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corporate governance specialists

Mertons' Corporate Update – December 2016

Mertons' Corporate Update is intended to provide you with an overview of corporate governance matters, including regulatory changes, trends, and other issues that are important for your business.

Should you need further information or assistance with any of the matters raised here, or to discuss how these matters may affect your business, please contact:

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Australian Charities Report

The latest Australian Charities Report, released in December 2016, analyses the data of over 51,000 charities registered with the Australian Charities and Not-for-profits Commission (ACNC) at the end of each charity's 2015 financial year.

Charities had a combined total income of $134.5 billion, employed 1.22 million staff and engaged almost 3 million volunteers.

These numbers show the significant size and impact of the sector on the Australian economy. In comparing the results with other indexes, the report shows that

- If the sector were an industry, it would rank 9th in the Bureau of Statistics list of 18 industries by income
- It would rank second by employment, only surpassed by retail trade.

Comparing year on year, while there was an overall modest increase of 2% in total income in the sector, there were wide variations ranging from 25% losses to over 25% increase in income. Overall, 42% of charities showed decreased income and 55% showed an increase in income.

Access the report and other information here.

If you are are a not-for-profit board looking at improving your governance practices, give Mertons a call for an obligation free discussion regarding our services.

ASIC News

Please note: ASIC's website does not allow links to individual media releases and documents. For this reason, please copy the link provided at the end of each article into your browser to access the relevant document.

New accounting standards expected to have significant impact on companies

ASIC has announced that three new accounting standards coming into force over the next two years are expected have a significant impact on financial reporting. The three major accounting standards being introduced for future financial years (early adoption is permitted) are:

- AASB 9 *Financial Instruments* (applies from years commencing 1 January 2018);
- AASB 15 *Revenue from Contracts with Customers* (applies from years commencing 1 January 2018); and
- AASB 16 *Leases* (applies from years commencing 1 January 2019).

These new standards can significantly affect the reporting of revenue, values of financial instruments, loan loss provisions, and the impact of lease arrangements.

ASIC recommends organisations consider the extent of the impact now and to put in place implementation plans. Please note that information about implementation and impact of the new standards would require disclosure to the market.

Further information is available in media release 16-442MR (http://asic.gov.au/about-asic/media-centre/find-a-media-release/2016-releases/16-442mr-companies-need-to-respond-to-major-new-accounting-standards/)

Contact Mertons for discussions on developing an implementation plan for compliance with the new standards.

ASIC releases new instrument for buy-backs for ASX-listed schemes

ASIC has replaced Class Order [CO 07/422] with the new legislative instrument *ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016/1159.* Class Order [CO 07/422], which was due to sunset on 1 April 2018, has been repealed.

Access media release, 16-439MR (http://asic.gov.au/about-asic/media-centre/find-a-media-release/2016-releases/16-439mr-asic-releases-new-instrument-for-buy-backs-for-asx-listed-schemes-and-updates-

guidance-for-scheme-buy-backs/) , ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016/1159, and Regulatory Guide 101 Managed investment scheme buy-backs (http://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-101-managed-investment-scheme-buy-backs/)

Transition period for fee and cost disclosure requirements under product disclosure statements (PDS)

ASIC has decided to conditionally extend the transition period for complying with updated requirements for disclosure of fees and costs to 30 September 2017. It has now published the form and instructions (copy and paste the following link into your browser http://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-97-disclosing-fees-and-costs-in-pdss-and-periodic-statements) for trustees of superannuation funds and responsible entities of managed funds and other managed investment schemes (issuers) to provide ASIC information in order to qualify for the extension. Issuers intending to take advantage of the transition period extension must:

1. advise ASIC in writing before 1 February 2017 by email to feeandcostdisclosure@asic.gov.au:
    a. identifying themselves and the PDS(s) for which they want extension;
    b. stating that they intend to provide to ASIC written information relating to any relevant superannuation products or relevant investment products to which the Statement relates before 1 March 2017; and
    c. if any financial product to which the Statement relates will not be offered for issue after September 2017, identifying that financial product; and
2. provide ASIC the information using the form published today on the ASIC website (copy and paste the following link into your browser http://asic.gov.au/media/4115539/form-and-instructions-to-provide-asic-fees-and-costs-data-superannuation-and-managed-investment-products.xlsx). The completed form must be emailed to ASIC at feeandcostdisclosure@asic.gov.au before 1 March 2017.

For more information, see media release 16-450MR (http://asic.gov.au/about-asic/media-centre/find-a-media-release/2016-releases/16-450mr-asic-publishes-form-for-superannuation-trustees-and-responsible-entities-to-provide-asic-information-on-updated-fee-and-cost-disclosure-requirements/).

World-first licencing exemption for fintech businesses

ASIC has released class waivers to allow eligible financial technology (fintech) businesses to test certain specified services without holding an Australian financial services or credit licence. ASIC's fintech licensing exemption allows eligible businesses to test specified services for up to 12 months with up to 100 retail clients, provided they also meet certain consumer protection conditions and notify ASIC before they commence the business. More information is available from media release 16-440MR (http://asic.gov.au/about-asic/media-centre/find-a-media-release/2016-releases/16-440mr-asic-releases-world-first-licensing-exemption-for-fintech-businesses/) and Regulatory Guide 257 Testing fintech products and services without holding an AFS or credit licence (http://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-257-testing-fintech-products-and-services-without-holding-an-afs-or-credit-licence/).

