

## Mertons' Corporate Update – September 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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## Governance Institute Ethics Index

The inaugural *Governance Institute Ethics Index* quantifies the perception of the Australian adult population as to what they believe to be the actual level of ethical behaviour within Australian society. It provides a powerful benchmark to assess ethics over time.

According to the study, Australian consumers view big business, banks and politicians as unethical.

The survey also found that

- Australians rate chief executives and directors as the most important 'gatekeepers' influencing ethics in organisations
- government laws, regulations and financial penalties are seen to influence ethical behaviour, but are not considered as important a factor as the 'tone from the top' set by directors and C-suite executives
- whistleblowers also have an important role to play in corporate Australia, with 80 per cent of respondents believing they are an essential element in driving ethical behaviour.

Download the [executive summary](#).

*Contact Mertons for help in analysing your governance structures, processes and reporting.*

## ASIC News

### ASIC remakes instruments that affect financial reporting

ASIC has remade five legislative instruments that affect financial reporting by disclosing entities and entities generally. The instruments:

- relieve entities of the obligation to send a hard copy of the directors' report, financial report and auditor's report to members who are uncontactable
- allow entities to transfer some information from the directors' report to the financial report or to a separate document accompanying both the directors' report and financial report
- allow entities to synchronise their financial year with that of a foreign parent where that foreign parent has an obligation under a foreign law to synchronise the financial years of controlled entities with its own
- relieve entities from reporting as disclosing entities if they cease to be disclosing entities before the reporting deadline for a financial year
- relieve disclosing entities which have a first financial year of 8 months or less from preparing a half-year financial report and directors' report during that financial year; and
- allow entities to round amounts disclosed in the directors' report and financial report.

The relief is set out in the following new legislative instruments:

- *ASIC Corporations (Uncontactable Members) Instrument 2016/187* (replaces Class Order 98/101)
- *ASIC Corporations (Directors' Report Relief) Instrument 2016/188* (replaces Class Order 98/2395)
- *ASIC Corporations (Synchronisation of Financial Years) Instrument 2016/189* (replaces Class Order 98/96)
- *ASIC Corporations (Disclosing Entities) Instrument 2016/190* (replaces Class Orders 98/2016 and 08/15)
- *ASIC Corporations (Rounding in Financial/Directors' Reports) Instrument 2016/191* (replaces Class Order 98/100).

### ASIC Review of marketing practices in IPOs

An ASIC review of marketing practices in 23 IPOs has found that social media was significantly less important than so-called 'traditional' marketing - telephone calls, emails and websites – for IPOs in Australia.

Surprisingly, the report found that despite considerable marketing by telephone to retail investors, and sophisticated or professional investors, firms' employees did not generally use a script or keep notes of the call. As a result, oversight of this marketing method by firms was limited.

The report also found that some firms and issuers may be disseminating information to the media before the prospectus is lodged with ASIC in a way that undermines the advertising provisions in the Corporations Act.

The report also warns investors against relying on information provided by online investor forums, as this information may not represent a balanced assessment of an IPO.

Report 494, *Marketing practices in initial public offering of securities*, is available from ASIC's [website](#).

### **Directors need to be more involved in IPO due diligence**

An ASIC review of issuer due diligence in initial public offerings, found that:

- The adoption of poor due diligence practices often produced prospectuses with defective disclosure.
- The issuers and their directors should conduct an effective due diligence process to mitigate the risk of any future liability from a poor-quality prospectus.
- It is important for directors of issuers and their advisers to be actively engaged in the due diligence process.
- Additional procedures may be required to overcome the additional challenges of foreign laws, language barriers and supervision for emerging market issuers.
- A low-cost due diligence process may often lead to delays, further work and ultimately be more costly to an issuer.

REP 484: *Due diligence practices in initial public offerings*, involved the review of due diligence practices of 12 IPO issuers between November 2014 and January 2016.

The report demonstrates the benefits in conducting a thorough diligence process, and includes guidance for directors and advisers about good practice due diligence. Download the report [here](#).

### **ASIC Review of 31 December 2015 financial reports**

A review of the 31 December 2015 financial reports of 100 listed and other public interest entities, has found that impairment of non-financial assets and inappropriate accounting treatments continues to be an issue in financial reports. ASIC recommends that directors and auditors should continue to focus on the values of assets and accounting policy choices when preparing their 30 June 2016 reports.

ASIC's focus areas for 30 June 2016 financial reports include:

- Asset values
- Accounting policy choices
- Material disclosures
- The role of directors
- Client monies

Further detail is available from [ASIC's website](#).

*Mertons can assist with all your compliance and reporting requirements.*

## **Corporate Culture and the Role of Boards**

The new report by the UK Financial Reporting Council (FRC) – *Corporate Culture and the Role of Boards* – seeks to address how boards and executive management can steer corporate behaviour to create a culture that will deliver sustainable good performance.

