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Bulletin No. 269

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Detailed Contents

1. Recent Corporate Law and Corporate Governance Developments

1.1 APRA 2019 year in review

17 January 2020 - The Australian Prudential Regulation Authority (APRA) has published Safeguarding Australia's Wellbeing: APRA 2019 Year in Review (the Review). It is stated in the Review that this new annual publication is designed to highlight the actions and decisions APRA has taken over the past year to fulfil its mandate to protect the financial wellbeing of the Australian community.

The Review is divided into three main parts:

- financial sector resilience (operating environment; the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Financial Services Royal Commission); APRA and the Australian Securities and Investments Commission (ASIC) relationship; APRA Capability Review; APRA's Corporate Plan; explaining APRA's mandate; greater transparency by APRA; building resilience: cross-industry initiatives; building resilience: internal initiatives);
- sector developments (authorised deposit-taking institutions; general insurance; life insurance; private health insurance; superannuation); and
- APRA organisation (new organisational structure; leadership and culture; APRA and diversity).

1.2 Investor survey of corporate governance trends in 2020

10 January 2020 - Russell Reynolds Associates has published the results of their survey 2020 Global & Regional Corporate Governance Trends.

For this survey, they interviewed over 40 global institutional and activist investors, pension fund managers, proxy advisors and other corporate governance professionals to identify the corporate governance trends that will impact boards and directors in 2020. Australia is included in the global survey.

For the first time, in 2020, the survey finds focus on the "E" and the "S" of environment, social and governance (ESG) as the leading trend globally, including in the United States (US), where it traditionally has not received as much attention by boards. Many of the key global trends for 2020, such as board oversight of human capital management (HCM), can be seen as subsets of ESG.

Highlights of the survey:

- greater focus on the E&S of ESG. Beyond the global emphasis on good governance, environmental and social issues appear to be taking the greatest precedence for investors, moving from being a national or regional focus to being a global phenomenon. In 2020, boards will be expected to strengthen their oversight and knowledge of material E&S matters and disclose their connection to the business in the form of risks and opportunities. Consensus is expected to emerge around reporting frameworks such as the Task Force on Climate-related Financial Disclosures (TCFD) and Sustainability Accounting Standards Board to help guide companies when reporting on E&S criteria;
- increasing importance of corporate purpose. Corporate purpose and stakeholder considerations have been business norms in various parts of the world for decades. In August 2019, 181 out of 188 member chief executive officers of the US Business Roundtable signed on to an amended Statement on the Purpose of a Corporation, putting aside the traditional view that maximising shareholder returns is the first priority. This was followed by a December announcement from the World Economic Forum updating their 2020 Davos Manifesto (last published in 1973) to centre on principles that guide companies into the Fourth Industrial Revolution. The manifesto - like the Business Roundtable's statement - challenges companies to put stakeholders at the heart of a company's purpose. There remains a great deal of scepticism concerning the practical application of these documents, but public opinion in many countries appears to be shifting against shareholder primacy;
- better board oversight of corporate culture and HCM. Investors are asking what the board is doing to ensure the culture is robust and can withstand transformation and change. Investors would like more transparency on board involvement in culture and HCM to determine whether boards are providing adequate oversight. Data and analysis on corporate culture will play a key part in this oversight by boards. Directors in 2020 should appreciate the impact of culture on hiring, retention and productivity. Management will need to satisfy the board that the company has the culture and talent needed to successfully execute on strategy;
- more expansive view of board diversity that includes ethnicity and race. Considerable strides have been made globally around board gender diversity. As institutional investor voting power grew dramatically, so did demands for gender diversity. In 2020, boards will begin to experience additional pressure to consider ethnic and racial diversity. This phenomenon will vary by country. In the US, it will be driven by investors such as Vanguard. In the United Kingdom (UK), it will be as a consequence of the Parker Review. In Japan, the push to add more international directors will also broaden board diversity. In Canada, it will be the Business Corporations Act legislation that will require federally incorporated companies to disclose detailed information on the diversity of board directors and senior management. There will continue to be jurisdictions around the world where it will be harder for this trend to gain traction; and
- companies facing wider forms of activism. Globally, investor activism continues to evolve and grow, creating a kaleidoscope of styles and approaches that change year to year. In 2020, increased activism is expected with greater influence from both the traditional "activist" investors in this space as well as larger non-governmental organisations. In some countries, employee shareholder activism around "#metoo" or climate risk has been successful at garnering public attention and impacting management decision-making. To prepare for these situations, boards are improving their effectiveness

through more robust board evaluation processes. Boards are also engaged with management in scenario planning to ensure role clarity in crisis situations.

1.3 UK FRC: Improved governance and reporting required to promote sustainability and trust in business

9 January 2020 - Companies need to improve their governance practices and reporting if they are to demonstrate their positive impact on the economy and wider society, according to a new report Annual Review of the UK Corporate Governance Code from the UK Financial Reporting Council (the FRC).

While changes to the *2018 UK Corporate Governance Code* (the 2018 Code) raised the bar and have led to some high-quality reporting, greater focus is needed on longer term sustainability including stakeholder engagement, diversity and the importance of corporate culture**.**

The FRC reviewed reporting against the *2016 UK Corporate Governance Code* and assessed the Financial Times Stock Exchange 100 "early adopters" of the revised 2018 Code. The 2018 Code came into force in 2019 and all premium listed companies will report against it this year. The FRC's analysis found:

- some good examples of reporting by companies who are increasingly using incentives relating to non-financial matters and are grounded in long-term strategy;
- many companies are grappling with defining purpose and what an effective culture means with too many substituting slogans or marketing lines for a clear purpose;
- there is insufficient consideration of the importance of culture and strategy, or the views of stakeholders. Following the FRC's 2016 report on culture, companies should be commenting on culture and explain how they are monitoring and assessing it;
- limited reporting on diversity. Those companies that did report well had clear plans to meet targets - beyond just gender - and understood the long-term value of diversity; and
- the use of engagement surveys was portrayed by many as an effective tool to achieve insight on employee engagement and culture. While these can help, they should not be used in isolation. Companies must be able to demonstrate that the engagement methods used are effective in identifying issues that can be elevated to the board and how this affects company decisions.

According to the FRC, in the future, companies need to ensure they apply the code's principles in a manner shareholders' can more easily evaluate with a much greater focus on activities and outcomes reporting. This should set out the effectiveness of the board in decision-making, and how this has led to sustainable benefits for shareholders, employees and wider stakeholders.

1.4 Global mergers and acquisitions review for 2019

9 January 2020 - The International Institute for the Study of Cross-Border Investment and M&A has published its Annual Review for 2019.