Report on decisions to cut red tape – April to September 2016

Report 506 *Overview of decisions on relief applications (April to September 2016)* (REP 506) notes that between 1 April 2016 and 30 September 2016, ASIC granted relief from provisions of the *Corporations Act 2001* (Corporations Act) or the *National Consumer Credit Protection Act 2009* (National Credit Act) in relation to 602 applications.

The report provides examples of situations where ASIC has exercised, or refused to exercise, its exemption and modification powers under the Corporations Act and the licensing and responsible lending provisions of the National Credit Act. Further, the report highlights instances where ASIC has considered adopting a no-action position regarding specified non-compliance with statutory provisions.

The report also includes an appendix detailing the publicly available individual relief instruments referred to in the report and provides information on publications that may be relevant to prospective applicants for relief.

Report 506 (http://asic.gov.au/regulatory-resources/find-a-document/reports/rep-506-overview-of-decisions-on-relief-applications-april-to-september-2016/).

ASIC announces focus areas for 31 December 2016 financial reports

As part of its financial reporting surveillance program, ASIC selects financial reports for review to determine compliance with the Corporations Act and accounting standards. Key focus areas for review for 31 December financial reports include:

- asset values
- accounting policy choices, including the treatment of off-balance sheet arrangements, revenue recognition, expensing of costs that should not be included in asset values, tax accounting and inventory pricing and rebates
- material disclosures of information useful to investors, such as assumptions supporting estimates, significant accounting policy choices, and the impact of new reporting requirements (see article above on this matter)
- the role of directors
- enhanced audit reports. These enhanced audit reports will outline key audit matters, being those matters that required significant auditor attention in performing the audit. Preparers and directors should be mindful that these matters may relate to accounting estimates and significant accounting policy choices that also require specific disclosures in financial reports, as well as matters relating to the business that should be covered in the Operating and Financial Review
- financial services licensees must ensure client monies are held in separate, designated trust bank accounts and are applied in accordance with client instructions and requirements of the Corporations Act.

Further information is available from media release 16-428MR (http://asic.gov.au/about-asic/media-centre/find-a-media-release/2016-releases/16-428mr-asic-calls-on-preparers-to-focus-on-useful-and-meaningful-financial-reports/) and ASIC's financial reporting surveillance program (http://asic.gov.au/regulatory-resources/financial-reporting-and-audit/directors-and-financial-reporting/asics-financial-reporting-surveillance-program/).

Mertons can help your organization comply with all relevant reporting requirements.

Whistleblower protections in the corporate, public and not-for-profit sectors

The passing of the Fair Work (Registered Organisations) Amendment Bill 2014 by the Senate on 22 November, included sweeping whistleblower protections for those disclosing wrongdoings in registered organisations (unions and employer organisations). Read the legislation and explanatory memoranda at http://www.austlii.edu.au/au/legis/cth/bill_em/fwoab2014452/memo_0.html

In addition, the Australian Government made a commitment to introduce sweeping new federal whistleblower protections, designed to protect whistleblowers in both the public and private sectors, and to provide for compensation.

Whistleblower legislation has historically focused on the public sector. However, for the private sector, legal protection only covers disclosures reporting breaches of the Corporations Act and the ASIC Act (Protected disclosure). The proposed measures, currently subject to consultation by the Parliamentary Joint Committee on Corporations and Financial Services, would mean comprehensive whistleblower protection, across all sectors.

Whistleblower protections in the corporate, public and not-for-profit sectors – Consultation

On 30 November 2016, the Senate referred an inquiry into whistleblower protections in the corporate, public, and not-for-profit sectors to the Joint Parliamentary Committee on Corporations and Financial Services for report by 30 June 2017. Submissions close on **10 February 2017**. Further details and to make a submission.

Whistling while they work 2

Whistling while they work 2 is a project led by Griffith University and supported by 23 partners. Its focus is on 'public interest' whistleblowing — encouraging and protecting organisation members who are prepared to speak up about issues that affect the integrity of the whole organisation, or impact on customers, consumers, citizens and society. Between April and August 2016, 702 Australian and New Zealand organisations participated in a short survey on their whistleblowing processes. Preliminary results, released on 7 November 2016, showed that:

- 90% of organisations reported having processes for ensuring appropriate investigations or management actions in response to wrongdoing concerns raised by staff
- 89% indicated they had formal, written whistleblowing procedures or policies, and
- 76%, including 79% of private sector businesses, responded that they accepted anonymous wrongdoing concerns.