The report looks at the increasing importance of corporate culture in delivering long-term business and economic success, and the role of the board in shaping, monitoring and overseeing culture.

“There needs to be a concerted effort to improve trust in the motivations and integrity of business. Rules and sanctions clearly have their place, but will not on their own deliver productive behaviours over the long-term.”

The report makes the connection between strong governance and a healthy culture and makes the following key observations:

- Leaders must embody the desired culture. Connect purpose and strategy to culture. “The strategy to achieve a company’s purpose should reflect the values and culture of the company and should not be developed in isolation. Boards should oversee both.”
- Recognise that a healthy corporate culture is a valuable asset. “Directors should not wait for a crisis to focus on company culture.”
- Openness and accountability should be demonstrated at every level in the way the company conducts its business and engages with all its stakeholders.
- Embed and integrate the values of the company.
- Assess, measure and engage. “Boards should give careful thought to how culture is assessed and reported on.”
- Align values and incentives to support behaviours consistent with the company’s purpose, values, strategy and business model.
- Effective stewardship should include engagement about culture and encourage better reporting.

Download the report [here](#).

*Contact Mertons for help to undertake a governance audit to assess the culture of your company.*

## Law, lore and culture

In an article in the Australian Institute of Company Directors’ (AICD) Board Room Report, Michael Henderson, corporate anthropologist, explains the importance of paying attention to the ‘lore’ of the organisation to avoid “falling off the ethical cliff”.

The article proposes that lore, which is about the creation of shared beliefs, language and the tales people tell themselves, also exists within organisations, creating strong motivations for people to see the world in particular ways, act according to this perspective and get encouragement and blessing from peers.

“From a governance perspective, to work solely on a robust and rigorous framework to ensure adherence to the law, and ignore its ‘kryptonite’ of lore, is an expensive and wasteful folly.”

Read the [article](#).

## 2016 Not-For-Profit Governance and Performance Study: Raising the Bar

The Australian Institute of Company Directors (AICD) has released the *2016 NFP Governance and Performance Study: Raising the Bar*. The study, which is a snapshot of governance across the not-for-profit sector, found that the sector is well-governed and achieves outstanding results. “Over the course of this research, we have found that there are deep-seated and negative perceptions about the efficiency, effectiveness and commerciality of NFPs. These perceptions do not align with the reality of the modern, sophisticated and well-governed NFPs of today.”

The report highlighted areas that are vital to the long-term sustainability and effectiveness of the sector, including:

- good governance
- financial sustainability
- collaboration between not-for-profits
- innovation
- building and improving relationships with government.

It also found that while most NFP directors recognise the importance of strategy, many focused too much on short-term or operational issues. NFP boards can grow their impact by challenging their expectations, setting higher goals and improving their long-term strategic planning. Some of the key questions for NFP boards to ask include:

- Do we have a clearly articulated strategic plan?
- Does the board understand the operational context? Does it know how it will change in the next five years?

- What are the major threats and opportunities the organisation faces? Do we have a plan to address them?
- What skills does the organisation need now and for the next five years? Why?
- What skills will the board need to best support this organisation? Do we have a skills matrix? Is it consistent with the organisation's needs?
- If my skills are out of date or duplicated on the board, should I step down?
- What responsibility do I have to bring the right skills to the board?

Download the report [here](#).

*Contact Mertons if you are a not-for-profit organisation wanting to review your board performance, composition and directors' skills, as well as your strategic planning processes.*

## CEO pay 2016

According to the Australian Council of Superannuation Investors' 15th annual study of CEO Pay, fixed pay for CEOs is at its lowest in nearly a decade. In the 100 largest listed companies, CEO salaries are down 3.3% to \$1.86m, as boards seize the opportunity to hire new CEOs on lower pay. Across the entire ASX200, the fall was 4.6%, with the average pay falling to \$1.51m before bonuses and shares.

The study relates this as a result of investor calls about executive pay, as well as the 'two strikes' rule.

Bonuses, however, especially in the ASX100, are strikingly persistent. A solid 93% of the ASX100 sample were awarded a bonus for their year's work – more than at any time since 2008 – and they received a median of 76% of their maximum bonus, with only a handful missing out on a bonus.

This was seen by ACSI as an area of concern, with questions rising about the appropriateness of bonus hurdles and whether bonus payments are just fixed pay dresses up as at-risk pay. ACSI warns that boards risk an investor backlash if they don't keep a tighter rein on management pay.

Download the report [here](#).

## White paper: Does the Annual General Meeting (AGM) need to become an eAGM?

While the AGM is the vital forum for decision-making by shareholders and shareholders and directors to interact. However, there is widespread acceptance that the AGM needs to change to improve shareholder engagement and enhance the efficiency of the process, the integrity of member communications, and decision-making.