Global M&A volume
Global mergers and acquisitions (M&A) volume approached US$3.9 trillion in 2019, the third highest annual total in the last decade, despite increasing global economic and political headwinds. A record was not far off - global M&A volume in 2019 trailed volumes in 2015 and 2018, the first and second highest - volume years in the last decade, by just 15% and 4%, respectively.

Strong economic growth, low interest rates, record amounts of private equity and the availability of corporate cash fuelled global M&A in 2019. The boom was strongest in the United States, with US$1.8 trillion in M&A volume for the year, the second highest annual total in the last decade, representing 47% of 2019 global M&A volume.

Domestic mega deals (transactions involving acquirers and targets in the same country valued at US$5 billion or greater) were the primary driver of global M&A volume in 2019. Domestic mega deals totalled US$1.3 trillion in 2019, representing 33% of total global M&A volume. The largest deals in 2019 were Bristol-Myers Squibb's US$93.4 billion acquisition of Celgene, United Technologies' US$89.8 billion combination with Raytheon, and AbbVie's US$83.9 billion acquisition of Allergan.

Cross-border M&A volume
Cross-border M&A activity declined in 2019, tempered by trade tensions, rising anti-globalism and general macroeconomic and geopolitical uncertainty. Cross-border M&A volume reached just US$1.2 trillion for the year, the lowest annual volume of cross-border M&A since 2013 (US$794 billion), representing only 30% of global M&A volume, the smallest proportion of global M&A volume since 2009 (27%). Despite the global slow-down, there were several significant cross-border transactions in Q4 2019, including LVMH Moet Hennessy Louis Vuitton's US$17 billion acquisition of Tiffany & Co.

1.5 Government consultation on implementing recommendations from the Financial Services Royal Commission

24 December 2019 - The Australian Government has released for consultation draft legislation which implements recommendation 6.9 of the Financial Services Royal Commission which will oblige ASIC and APRA to:

- co-operate with one another;
- share information to the maximum extent practicable; and
- notify the other whenever it forms the belief that a breach of the law for which the other regulator has enforcement responsibility has occurred.

These new provisions will enable the regulators to support each other in discharging their regulatory functions effectively, and ensure that there are no unnecessary barriers to their sharing information.

These obligations are supplemented by the release of the updated Memorandum of Understanding between APRA and ASIC, which implements recommendation 6.10 of the Financial Services Royal Commission.

The exposure draft legislation will also implement recommendation 6.11 by making amendments to formalise the meeting procedures which apply to ASIC, bringing them in line with those that apply to APRA.

The exposure draft materials are available on the Treasury website.

1.6 Insolvency practices inquiry

20 December 2019 - The Australian Small Business and Family Enterprise Ombudsman has released a Discussion Paper, seeking feedback on developing a best practice framework for small businesses facing insolvency and for practitioners managing external administrations.

To date more than 300 small businesses have contributed to the inquiry. The experience of small businesses facing insolvency has been a loss of control, costs that strip the value of the business and a lack of transparency throughout the process. The key message from the practitioners and other service providers who have contributed to the inquiry is that small businesses experiencing financial difficulty wait too long before seeking professional advice and assistance. Small business owners ignore the signs of financial distress, hoping or believing that things will improve, until it is too late. Where they do seek help early, the current system appears self-defeating as the costs of a voluntary administration often consume or exceed the assets of the company.

The Discussion Paper explores the framework from the experiences of small businesses, identifies which actions had to be undertaken by the registered liquidator and seeks feedback to identify improvements to the framework for the benefit of all parties to the process.

The Final Report will be released in March 2020.

1.7 Government publishes consultation on Compensation Scheme of Last Resort

20 December 2019 - The Financial Services Royal Commision recommended that a compensation scheme of last resort (CSLR) be established and that the three principal recommendations made in the Supplementary Final Report of the Review of the financial system external dispute resolution and complaints framework (the Ramsay Review) should be carried into effect (see recommendation 7.1).

The government's response to this recommendation agreed to establish a forward looking CSLR that is industry-funded, operated by the Australian Financial Complaints Authority (the AFCA), extends beyond personal advice failures and has design features consistent with the recommendations of the Ramsay Review.

The government has released for public consultation a Discussion Paper to further explore and seek views on four aspects of the CSLR. These four aspects are:

- coverage, beyond personal advice;
- funding arrangements;

- compensation to be paid; and
- managing scheme evolution.

1.8 APRA publishes executive accountability statements

19 December 2019 - APRA has published a document outlining its governance arrangements, along with accountability statements for its senior executives.

The paper, titled Governance and Senior Executive Accountabilities, describes APRA's internal governance and accountability arrangements and is supported by individual accountability statements for senior executive roles and an accountability map. The accountability statements cover all four APRA members, as well as APRA's six executive directors, APRA's chief risk officer and chief internal auditor.

This release responds to recommendation 6.12 of the Financial Services Royal Commission in that "each of APRA and ASIC should internally formulate and apply to its own management accountability principles of the kind established by the [Banking Executive Accountability Regime] BEAR."

APRA accepted the recommendation and committed to meeting it by 31 December 2019.

1.9 Report on the quality and independence of audit in the UK

18 December 2019 - The UK Government has published the report Assess, Assure and Inform: Improving Audit Quality and Effectiveness (the Report). The Report considers how the audit process could be developed to better serve the needs of users and the wider public interest.

The Report makes 64 recommendations, including the establishment of a new corporate auditing profession with a unifying purpose and set of principles. The recommendations encompass:

- a redefinition of audit and its purpose;
- the creation of a corporate auditing profession governed by principles;
- the introduction of suspicion into the qualities of auditing;
- the extension of the concept of auditing to areas beyond financial statements;
- mechanisms to encourage greater engagement of shareholders with audit and auditors;
- a change to the language of the opinion given by auditors;
- the introduction of a corporate Audit and Assurance Policy, a Resilience Statement and a Public Interest Statement;
- suggestions to inform the work of the UK Department for Business, Energy and Industrial Strategy on internal controls;
- greater clarity around the role of the audit committee;
- a package of measures around fraud detection and prevention;
- improved auditor communication and transparency;
- obligations to acknowledge external signals of concern;
- extension of audit to new areas including Alternative Performance Measures; and

- the increased use of technology.

The recommendations are aimed primarily at the audit of Public Interest Entities (listed companies, and credit and insurance firms) in accordance with the review's terms of reference.

The review is the third of three audit reviews commissioned by the UK Government. It follows:

- Sir John Kingman's Independent Review of the FRC, which considered the role of the audit regulator; and
- the Competition and Market Authority's study of the statutory audit market.

1.10 UK FRC moves to strengthen auditor independence

17 December 2019 - To support the delivery of high-quality audit in the UK, the FRC has issued a major revision to its Ethical Standard and revised Auditing Standards. The changes will help to strengthen auditor independence.

