



Mertons' Corporate Snapshot – October 2017

Mertons' Corporate Snapshot provides you with an overview of current corporate governance matters, including regulatory changes, trends, and other important issues.

To discuss how these may affect you, please contact us on 03 8689 9997

Directors' Safe Harbour Reform passes Senate

Reforms that amend the *Corporations Act 2001* have passed Parliament and will now become law. The amendments create a safe harbour for company directors from personal liability for insolvent trading if the company is undertaking a restructure.

Under the current regime, directors may be personally liable for a company debt if at the time it was incurred, there were reasonable grounds to suspect the company was insolvent or may become insolvent.

Under the amendments, the safe harbour from personal liability will apply if the director "starts taking a course of action that is reasonably likely to lead to a better outcome for the company and its creditors". The amendments will also make certain types of ipso facto contractual clauses unenforceable while a company is restructuring under administration.

According to the explanatory memorandum, "This will drive cultural change amongst company directors by encouraging them to keep control of their company, engage early with possible insolvency and take reasonable risks to facilitate the company's recovery instead of simply placing the company prematurely into voluntary administration or liquidation."

The Bill and explanatory memorandum is available [here](#), or read the [AICD's explainer article here](#).

ASIC news

ASIC reports on how investors decide to invest in IPOs

ASIC survey finds there is scope for improvement in the usability and credibility of prospectuses for investors. More information is available in [REP 540](#) *Investors in initial public offerings*.

NSX listing standards

ASIC's review of the listing standards of the National Stock Exchange of Australia Limited (NSX) concludes that the NSX should make a number of changes to improve compliance with its statutory obligations. More information is available [here](#).

ASIC facilitates crowd-sourced funding

ASIC has released [guidance](#) to help public companies seeking to raise funds through crowd sourcing to understand and comply with their obligations commencing on 29 September 2017. ASIC has also amended a number of regulations and instruments to reduce the compliance burden associated with obtaining consent. Download [RG 261](#) *Crowd-sourced funding: Guide for public companies*.

ASIC reports on outcomes of relief applications

[Report 530](#) *Overview of decisions on relief applications* notes that between October 2016 and March 2017, ASIC granted relief from provisions of the *Corporations Act 2001* or the *National Consumer Credit Protection Act 2009* to 474 applications. The report also provides examples that may be relevant to others considering applying for relief.

ASIC's key focus areas for enforcement

- **Market integrity:** Risk in Australia's markets and the integrity of financial market benchmarks, especially in terms of technology-enabled offending and malicious cyber crime.
 - **Corporate governance:** Gatekeepers who do not meet the high standards required by law, particularly when it comes to undisclosed associations and substantial holdings in shares in public companies and poor financial reporting
 - **Financial services:** Responsible lending practices in the consumer credit industry, particularly the assessment of the legitimacy of a loan and the customer's ability to repay a loan.
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ASIC market integrity report

[Report 542](#) covers ASIC's work to help ensure Australia's financial markets operate fairly and efficiently. It looks at ASIC's focus on cyber resilience, sell-side research and listing standards, as well as key activities in areas such as insider trading and the management of spot foreign exchange businesses.

ASX News

Fees for registering paper-based transfers

Listing Rule 8.14.1 and [Guidance Note 28](#) permit a reasonable fee to be charged for registering a paper-based transfer; however, only if permitted by the constitution. Entities should review their constitution to confirm that it permits charging a fee for paper-based transfers. Exceptions are deceased estates and employee share plans.

Whistleblower protections found inadequate

The Parliamentary Inquiry into whistleblower protections has found that the protections are inadequate, due to the near impossibility under current laws to protect whistleblowers from retaliation or to hold those those responsible for reprisals to account. One of the committee's main recommendations is the establishment of a Whistleblower Protection Authority that can support whistleblowers, assess and prioritise the treatment of whistleblowing allegations, conduct investigations of reprisals, and oversight the implementation of the whistleblower regime for both the public and private sectors. Download the [report](#).

LexisNexis and GIA call for wholesale review of the Corps Act

LexisNexis and Governance Institute of Australia hosted a roundtable of senior governance and risk professionals earlier this year to explore views regarding the need for a wholesale review of the Corporations Act and the best way to pursue holistic reform. This resulted in a whitepaper: [Governance professionals call for a review of the Corporations Act](#). [Download](#) the whitepaper.