To discuss these matters, LexisNexis and the Governance Institute of Australia held a roundtable discussion in March this year. The white paper is the result of those discussions.

Key points include:

- Costs of holding an AGM have been increasing, while at the same time, shareholder attendance is falling.
- Most roundtable participants have used various strategies to increase shareholder attendance and engagement, including webcasting the AGM, allowing shareholders to vote directly online and in advance, allowing shareholders to submit questions in advance of the AGM, conducting voting on electronic handsets or smartphone apps.
- Changes suggested include: canvass questions in advance and select highest priority issues to be addressed at the AGM, promote direct voting, mandate electronic meeting materials, separate the AGM into two meetings: one for voting/decision making, the other for shareholder information sharing and allow discussion of the company's future plans and strategies.

Download the full white paper [here](#).

*Contact Mertons for help with planning and holding your AGM, including creating an effective shareholder communications program.*

## Gender target progress

The Australian Institute of Company Directors' (AICD) latest *Gender Diversity Progress Report* shows that the target to achieve 30% female representation on ASX200 boards can be met by the end of 2018 if the current appointment rates are sustained.

The report, covering the 12 months to June 2016, found that the average appointment rate has steadily increased since 2013. The current yearly appointment rate is 30.9%.

Download the report [here](#).

Contact Mertons for an audit and review of your diversity policies.

## ASX News

### Amendments to Appendix 4C and Appendix 5B- Quarterly Cash Flow Reports are effective now

All listed entities required to lodge Quarterly Cash Flow Reports should note that the new Appendices 4C and 5B came into effect on 1 September 2016 and are effective for quarters ending on or after 30 September 2016. Accordingly, listed entities filing Appendices 4C or 5B will need to use the new form for their September 2016 quarter filings and all subsequent filings. Editable copies of the new forms are available on the ASX Compliance downloads page at <http://www.asx.com.au/regulation/compliance/compliance-downloads.htm>.

### Listing Rule 7.1A - Additional 10% Placement Capacity

ASX has published a [Listing Rule 7.1A User Guide](#) with detailed information to assist eligible entities and their advisers in drafting the notice of meeting seeking security holder approval, and information to assist entities with their disclosure requirements once an issue has been made under this rule.

### Daylight savings commencing 2 October

Daylight saving commences in New South Wales, the Australian Capital Territory, Victoria, Tasmania and South Australia at 2 a.m. EST on Sunday 2 October 2016, and will end at 3 a.m. on Sunday 2 April 2017. Daylight saving is not observed in Queensland, Western Australia or the Northern Territory.

As WA will be 3 hours behind Sydney time during daylight saving, ASX Market Announcements will stay open until 8.30 p.m. Sydney time (5.30 p.m. WST) starting on Monday 3 October 2016. ASX Market Announcements will revert to its usual 7.30 pm Sydney time closing time when daylight saving has ended.

### Upcoming deadlines for periodic reports

- Statutory half year financial reports for mining exploration entities, 31 December balance date: *Tuesday 13 September 2016*
- Statutory audited annual accounts, 30 June balance date: *Friday 30 September 2016*
- Annual reports, 30 June balance date: *Monday 31 October 2016*

### Guidelines on title headers to ASX announcements

Listed entities are reminded of the guidance in paragraph 12 of [ASX Guidance Note 14](#) and paragraph 9 of [ASX Guidance Note 20](#) about giving an announcement that contains market sensitive information a header that clearly conveys this fact. ASX has had issues with announcements that have headers that convey an impression that they are not market sensitive when they have embedded within them market sensitive information. Some examples are:

- "Cleansing Notice and Receipt of Indicative, Non-binding and Conditional Proposal" as opposed to just "Cleansing Notice"
- "Notice of AGM and Buy Back Offer" as opposed to just "Notice of Annual General Meeting"

Alternatively and preferably, market sensitive announcements should be made on a stand-alone basis and not embedded in other announcements that may not be market sensitive.

### **Lodging your notice of meeting for your AGM with ASX**

Listed entities must hold their AGMs within five months of their financial year end. Almost 90% of ASX's listed entities have a balance date of 30 June and therefore have to hold their AGMs by 30 November each year.

Under Listing Rule 15.1.7, draft notices of general meeting that contain resolutions for Listing Rules purposes must be submitted to ASX for review before they are sent to security holders. Listing Rule 15.1 provides that ASX may take five business days to advise whether it objects to a draft document and may extend that deadline that it needs further time to review the document.

ASX reminds listed entities to allow sufficient time for ASX to review their draft notices of meeting. This is particularly important if there are a number of resolutions or complex transactions to be considered.

If waivers from any listing rules are required in connection with the notice of AGM, additional time should be allowed. Listed entities should contact their Listings Compliance Adviser to seek advice on how long ASX needs to process a waiver request.