They incorporate changes to international ethical requirements, which now prohibit auditors from providing recruitment and remuneration services or playing any part in management decision making. Public interest entity auditors will now only be able to provide non-audit services which are closely linked to the audit itself or required by law or regulation. This will reduce the risk of a damaging conflict of interest.

The revised Ethical Standard has also been simplified and made clearer to use. The revised Auditing Standards include additional application guidance to clarify how an auditor should respond to requirements. The FRC also consulted on whether further entities should be subject to the more stringent non-audit services requirements for public interest entities, which received widespread support. A decision on expanding which entities will follow these requirements has been deferred until early 2020.

1.11 IOSCO consults on measures to reduce conflicts of interests in debt capital raising

16 December 2019 - The Board of the International Organization of Securities Commissions (IOSCO) is requesting feedback on proposed guidance to help IOSCO members address potential conflicts of interest and associated conduct risks arising from the role of market intermediaries in the debt capital raising process.

Conflicts of interest and associated conduct risks can weaken investor confidence and undermine debt capital markets as an effective vehicle for issuers to raise funding. To help regulators identify and address these risks, IOSCO has published the consultation report Conflicts of interest and associated conduct risks during the debt capital raising process (the Consultation Report).

Among other things, the consultation seeks public comments on the use of Distributed Ledger Technology (DLT) in bond issuances and the potential benefits and risks of using this technology, including for managing conflicts of interest.

The Consultation Report describes the key stages of the debt raising process where the role of intermediaries might give rise to conflicts of interest. The proposed guidance is comprised of eight measures grouped according to three key aspects of the debt raising process:

- pricing of debt securities and risk management transactions;
- quality of available information to investors; and
- allocations of debt securities.

While the guidance focuses on traditional corporate bonds, it may prove useful to IOSCO members considering raising capital through other types of debt securities.

The guidance is the second part of a two-stage project on conflicts of interest in capital raising. The first stage focused on the equity capital raising process with the final report Conflicts of interest and associated conduct risks during the equity capital raising process being published in September 2018.

1.12 Government publishes consultation on unfair contract term protections

13 December 2019 - The Australian Government has published a consultation package on Enhancements to Unfair Contract Term Protections.

On 1 July 2010, protections for consumers against unfair contract terms (UCTs) in standard form contracts were introduced into the Trade Practices Act 1974 No. 51 (Cth) (now contained in the *Australian Consumer Law*, which is in Schedule 2 to the Competition and Consumer Act (2010) 1974 No. 51 (Cth)), and the Australian Securities and Investments Commission Act 2001 No. 51 (Cth).

In November 2016, the UCT protections were extended to small business contracts. Two years later, the government undertook a review of these new protections for small business contracts (the UCT Review).

This consultation seeks stakeholder feedback on a range of policy options to address the issues identified by the UCT Review. It also seeks views on whether any enhanced UCT protections for small business contracts should be extended to consumer and insurance contracts to ensure consistency in the operation of the protections.

1.13 Survey of institutional investors' views regarding ESG practices

3 December 2019 - Edelman has published the findings of research that involved obtaining the views of 600 institutional investors in six countries representing firms that collectively manage over US$9 trillion in assets under management. The 2019 Edelman Trust Barometer Special Report: Institutional Investors identifies issues shaping investment criteria and reveals that investors believe companies must address the needs of a wide range of stakeholders, not just shareholders, and must implement effective ESG practices.

Key highlights of the report include:

Investors agree that corporations need to have multi-stakeholder commitment
84% of respondents said maximising shareholder returns can no longer be the primary goal of corporations and that business leaders need to commit to balancing the needs of shareholders with customers, employees, suppliers and local communities.

Investors are investing more in ESG-excelling companies
More than half of investors believe that ESG practices positively impact trust, with 61% having increased their investment allocation to companies that excel when it comes to ESG factors.

Data privacy and cybersecurity, employee health and safety, and eco-efficiency are the top priorities for shareholder engagement in the next 6 months. 99% of respondents expect the Board of Directors (the Board) to oversee at least one ESG topic.

Investors are changing their voting and engagement policy to be more attentive to ESG
87% of respondents said that their firms have changed their voting and/or engagement policy to be more attentive to ESG risks and 56% of investors globally are hiring more ESG-focused staff. 86% of investors would consider investing with a lower rate of return if it meant investing in a company that addresses sustainable or impact investing considerations.

Investors believe the Board diversity should be multi-dimensional, with diverse business areas of expertise being most desired. 55% of respondents said that diversity within a company's board has a significant positive impact on trust. Investors prioritise the following aspects of board diversity: business areas of expertise (59%), business strategy philosophies (53%) and experience outside the industry or sector (52%), gender (21%), ethnicity (21%) and race (18%).

Employee activism makes a company a less attractive investment
Investors recognise the impact that healthy culture and engaged employees have on corporate performance, with 74% seeing companies with activist employees as less attractive investments. Furthermore, 79% believe companies are not prepared for employee activism. Investors assess corporate culture by speaking with senior leadership and employees at all levels throughout the organisation.

Companies are unprepared for shareholder activism because they fail at identifying emerging risks
79% of respondents stated that most companies are not prepared to handle activist campaigns, with the main issue being an inability to define and specify new and emerging areas of risk and value creation, including cybersecurity, ESG and technological innovation.

Social media content matters
96% of investors use one or more social platforms on a weekly basis. When evaluating a current or prospective investment, 82% of investors consult the company's social media channels and 79% of investors consult company executive social media channels.

Strategies for underperforming companies
Top strategies for underperforming companies to shore up trust with investors include announcing a change to business strategy (52%), conducting a business or strategic review process (51%) and implementing significant cost cuts (46%). Increasing transparency and engaging with shareholders can also help to maintain investor trust.

1.14 Survey of investment professionals on sustainable investment

December 2019 - The Global Sustainable Investment Alliance has published a report Sustainable Investor Poll on TCFD Implementation containing findings from a global, online survey of investment professionals regarding issues of sustainable investment.

Key findings:

- sustainable investment professionals are generally unsatisfied with publicly-traded companies' climate related disclosure. This negative sentiment is particularly strong in the US, and within service providers and asset managers. Furthermore, the vast majority of respondents do not believe that markets are consistently and correctly pricing climate risks into company and sector valuations;
- one-third of survey respondents have already incorporated the TCFD disclosures into their investment analysis, led by respondents in the UK and Australasia. A further one-quarter of respondents have a plan to incorporate TCFD disclosures into their analysis in the near-term;
- the percentage of survey respondents who are already reporting in line with the TCFD recommendations is very low, and lags the percentage who are incorporating them into their investment analysis. Stated intentions to report in line with the TCFD recommendations in 2020 indicate positive momentum for support of the TCFD recommendations; and
- globally, the overwhelming majority of survey respondents consider the TCFD recommendations to be helpful. The majority of survey respondents agree that the TCFD recommendations will help investors to limit the global average temperature rise to less than 2 degrees.