However, other results showed that major gaps still remain:

- 26% of businesses and 36% of not-for-profit organisations (23% of all organisations) had no particular system for recording and tracking wrongdoing concerns
- 33% of businesses and not-for-profit organisations (23% of all organisations) did not currently have any strategy, program or process for supporting and protecting staff who raise concerns
- 49% of businesses and 51% of not-for-profit organisations (38% of all organisations) indicated they did not assess the risks of detrimental impacts that staff might experience from raising wrongdoing concerns, either at all or until problems began to arise
- Only 39% of businesses and 32% of not-for-profit organisations (46% of all organisations), provide potential whistleblowers with access to a management-designated support person inside the organisation as part of their response; and
- Only 17% of businesses, 17% of public agencies and 13% of not-for-profits (16% of all organisations) have any mechanisms for ensuring adequate compensation or restitution if staff experience reprisals or other detriment after raising wrongdoing concerns.

Read the report.

Contact Mertons for assistance to develop a robust whistleblower policy and framework for your organisation.

Governance in sports clubs and associations

Most non-professional clubs are incorporated as not-for-profit associations under the *Associations Incorporation Reform Act 2012*. Regardless of size, every club and association should have good governance and comply with their obligations under the law.

The Australian Institute of Company Directors (AICD) has set out ten basic principles for good governance for clubs:

- Clubs/ associations should have clarity regarding director responsibilities, organisational expectations of directors and the role of the board
- Boards need to have the right mix of people, skills, and experience
- The board plays a key role in setting the vision, purpose and direction for the organisation, and helps the organisation understand these and to set in place plans to achieve these.
- Boards are responsible for identifying and managing risks
- The board should have in place measures to assess organisational performance
- Key aspects of an effective board include: careful planning of board activities, effective board meetings, regular assessment of board performance, having a board succession plan in place, and the effective use of subcommittees where appropriate.
- Board accountability and integrity
- The board has a role to play in enhancing the capacity of the organisation they serve
- The board sets the tone for ethical and responsible decision making throughout the organisation

- The board helps the organisation engage with its stakeholders.

Contact Mertons for advice and help with your organisation's governance structures, processes and issues.

Risk Culture and Good Risk Governance

The Australian Prudential Regulation Authority (APRA) defines "risk culture" as "the influence of organisational culture on how risks are managed in an organisation. It is how staff identify, understand, discuss and act on the risks an organisation confronts and takes. All organisations have a risk culture regardless of whether it is actively considered or managed."

APRA has released an information paper providing a snapshot of current practice in risk culture in banking, insurance and superannuation.

The information paper notes that the 2008 global financial crisis revealed major shortcomings in the way the global financial sector managed risk. "This was not solely an issue of poor risk measurement, or weaknesses in internal control structures. It also reflected deficiencies in institutions' attitudes towards risk. In combination, a poor risk culture and weak risk management (the former often being the root cause of the latter) led to unbalanced and ill-considered risk-taking, to significant losses and, in some cases, to institutional failures."

"Unfortunately, a poor risk culture can persist for some time without detection, or immediate damage. Typically, it will be when a poor risk culture is combined with adverse market conditions and/or other stresses that there is greater potential for a build-up of unbalanced and ill-considered decisions to result in significantly adverse, and potentially crippling, financial outcomes. Good times will often mask poor practices. In an Australian context, where the domestic economy has enjoyed 25 years without a serious recession, this should sound a clear note of caution against complacency."

The board of directors has the ultimate responsibility for the oversight of risk management in an organisation, while CEOs and senior executive teams are charged with making decisions within the risk framework set by the board.

APRA aims to ensure that risk-taking in financial institutions is conducted within reasonable bounds and that risks are clearly identified and well-managed. The paper on risk culture is part of APRA's effort to support and reinforce positive risk culture among regulated companies.

Download the APRA risk culture information paper.

ASIC focuses on 'culture'

"What you walk past is what you accept", stated John Price, Commissioner of the Australian Securities and Investments Commission (ASIC) in an interview. He explains ASIC's interest in corporate culture as follows: "Poor culture can be a driver of poor conduct and ASIC regulates poor conduct". Poor culture can lead to misconduct and result in significant financial and reputational costs.

Culture comes from the top. The board and senior management are responsible for setting the tone, and ensuring the firm's values are clearly articulated, communicated and understood.

Read the interview with John Price.

The Governance Institute of Australia has released two Good Governance Guides related to managing risk: the Good Governance Guide on Risk Governance, and the Good Governance Guide on Risk Appetite Statement.

Contact Mertons for help in creating a governance framework that will foster a strong corporate culture within your organisation.

