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Bulletin No. 281

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1. Recent Corporate Law and Corporate Governance Developments

1.1 Licensing of debt management firms

15 January 2021 - The Federal Government has published an exposure draft of regulations that will require debt management firms to hold an Australian Credit License (ACL) when they are paid to represent consumers on matters related to credit activities.

The *National Consumer Credit Protection Amendment (Debt Management Services) Regulations 2021 (Cth)* (the Regulations) prescribe a new type of "credit activity", that will require providers of debt management services to hold an ACL. This means that providers of debt management services will need to apply for an ACL or seek a variation to the conditions of their existing ACL and meet the ongoing obligations imposed on credit licensees. These obligations include amongst other things, a requirement to meet the "fit and proper person" test, and to undertake their activities "efficiently, honestly and fairly". Licensees are subject to general conduct obligations and are required to be members of the Australian Financial Complaints Authority (AFCA).

The regulations define debt management assistance to include situations where a person (for a fee), by dealing directly with the consumer in the course of a business:

- suggests that the consumer apply for, or assists the consumer to apply for, a change to a credit contract for which the consumer is the debtor; or
- suggests that the consumer, or assists the consumer to:
    - make a complaint to the credit provider, AFCA, Australian Securities and Investments Commission (ASIC) or the Information Commissioner, in relation to a credit contract for which the consumer is the debtor; or
    - give a hardship notice (within the meaning of the Credit Code) to the credit provider under a credit contract for which the consumer is the debtor; or
    - institute proceedings or take any other action in relation to a credit contract for which the consumer is the debtor.

The exposure draft of the Regulations and Explanatory Statement are available on the [Treasury website](#).

1.2 Securities class action settlements in 2020 in Australia, Canada and the US

6 January 2021 - Institutional Shareholder Services (ISS) has published information on securities class action settlements in Australia, Canada and the United States (US) for 2020. According to ISS, the dollar amount of settlements in 2020 totaled US$5.84 billion, an increase of 61% over the US$3.62 billion in settlements during 2019. The number of worldwide settlements in 2020 where a monetary amount was agreed to totaled 133, an increase of 13% over the 118 settlements finalised during 2019.

There were 117 US settlements in 2020 (totaling US$5.5 billion), and six of these were Standard and Poor's 500 (S&P 500) listed companies. Outside of the US, there were a total of 16 settlements in 2020, ten in Canada (totaling US$117.2 million) and six in Australia (totaling US$173.2 million). According to ISS, no other country experienced a shareholder securities class action settlement during 2020.

Further information is available on the ISS website.

1.3 Report on improving consumer protection in the financial marketplace

5 January 2021 - The US Consumer Financial Protection Bureau (Bureau) Taskforce on Federal Consumer Financial Law (Taskforce) has published a report with recommendations on how to improve consumer protection in the financial marketplace. The Taskforce Report uses five interrelated principles that serve as the foundation for proposed systematic changes to the current US legal and regulatory framework: consumer protection, information and education, competition and innovation, regulatory modernization and flexibility, and inclusion and access.

In its report, the Taskforce makes approximately 100 recommendations to the Bureau, US Congress, and US state and federal regulators to strengthen consumer protection. Among the Taskforce recommendations are the following:

- authorise the Bureau to issue licenses to non-depository institutions that provide lending, money transmission, and payments services;
- expand access to the payment system by unbanked and underbanked consumers and ensure consistent treatment by applying the same rules to similar financial products;
- identify competitive barriers and make appropriate recommendations to policymakers and regulators for expanding access to the payments systems by non-bank providers;
- research and develop policies tailored to the unique challenges of formerly incarcerated people, and work with state and federal authorities to improve protection of this population;
- research and develop policies to address problems of financial inclusion in rural communities;
- research consumer reporting issues that arise in connection with a consumer's bankruptcy;
- consider the benefits and costs of preempting state law where conflicts can impede the provision of valuable products and services, such as the regulation of FinTech companies engaged in money transmission;
- work with other agencies to create a unified regulatory regime for new and innovative technologies providing services similar to banks; and
- assess periodically the accuracy and completeness of consumer credit reports.

To read the Taskforce Report Volume I click here.
To read the Taskforce Report Volume II click here.

1.4 2020 update on APRA-ASIC engagement

22 December 2020 - The Australian Prudential Regulation Authority (APRA) and the ASIC have published their first report on joint engagement activities which is required under the 2019 Memorandum of Understanding.

The update provides the following examples of joint engagement activities over the past 12 months:

- COVID-19 amplified the need for alignment in response to common problems. Both agencies worked together with the banking industry on measures to help customers faced with loan repayment difficulties because of the pandemic. APRA adjusted capital and provision requirements for loan deferrals, and worked together with ASIC to ensure that messaging to authorised deposit-taking institutions (ADIs), particularly in relation to expectations, was consistent and aligned. In August, the agencies worked jointly with industry on plans to review the position of all customers who had deferred loan repayments and the agencies continue to work on the ongoing performance of the broader credit portfolio. Central to this alignment was that data needed by each agency was captured in a single request;
- Each agency has available an array of enforcement tools that each seek to use efficiently and effectively. Conduct issues can give rise to breaches of legal requirements under the respective remits of both agencies. In two cases - Tidswell and Westpac - the agencies agreed that ASIC should be the lead regulator to address alleged misconduct. These decisions were designed to avoid significant duplication in the investigative process for each regulator and the institutions, and focus the institutions on a single regulatory response;
- In superannuation, APRA and ASIC have worked together to ensure guidance to trustees was integrated, including jointly informing all licensees on 1 April 2020 of current and new obligations prompted by the crisis. The agencies have also collaborated on developing and implementing a single pandemic data collection;
- APRA and ASIC's have worked together on business interruption insurance. The agencies continue to share data and analysis to understand the extent of industry exposure, and policyholder protection and solvency implications. APRA and ASIC participated in a cross-agency working group with the Treasury and the AFCA to assess the extent of the issue and advance the business interruption insurance test case with industry; and
- APRA and ASIC have aligned communication on key policy changes, such as recent updates to the agencies' respective frameworks because of changes to accounting standards relating to insurance contracts.