1.15 Women on boards

December 2019 **-** Morgan Stanley Capital International (MSCI) has published Women on boards: 2019 Progress Report. The board and executive management of 2,765 companies were reviewed for the purpose of the report. These companies constitute the MSCI All Country World Index (MSCI ACWI). The MSCI ACWI includes large and mid-cap companies in 23 developed countries and 26 emerging markets countries. The key findings are:

- progress is still slow, but 2019 saw a noticeable uptick: 20.0% of directors were women in 2019, up from 17.9% in 2018 and 17.3% in 2017. This 2.1% point increase in 2019 also slightly shortened the path to 30% female directorship (projected for 2027, based on the latest data). At the current pace, a 50/50 gender split among global directors might be reached by 2044;
- 57.3% of the companies subject to mandatory gender quotas had exceeded requirements as of 31 October 2019. Italy and France had the highest percentage of companies with more females than required (among MSCI ACWI constituents);
- the number of companies with majority female boards doubled in 2019 compared with 2018. Yet these 22 firms accounted for fewer than 1% of the constituents of the MSCI ACWI as of 31 October 2019; 98.7% of the boards remained male-dominated;
- the information technology GICS® sector, historically lagging, had the steepest increase in companies with three or more female directors (28.3% in 2019 vs 15.5% in 2018);
- in emerging markets, female directors and executives were more likely to have financial expertise than their male counterparts: 47% vs 39%. In developed markets, the research

found no significant differences in professional expertise (risk or financial expertise) between male and female directors; and

- more women (22%) than men (12%) were over boarded (serving on three or more boards) globally. Higher levels of multiple directorships among female directors may, according to MSCI, indicate overreliance on a limited pool of female directors.

2. Recent ASIC Developments

2.1 Consultation on s. 444GA share transfers under a Deed of Company Arrangement

16 January 2020 - ASIC has released a consultation paper on a proposal to formalise its policy on share transfers made under s. 444GA of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act)

Section 444GA of the Corporations Act permits a court to grant leave to allow an Administrator to transfer shares as a part of a Deed of Company Arrangement (DOCA), where it will not "unfairly prejudice" the interests of shareholders. The courts will generally allow the transfer if evidence shows that the shares have no value.

Where a transfer under a DOCA results in a shareholder's voting power in the company increasing above 20%, ASIC relief from s. 606 of the Corporations Act is required.

ASIC is proposing to formalise its policy on giving relief from s. 606 of the Corporations Act in these circumstances.

Consultation Paper 326 Chapter 6 relief for share transfers using s. 444GA of the Act (CP 326) seeks views on ASIC providing relief where:

- shareholders are provided with explanatory materials prior to the s. 444GA hearing, including an Independent Expert Report (IER) prepared under Regulatory Guide 111: Content of Expert Reports;
- the IER is prepared by an independent expert (not the Administrator); and
- the IER is prepared on a liquidation basis.

2.2 Findings from 2018-2019 Regtech Initiative Series

20 December 2019 - ASIC has published Report 653 Regtech Initiatives 2018-19 (REP 653) that includes observations and findings from four initiatives coordinated by ASIC in 2019. Each initiative was designed to explore how Regtech can help businesses better manage their conduct of business compliance issues.

The four initiatives were:

1. **Financial Promotions Demonstration and Symposium**: five demonstrators analysed financial promotional material (both traditional and non-traditional media) to extract key features that identified potential risk and non-compliance characteristics;

2. **Financial Advice Files Demonstration and Symposium**: six demonstrators investigated how Regtech could improve compliance and consumer advice outcomes;
3. **Voice Analytics and Voice-to-Text Symposium**: three demonstrators chosen by tender process examined how voice analytics, applied to over 1,700 insurance sales phone calls, could assist in analysing a sellers' behaviour; and
4. **Technology-assisted Guidance Tool**: one Regtech firm chosen by tender process designed a tool for ASIC to provide user-friendly licensing guidance.

The initiatives showed Australian Regtech solutions can:

- detect potential breaches of mandatory disclosure requirements in financial promotions, with high rates of accuracy, at near real-time;
- detect potential conduct breaches in financial advice files such as statements of advice;
- identify cases of poor sales practices/tactics in phone calls (stored, non-compressed recordings using voice analytics and voice-to-text technology); and
- help ASIC provide guidance on licencing using a chatbot.

As well as summarising the results of symposium participants, REP 653 includes observations from demonstrators and observers.

REP 653 reflects observations that Regtech will augment - not eliminate - roles in risk-management and compliance in Australia's financial services industry.

View:

- REP 653

2.3 Consultation on guidance for the new product design and distribution obligations

19 December 2019 - ASIC has initiated consultation on draft guidance for the new financial product design and distribution obligations. The new obligations come into effect in April 2021.

The obligations require financial product firms to develop products that meet the needs of the consumers in their intended target market. According to ASIC, the obligations also address the causes of much of the misconduct examined by the Financial Services Royal Commission.

ASIC's proposed approach to the guidance is outlined in Consultation Paper 325 Product Design and Distribution Obligations. Consistent with the legislation and international practice, the draft guidance is principles-based but also incorporates working examples. This approach reflects Parliamentary intent that firms are best placed to apply the regime in the circumstances of their product offerings and distribution processes. ASIC's approach also reflects the fact that the obligations are focussed on taking "reasonable steps" and apply broadly across the financial services industry.

The legislation has provided a two year transition period for industry to meet the new design and distribution obligations.

The design and distribution obligations bring Australia into line with comparable jurisdictions, including the UK, Netherlands and European Union, where similar product governance regimes are already in place. ASIC has engaged with European regulators in developing its draft guidance.

The Financial System Inquiry (the FSI) and the Financial Services Royal Commission outlined the limitations of disclosure in delivering good consumer outcomes. The FSI recommended the introduction of the product design and distribution obligations in recognition of these limitations.

2.4 Updated internal governance and accountability frameworks

19 December 2019 - ASIC has updated its internal governance framework and implemented a new accountability regime.

Strengthening governance and accountability measures are part of ASIC's strategic change program and follow on from the recommendations of the Financial Services Royal Commission.

The framework articulates how ASIC's Commission collectively exercises its functions and powers to deliver ASIC's statutory objectives.

The changes include:

- an updated committee structure to strengthen oversight of executive actions and assist the Commission in the performance of its responsibilities; and
- accountability statements for executive directors and commissioners that identify core responsibilities and individual accountabilities.