Deloitte’s Board Effectiveness Report – Seven ways to improve board effectiveness

Courage in the boardroom: Winning in uncertain times, is Deloitte’s latest board effectiveness report. It is based on interviews with over 50 of Australia’s most senior non-executive directors and board members on how to manage in uncertain times. The report identifies seven key themes that emerged from those discussions:

1. **Bold, decisive leadership**. While uncertainty isn’t new, the speed of change is faster and the impact greater. Leaders who act decisively to identify and capitalise on opportunities will be the winners. It is important to have a strong strategic framework that facilitates better and faster decisions, and clarity of purpose. Bold, decisive leadership is necessary to
   a. Shape the composition of the board and how it works with management to drive better decisions
   b. Challenge the idea that more data is always better
   c. Better connect the organisation to a wider range of stakeholders
2. **Opportunity mindset**. It is vital for board members to carve out the time to be strategic and forward-looking. Taking the time to do this is crucial for creating the space to innovate and generate opportunity. Boards can also help set the tone for an opportunity mindset within an organisation by giving clarity around ‘acceptable failure’ on the road to innovation and growth.
3. **Ecosystems are crucial.** Seeking to understand ecosystem risks beyond traditional stakeholders and extending this to employees, suppliers, the environment, and wider communities can build brand loyalty and organisational resilience through difficult market conditions. Building valuable, open relationships across multiple stakeholder groups is key to building brand trust and organisational resilience.
4. **Match fit.** “to do what we currently do, but better” is no longer enough. To capitalise on opportunity and emerge a winner from uncertainty, an organisation needs to be aggressively fit, agile and responsive, and Boards meed to look closely at whether business models, systems and processes are fit for this purpose.
5. **Culture, culture, culture.** A culture where people feel confident and empowered to call out bad behaviour, offer a different view and own their mistakes allows risks to be managed before they have serious consequences. People at the coalface are closest to what’s happening and often have the best ideas to fix a problem. Boards need to systematise ways to hear and develop these ideas to make both culture and operations stronger and more resilient.
6. **Cracking the diversity code.** Truly diverse thinking is not only cultural but includes age, gender, skills, experience, background and more. Bringing such diversity of thought can drive competitive advantage, but is challenging to achieve in practice.
7. **Curiosity is key.** Boards aren’t expected to have all the answers to today’s challenges, but complacency can be a killer. Directors have a responsibility to change old habits and widen learnings and perspectives from other industries as well as globally.

Read the report here.

Contact Mertons for assistance to undertake a comprehensive board evaluation and performance review.

Balanced boards outperform

The Australian Institute of Company Directors (AICD) recently commissioned research exploring the relationship between board independence and stock price performance. The research found that balanced boards, described as those with between 30% and 60% of independent directors, outperform others. The research identified the ‘sweet spot’ showing strongest outperformance for boards where independent directors comprise 40% to 60% of the board.

Professor Alex Frino, author of the report concluded: “Quite simply, balanced boards are best. Having independent directors on boards adds value, as does having non-independent directors who may be former executives or who hold substantial shareholdings. Getting the mix right is what matters.”

Download the report.

Another AICD paper reviews the concept of director independence. Are current measures of director independence wrong? A strong theme across the study was the need to consider director independence as a state of mind, more so than a structural characteristic of governance.

Download the report.

Contact Mertons for help with a board skills assessment and preparation of succession planing.

Threat of class actions the ‘new normal’

A review of class actions in Australia by law firm King& Wood Mallesons for the years 2015 and 2016 concludes that the threat of class actions is the ‘new normal’ for Australian businesses. Some key points from the report include:

- 2016 saw 35 class actions launched, with 29 of these (83%) filed in New South Wales. In 2015, 40 class actions were launched.
- Of the 35 class actions in 2016, 16 settled with more than $600 million (estimated) in settlement funds. The most significant single settlement was the $250 million settlement of a consumer claim against De Puy International hip replacement products.
- Just under half (16) of class actions filed were funded by third party litigation funders.
- Top areas for class actions were consumer claims (11) and financial products/ investments (11). Securities saw 7 claims, Government 4, and 2 claims related to national disasters (both related to bush fires).
- There were 19 plaintiff firms involved in the 35 new actions in 2016.
- Directors were joined as defendants in five class actions, all in the securities and investment claims categories.
- No specific legal regime applies to regulate third party litigation funders. An ASIC class order and amendments to the *Corporations Regulations 2001(Cth) Act* exclude litigation funding schemes and arrangements from the definition of managed investment scheme and provide exemption to the need to hold an Australian Financial Services Licence.
- The above, together with reported return on investments of 144%, make Australia an attractive environment for litigation funders.

The report also provides detailed information on procedures, settlements under scrutiny or rejected, funding models and many other interesting facts.

Download the Class Actions report.

Implications for directors

Directors need to be aware that they can be held to account (joined in an action) related to their company’s actions. This has been the case, for example, in actions related to continuous disclosure obligations, misleading and deceptive conduct, among others.

Contact Mertons for assistance in undertaking a risk audit and review, and the development of a solid risk management framework.

Purpose of the Corporation Project

Since the Global Financial Crisis, corporations have been increasingly criticised for focusing on short-term profit maximisation for shareholders at the expense of long-term strategising, innovation, and

sustainability. A consensus has begun to emerge that corporations should focus on creating long-term sustainable value.

The *Corporate Governance for a Changing World* report is the result of a series of global roundtable discussions carried out by European law firm Frank Bold and the Cass Business School involving more than 260 leaders in business management, investment, regulation, and academic and civil society communities. The aim of the discussions was to identify the desired outcomes and principles of corporate governance that are fit for the challenges of the 21st century. Key questions the roundtables sought to answer are:

- How can corporate governance contribute to robust long-term value creation for companies?
- What is the role of stakeholders, including shareholders, in fostering a long-term focus on sustainable behaviour?
- What incentives for short-termism exist in law, corporate governance codes and business practice?