### **Dividend and distribution information**

Listed entities declaring a dividend or distribution for the period ending 30 September 2016 are reminded that they must use ASX Online forms to announce the dividend or distribution and that if they wish to set a record date of 30 September 2016, they will need to announce the dividend or distribution by no later than **26 September 2016** (Day 0 in the [Appendix 6A](#) Paragraph 1 timetable).

### **Continuous Disclosure – Naming Counterparties to Material Transactions even if subject to confidentiality agreements**

ASX has recently identified a number of instances where listed entities have announced a material transaction without disclosing the identity of the other party or parties to the transaction. The transactions have included binding and non-binding terms sheets or memoranda of understanding for acquisitions or disposals of assets, off-take agreements, distribution agreements, strategic investments and financing arrangements.

ASX considers that if a transaction is sufficiently material to warrant disclosure under Listing Rule 3.1, the identity of the other party or parties will generally itself be material information that must also be disclosed under that rule. Such information is required by investors and their professional advisers to understand the ramifications of the transaction and to assess its impact on the price or value of the entity's securities.

Listed entities are also reminded that they must comply with their disclosure obligations under Listing Rule 3.1, even where they are party to a confidentiality or non-disclosure agreement that might otherwise require them to keep information confidential. ASX, therefore, will not accept as an excuse from a listed entity for not disclosing an appropriate level of information about the other party or parties to a material transaction that the entity is subject to confidentiality obligations prohibiting that disclosure.

For further information, entities should refer to [ASX Guidance Note 8 Continuous Disclosure: Listing Rules 3.1 - 3.1B](#).

### **Listing and waiver applications declined by ASX 1 January 2016 – 30 June 2016**

ASX has an absolute discretion concerning the admission of an entity to the official list and the quotation of its securities. ASX also has broad discretions under the Listing Rules whether to require or waive compliance with the Listing Rules in a particular case, to remove an entity from the official list and to suspend its securities from quotation.

To enhance transparency and assist stakeholders to understand how ASX interprets and applies the Listing Rules, ASX intends to publish on a quarterly basis high-level reasons why it has declined certain listing and waiver applications. The first of such publications, which covers the 6-month period ended 30 June 2016, is now

available on the ASX website at the following link: <http://www.asx.com.au/documents/asx-compliance/rejected-listing-and-waiver-applications.pdf>

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

## Tips for board recruitment

The Australian Institute of Company Directors (AICD) recently put together the tips for board recruitment from three of the country's top executive search firms: Korn Ferry, Spencer Stuart and Derwent Executive.

Tom Mutch, Partner at Derwent Executive, recommends using the organisation's short and long-term strategic priorities as the foundation for building not just the profile of the ideal candidate, but also to start thinking what you want the board to look like in years to come.

An important part of the process, especially in the early stages, is to review the skills matrix of the board and committees against the organisation's strategic intent, followed by an evaluation of the board's strengths, so you can identify the gaps that need to be filled.

Compiling a list of key skills, capabilities and attributes is important, as is developing a clear position description for the role from the very beginning. Another important step is to find ways of quantifying the subjective attributes, such as 'cultural fit'. Finally, standardising the recruitment process allows you to ensure that all candidates are assessed by the same criteria.

Read the [article](#).

*Contact Mertons for help with a review of board performance, skills matrix creation or audit and/or the preparation of a succession planning process.*

## Governance issues in not-for-profit organisations

The Governance Institute of Australia has published a series of 'Good Governance Guides' to help not-for-profit organisations deal with governance issues. The guides cover topics ranging from board structure, managing conflicts of interest, separation of authority between board and management, volunteer management, and several others.

The guides are available [here](#).

*Contact Mertons for advice and help with your governance structures, processes and documentation.*

## NZX review of corporate governance best practice code

The NZX has released a consultation paper seeking feedback from interested parties on proposed updates to NZX's corporate governance best practice code. The consultation paper states that one of the aims of the updated code is to ensure that the NZX code is the primary source of corporate governance guidelines for NZX Main Board issuers.

The key changes cover diversity, environmental, social and governance reporting, health and safety reporting and remuneration reporting. All new recommendations sit within the current 'comply or explain' framework.

The closing date for submissions is **5.00 pm Friday, 14 October 2016**.

Download the consultation paper [here](#).

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Sources of information for this document:

Ashurst; Australian Charities and Not-for-profits Commission (ACNC); Australian Council of Superannuation Investors (ACSI); Australian Financial Security Authority; Australian Government; Australian Institute of Company Directors (AICD); Australian Securities and Investments Commission (ASIC); Australian Securities Exchange (ASX); ComLaw; Commonwealth Government; Governance Institute; LexisNexis, Productivity Commission; UK Financial Reporting Council; UK Prudential Regulation Authority (PRA).