View:

- ASIC's governance and accountability

2.5 Report on practices in wholesale foreign exchange markets

18 December 2019 - ASIC has released Report 652 Wholesale FX practices in Australia (REP 652), summarising its work in wholesale foreign exchange (FX) markets during 2018 and 2019. REP 652 highlights ASIC's observations of better practices and some poor practices used by participants operating in the market.

FX is a key global market and is of systemic importance to the Australian economy. To function effectively, the FX market relies on participants to act with integrity and fairness. As of April 2019, total global FX volume was around US$6.6 trillion per day, and the Australian dollar is the fifth most traded currency in the world.

REP 652 provides ASIC's observations in the areas of:

- governance and supervision;
- FX mark-ups;
- last look;

- handling confidential client order information;
- surveillance and monitoring;
- staff training on conduct risk; and
- staff personal training.

REP 652 builds on Report 525 Promoting better behaviour: Spot FX (REP 525), which ASIC published in 2017. REP 525 described how conduct in the wholesale spot FX businesses of some of Australia's largest market participants had fallen short of ASIC's expectations, and the enforcement action ASIC took where regulatory obligations were not complied with.

View:

- REP 652; and
- REP 525.

2.6 Report on corporate insolvencies 2018-2019

18 December 2019 - ASIC has published its annual overview of corporate insolvencies for the 2018-2019 financial year.

Report 645 Insolvency statistics: External administrators' reports (July 2018 to June 2019) (REP 645), provides an overview of the nature of corporate insolvencies, supplementing the monthly insolvency statistics that ASIC publishes on its website, and is compiled from reporting by external administrators.

Some key observations from REP 645 are:

- small to medium size corporate insolvencies continue to dominate external administrators' reports. 85% had assets of $100,000 or less, 76% had fewer than 20 employees and 38% had liabilities of $250,000 or less;
- 96% of creditors in this group received between 0-11 cents in the dollar, reflecting the asset/liability profile of small to medium size corporate insolvencies;
- ASIC requested 875 supplementary reports from external administrators where the initial report meets certain thresholds in assessing if further action was warranted;
- generally, due to a lack of evidence or because ASIC considered no further action was required given the circumstances, over the last three years on average, fewer than 20% of these supplementary reports resulted in further regulatory action; and
- external administrators advised that in nearly 50% of reports where they alleged a civil breach for insolvent trading, they had either commenced or were contemplating initiating recovery actions for insolvent trading.

Registered liquidators continue to improve the timeliness in lodging their reports with ASIC, with 60.5% now lodged within the period of between two months and less than six months after appointment (increased from 54.7% in 2017/18). The improvement reflects a longer-term trend. Further insights, including information on allegations of director and officer misconduct, are available in the report.

2.7 Report on cyber resilience assessments of financial markets firms

18 December 2019 - Report 651 Cyber resilience of firms in Australia's financial markets: 2018-19 (REP 651), provides an update on organisations' cyber resilience capabilities in the two years since the publication of Report 555 Cyber resilience of firms in Australia's financial markets (REP 555) in November 2017.

REP 651 is designed to:

- provide an update to REP 555 on the cyber resilience of firms operating in Australia's financial markets; and
- identify new and emerging trends, particularly any challenges that have emerged over the past two years.

Among the key insights from the assessments:

- the gap between large firms and small-to-medium enterprises (SMEs) identified in REP 555 is gradually closing, with the overall improvement in cyber resilience across the industry largely driven by SMEs;
- larger firms have continued to refine and improve their cyber resilience through targeted investment; and
- supply chain risk management is now accepted as an industry-wide challenge that requires attention over the next period.

2.8 Approval of updated Banking Code of Practice

17 December 2019 - ASIC has considered and approved an updated version of the Australian Banking Association's (ABA's) *Banking Code of Practice* (March 2020 Code), which will commence on 1 March 2020.

Among other things, the March 2020 Code is intended to implement recommendations from the Financial Services Royal Commission relating to accessibility of banking products and services and easing the burden on agricultural borrowers affected by drought and natural disaster.

The updates in the March 2020 Code include changes to:

- introduce the concept of "basic accounts" that have minimum features (including no account keeping fees, no minimum deposits, free direct debit facilities and access to a debit card);
- provide for eligible low-income customers to access basic accounts and other low and no-fee accounts, each of which must not feature informal overdrafts, dishonour fees or overdrawn fees;
- clarify the restrictions on non-monetary defaults on small business loans;
- extend protections to guarantors of small business loans - banks will now be required to first pursue the borrower in the event of default, before the guarantor (previously the Code limited these protections to guarantors of consumer loans); and
- prohibit default interest on small business loans secured by agricultural and commercial property in the event of drought or natural disaster.

The ABA published the March 2020 Code on its website on 12 December 2019. The approval is contained in ASIC Corporations (Approval of March 2020 Banking Code of Practice) Instrument 2019/1255.

ASIC has also issued ASIC Corporations (Banking Code of Practice - Revocation of June 2019 Approval) Instrument 2019/1254 to revoke its approval of the version which was previously approved in June 2019. That version of the Code (the July 2019 Code) commenced on 1 July 2019. The revocation will take effect from 1 March 2020, to allow the July 2019 Code to continue under ASIC's earlier (July 2019) approval until the March 2020 Code commences.

Further changes commencing in March 2021

ASIC's decision to approve the March 2020 Code is on the understanding that the ABA will revisit the Code's definition of "banking services" and include an amended definition in the March 2020 Code from 1 March 2021. The amended definition will address a concern that stakeholders and ASIC raised about the consequences of the current definition (which refers to definitions of "retail client" and "wholesale client" in Chapter 7 of the Corporations Act 2001 No. 50 (Cth)) for small business coverage under the March 2020 Code.

ASIC also notes future additional changes relating to informal overdrafts on basic accounts. These changes are required by the Australian Competition and Consumer Commission's determination and conditional authorisation AA1000441, issued on 21 November 2019.

Enforcement of the Code

ASIC does not administer the March 2020 Code - for this, there is an independent Banking Code Compliance Committee. Customers may also take their complaints through internal dispute resolution and to the AFCA for external dispute resolution. ASIC also notes that customers can use the Code in private litigation, as the relevant terms of the Code form contractual terms and conditions between the bank and their customer.

2.9 Report on assessment of licensing and professional registration applications

16 December 2019 - ASIC has released its latest report on its assessment of licensing and professional registration applications. The report has been refocused to make clear the information ASIC wants prospective applicants to be aware of when making an application for a new licence, licence variation or professional registration.

ASIC's report also provides insights about the regulatory and policy issues that impact ASIC's licensing and registration application-related activities.