The roundtables identified that while there is significant scope within corporate law in terms of the purpose of the corporation, the dominant corporate governance model persistently directs board focus to short-term increases in market value to the detriment of long-term value creation.

“The roundtables clearly expressed that there is a need to build a stronger corporate governance model that should aim to create real value for customers and wealth for shareholders as joint and mutually reinforcing objectives; take account of environmental sustainability and societal well-being; take into account systemic risks and opportunities; and adopt both financial and environmental, social and governance (ESG) benchmarks to measure corporate performance over the long-term.”

Taking this into account, the roundtables developed a comprehensive set of recommendations in seven areas, which focus corporate strategy on long-term sustainable value:

- Embedding purpose in the governance structure of the corporation.
- Clarifying fiduciary duties to restore the focus to long-term value creation.
- Strengthening the role of the board to pursue a broad and long-term view of corporate purpose.
- Revising incentive structures for directors and executives.
- Engaging stakeholders in corporate governance.
- Improving shareholder engagement to foster patient capital.
- Integrating intangibles, non-financial capitals and ESG matters into corporate accounting and reporting models.

“The report presents an emerging comprehensive approach to corporate governance that can assist corporations to focus on a broad understanding of their purpose, long-term sustainable value, building resilience, and sustaining a strong social license. This approach can be beneficial to a wide set of stakeholders who take part in or are affected by corporate governance, because it allows for the alignment between corporate strategies and the broader interests of society by taking account of systemic risks such as climate change and growing inequality.”

Download the report here.

Organisations should consider whether they have a robust corporate governance framework. Contact Mertons to discuss further.

Consultation on proposal to introduce financial product intervention powers

On 13 December 2016, the government published a consultation paper on its proposed reforms to the regulation of the design and distribution of financial products, and new intervention powers for ASIC.

This is part of the government’s response to the Financial System Inquiry (FSI), in particular, recommendations to create new accountability obligations for entities that issue or distribute financial products (recommendation 21) and to strengthen consumer protection by introducing financial product intervention powers (recommendation 22).

Closing date for submissions is 15 March 2017.

In the past, the main form of consumer protection was disclosure. However, the FSI identified the limitations of this and, over time, disclosure has been supplemented with initiatives aimed at making firms more accountable. Implementation of the measures proposed in this paper would extend the approach of supplementing disclosure as the main form of consumer protection more broadly throughout the financial product lifecycle.

"While the measures proposed in this paper are intended to reduce the risk of consumers acquiring or being mis-sold products that do not meet their needs, they will not eliminate all product failures or mis-selling. In particular, it is not proposed that the Government 'pre-vet' financial products before they are made available to consumers. Providers will be responsible for ensuring products are targeted based on consumer needs, while consumers will still be responsible for the ultimate outcomes of their financial decisions."

The paper puts forward nine proposed positions on key implementation issues:

1. What products will attract the design and distribution obligations? The obligations will apply to financial products made available to retail clients except ordinary shares. This would include insurance products, investment products, margin loans and derivatives. The obligations would not apply to credit products (other than margin loans).
2. Who will be subject to the obligations? 'Issuers' and 'distributors' of financial products must comply with the obligations.
3. What will be expected of issuers? Issuers must: (i) identify appropriate target and non-target markets for their products; (ii) select distribution channels that are likely to result in products being marketed to the identified target market; and (iii) review arrangements with reasonable frequency to ensure arrangements continue to be appropriate.
4. What will be expected of distributors? Distributors must: (i) put in place reasonable controls to ensure products are distributed in accordance with the issuer's expectations; and (ii) comply with reasonable requests for information from the issuer related to the product review.
5. What products will attract the product intervention power? The power would apply to all financial products made available to retail clients (securities, insurance products, investment products and margin loans) and credit products regulated by the National Consumer Credit Protection Act 2009 (the Credit Act) (credit cards, mortgages and personal loans).
6. What types of intervention will the Australian Securities and Investments Commission (ASIC) be able to make using the power? ASIC can make interventions in relation to the product (or product feature) or the types of consumers that can access the product or the circumstances in which consumers access it. Examples of possible interventions include imposing additional disclosure obligations, mandating warning statements, requiring amendments to advertising documents, restricting or banning the distribution of the product.
7. When will ASIC be able to make an intervention? In order to use the power, ASIC must identify a risk of significant consumer detriment, undertake appropriate consultation and consider the use of alternative powers. ASIC must determine whether there is a significant consumer detriment by having regard to the potential scale of the detriment in the market, the potential impact on individual consumers and the class of consumers likely to be impacted.
8. What will be the duration and review arrangements for an ASIC intervention? An intervention by ASIC can last for up to 18 months. During this time, the Government will consider whether the intervention should be permanent. The intervention will lapse after 18 months (if the Government has not made it permanent). ASIC interventions cannot be extended beyond 18 months. ASIC market wide interventions are subject to Parliamentary disallowance. ASIC individual interventions are subject to administrative review.
9. What oversight will apply to ASIC's use of the power? Interventions made by ASIC in relation to an individual product or how a specific entity is distributing a product will be subject to administrative and judicial review. Market-wide interventions subject to Parliamentary oversight

including a 15-day Parliamentary disallowance period. The Government will review ASIC's use of the power after it has been in operation for five years.

