending allows investment in loans to consumers and small and medium enterprises (SMEs) and can provide an additional avenue of funding for business and consumers.

The survey covers marketplace lending activities that are regulated by ASIC. During the 2016-2017 financial year the marketplace lending industry continued to grow with survey results identifying $300 million in loans written to consumers and SMEs, nearly double the figure for 2015-16. Respondents reported a total of 7768 investors and 18,746 borrowers as at 30 June 2017, which is more than double the figure for 2015-16.

As with the 2015-16 survey, the provider revenue was predominately tied to loan origination, paid by borrowers. There was a moderate rise of 1.6% in overall default rates, to 2.2%. The number of complaints received by providers remains generally low at this stage, however, there was an increase in reported breaches and instances of fraud and cyber incidents.

Report 559 *Survey of marketplace lending operators* (REP 559) summarises ASIC's findings from the 2017 Marketplace Lending Industry Survey.

Download

- REP 559

3. Recent ASX Developments

3.1 ASX selects distributed ledger technology to replace CHESS

In December 2017 the Australian Stock Exchange (ASX) announced its intention to replace CHESS using distributed ledger technology (DLT) developed by its technology partner Digital Asset (DA). CHESS (Clearing House Electronic Subregister System) is the system used by ASX to record shareholdings and manage the clearing and settlement of equity transactions in Australia. ASX is now taking the opportunity to replace CHESS with a next generation post-trade platform using contemporary technology. This decision follows the successful build of enterprise-grade DLT software for core equity clearing and settlement functions, and the completion of extensive suitability testing by ASX and DA over the past two years.

ASX will now work with stakeholders on finalising the scope of Day 1 functionality for the new system, drawing on its extensive consultation that will continue in 2018. Day 1 functionality and the proposed timing for transition are expected to be released for market feedback at the end of March 2018.

More details relating to this announcement are available on the ASX website.

3.2 ASX Clear Operating Rules amendments - Minimum core capital requirements

In July 2017 ASX issued a consultation paper on draft amendments to the *ASX Clear Operating Rules*, *ASX Clear Operating Rules Procedures*, *Capital Liquidity Handbook* and revised *Business Activities Return* (BAR) in relation to the proposed changes to the approach for clearing participant minimum core capital requirements (MCCR). ASX received 3 responses from clearing participants however none of these provided feedback on the proposed amendments to the Rules and Procedures and other documents.

ASX will now proceed with the proposed changes to the MCCR. The Rule and Procedure amendments to implement this change became effective on 15 December 2017. Participants will not be required to meet any increased core capital requirement under the new approach until 1 January 2019.

The notice is available on the [ASX website](#).

3.3 ASX Clear Operating Rules amendments - Risk based capital requirements

ASX has made amendments to the risk based capital requirements set out in Schedule 1 of the *ASX Clear Operating Rules*. These amendments affect the definitions of "Financial Asset Revaluation Reserves", "Core Capital" and "Liquid Capital". These changes became effective from 1 January 2018.

The notice is available on the [ASX website](#).

3.4 ASX Clear Operating Rules amendments - Default broker requirements

ASX has made amendments to the *ASX Clear Operating Rules* to provide ASX Clear with the power to require a Clearing Participant that is a Market Participant to enter into an agreement with ASX Clear to act as a default broker and participate in any fire drills held by ASX Clear from time to time.

No notice of these amendments has been issued.

3.5 ASX Clear (Futures) Operating Rules amendments - Overnight margining

In December 2017 ASX made amendments to the *ASX Clear (Futures) Operating Rules* to enable ASX Clear (Futures), in the event of extreme market movement, to call an intra-day margin from Clearing Participants (Futures or OTC) on a Saturday. These amendments have been lodged with ASIC.

A notice was issued on the [ASX website](#) in November 2017 for related amendments to the procedures to the *ASX Clear (Futures) Operating Rules*. The amended procedures became effective on 27 November 2017.