In 2021, APRA and ASIC's cooperation will be reinforced by the implementation of Recommendation 6.9 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry which will impose a statutory obligation to cooperate, share information and notify each other of suspected entity breaches of laws administered by the other.

1.5 SEC approves NYSE proposal to allow companies to raise capital through primary direct listings

22 December 2020 - The US Securities and Exchange Commission (SEC) has approved the New York Stock Exchange (NYSE) proposed rule change for a new alternative to the traditional initial public offering (IPO). This will enable the NYSE to allow an issuer, at the time of an initial listing on the NYSE, to conduct a primary offering as part of a direct listing without conducting a firm commitment underwritten offering. In an IPO underwritten on a firm commitment basis, an

underwriter or group of underwriters enter into an underwriting agreement with the issuer in which they commit to take and pay for a specified amount of shares at a set price. The underwriters' purchase price reflects a discount, or spread, to the public offering price, which is negotiated between the issuer and the underwriters. The underwriters purchase the securities at the agreed upon discount and then resell the securities to the initial investors at the public offering price prior to the opening of trading. The underwriters and the issuer generally determine the public offering price and the discount based on indications for interest from prospective initial purchasers, which typically are, in large part, institutional investors with ongoing relationships with the underwriters. When the securities begin trading on an exchange, the opening price is determined based on orders to buy and sell the securities and may vary significantly from the initial public offering price. In a direct listing, in contrast, there is no initial sale to an underwriter or pre-opening sale by the underwriter to the initial purchasers. Instead, initial sales are conducted through the exchange, with the prices determined based on matching buy and sell orders and in accordance with applicable listing rules.

The SEC release approving the NYSE rule change is available on the SEC website.

1.6 IOSCO publishes report on education of retail investors regarding risks of crypto-assets

22 December 2020 - The Board of the International Organization of Securities Commissions (IOSCO) has published a report that seeks to help regulators inform retail investors about the risks and characteristics of crypto-assets. Crypto-assets carry risks that retail investors may not fully understand, increasing the chance of losses on investments in these assets. The IOSCO report titled "Investor Education on Crypto-Assets" identifies an array of possible risks to investors, including such things as lack of market liquidity, volatility, partial or total loss of the invested amount, insufficient information disclosure and fraud. The report describes methods that regulators can use to provide educational material to retail investors on the risks of investing in crypto-assets and offers four areas of guidance covering the following activities:

- developing educational content about crypto-assets;
- informing the public about unlicensed or fraudulent firms;
- using a variety of communication channels to inform investors; and
- forming partnerships to develop and disseminate educational materials.

In recent years, IOSCO members have expressed concerns about the use of crypto-assets in areas ranging from trading, custody, clearing and settlement, accounting, valuation, intermediation and investment funds. In response, the IOSCO Board identified crypto-assets as one of its top work priorities for 2019 and 2020.

In January 2018, IOSCO issued a Statement on concerns related to Initial Coin Offerings (ICOs), noting the risks associated with ICOs, particularly regarding parties that target retail investors through online distribution channels, often from outside the investors' home jurisdiction. Crypto-assets distributed in an ICO are highly risky investments and vulnerable to abuse and fraud.

1.7 IOSCO report on the impact of COVID-19 on retail market conduct

22 December 2020 - The IOSCO Board has published a report titled "Initial Findings and Observations About the Impact of COVID-19 on Retail Market Conduct" that seeks to assist regulators in responding to the retail market conduct issues caused by stress events such as the current COVID-19 pandemic.

The report examines common retail misconduct risks that have arisen in the financial services industry during the pandemic and sets out measures to assist regulators in responding to this unprecedented and challenging environment. The report, prepared by IOSCO's Retail Market Conduct Task Force (RMCTF), shares preliminary findings and observations of IOSCO member experiences and identifies the common drivers of firm and retail investor behaviour, which together create increased opportunities for potential misconduct in periods of stress. Drawing on case studies from IOSCO members, the report also describes the measures that IOSCO members have used to mitigate these risks and derives lessons from their experiences.

The report describes how the COVID-19 crisis impacted firm and retail investor behaviour. IOSCO findings indicate that extreme price volatility during March-April 2020 and the growing pressure of COVID-19 on firms' profitability may have resulted in increased offerings of riskier products and retail investor flow into such products. The COVID-19 experience also highlights that retail investor vulnerability may take many forms and vulnerable investors may be more susceptible to financial exploitation during periods of market stress.

IOSCO's findings demonstrate a spectrum of retail misconduct ranging from the more egregious examples of fraudulent or predatory practices by unlicensed operators to incidents of inadvertent misconduct by regulated entities. Common types of potentially harmful behaviour that may increase during periods of stress include mis-selling; mis-labelling; and misleading disclosure and investment advice.

Based on its review of the case studies, IOSCO suggests a number of measures that regulators can take in responding to the challenges created by the COVID-19 pandemic. These measures include:

- proactive monitoring of investor behaviour and offerings targeting vulnerable investors;
- supervisory scrutiny of certain firm behaviour which may flag potential misconduct;
- regulatory communication during periods of stress;
- monitoring of return to normal and taking effective enforcement action;
- leveraging on experience from periods of stress (such as COVID-19) to enhance regulatory requirements and approaches;
- cross-border cooperation and regulatory coordination; and
- addressing risks emerging from remote working and social distancing requirements.

1.8 Parliamentary Committee report on litigation funding and the regulation of the class action industry

21 December 2020 - The Parliamentary Joint Committee on Corporations and Financial Services has published its report "Litigation funding and the regulation of the class action industry".