The proposals paper and details on how to make a submission are available here.

Directors should consider climate change risk in their duty of care

As a matter of Australian law, directors and boards must actively engage with the impacts of climate change-related risks on their operations and strategy in order to satisfy their duty of due care and diligence under section 180 of the *Corporations Act*. The core standard of competence to which company directors are held is that of the due care and diligence that would be exercised by a reasonable director in the relevant circumstances.

These views were expressed by Mr Noel Hutley SC and junior counsel Sebastian Hartford-Davis at a roundtable of business, regulatory and investment leaders on 21 October. Mr Hutley was commissioned by the Centre for Policy Development and the Future Business Council to provide his opinion on the extent to which the law permits or requires Australian company directors to respond to climate change risks.

"The opinion states that:

- 'climate change risks' represent, or are capable of representing, risks of harm to the interests of, and opportunities for, Australian companies and their business models, which would be regarded by a Court as being foreseeable at the present time;
- such risks are relevant to a director's duty of due care and diligence, and directors can, and in many cases should, be considering the impacts on their business;
- Conversely, the law does not prohibit directors from taking climate change and related economic, environmental and social sustainability risks into account where those risks are, or may be, material to the company's interests; and, critically
- it is conceivable that directors who fail to consider the impacts of climate change risk for their business, now, could be found liable for breaching their statutory duty of due care and diligence going forwards.

In addition, Mr Hutley warned that directors who perceive that climate change does present risks to their business should also assess the adequacy of their disclosure and reporting of those risks."

"Mr Hutley's opinion clearly confirms that, from an evidentiary perspective, risks associated with climate change have evolved from an 'ethical environmental' to material financial issues, and that directors who fail to grapple with them are legally exposed. There is simply no substitute for a proactive, robust governance of the impacts of relevant climate risks in the unique circumstances of each business. As a starting point to the exercise of due care and diligence, directors should inform they are adequately formed in relation to the scientific and economic issues, inquire of experts where appropriate, and critically evaluate the impact of these risks and their company's strategic response."

View the full legal opinion.

Contact Mertons for help in developing a solid risk management framework that includes consideration of climate change risks.

Related party transactions in not-for-profits

A related party is a person or organisation that is related to or has a connection with the not-for-profit organisation (NFP). These can be suppliers, contractors, etc. It is important, from a governance perspective, to ensure the NFP has in place clear policy about how to manage transactions with these related parties. The risk is that otherwise transactions with related parties might not be or may be seen as not being in the best interest of the organisation. Contact Mertons to develop a clear third party transactions policy for your organisation.

Director Sentiment Index 2016

The Director Sentiment Index survey for the second half of 2016 shows directors planning to get on with business despite global uncertainty dragging down overall sentiment.

The latest survey, conducted in October, shows that business is planning to increase investment and boost employment over the next 12 months, despite global political and economic uncertainty seeing the overall sentiment among Australian directors drop by 5 points.

While optimistic on the business outlook, a large majority of directors, almost 80%, said the Federal Government is negatively impacting consumer confidence, and only 8% believe the Government's performance is having a positive impact on business decision making.

On the policy front, directors remain concerned about a lack of infrastructure, taxation reform and the size of the federal budget deficit. They also identified global economic uncertainty (30%), low productivity growth (26%) and a slowdown in China (25%) as the main economic challenges facing Australian business.

Download the report.

ASX News

Admission rule changes and accompanying Guidance Note changes

Changes to ASX's Listing Rules relating to ASX's admission requirements came into effect on 19 December 2016. To assist entities, the ASX has published updates to Guidance Notes 1 Applying for Admission - ASX Listings, 4 Foreign Entities Listing on ASX, 5 CHESS Depositary Interests (CDIs), 8 Continuous Disclosure: Listing Rules 3.1 - 3.1B, 9 Disclosure of Corporate Governance Practices, 12 Significant Changes to Activities, 14 ASX Market Announcements Platform, 15A Schedule of ASX Listing Fees, 23 Quarterly Cash Flow Reports, 27 Trading Policies, 28 Reasonable Fees for Activities Covered by Listing Rule 8.14.1, 29 Applying for Admission - ASX Debt Listings, 30 Applying for Quotation of Additional Securities, and 33 Removal of Entities from the ASX Official List.

These documents are also available on the ASX Listing Rules webpage (see tab on 'Guidance Notes' at the top of the page. A marked-up copy highlighting the changes made is available here.