In 2018-2019, ASIC considered approximately 2,491 applications (including applications made in previous financial years), with 64% relating to Australian Financial Services (AFS) licence applications, 27% relating to credit licence applications and the remaining 9% relating to professional auditor registrations.

Of the 2,491 total applications, 53% (1,326) were approved. Of all AFS licence and credit licence applications that were approved, 60% were approved in a form different in scope to the licence authorisations sought by the applicant or in form different to the standard conditions.

ASIC assessed 92 applications for registration of self-managed super fund auditors and approved 61, while assessing 115 company auditors and approving 87.

During 2018-2019, 11 AFS licences and five credit licenses were suspended and approximately 16% of the 342 AFS licences and 27% of 546 credit licences cancelled were cancelled at the initiation of ASIC.

View:

- Report 650 Overview of licensing and professional registration application: July 2018 to June 2019

3. Recent ASX Developments

3.1 Amendments to the ASX Settlement Operating Rules and Procedures - Transfers to the CHESS Subregister

On 18 December 2019, the Australian Securities Exchange (the ASX) Settlement Operating Rules and Procedures were amended to streamline the process for affecting transfers to the Clearing House Electronic Subregister System (CHESS) subregister. This was achieved by removing the requirement for certain eligible settlement participants that are not also ASX trading participants to receive and provide to the issuer, a registrable transfer document in order to effect a transfer of an issuer sponsored holding to a CHESS holding.

The notice is available on the ASX website.

3.2 Updates to ASX Listing Rules Guidance Note 9 - Disclosure of governance practices

On 1 January 2020, Guidance Note 9 (GN 9) for the ASX Listing Rules was updated to reflect the coming into effect of the fourth edition of the *Corporate Governance Principles and Recommendations*. The amended GN 9 will assist listed entities in complying with the Listing Rules, and can be found on the ASX website.

3.3 Public consultation - Proposed changes to ASX 24 Trade Cancellation Policy

On 8 January 2020, the ASX released a consultation paper outlining proposed changes to the ASX 24 Trade Cancellation Policy, specifically:

- the removal of the No Cancellation Ranges (NCR) for all exchange traded options (ETOs), including the Single Session Options;
- amendment to the Extreme Trade Range (ETR) for the 20 Year Bond Futures product; and

- seeking feedback on the current cancellation ranges for all other ASX 24 products.

ASX proposes, subject to feedback, to:

- remove the NCR for ETOs to provide greater flexibility for market participants, further aligning the ASX 24 and ASX Trade Operating Rules Procedures;
- amend the ETR range of the 20 Year Treasury Bond Futures from 50 basis points to 25 basis points to reduce the likelihood of an error trade causing a negative impact on a participant; and
- assess whether the current cancellation ranges for all the ASX 24 products are appropriate.

3.4 Monthly Activity Reports

On 5 December 2019, the ASX released the ASX Monthly Activity Report for November 2019.

On 7 January 2020, the ASX released the ASX Monthly Activity Report for December 2019.

4. Recent Takeovers Panel Developments

4.1 Smoke Alarms Holdings Limited - Declaration of unacceptable circumstances and orders

6 January 2020 - The Takeovers Panel (the Panel) has made a declaration of unacceptable circumstances (Annexure A) and final orders (Annexure B) in relation to an application dated 3 December 2019 by Greenwich Capital Partners and Anthony Richard Lewis in relation to the affairs of Smoke Alarms Holdings Limited (SAH) (see TP19/73).

Background
SAH is an unlisted public company with more than 50 members. Its directors are Randall Deer, Cameron Davis and Matthew Driscoll.

On 24 October 2019, SAH entered into a Convertible Note Issue Agreement (the Agreement) with Fast Future Pty Ltd as trustee for Fast Future Trust (Fast Future), an entity controlled by Randall Deer (having previously entered into a term sheet relating to the proposed issue of the convertible notes on 26 September 2019).

Under the terms of the Agreement, Fast Future could subscribe for up to three tranches of convertible notes. Each convertible note entitles the holder to convert that note into 8.33 ordinary shares in SAH at an effective issue price of 12 cents per share. Upon conversion each share has three options attached for the issue of an ordinary share in SAH at 12 cents. Interest on the face value of each convertible note accrues daily at 10% per annum, and can be capitalised by the convertible note holder upon notice to SAH.

SAH sought shareholder approval under item 7 of s. 611 of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) for the issue of up to 211,830,604 shares in SAH to Fast Future pursuant to the Agreement. The explanatory memorandum disclosed that Randall Deer's voting power in SAH would increase from 5.7%:

- if all the convertible notes are subscribed for and converted, to 40.33% of SAH;
- if all the options are exercised, to 71.61% of SAH; and
- if all the interest is capitalised, to 80.04% of SAH.

The Notice of Meeting did not include an independent expert's report. On 6 December 2019, the resolution passed at SAH's AGM.

Declaration

The Panel considered, among other things, that:

1. the Agreement was a control transaction involving a participating insider (Randall Deer), who was in a position to influence SAH's consideration of the Agreement. Cameron Davis took the lead role in negotiating the Agreement with Fast Future on behalf of SAH. In view of his connection to Randall Deer (including his involvement in a company with Randall Deer that had a 14.7% interest in SAH), there were conflicts of interest, or potential conflicts of interest, and appropriate protocols and processes were not put in place;
2. the explanatory statement for the item 7 of s. 611 of the Corporations Act approval was not accompanied by an independent expert's report. In light of the conflicts described above, an independent expert's report would have assisted SAH shareholders in assessing the merits of approving the Agreement; and
3. the explanatory statement contained insufficient or misleading information regarding:

(a) Randall Deer's relationship to Cameron Davis and the company that they both were involved in and any consequent voting power in SAH;
(b) the use of the funds to be raised under the Agreement;
(c) what convertible notes had been issued;
(d) whether options would be exercised;
(e) the voting exclusion of Cameron Davis and entities controlled by him;
(f) current financial information for SAH, including its cash position;
(g) valuation information to allow shareholders of SAH to ascertain whether it was fair and reasonable to approve the item 7 of s. 611 of the Corporations Act resolution, including an independent expert's report or a sufficiently detailed directors' report; and
(h) whether negotiations for the Agreement had been undertaken free from any actual influence, or appearance of influence, from participating insiders and if not, why not.

Orders

Following consideration of submissions, including material provided by SAH regarding its financial position, the Panel became concerned about the near term solvency of SAH and considered that, in the difficult circumstances that SAH now finds itself in, it was important that SAH had the certainty of receiving the injection of convertible note capital under the Agreement. Accordingly, the Panel has made orders including that (in effect):

- Randall Deer must subscribe for the remaining tranche of convertible notes and convert all his convertible notes (thereby eliminating the accumulation of interest under the convertible notes and minimising his potential control position on later conversion); and
- other than in reliance on the creep exception, the options can only be exercised if new approval is sought with updated disclosure and an independent expert's report.