The report is divided into five parts:

- Part 1 provides background information, data and trends on class actions and litigation funding, and then sets out the rationale for the committee's approach to the key issues;

- Part 2 considers reasonable, proportionate and fair powers, procedure and practice in Federal Court class actions;
- Part 3 considers reasonable, proportionate and fair litigation funding fees and legal costs in class actions;
- Part 4 considers other regulatory measures, including oversight of conflicts of interests in litigation funded class actions and the financial services regulation of litigation funders in class actions; and
- Part 5 considers two final matters: shareholder class actions and national consistency across Australia's class action regimes.

The report is supportive of class actions and litigation funding. However, the report is critical of the current operation and regulation of class actions and litigation funding:

"Australia's highly unique and favourably regulated litigation funding market has become a global hotspot for international investors, including many based in tax havens and with dubious corporate histories, to generate investment returns unheard of in any other jurisdiction - in some cases of more than 500 per cent. This is directly the result of a regulatory regime described by the ASIC as 'light touch' and under which no successful action by a regulator has ever been taken against a funder. Participants in class actions are the biggest losers in this deal. When they finally get their day in court, it is the genuinely wronged class action members who are getting the raw deal of significantly diminished compensation for their loss, as bigger and bigger cuts are awarded to generously paid lawyers and funders."

The concerns outlined in the report include:

- the significant growth in shareholder class actions, and related issues;
- the increase in multiple and competing class actions and the delays added in resolving those matters;
- the "excessive profits obtained by litigation funders compared to the risks the funders are taking";
- the "scant regulatory framework covering litigation funders, including issues of the funder's duties to class action members and the determination and oversight of funding fees";
- whether the interests of class members are being served by the current regulatory environment; and
- inconsistencies between federal, state and territory class action regimes.

The report contains 31 recommendations of the majority members of the Committee and a separate report of minority members of the Committee who dissent from some of the majority's recommendations and make three recommendations.

The recommendations of the majority members of the Committee include recommendations that:

- the federal, state and territory governments work towards achieving consistency in class action regimes across jurisdictions;
- the Federal Government amend Part 9.6A (Jurisdiction and Procedure of Courts) of the Corporations Act 2001 No. 50 (Cth) and s. 12GJ of the Australian Securities and Investments Commission Act 2001 No. 51 (Cth) so that exclusive jurisdiction is conferred on the Federal Court of Australia (FCA) with respect to civil matters, commenced as class actions, arising under that legislation;
- the Federal Government permanently legislate changes to continuous disclosure laws in the Corporations (Coronavirus Economic Response) Determination (No. 2) 2020;
- the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 No. 244 (NSW) and the Legal Profession Uniform Conduct (Barristers) Rules 2015 No. 243

(NSW) be amended to prohibit solicitors, law firms and barristers from having a financial or other interest in a third-party litigation funder that is funding the same matters in which the solicitor, law firm or barrister is acting;
- there be enhanced disclosure to potential class members by legal representatives in litigation funded class actions;
- there be enhanced regulation of fees payable in litigation funded class actions; and
- there be enhanced disclosure of information to the court where the court is considering an application to approve a class action settlement.

1.9 UK Financial Conduct Authority introduces rule to enhance climate-related disclosures

21 December 2020 - The United Kingdom (UK) Financial Conduct Authority (FCA) has published a Policy Statement and final rule and guidance (Policy Statement 20/17 "Proposals to enhance climate-related disclosures by listed issuers and clarification of existing disclosure obligations") promoting better climate-related financial disclosures for UK premium listed commercial companies.

Companies will be required to include a statement in their annual financial report which sets out whether their disclosures are consistent with the recommendations of the Taskforce on Climate-related Financial Disclosures (TCFD), and to explain if they have not done so.

The rule will apply for accounting periods beginning on or after 1 January 2021, meaning the first annual financial reports subject to the rule would then be published in spring 2022.

1.10 Consultation on modernising business communications

18 December 2020 - The Australian Treasury has published a consultation paper that addresses how to modernise business communications by improving the technology neutrality of Treasury portfolio laws, to ensure they do not restrict the use of current and future technologies.

The objectives of the consultation is to obtain feedback from stakeholders that will assist the government to:

- identify and categorise the types of business communications that would benefit from technology neutrality changes, including those technology neutrality changes that will lower current compliance costs;
- develop principles to guide subsequent legislative change;
- identify legislative change that may be required to give effect to these principles and improve the technology neutrality for each category of communication;
- address sensitivities and risks associated with technology neutrality; and
- prioritise reform implementation.

The five categories of business communication which are the focus of the consultation are:

- written communications or transfers of information among stakeholders, including business, customers, and investors;

- communicating with regulators such as the ASIC, the APRA and the Australian Competition and Consumer Commission (ACCC). Examples include lodging documents and attending hearings;
- written signature requirements, beyond the proposed permanent changes to the execution of company documents relating to meetings;
- record-keeping requirements, including the keeping of books and registers; and
- the making of payments by customers, investors, regulators or businesses.

The consultation paper is available here.

1.11 Cloud outsourcing guidelines for financial service providers

18 December 2020 - The European Securities and Markets Authority (ESMA), the European Union's (EU) securities markets authority, has published the final report on its guidelines on outsourcing by financial service providers to cloud service providers (CSPs).

The Guidelines are intended to help firms identify, address and monitor the risks arising from cloud outsourcing arrangements. They provide guidance to firms on:

- the risk assessment and due diligence that they should undertake on their CSPs;
- the governance, organisational and control frameworks that they should put in place to monitor the performance of their CSPs and how to exit their cloud outsourcing arrangements without undue disruption to their business;
- the contractual elements that their cloud outsourcing agreement should include; and
- the information to be notified to competent authorities.

In addition, the Guidelines provide guidance to regulators on the supervision of cloud outsourcing arrangements, with a view to fostering a convergent approach in the EU.