Inappropriate use of the Market Announcements Platform

The ASX has noted an increase in entities lodging announcements that are mainly promotional in nature and not required to be announced to the market under the Listing Rules, for example, an entity receiving an award or other form of recognition. ASX has announced it may refuse to release an announcement if it is not required to be disclosed under the Listing Rules. In brief, Listing Rule 3.1 requires an entity to disclose information "concerning it" that "a reasonable person would expect to have material effect on the price or value of the entity's securities". Further information is available under Section 4 of Guidance Note 8 Continuous Disclosure.

Deadlines for periodic reports

The upcoming deadlines for periodic reports are:

- Quarterly reports for mining exploration, oil and gas exploration and commitments test entities – Tuesday 31 January 2017
- Half year accounts for entities other than mining exploration and oil and gas exploration entities (June year end) – Tuesday 28 February 2017
- Preliminary final reports for entities other than mining exploration and oil and gas exploration entities (December year end) – Tuesday 28 February 2017

- Half year accounts for mining exploration and oil and gas exploration entities (June year end) – Thursday 16 March 2017
- Full year audited accounts/auditor's report/directors' statement (December year end) – Friday 31 March 2017.

Announcements lodged just before market open or closes

The ASX Market Announcements Office receives higher volumes of documents for release to the market just before the market opens at 10:00 am and just before the market closes at 4:00 pm. This may lead to slightly longer processing times during these peak periods than at other times of the day.

An announcement should be submitted to ASX Market Announcements Office by no later than:

- 9:30 am for release by market open at 10:00 am AEDT; or
- 3:40 pm for release by market close at 4:00 pm AEDT.

Meeting these submission times will not necessarily guarantee publication of the announcement by market open or close, especially if the ASX Market Announcements Office identifies any concerns with the announcement that may require discussion with the entity or its Listings Compliance adviser. Not meeting them, however, will significantly increase the likelihood of the announcement not being released in time.

If a listed entity is trying to lodge a market sensitive announcement before market open and it becomes apparent that it will not be able to submit it to the ASX Market Announcements Office by 9:30 am AEDT, it should immediately contact its Listings Compliance adviser to discuss the options available. This may include putting in place a short trading halt under Listing Rule 17.1 to cater for any delay in the release of the announcement and to ensure the market does not trade on an uninformed basis.

A listed entity should, wherever possible, try to avoid lodging announcements between 3:40 pm and 4.11 pm AEDT as this may interfere with the closing single price auction which occurs between 4:10 pm and 4:11 pm AEDT each day.

Contact Mertons for assistance with all your ASX reporting obligations and governance disclosures.

Women now making up to 30% of 64 ASX boards

A new report released by the Australian Institute of Company Directors (AICD) shows that among the broader ASX 200, women now account for 25% of board positions, up from 8.3% in 2009 when the AICD began compiling figures. This is against the target of 30% female representation on ASX 200 boards by the end of 2018.

While the results for the ASX 200 are generally positive, there are currently 16 companies in the ASX 200 without any female directors – six fewer than in the previous quarterly report for the period June–August.

the AICD also analysed the make-up of the 23 boards that completed Initial Public Offerings (IPOs) during the 1st Quarter of this financial year and found only 7% of board members were women.

Download the report.

Contact Mertons for a review of your current diversity policy.

UK Consultation on Corporate Governance Reform

The UK Government has released a Green Paper on corporate governance reform, asking for views on

- executive pay
    - how to ensure that companies retain flexibility to set remuneration policy while giving proper consideration to the views and concerns of shareholders and the interests of employees and other stakeholders.
- strengthening the employee, customer voice and supplier voice at boardroom level

    - options to improve the connection between the boardroom and the workforce and other interests. These include the establishment of advisory panels and the appointment of designated non-executive directors to take formal responsibility for articulating particular stakeholder perspectives.
- corporate governance in the UK's largest private businesses
    - Shareholders in these companies need mechanisms to ensure that the company is being run in their interests and to have the information that they need to hold the executive directors to account. This section seeks views on whether the UK's largest privately-held companies – where they are of similar size and economic significance to public companies – should be expected to meet higher minimum standards of corporate governance and reporting. If a stronger framework is required, it suggests either extending the UK Corporate Governance Code or developing a new code tailored more specifically to the circumstances of large privately-held businesses.

This consultation closes on 17 February 2017 11:45pm, UK time.

In its introduction, the Prime Minister sets out the tone of the paper by stating her view that strong business and markets are crucial to the collective prosperity of the nation. However, she also makes the point that many ordinary working people have lost faith in the system.

"Good corporate governance is about having the right checks and balances within big business to strengthen decision making and accountability. This Green Paper therefore focuses on ensuring that executive pay is properly aligned to long term performance, giving greater voice to employees and consumers in the boardroom, and raising the bar for governance standards in the largest privately held companies. These are issues which are about competitiveness, and creating the right conditions for investment, as much as they are issues about fairness."