3.6 Response to consultation - Changes to security status and timeframes related to company announcements

In December 2017, ASX released its response to a consultation paper on proposed changes to the process for advising of changes to equity market security status. This consultation followed on from the recommendations of an ASIC review into the September 2016 ASX Trade outage. The document summarises feedback received from stakeholders on ASX's September consultation paper and ASX's response to that feedback.

More details relating to this consultation paper can be found on the [ASX website](#).

3.7 Monthly activity report

On 4 January 2018 ASX released the [ASX Monthly Activity Report](#) for December 2017.

4. Recent Takeovers Panel Developments

4.1 Tap Oil Limited - Panel declines to make declaration

The Panel has declined to make a declaration of unacceptable circumstances in response to an application dated 24 November 2017 from Tap Oil Limited in relation to its affairs (see TP17/58).

Tap submitted that:

- Mr Chatchai Yenbamroong, who has a relevant interest in 22.67% of the shares in Tap, holding his interest both directly and indirectly through Northern Gulf Petroleum Holdings Limited; and
- Risco Energy Investments (SEA) Limited, and indirectly Suncastle Equities Inc, which have a relevant interest in 22.14% of the shares in Tap, or their ultimate controller or controllers, had become associated with each other.

The Panel conducted proceedings but decided not to make a declaration of unacceptable circumstances. The Panel considered that there was not sufficient material to establish that an association had been formed.

It was unclear from the materials submitted whether there has been sufficient disclosure of the persons (including shareholders in Suncastle) who may have a relevant interest in Risco's shareholding in Tap. The Panel considered that it was not desirable in the circumstances to continue making enquiries solely to determine this issue, noting that ASIC has oversight of this area.

The Panel will publish its reasons for the decision in due course on its website.

5. Recent Research Papers

5.1 Centre for Corporate Law and Securities Regulation Research Papers published in 2017

The following research papers and reports were published by members of the Centre for Corporate Law and Securities Regulation in 2017 and are available on the Social Science Research Network:

- A Jurisdictional Comparison of the Twin Peaks Model of Financial Regulation (2017) By Andrew Godwin, Timothy Howse and Ian Ramsay;
- An Evaluation of Debt Agreements in Australia (2017) By Vivien Chen, Lucinda O'Brien and Ian Ramsay;
- ASIC Enforcement Outcomes: Trends and Analysis (2017) By Ian Ramsay and Miranda Webster;
- Assessing Financial Regulatory Coordination and Integration with Reference to OTC Derivatives Regulation (2017) By Andrew Godwin, Ian Ramsay and Edwin Sayes;
- Bankruptcy and Debtor Rehabilitation: An Australian Empirical Study (2017) By Paul Ali, Lucinda O'Brien and Ian Ramsay;
- Consumer Leases and Indigenous Consumers (2017) By Paul Ali, Steve Kourabas, Cosima Hay McRae and Ian Ramsay;
- Financial Hardship Assistance Behind the Scenes: Insights from Financial Counsellors (2017) By Paul Ali, Evgenia Bourova and Ian Ramsay;
- Financial Market Manipulation and Insider Trading: An International Study of Enforcement Approaches (2017) By Lev Bromberg, George Gilligan and Ian Ramsay;

Fintech Sandboxes: Achieving a Balance between Regulation and Innovation (2017) By Lev Bromberg, Andrew Godwin and Ian Ramsay;