The Panel considered it was important to ensure the interests of all shareholders in SAH were protected, notwithstanding the unacceptable circumstances.

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

4.2 Cromwell Property Group - Panel declines to conduct proceedings

3 January 2020 - The Panel has declined to conduct proceedings on an application dated 11 December 2019 on behalf of Cromwell Property Group (Cromwell) in relation to Cromwell's affairs. Cromwell's listed securities are stapled (ASX: CMW).

The application concerned whether various security holders in Cromwell were associated (see TP19/77).

Cromwell submitted that ARA Real Estate Investors XXI Pte Ltd and related entities (ARA Group), Ms Jialei Tang, Senz Holdings Limited, and people and companies connected to Mr Gordon Tang were associated and consequently held a combined, but undisclosed, relevant interest and voting power of up to 35.85% in Cromwell.

The Panel considered that Cromwell did not provide a sufficient body of material to justify the Panel making further enquiries as to whether there were any associations between the ARA Group and the other persons alleged by Cromwell to be associated with the ARA Group.

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

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

4.3 Keybridge Capital Limited 03 - Panel declines to conduct proceedings

18 December 2019 - The Panel has declined to conduct proceedings on an application dated 5 December 2019 from Mr John Patton in relation to the affairs of Keybridge Capital Limited (Keybridge).

The application concerned (among other things) an allegation of a possible contravention of s. 631 of the Corporations Act 2001 No. 50 (Cth) in relation to a proposed bid by WAM Active Limited (WAA) announced on 13 October 2019 and an allegation of association between WAA and related entities and Bentley Capital Limited (Bentley) in relation to the composition of the Keybridge board and the WAA proposed bid (see TP19/75). WAA's proposed bid was withdrawn and another proposed bid was announced on 13 December 2019.

The Panel considered that the s. 631 issue had been superseded by the withdrawal of the first proposed bid.

The Panel further considered that insufficient probative material was provided that would lead it to infer the existence of an association in the circumstances and did not consider it was likely to find that Bentley's acceptance statement in relation to the first proposed bid was unacceptable.

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

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

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4.4 MEC Resources Limited 02 - Panel declines to make declaration

16 December 2019 - The Panel has declined to make a declaration of unacceptable circumstances in response to an application dated 21 November 2019 from the trustee of the Anstey Super Fund and other MEC Resources Limited shareholders (the Applicants) in relation to the affairs of MEC Resources.

On 9 April 2019, MEC Resources announced a 1 for 1 pro-rata non-renounceable rights offer at $0.005 per share to raise up to $1,709,340 (Rights Offer). There was a significant shortfall under the Rights Offer, with a limited take up of rights and shortfall shares by shareholders.

The Panel considered (among other things) that there was insufficient material to establish a control effect in relation to the Rights Offer. However, the Panel was concerned about aspects of MEC Resource's fundraising and has decided to refer the matter to ASIC under r. 18 of the Australian Securities and Investments Commission Regulations 2001 No. 192 (Cth) for ASIC to make such inquiries as it considers fit and to consider whether to make a further application to the Panel. These concerns included:

- the transparency of the Rights Offer and subsequent fundraising, with potential inconsistencies in some of the details regarding MEC's need for funds, use of funds, future capital requirements and future direction;
- the transparency regarding the placement of shortfall shares following the Rights Offer, and the basis for allocation decisions regarding the placement, including the apparent relationship of places to the placement agent;
- the apparent failings of recipients of shortfall shares to lodge substantial shareholder notices;
- the difficulty experienced by at least one of the applicants obtaining a copy of MEC Resources' register of members; and
- some curiosities in some of the statements made to potential places that remain unexplained and the nature of the relationship of the placement agent to the company and to the places which is of potential concern.

The Panel considered that it is not against the public interest to decline to make a declaration of unacceptable circumstances. On the basis of the above, the Panel decided not to make a declaration of unacceptable circumstances.

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

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5. Recent Research Papers

5.1 Centre for Corporate Law Research Papers published in 2019

The following research papers were published by members of the Centre for Corporate Law in 2019 and can be downloaded using the links provided:

- A History of the Corporations and Markets Advisory Committee and its Predecessors (2019) Ian Ramsay
- A New Approach to Corporate Structures Involved in Labour Law Breaches (2019) Helen Anderson
- An Analysis of the Enforcement of the Statutory Duty of Care by the Australian Securities and Investments Commission (2019) Ian Ramsay and Benjamin Saunders
- Challenges and Opportunities for the China International Commercial Court (2019) Wei Cai and Andrew Godwin
- Consumer Contracts and Product Safety Law in Southeast Asia: Partly Trading Up? (2019) Luke Nottage and Jeannie Marie Paterson
- "Contrary to the Spirit of the Age": Imprisonment for Debt in Colonial Victoria, 1857-90 (2019) Jodie Boyd, Ian Ramsay and Paul Ali
- Court Review of the Decisions of the Australian Financial Complaints Authority and its Predecessors (2019) Ian Ramsay and Miranda Webster
- Determining Secondary Liability: In Search of Legislative Coherence (2019) Helen Anderson
- Director Restriction: An Alternative to Disqualification for Corporate Insolvency (2019) Michelle Welsh and Helen Anderson
- Does Section 191 of the Corporations Act Include Conflicting Duties? (2019) Rosemary Langford and Ian Ramsay
- Enhancing the Internal Dispute Resolution Processes of Financial Firms for Consumer Complaints (2019) Ian Ramsay and Miranda Webster
- FinFuture: The Future of Personal Finance in Australia (2019) Christoph Breidbach, Chris Culnane, Andrew Godwin, Carsten Murawski and Cynthia Sear
- FinTech Challengers and Incumbents' Responses: A Window into Innovation Management Strategy Modes within Australia's Financial Services Sector (2019) Martin Gold and Paul Ali
- Impacts of Financial Literacy and Confidence on the Severity of Financial Hardship in Australia (2019) Evgenia Bourova, Malcolm Anderson, Ian Ramsay and Paul Ali
- Insolvency Law Reform in Australia and Singapore: Directors' Liability for Insolvent Trading and Wrongful Trading (2019) Stacey Steele, Ian Ramsay and Miranda Webster
- Insolvent Trading in Australia: A Study of Court Judgments from 2004 to 2017 (2019) Stacey Steele and Ian Ramsay
- "It's Easy to Say Don't Sign Anything": Debt Problems Among Recent Migrants from a Non-English Speaking Background (2019) Evgenia Bourova, Ian Ramsay and Paul Ali
- Limitations of Australia's Legal Hardship Protections for Women with Debt Problems Caused by Economic Abuse (2019) Evgenia Bourova, Ian Ramsay and Paul Ali
- "More to Lose: The Attributes of Involuntary Bankruptcy" (2019) Lucinda O'Brien, Malcolm Edward Anderson, Ian Ramsay, Paul Ali
- Removal of Directors of Public Companies by Shareholders: When do Companies Contract out of the Corporations Act? (2019) Rosemary Teele Langford and Ian Ramsay
- Social Licence to Operate and Directors' Duties: Is there a Need for Change? (2019) Rosemary Teele Langford
- The "Creditors' Interests Duty": When Does It Arise and What Does It Require? (2019) Rosemary Teele Langford and Ian Ramsay