1.12 Consultation on the impact of algorithmic trading

18 December 2020 - The ESMA has published a consultation paper seeking input from market participants on the impact of requirements under the *Markets in Financial Instruments Directive* (*Directive 2014/65* of the European Parliament and of the Council) and the *Markets in Financial Instruments Regulation* (*Regulation 600/2014* of the European Parliament and of the Council) regarding algorithmic trading, including high-frequency algorithmic trading.

The Consultation Paper covers the overall approach towards algorithmic trading, in particular:

- the authorisation regime;
- provisions for algorithmic and high-frequency traders; and
- provisions applicable to trading venues allowing or enabling these market participants.

In addition, the consultation paper addresses crisis-related issues, such as circuit breakers, and contemporary issues closely linked to algorithmic trading, including the deployment of speedbumps and the sequence of trade confirmations to individual participants versus the public disclosure of transactions.

1.13 Prototype climate-related financial disclosure standard

18 December 2020 - Five organisations working in in sustainability and integrated reporting have published a report that addresses standards for reporting on enterprise value for sustainability-related financial disclosure, together with a prototype climate-related financial disclosure standard.

Carbon Disclosure Project (CDP), the Climate Disclosure Standards Board (CDSB), the Global Reporting Initiative (GRI), the International Integrated Reporting Council (IIRC) and the Sustainability Accounting Standards Board (SASB), have co-authored an illustration of how their current frameworks, standards and platforms, along with the elements set out by the TCFD, can be used together to develop standards that enable disclosure of how sustainability matters create or erode enterprise value.

The report is available here.

1.14 Financial Sector Reform (Hayne Royal Commission Response) Act

17 December 2020 - The Financial Sector Reform (Hayne Royal Commission Response) Act 2020 No. 135 (Cth) was assented to on 17 December 2020 and amends the legislation listed below. According to the explanatory memorandum, the amending Act:

- strengthens the existing voluntary code of conduct framework to allow the ASIC to designate enforceable code provisions in approved codes of conduct;
- limits the circumstances in which an insurer can avoid a life insurance contract on the basis of non-fraudulent misrepresentation or non-disclosure by an insured;
- replaces the duty of disclosure for consumer insurance contracts with a duty to take reasonable care not to make a misrepresentation;
- places a cap on the amount of commission that may be paid in relation to add-on risk products; and
- makes other and related amendments.

This Act amends the following legislation:

- Australian Prudential Regulation Authority Act 1998 No. 50 (Cth);
- Australian Securities and Investments Commission Act 2001 No. 51 (Cth);
- Competition and Consumer Act 2010 1974 No. 51 (Cth);
- Corporations Act 2001 No. 50 (Cth);
- Insurance Act 1973 No. 76 (Cth);
- Insurance Contracts Act 1984 No. 80 (Cth);
- Life Insurance Act 1995 No. 4 (Cth);
- National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009 No. 135 (Cth);

- National Consumer Credit Protection Act 2009 No. 134 (Cth); and
- Superannuation Industry (Supervision) Act 1993 No. 78 (Cth).

1.15 Nasdaq proposes new listing rules relating to board diversity and disclosure

December 2020 - Nasdaq, the US securities exchange, has filed a proposal with the US SEC to adopt new listing rules related to board diversity and disclosure. If approved by the SEC, the new listing rules would require all companies listed on Nasdaq's US exchange to publicly disclose consistent, transparent diversity statistics regarding their board of directors. Additionally, the rules would require most Nasdaq-listed companies to have, or explain why they do not have, at least two diverse directors, including one who self-identifies as female and one who self-identifies as either an underrepresented minority (defined as an individual who self-identifies in one or more of the following groups: Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander or two or more races or ethnicities) or LGBTQ+. Foreign companies and smaller reporting companies would have additional flexibility in satisfying this requirement with two female directors.

According to Nasdaq, the goal of the proposal is to provide stakeholders with a better understanding of the company's current board composition and enhance investor confidence that all listed companies are considering diversity in the context of selecting directors, either by including at least two diverse directors on their boards or by explaining their rationale for not meeting that objective. As part of rationale for the new requirements, Nasdaq's proposal presents an analysis of over two dozen studies that found an association between diverse boards and better financial performance and corporate governance.

Under the proposal, all Nasdaq-listed companies will be required to publicly disclose board-level diversity statistics through Nasdaq's proposed disclosure framework within one year of the SEC's approval of the listing rule. The timeframe to meet the minimum board composition expectations set forth in the proposal will be based on a company's listing tier. Specifically, all companies will be expected to have one diverse director within two years of the SEC's approval of the listing rule. Companies listed on the Nasdaq Global Select Market and Nasdaq Global Market will be expected to have two diverse directors within four years of the SEC's approval of the listing rule. Companies listed on the Nasdaq Capital Market will be expected to have two diverse directors within five years of the SEC's approval. For companies that are not in a position to meet the board composition objectives within the required timeframes, they will not be subject to delisting if they provide a public explanation of their reasons for not meeting the objectives.

2. Recent ASIC Developments

2.1 Application for relief - Insurance Council of Australia

14 January 2021 - As a result of regulatory relief given to Australia Post by the Government, ASIC has issued a no-action position in relation to breaches of the following provisions of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) and Corporations Regulations 2001 No. 193 (Cth) (the Corporations Regulations):

- s. 941D of the Corporations Act - the requirement to provide a Financial Services Guide within five business days of advice being provided in time-critical circumstances
- s. 1012G of the Corporations Act - the requirement to provide a Product Disclosure Statement (PDS) within five business days of a product being issued in time-critical circumstances
- r. 7.9.15C(5)(b)(i) of the Corporations Regulations - the requirement to provide a document containing dollar disclosure within five business days of a general insurance product being issued.