- Financial Stability Authorities and Macroprudential Regulation (2017) By Andrew Godwin, Steve Kourabas and Ian Ramsay;
- Insider Trading and Market Manipulation: The SEC's Enforcement Outcomes (2017) By Lev Bromberg, George Gilligan and Ian Ramsay;
- Review of the Financial System External Dispute Resolution and Complaints Framework: Supplementary Final Report (2017) By Ian Ramsay, Julie Abramson and Alan Kirkland;
- Review of the Financial System External Dispute Resolution and Complaints Framework: Final Report (2017) By Ian Ramsay, Julie Abramson and Alan Kirkland;
- International Commercial Courts: The Singapore Experience (2017) By Andrew Godwin, Ian Ramsay and Miranda Webster;
- Illegal Phoenix Activity: Is a 'Phoenix Prohibition' the Solution? (2017) By Helen Anderson, Jasper Hedges, Ian Ramsay and Michelle Welsh;
- The Potential Economic Gains from Increasing Public Law Enforcement Against Illegal Phoenix Activity (2017) By Jasper Hedges, Ian Ramsay, Michelle Welsh and Helen Anderson;
- Misfortune or Misdeed: An Empirical Study of Public Attitudes Towards Personal Bankruptcy (2017) By Paul Ali, Lucinda O'Brien and Ian Ramsay;
- No "Silver Bullet": A Multifaceted Approach to Curbing Harmful Phoenix Activity (2017) By Jasper Hedges, Helen Anderson, Ian Ramsay and Michelle Welsh;
- Penalties Regimes to Counter Corporate Misconduct in Australia - Views of Governance Professionals (2017) By George Gilligan, Andrew Godwin, Jasper Hedges and Ian Ramsay;
- Phoenix Activity: Recommendations on Detection, Disruption and Enforcement (2017) By Helen Anderson, Ian Ramsay, Michelle Welsh and Jasper Hedges;
- Registered Charities and Governance Standard 5: An Evaluation (2017) By Ian Ramsay and Miranda Webster;
- Regulation of Mutual Funds in Australia (2017) By Pamela Hanrahan and Ian Ramsay;
- Remunerating Corporate Insolvency Practitioners in the United Kingdom, Australia and Singapore: The Roles of Courts (2017) By Stacey Steele, Wee Meng Seng and Ian Ramsay;
- Reporting on Hardship Practice in the Consumer Credit and Energy Sectors: An Analysis (2017) By Evgenia Bourova, Ian Ramsay and Madeleine Roberts;
- Shadow Banking and Regional Coordination in Asia: Risks, Challenges and Benefits (2017) By Andrew Godwin, Ian Ramsay and Drossos Stamboulakis;
- Similar Insider Trading Laws, Different Enforcement Reality: An Evaluation of Australian and Singaporean Enforcement Approaches (2017) By Lev Bromberg, George Gilligan and Ian Ramsay;
- The Extent and Intensity of Insider Trading Enforcement - An International Comparison (2017) By Lev Bromberg, George Gilligan and Ian Ramsay;
- The Inherent Power of Common Law Courts to Provide Assistance in Cross-Border Insolvencies: From Comity to Complexity (2017) By Andrew Godwin, Timothy Howse and Ian Ramsay;
- The Policy and Practice of Enforcement of Directors' Duties by Statutory Agencies in Australia: An Empirical Analysis (2017) By Jasper Hedges, Helen Bird, George Gilligan, Andrew Godwin and Ian Ramsay;
- The Proper Purpose Rule as a Constraint on Directors' Autonomy - Eclairs Group Limited v JKX Oil & Gas Plc (2017) By Rosemary Langford and Ian Ramsay; and
- Twin Peaks: South Africa's Financial Sector Regulatory Framework (2017) By Andrew Godwin, Timothy Howse and Ian Ramsay.

5.2 Other recent research papers

(a) The changing landscape of auditor litigation and its implications for audit quality

This paper documents the declining role of s.10(b) of the *US Securities Exchange Act of 1934* (a general catch-all antifraud provision) in securities class-action lawsuits against auditors since the passage of the *US Private Securities Litigation Reform Act of 1995*. The decline is perhaps most noticeable in dismissal rates, as claims brought in recent years are increasingly dismissed at an early stage of the litigation process. To understand whether the waning influence of s. 10(b) has impacted audit quality - and to facilitate sharper potentially causal tests - the paper focuses on the US Supreme Court's 2007 and 2011 rulings in *Tellabs v Makor* and *Janus v First Derivative*, respectively. These decisions affected s. 10(b) litigation by making it more difficult to bring claims in some circuit courts and, in the case of Tellabs, easier to bring claims in other circuit courts.