- The Distinctive Features of Women in the Australian Bankruptcy System: An Empirical Study (2019) Lucinda O'Brien, Ian Ramsay and Paul Ali
- The Evolution and Consolidation of External Dispute Resolution Schemes in the Financial Sector: From the Banking Ombudsman to the Australian Financial Complaints Authority (2019) Ian Ramsay and Miranda Webster
- The Experience of Financial Hardship in Australia: Causes, Impacts and Coping Strategies (2019) Evgenia Bourova, Ian Ramsay and Paul Ali
- The Hayne Royal Commission - Just Another Piece of Official Discourse? (2019) George Gilligan
- The Origins and Evolution of the Statutory Duties of Trade Union Officers (2019) Ian Ramsay and Miranda Webster
- The Reach of Constitutional Conflicts Provisions: How Do Companies Contract out of the General Law Duties? (2019) Rosemary Teele Langford and Ian Ramsay

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5.2 Other recent research papers

(a) Shareholder primacy in benefit corporations

The goal of the business corporation traditionally has been understood to be the maximisation of shareholder wealth. A growing demand for social enterprise has led to the creation of various new forms of business organisation, including the benefit corporation, that have the goal of creating both shareholder wealth and other public benefits. Although benefit corporations were developed to overcome the shareholder wealth maximisation norm, it is not fair to say that they also overcome shareholder primacy. Properly understood, benefit corporations are shareholder-centric: they exist to allow shareholders to pursue altruistic goals rather than to require them to do so. This essay demonstrates this from the history and structure of the Model Benefit Corporation Act and argues that benefit corporation legislation ought to remain essentially enabling rather than mandatory in nature.

Shareholder Primacy in Benefit Corporations

(b) The third wave of shareholder influence and the emergence of informational activism in Australia

The role and functions of the shareholder have continually evolved to adapt to changing commercial realities. The first two "waves" or categories of shareholder influence are outlined in both theory and Australian law according to a proposed "member-investor" paradigm. Viewed through such a lens, this analysis exposes a steady downward trajectory of shareholder influence over time. A deconstruction of three prominent shareholder activism campaigns then reveals the emergence of a new form of "informational activism" which is incompatible with prevailing contemporary views of the shareholder. Following its genesis in the US and spreading as a global phenomenon, this new third "wave" or category of shareholder influence represents an emerging view and function of shareholders as participatory investors with a substantial level of power in the market.

The Third Wave of Shareholder Influence and the Emergence of Informational Activism in Australia

(c) The OECD guidelines for multinational enterprises and international investment agreements: Converging universes

This paper addresses the impact the Organization for Economic Co-operation and Development (the OECD) Guidelines (the Guidelines) for Multinational Enterprises have on the field of international investment law. More specifically, the paper shows how the Guidelines, and similar instruments of corporate social responsibility (CSR), as well as the underlying concerns and interests they protect, are increasingly finding their way into the texts of investment agreements, and are being referred to by disputing parties and arbitral tribunals as instruments with legal authority in the interpretation and application of investment agreements. The paper also assesses critically the consequences the increasing reference to CSR in investment dispute settlement has. While, for example, the increasing use of the OECD Guidelines in arbitrations may substitute for the weak compliance mechanism under the Guidelines themselves, and could thus harden the Guidelines' legal effect, placing their interpretation in the hands of party-appointed arbitrators may also change the Guidelines' epistemic context and legal effects. The paper therefore also calls for a deeper engagement of the communities of investment lawyers and lawyers working in CSR in order to produce better-suited results in the emerging field of business and human rights.

The OECD Guidelines for Multinational Enterprises and International Investment Agreements: Converging Universes

(d) Personal liability of directors and officers in tort: Searching for coherence and accountability

The 21st century has been marred by corporate scandal after scandal, including financial fraud, pyramid schemes, international bribery, and decades of sexual harassment. This raises an important question regarding the role of corporate and tort law in controlling the behaviour of corporate executives more broadly. It is clear that directors and officers should not be overexposed to tortious liability - doing so would ultimately make them insurers of the firm's obligations. Yet underexposure creates its own set of problems, including a lack of accountability when directors and officers are not required by law to conduct themselves reasonably. The purpose of this article is to address how US state courts attribute personal liability in tort to directors and officers in actions by non-shareholder third parties. It does so, in part, by relying on Canadian law as a comparator as well as on Professor Lewis Checchia's admonishment that the law must not "reward unreasonable and unethical conduct" nor "deny recovery to injured third parties with valid legal claims". The article concludes that, contrary to the law in certain US jurisdictions, directors and officers liability should be assessed according to the ordinary principles of tort law. Defences based on the special status of directors and officers are objectionable because they degrade corporate culture, generate moral hazard, and deny justice to the otherwise worthy plaintiff.

Personal Liability of Directors and Officers in Tort: Searching for Coherence and Accountability

(e) ESG performance and disclosure: A cross-country analysis

The authors use a unique dataset to examine the link between ESG disclosure and quality through a cross-country comparison of disclosure requirements and stewardship codes. They find a strong relationship between the extent of ESG disclosure and the quality of a firm's disclosure. Furthermore, they find that ESG is correlated with decreased risk. This result suggests that firms with good ESG scores are simply disclosing more information. Finally, the authors show that ESG scores have little or no impact on risk-adjusted financial performance.

ESG Performance and Disclosure: A Cross-Country Analysis

(f) Law firm expertise and shareholder wealth
This paper examines the impact of law firm expertise on bidder and target shareholder wealth gains during M&A. After controlling for endogeneity in the matching between the mandating firm (bidder or target firm) and the law firm, the authors find that top-tier law firms increase the wealth of bidder shareholders by an average of 0.98% ($15.09 million), but not that of target firm shareholders. The authors' findings suggest that top-tier lawyers are effective "transaction cost engineers." They create value for their clients by structuring deals to minimise transaction and regulatory costs, and by achieving a higher completion probability.

Law Firm Expertise and Shareholder Wealth