The Insurance Council of Australia (ICA) sought the relief for its members due to the effect of regulatory relief given to Australia Post by the Australian Postal Corporation (Performance Standards) Amendment (2020 Measures No 1) Regulations 2020 (Cth). The regulatory relief given to Australia Post temporarily adjusts Australia Post's performance standards by relaxing some delivery timeframes until 30 June 2021 ("postal standards relief"). As a result of the postal standards relief, it may not be possible in all cases for insurers to comply with obligations under ss. 941D and 1012G of the Corporations Act and r. 7.9.15C(5)(b)(i) of the Corporations Regulations, to the extent those provisions require documents to be given within five business days of specified events.

ASIC's no-action position is subject to the following conditions:

- The issuer must extend the cooling-off period for consumers who are sent a PDS or dollar disclosure document by mail by an additional five days ("additional cooling-off period") over the period specified in s. 1019B of the Corporations Act ("statutory cooling-off period");
- The regulated person must take reasonable steps to advise the consumer of the additional cooling-off period when the product is issued; and
- If a consumer seeks to return the product outside the statutory cooling-off period but within the additional cooling-off period, the issuer must allow the consumer to exercise their right of return, and they must refund the consumer in a way that is otherwise consistent with s. 1019B of the Corporations Act.

The no-action position ceases when the regulatory relief given to Australia Post expires.

ASIC's letter to the ICA is available on the ASIC website.

2.2 ASIC approval of variations to the Banking Code

8 January 2021 - ASIC has approved variations to the Banking Code of Practice (the Code). The variations, as proposed by the Australian Banking Association (ABA), do the following:

- amend the Code's definition of "banking services" to address an anomaly in the Code's previous wording that had the unintended result of excluding certain types of small business banking customers who would otherwise meet the Code's definition of "small business";
- make some minor amendments to the Code's definition of "small business";
- extend the application of the Code's COVID-19 Special Note, which allows for special application of specified Code provisions in light of the extraordinary external environment caused by COVID-19, for a further six months until 1 September 2021;

- specify situations in which banks may decline to continue dealing with a representative that a customer in financial difficulty has appointed, if the bank reasonably considers that representative is no longer able to act in the customer's best interests; and
- align the Code's timeframes for responding to complaints with the updated timeframes in ASIC's Regulatory Guide 271 *Internal dispute resolution*, which is due to commence on 5 October 2021.

Background

ASIC previously approved the Code, as a whole, in December 2019. That Code commenced on 1 March 2020. On 1 January 2021, as part of the Financial Sector Reform (Hayne Royal Commission Response) Bill 2020, which received Royal Assent on 17 December 2020, a new framework commenced for ASIC's approval of codes of conduct.

If an application is made to vary an approved code of conduct, ASIC may, by legislative instrument, approve the variation. In the approval, ASIC may identify a provision of the code of conduct as an "enforceable code provision" if ASIC considers that the provision or provisions meet specific legislative criteria.

This approval does not identify any enforceable code provisions. The relatively narrow set of variations are changes to the existing Code provisions, and the ABA will be commencing its comprehensive triennial review of the Code later in 2021. The terms of reference for that review will specifically consider the enforceable code provisions framework.

The changes to the small business definition were recommended by Pottinger, the independent firm who reviewed the definition in September and October 2020. The review recommended that those changes be made now and that the more comprehensive changes will be considered as part of the Code's triennial review.

View the ASIC Corporations (Approval of Variation March 2020 Banking Code of Practice) Instrument 2021/11 and Explanatory Statement.

2.3 Audit inspection findings for 12 months to 30 June 2020

22 December 2020 - ASIC has reported on the results from its audit firm inspections for the 12 months to 30 June 2020 and has released a supplementary report of audit quality measures, indicators and other information.

Audit inspection findings

ASIC's latest review found that auditors did not, in ASIC's view, obtain reasonable assurance that the financial reports were free from material misstatement in 27% of the 179 key audit areas that ASIC reviewed across 53 audit files. The results compare to 26% in the 12 months to 30 June 2019. The largest numbers of adverse findings were in the audit of asset values, particularly impairment of non-financial assets and the audit of revenue.

Since 2019, ASIC has undertaken a number of regulatory initiatives to promote audit quality, although it was too early for these measures to be reflected in findings from the current review. These include:

- more enforcement actions involving auditor misconduct, with twelve matters concerning auditor misconduct currently being considered or progressed by ASIC for possible enforcement outcomes;
- transparency of audit inspection results, with ASIC's individual audit inspection reports for the largest six firms being made public during 2019 and 2020;
- ASIC reviews of conflicts of interest, firm governance, accountability for quality, culture, talent and root cause analysis focused on audit quality at the largest audit firms; and
- reporting ASIC's findings directly to audit committees.

ASIC's findings do not necessarily mean that the financial reports audited were materially misstated. Rather, in ASIC's view, the auditor may not have a sufficient basis to support their opinion on the financial report.

ASIC has reviewed a limited number of files and focused on higher risk audit areas. ASIC's separate risk-based surveillance of the financial reports of public interest entities led to material changes to net assets and profits for 4% to 5% of these financial reports reviewed in recent years.

Audit quality measures, indicators and other information

ASIC Report 678 *Audit quality measures, indicators and other information: 2019-20* (REP 678) provides a broad group of audit quality measures, indicators and other information to supplement ASIC's audit inspection findings.

It includes information from the largest six audit firms showing that the firms caused 78 material corrections to net assets and net profit after tax prior to the release of the financial reports of the largest 300 Australian Securities Exchange (ASX) - listed Australian entities for financial years that ended from 1 April 2019 to 31 March 2020.

2.4 ASIC review of 30 June 2020 financial reports

17 December 2020 - ASIC has announced the results from its review of the financial reports of 170 listed entities (and other public interest entities with larger numbers of users of their reports) for the year ended 30 June 2020. The review was conducted as part of ASIC's ongoing risk-based reviews of financial reports.