Questions covered in the Green Paper:
<u>Executive Pay</u>

1. Do shareholders need stronger powers to improve their ability to hold companies to account on executive pay and performance? If so, which of the options mentioned in the Green Paper would you support? Are there other options that should be considered?
2. Does more need to be done to encourage institutional and retail investors to make full use of their existing and any new voting powers on pay? Do you support any of the options mentioned? Are there other ideas that should be considered?
3. Do steps need to be taken to improve the effectiveness of remuneration committees, and their advisers, in particular to encourage them to engage more effectively with shareholder and employee views before developing pay policies? Do you support any of the options set out in the Green Paper? Are there any other options you want to suggest?
4. Should a new pay ratio reporting requirement be introduced? If so, what form of reporting would be most useful? How can misleading interpretations and inappropriate comparisons (for example, between companies in different sectors) be avoided? Would other measures be more effective? Please give reasons for your answer.
5. Should the existing, qualified requirements to disclose the performance targets that trigger annual bonus payments be strengthened? How could this be done without compromising commercial confidentiality? Do you support any of the options outlined in the Green Paper? Do you have any other suggestions?
6. How could long-term incentive plans be better aligned with the long-term interests of quoted companies and shareholders? Should holding periods be increased from a minimum of three to a minimum of five years for share options awarded to executives? Please give reasons for your answers.

Strengthening the employee, customer and wider stakeholder voice

7. How can the way in which the interests of employees, customers and wider stakeholders are taken into account at board level in large UK companies be strengthened? Are there any existing examples of good practice that you would like to draw to our attention? Which, if any, of the options (or combination of options) described in the Green Paper would you support? Please explain your reasons.
8. Which type of company do you think should be the focus for any steps to strengthen the stakeholder voice? Should there be an employee number or other size threshold?
9. How should reform be taken forward? Should a legislative, code-based or voluntary approach be used to drive change? Please explain your reasons, including any evidence on likely costs and benefits.

Corporate governance in large, privately-held businesses

10. What is your view of the case for strengthening the corporate governance framework for the UK's largest, privately-held businesses? What do you see as the benefits for doing so? What are the risks to be considered? Are there any existing examples of good practice in privately-held businesses that you would like to draw to our attention?
11. If you think that the corporate governance framework should be strengthened for the largest privately-held businesses, which businesses should be in scope? Where should any size threshold be set?
12. If you think that strengthening is needed how should this be achieved? Should legislation be used or would a voluntary approach be preferable? How could compliance be monitored?
13. Should non-financial reporting requirements in the future be applied on the basis of a size threshold rather than based on the legal form of a business?

Other issues

14. Is the current corporate governance framework in the UK providing the right combination of high standards and low burdens? Apart from the issues addressed specifically in this Green Paper can you suggest any other improvements to the framework?

Download the Green Paper. Make a submission. Read the interview by the AICD of Oliver Parry of the UK's Institute of Directors about the proposed changes.

NZX update

Annual report diversity statistics
The NZX has reviewed several annual reports where issuers are not providing or incorrectly providing the gender statistics of directors and officers. Main Board Listing Rule 10.4.5 (j) requires issuers to provide a quantitative breakdown as to the gender composition of its directors and officers as at the issuer's balance date, and include comparative figures for the prior balance date.

For further information please refer to NZX's listing rules guidance on diversity policies and disclosure, and the NZX Main Board ruling, both can be access here.

Waivers from corporate governance provisions of the Listing Rules
NZX has confirmed that it is unlikely to grant waivers from the corporate governance provisions of the Rules, except for in exceptional circumstances. The waiver recently granted to Fonterra Co-operative Group Limited, provides further clarity on when NZX considers circumstances exceptional, and may grant a waiver.

Continuous disclosure
NZX is considering how issuers manage disclosure relating to the development of trends. NZX's Continuous Disclosure Guidance Note sets out guidance on how to manage the obligation in this situation, but we acknowledge that the specific circumstances of an issuer's business introduces a subjective element.

NZX corporate governance review

NZX is reviewing submissions received in response to consultation in 2016, with a view to finalising the proposed updated NZX corporate governance best practice code, implementation plans, and seek approval from the Financial Markets Authority for the proposed amendments by Q1 2017. Further information in relation to the review can be found here.

Disclosure of key audit matters within audit reports

NZX reminds issuers that amendments will come into effect in relation to the disclosure of key audit matters within audit reports for reporting periods ending 31 December 2016 and beyond. Further information can be found here. Chartered Accountants Australia and New Zealand has also prepared a report that analyses early adoption of the enhanced audit report which is available here.

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Sources of information for this document:

Ashurst; Australian Charities and Not-for-profits Commission (ACNC); Australian Competition and Consumer Commission (ACCC); Australian Council of Superannuation Investors (ACSI); Australian Financial Security Authority; Australian Government; Australian Institute of Company Directors (AICD); Australian Prudential Regulation Authority (APRA); Australian Securities and Investments Commission (ASIC); Australian Securities Exchange (ASX); Chartered Accountants Australia and New Zealand ComLaw; Commonwealth Government; Deloitte; Governance Institute; Future Business Council; King & Wood Mallesons; LexisNexis; Madgwicks Lawyers; MinterEllison; New Zealand Stock Exchange (NZX); Productivity Commission; Purpose of the Corporation Project; UK Government.

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