The paper's analysis confirms the real impact of these cases by documenting changes in auditor litigation outcomes such as case dismissals and settlements in the affected circuits. Further, consistent with the idea that these changes in s. 10(b) liability exposure led to corresponding changes in audit quality, the paper finds that proxies for audit quality increased in the circuits in which auditor liability increased. By contrast, audit quality stayed the same or decreased in the circuits in which auditor liability decreased.

The changing landscape of auditor litigation and its implications for audit quality

(b) Corporate governance that 'works for everyone': Promoting public policies through corporate governance mechanisms

Corporate governance mechanisms are traditionally seen as devices for reducing agency costs between shareholders and managers in the context of private ordering. More recently, however, the UK and other governments have embraced regulations in the field of corporate governance as tools through which to impose public responsibilities on corporations. Among others, corporate governance mechanisms have been relied on to equalise wealth distribution, promote equality in the labour force, and pursue environmental goals.

This article assesses the justification, utility, and efficacy of using corporate governance to promote public aims. It finds that while it may be appropriate for corporate governance mechanisms to include public goals, the current overreliance on disclosure requirements and on indirect regulation to address societal issues is misguided. Instead, the article suggests that governments should view corporate governance mechanisms with public policy goals as complementary strategies, and not as substitutes, to direct external regulation.

Corporate governance that 'works for everyone': Promoting public policies through corporate governance mechanisms

(c) Board governance and corporate performance

This article examines the link between the monitoring capacity of the board and corporate performance of UK listed firms. The article also investigates how firms use the flexibility offered by the voluntary governance regime to make governance choices. The article finds a strong positive association between the board governance index the article constructs and firm operating performance. The article's results imply that adherence to the board-related recommendations of the *UK Corporate Governance Code* strengthens the board's monitoring capacity, potentially helping mitigate agency problems, but that investors do not value it correspondingly.

Moreover, in contrast to prior UK findings suggesting efficient adoption of Code recommendations, the article finds that firms at times use the Code flexibility opportunistically, aiming to decrease the monitoring capacity of the board, which is followed by subsequent underperformance. This finding questions the effectiveness of the voluntary approach to governance regulation followed in the UK and in many countries around the world.

Board governance and corporate performance

(d) Globalization and executive compensation

This paper identifies globalization as a factor behind the rapid increase in executive compensation and inequality over the last few decades. Employing comprehensive data on top executives at major US companies, the paper shows that compensation is higher at more global firms. The paper finds that pay responds not only to firm size and technology but also to exports conditional on other firm characteristics. Export shocks that are not related to the executive's talent and actions also increase executive compensation, indicating that globalization is influencing compensation through pay-for-non-performance. Furthermore, this effect is asymmetric, with executive compensation increasing due to positive export shocks but not decreasing due to negative shocks. Finally, export shocks primarily affect discretionary forms of compensation of more powerful executives at firms with poor corporate governance, as one would expect if globalization has enhanced rent-capture opportunities.

Overall, these results indicate that globalization has played a more central role in the rapid growth of executive compensation and US inequality than previously thought, and that both higher returns to top talent and rent-capture are important parts of this story.

Globalization and executive compensation

(e) International evidence on firm level decisions in response to the crisis: Shareholders vs other shareholders

The relationship between changes in GDP and unemployment during the 2008 financial crisis differed significantly from previous experiences and across countries. This paper studies firm-level decisions in France, Germany, Japan, the UK, and the US. The paper finds significant differences between the response of US and non-US firms. US firms significantly decreased their production costs relative to firms in other countries. They have also reduced debt, reduced dividend payout, and increased their cash holdings compared to firms in other countries. The differences are, in general, explained by differences in financial leverage. However, financial leverage does not explain differences between production decisions in German and US firms and between Japanese and US firms.

The paper argues that differences in firm governance between US firms and firms in Germany and Japan drive these responses. US firms are more prone to cut labor costs and reduce leverage compared to German firms and Japanese firms in order to achieve larger profits and a larger cash-cushion in the short-run.

International evidence on firm level decisions in response to the crisis: Shareholders vs. other shareholders

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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