ASIC has made inquiries of 27 entities on 58 matters. The largest numbers of matters relate to impairment of non-financial assets, asset values and disclosure in the operating and financial review. Other inquiries related to revenue recognition, tax accounting, provisions, non-International Financial Reporting Standards (IFRS) profit measures, operating segments, and classification of debt.

Many companies made useful and meaningful disclosures on the impact of COVID-19 conditions. However, some entities with businesses adversely affected by the pandemic did not appear to give sufficient attention to the reporting of asset values and financial position.

3. Recent ASX Developments

3.1 ASX Listing Rules Guidance Note amendments

9 December 2020 - ASX has released updates to ASX Listing Rules Guidance Notes 5 Chess Depositary Interests and 8 Continuous Disclosure: Listing Rules 3.1 - 3.1B. They are available on the ASX website at:

- Guidance Notice 5; and
- Guidance Notice 8.

The change to Guidance Note 5 is relatively minor - an amended footnote addressing the use of the CHESS settlement facility by entities formed in Israel, noting the need for those entities to have a provision in their constitution that securities holders are not entitled to a certificate for their securities.

The changes to Guidance Note 8 are more significant and include substantial enhancements to the materials on earnings guidance and earnings surprises in ss. 7.1 to 7.3 of, and worked examples F and G in Annexure A to, that Guidance Note. This includes important new guidance that:

"Where an entity does not have published earnings guidance on foot for the current reporting period and it is covered by sell-side analysts, ASX would recommend that the entity carefully consider notifying the market of a potential earnings surprise if and when it expects there to be a 15% or greater difference between its actual or projected earnings for the period and its best estimate of the market's expectations for its earnings (applying the guidance under the question 2 above 'How does an entity translate sell-side analyst forecasts into an estimate of the market's expectations for its earnings?')."

ASX has also taken the opportunity to make some minor editorial changes to Guidance Note 8, including noting the recent and important decision in *ASIC v Big Star Energy Limited (No 3)* [2020] FCA 1442 (see footnote 111). In that case, the FCA held that a listed entity breached Listing Rule 3.1 and s. 674(2) of the Corporations Act 2001 No. 50 (Cth) by announcing the sale of a significant asset without disclosing:

- the identity of the purchaser;
- that the entity had done no due diligence to verify the capacity of the purchaser to complete the purchase; and
- that the entity had in fact been informed by the purchaser that it had not yet received all funding approvals required to complete the purchase.

The transaction ultimately failed to complete. The court specifically rejected an argument by the entity that because the purchase was for a cash consideration, the identity of the purchaser was not material.

Mark-ups of the changes to the Guidance Notes 5 and 8 are available at:

- Guidance Notice 5 - mark-ups; and
- Guidance Notice 8 - mark-ups.

3.2 Reports

On 7 January 2021, ASX released the [ASX Group Monthly Activity Report for December 2020](#).

4. Recent Takeovers Panel Developments

4.1 Thorn Group Limited 01 & 02 - Declaration of unacceptable circumstances and orders

18 December 2020 - The Takeovers Panel has made a declaration of unacceptable circumstances and final orders in relation to an application dated 14 October 2020 by Forager Funds Management Pty Ltd and an application dated 21 October 2020 by Vaspip 2 Pty Ltd (Vaspip), both in relation to the affairs of Thorn Group Limited (Thorn) (ASX: TGA) (see TP20/59 and TP20/60).

Background

The following facts are in summary form. On 31 August 2020, Thorn received a s. 249D of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) request to call a general meeting of Thorn and a s. 249P of the Corporations Act request to distribute a members' statement.

On 16 September 2020, Thorn announced that, having taken advice, it considered that the requisitioning shareholders' requests were invalid.

On 23 September 2020, Vaspip (one of the requisitioning shareholders) commenced proceedings in the Supreme Court of Victoria (the Court) seeking orders for Thorn to call the general meeting and relief from any alleged invalidity in the requisitioning shareholders' requests.

On 12 October 2020, Thorn announced that:

- the Thorn Board had declared a fully franked special dividend of $0.075 cash per share (totalling approximately $24.2 million) (Special Dividend);
- Thorn's dividend reinvestment plan (DRP) would apply to the Special Dividend with the last day for elections under the DRP being 20 October 2020; and
- the Thorn Board was considering Thorn's ability to undertake a buy back of Thorn shares for an amount in the order of $15 million to $25 million.

On 14 October 2020, the Court declared that the requisitioning shareholders' requests were not invalid by reason of a procedural irregularity.

On 28 October 2020, Thorn called an extraordinary general meeting in response to the s. 249D of the Corporations Act request scheduled to be held on 3 December 2020 (Thorn EGM). (The Panel made interim orders on 1 December 2020 requiring the Thorn EGM to be adjourned (see TP20/83)).

On 3 November 2020, Thorn paid the Special Dividend and issued shares under the DRP. The total number of Thorn shares issued under the DRP was 60,764,233.

On 5 November 2020, Thorn's largest shareholder, Somers Limited and its associates (Somers), gave a substantial holder notice disclosing that its voting power in Thorn had increased from

30.57% to 39.42% (and from 31.57% to 39.42% as a result of their participation in the DRP). Somers received 49,241,938 Thorn shares under the DRP.

At the time Thorn made its announcements on 12 October 2020, paid the Special Dividend and issued shares under the DRP, Thorn's Board consisted of 3 directors, only one of whom was considered independent by Thorn. The other 2 directors were nominated to act as directors by Somers, and the Chair of Thorn is also the Chair of Somers Limited.