“Directors shouldn't leave innovation to chance.” *David Thodey*

At a recent Leaders' Edge Luncheon held in Melbourne, David Thodey AO FAICD, chairman of CSIRO, shared ways directors can successfully drive innovation and change from the boardroom. Thodey believes

the most successful approaches to innovation rely on the active, authentic leadership of directors. To succeed, directors need to:

- Be clear on what the organisation is and what it isn't
- Use the customer as an agent of change
- Bring a learning attitude to the boardroom
- Create a culture that will enable change to flourish
- Ensure innovative ideas are always supported by processes and structures
- Put your money where your mouth is
- Actively pursue opportunities to collaborate

Read the [interview](#).

Cybersecurity red flags

The Australian Institute of Company Directors has partnered with Optus to bring expert insights on cybersecurity to Australian directors and business leaders. The three red flags of an organisation not being prepared to deal with cyber threats are:

- the first time the board discusses it is after they have read something in the newspaper, where perhaps their competitor has been hit, or something in their industry is happening.
- that security teams aren't talking across the organisation and they are operating too much in a silo, where they are not speaking to procurement, legal, marketing and or sales teams to see what is happening across the organisation.
- they do not have a tried and tested instant response plan.

Read more [here](#).

New guide on continuous disclosure

Governance Institute of Australia's new publication, *Continuous Disclosure: listed and other disclosing entities*, provides an invaluable guide to the essentials of continuous disclosure and what it involves in practice. [Read more](#)

What can directors do to improve corporate culture?

At an AICD event, APRA's Chairman and an ASIC Commissioner gave their thoughts on what organisations can do to improve corporate culture. The questions boards could be asking include:

- Has the culture of the organisation been independently assessed?
- Do the stated values match the actual experience of customers, employees and suppliers?
- Is culture a regular feature on the board or a relevant committee agenda?
- Do directors have broader interaction across the organisation, not just with management?
- Does the board engage with external stakeholders such as customers, suppliers and even regulators?

Read the article [here](#).

Advocacy by charities

The Charities Act 2013 (Cth) recognises advocacy as a legitimate activity of charities. The law is quite broad and allows charities to assess, critique, compare or rank policies of political parties and candidates where it is consistent with their charitable purpose. Read the [article](#).

NZX

Review of NZX equity market structure / main board listing rules

In June, NZX announced that it was reviewing its current equity market structure. A likely outcome of this review will be to consolidate NZX's equity markets (NZSX, NZAX and NXT) into a single board. NZX commenced a formal consultation process on the structure at the end of September.

NZX Corporate Governance Code

The updated NZX Corporate Governance Code has been approved by the Financial Markets Authority. The Code will apply to all issuers listed on the Main Board for reporting periods ending 31 December 2017 and beyond. The code promotes transparency on governance practices under a "comply or explain" regime so issuers can depart from recommendations where appropriate. Read the Code [here](#).

Practice Notes

NZX has released its third batch of [Practice Notes](#), which includes guidance on how to manage disclosure obligations in four scenarios:

- Material information arises during a trading day;
- Material information arises outside of trading hours;
- Material information emerges for an issuer listed on more than one exchange; and
- A third party releases information about an issuer.

Accelerated entitlement offers

NZX has granted a class waiver to facilitate the use of accelerated entitlement offers to raise capital. Accelerated offers are pro-rata offers of securities to existing shareholders under an accelerated timetable. The waiver enables the three most common forms of accelerated offer seen in the Australasian markets (AREOs, SAREOs and PAITREOs), without needing to apply for waivers of various Listing Rules that are usually triggered by such offers. Class waiver [here](#). Read the Practice Note on [Accelerated Offers](#).

Class ruling on proxy forms

The [class ruling](#) confirms that, subject to issuers meeting certain prescribed conditions, issuers may provide in their proxy forms that a named person or officer will act as that shareholder's proxy and vote in accordance with their express direction.

Sources of information: Australian Charities and Not-for-profits Commission (ACNC); Australian Government; Australian Institute of Company Directors (AICD); Australian Securities and Investments Commission (ASIC); Australian Securities Exchange (ASX); Governance Institute of Australia; New Zealand Stock Exchange (NZX); Productivity Commission.

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