Declaration

The Panel considered, among other things, that:

- it was apparent that the DRP had the potential to have a substantial effect on control of Thorn in a manner inconsistent with the purposes in s. 602 of the Corporations Act given a combination of factors, including:
    - the size of the Special Dividend relative to Thorn's market capitalisation and previous dividends;
    - the known or likely preferences of Thorn's substantial shareholders;
    - the short time given to shareholders to make an election to participate in the DRP;
    - the uncertainty regarding Thorn's plans for further major restructuring;
    - the lack of disclosure regarding any control effects of the DRP and the response, or likely response, of Thorn's substantial shareholders to the DRP; and
    - the potential effect of a large number of newly issued shares on voting at the Thorn EGM.
- Thorn did not adequately consider the potential control effects of applying the DRP to the Special Dividend or the potential conflicts of interest of the Thorn Board when considering potential control effects; and
- the effect of applying the DRP to the Special Dividend in the circumstances was likely to have an effect on control and result in Somers acquiring a substantial interest in Thorn.

The Panel considered that the circumstances were unacceptable:

- having regard to the effect that the Panel is satisfied they have had, are having, will have or are likely to have on the control, or potential control, of Thorn or the acquisition, or proposed acquisition, by a person of a substantial interest in Thorn; and
- in the alternative, having regard to the purposes of Chapter 6 (Takeovers) set out in s. 602 of the Corporations Act.

Orders

The Panel has made orders that, among other things:

- cancel sufficient shares issued under the DRP to Somers to return its voting power to 31.57% being its voting power immediately prior to the issue of shares under the DRP;
- require Thorn to pay Somers its Special Dividend entitlement in cash in lieu of the cancelled shares; and
- require Thorn to resume the adjourned Thorn EGM on or after Monday, 4 January 2021 and no later than noon on Friday, 15 January 2021, with such date to be notified to shareholders through ASX.

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 Research Papers published in 2020

The following research papers were published by members of the Centre for Corporate Law in 2020 and are available on the Social Science Research Network:

- A "Damaging Loophole" "Long Overdue" for Closing: Extending Consumer Protections Against Unfair Contract Terms to Insurance (2020) By Evgenia Bourova, Ian Ramsay and Paul Ali;
- An Analysis of Board of Director Appraisal Disclosures in Australia and the United States (2020) By Ian Ramsay and Mihika Upadhyaya;
- Capital Raising by Companies During the COVID-19 Crisis: An Analysis of Recent ASX Reforms (2020) By Lloyd Freeburn and Ian Ramsay;
- Cause to Complain? Consumer Experiences of Internal and External Dispute Resolution in the Context of General Insurance (2020) By Evgenia Bourova, Ian Ramsay and Paul Ali;
- Conflicts and Coherence in the Charities Sphere: Would a Conflict By Any Other Name Proscribe the Same? (2020) By Rosemary Teele Langford;
- Dystopian Accessorial Liability' or the End of Stepping Stones As We Know It? (2020) By Rosemary Teele Langford;
- Equity Crowdfunded Companies in the United Kingdom: What Factors Determine Post-campaign Success? (2020) By Steve Kourabas, Ian Ramsay and Mihika Upadhyaya;
- Financial Crisis Management Under the Twin Peaks Model of Financial Regulation - Australia and the UK Compared (2020) By Andrew Godwin, Steve Kourabas and Ian Ramsay;
- Frustratingly Unclear? The Interplay Between Common Law, Statute and the ACL in Assessing Consumer Rights in a Time of Crisis (2020) By Alex Jane and Jeannie Marie Paterson;
- Green Bonds: Legal and Policy Issues (2020) By Lloyd Freeburn and Ian Ramsay;
- Insolvent Trading, Charitable Companies and COVID-19 (2020) By Rosemary Teele Langford;
- "Legitimate Expectations" and the Oppression Remedy (2020) By Stephanie CB Brenker and Ian Ramsay;
- Online Payday Lenders: Trusted Friends or Debt Traps? (2020) By Vivien Chen;
- Purpose-Based Governance: A New Paradigm (2020) By Rosemary Teele Langford;
- Pursuit Revisited (2020) By Rosemary Teele Langford;
- RegTech Innovation and Cooperation - Australia and China Compared (2020) By Andrew Godwin, Stacey Steele, Dong Yang and Meihui Zhang;
- Scrutinising COVIDSafe: Frameworks for Evaluating Digital Contact Tracing Technologies (2020) By Adam Lodders and Jeannie Marie Paterson;
- The Contours and Content of the "Creditors" Interests Duty (2020) By Rosemary Teele Langford and Ian Ramsay;
- The Geography of Bankruptcy in Australia (2020) By Lucinda O'Brien, Malcolm Edward Anderson and Ian Ramsay;
- The "Safe Harbour" Reform of Directors' Insolvent Trading Liability in Australia: Insolvency Professionals' Views (2020) By Ian Ramsay and Stacey Steele;
- Use of the Corporate Form for Public Benefit: Revitalisation of Australian Corporations Law (2020) By Rosemary Teele Langford; and
- When Is an Individual Investor Not in Need of Consumer Protection? A Comparative Analysis of Singapore, Hong Kong, and Australia (2020) By Wai Yee Wan, Andrew Godwin and Qinzhe Yao.

5.2 Virtual shareholder meetings in Australia

The COVID-19 pandemic has led to some countries, including Australia, enacting temporary changes to their corporate laws to allow virtual meetings of shareholders to be conducted. The purpose of this article is to identify and evaluate the corporate governance arguments arising with a move to virtual meetings. These arguments include whether virtual meetings increase shareholder accessibility and engagement or reduce the accountability of directors and management.

Virtual shareholder meetings in Australia

5.3 Carrying on business in Australia

The concept of carrying on business in Australia appears frequently in Australian legislation and can have significant implications for those whose activities fall within its parameters. The purpose of this research note is twofold. The first is to explain why the concept of carrying on business in Australia is important, both by reference to the frequency with which the phrase or variants of it are found in Australian legislation, and also by reference to the key obligations imposed on those found to be carrying on business in Australia under the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) and the Competition and Consumer Act 2010 1974 No. 51 (Cth). For instance, under the Corporations Act, a foreign company must not carry on business in Australia unless it is registered with the ASIC. Once registered, the foreign company has numerous obligations, including to lodge certain financial information annually with ASIC and to have a registered office in Australia. In addition, the territoriality of certain provisions of the Corporations Act, including the directors' duties provisions and insider trading provisions, can depend on whether a business is carried on in Australia. The second purpose of the research note is to identify the factors that are relevant to determining when a business is carried on in Australia, based on an analysis of the case law in which courts have considered the concept.

Carrying on business in Australia

5.4 Global Investor-Director Survey on Climate Risk Management

Changes in the global climate are having profound impacts on business operations, governance, and organizational management around the world. Boards of directors are searching for ways to account for these changes as they help guide their organizations, and investors are increasingly concerned about how these changes might impact their portfolios. This global survey, conducted by a team of researchers at the Ira M. Millstein Center for Global Markets and Corporate Ownership at Columbia Law School and experts at LeaderXXchange, seeks to understand how - if at all - institutional investors and board directors incorporate climate-related issues in their investment decision making and their oversight responsibilities, respectively. It is among the first global survey of its kind targeting both investors and directors to probe their responses on climate risk management using two tracks aggregated in a single survey. The survey collected data on a broad range of topics, including demographic information of respondents and their views on issues such as materiality of climate change, training on climate change issues, disclosure of climate risks, climate risk management, board oversight and engagement and proxy voting on climate-related issues. The authors find a strong majority of respondents across groups rank climate issues high up on their list of important considerations. That said, climate issues appear to attract stronger attention among investors (as opposed to directors), women, younger respondents, and European respondents.

Global investor-director survey on climate risk management

5.5 Corporate governance implications of equity crowdfunding

Equity crowdfunding seeks to promote the fundraising efforts of micro, small, and medium enterprises. In support of this aim, policy makers around the world have constructed regulatory frameworks that provide an exemption from the traditional requirements that accompany a public offer of shares for corporations wishing to raise funds through equity crowdfunding. This has expanded the number and type of corporations that can obtain funds from the broader public and empowers these enterprises to raise funds outside of the traditional financial sector.

While ostensibly just another corporate fundraising mechanism, equity crowdfunding also establishes a new set of corporate circumstances that effect our understanding of corporate governance. In particular, equity crowdfunding creates a new class of corporate actor: a widely dispersed group of shareholders consisting of investors that, while relatively unsophisticated financial investors, are driven to invest through the combined promise of potential financial return on investment and the desire to contribute towards an enterprise that benefits the community.

Equity crowdfunding therefore reintroduces a key aspect of the Berle and Means corporation into the corporate governance framework - widely dispersed shareholders. However, the process tweaks our understanding of the Berle and Means corporation by applying this shareholder cohort to private corporations and recognising an element of community benefit as a motivator for investment. This chapter explores some of the corporate governance implications of this evolution in corporate fundraising.

Corporate governance implications of equity crowdfunding

5.6 A comprehensive review of the global development of Initial Coin Offerings (ICOs) and their regulation

ICOs represent an innovative and new funding mechanism for new technology ventures. In the authors' review of the industry's evolution, they show that despite its short history, there have been dramatic changes and shifts in the number of ICOs, the amount of money raised, the geographic distribution of ICOs, and their regulation. This dynamism calls into question current research practices and findings. The authors propose that scholars sort out and differentiate supply of vs. demand for ICO funding, taking geography and regulation into account with a global perspective.

A comprehensive review of the global development of ICOs and their regulation

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5.7 Inside the regulatory sandbox: Effects on fintech funding

Policymakers around the world are adopting regulatory sandboxes as a tool for spurring innovation in the financial sector while keeping alert to emerging risks. Using unique data for the UK, this paper provides the first evidence on the effectiveness of the world's first sandbox in improving fintechs' access to finance. Firms entering the sandbox see a significant increase of 15% in capital raised post-entry, relative to firms that did not enter; and their probability of raising capital increases by 50%. The results suggest that the sandbox facilitates access to capital through two channels: reduced asymmetric information and reduced regulatory costs or uncertainty. The results are similar when the authors exploit the staggered introduction of the sandbox and compare firms in earlier to those in later sandbox cohorts, and when the authors compare participating firms to a matched set of comparable firms that never enters the sandbox.

Inside the regulatory sandbox: effects on fintech funding

5.8 The unfinished business of regulating clearinghouses

Financial derivatives have been widely blamed for causing the 2008 financial crisis. These complex instruments created a deep and opaque web of bilateral links between major financial institutions that contributed to the transmission of systemic risk throughout financial markets. In order to stabilize the derivatives markets, legislators included radical provisions in the *Dodd-Frank Wall Street Reform Act 2010*. As a result, traders are now required to process derivatives through clearinghouses: specialized risk managers that act as middlemen between buyers and sellers and guarantee each party's performance.

Policymakers believed that clearinghouses would provide much-needed stability in derivatives markets by acting as designated systemic risk managers. However, this article argues that the effect of clearinghouses on systemic risk is less clear-cut than scholars and policymakers have generally believed. While clearinghouses have removed much of the financial risk from markets, they have simultaneously concentrated it within their own walls. Yet, these walls stand on fragile foundations: the economic and governance incentives of clearinghouses and their stakeholders are misaligned, which could undermine their systemic resilience.

This article contends that the current regulatory framework has critical, overlooked flaws that exacerbate clearinghouses' moral hazard while creating new, risky, too-big-to-fail institutions. It urges policymakers to intervene: in order to rectify this situation, financial regulators must do more to ensure that clearinghouses are bastions of financial stability and not systemic risk amplifiers. The implementation of a multi-stakeholder board and the creation of hybrid financial instruments to complement the capital structure of clearinghouses are the first steps toward enhancing the accountability and systemic resilience of these critical market infrastructures.

The unfinished business of regulating clearinghouses
