



Mertons' Corporate Snapshot – September 2018

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.

It's a matter of trust

Australia is experiencing a crisis of trust, exacerbated by the continuing scandals to come out of the banking Royal Commission, scandals in politics, business, sports and in many key institutions that support society. In 2018, trust continues to decline across all four key institutions: the media, business, government and NGOs, with all four institutions classified as 'distrusted' ([Edelman report](#)). Note that these results reflected the state of trust in Australia in November last year, before the Royal Commission, so are likely to fall further.

The [Governance Institute's Ethics Index 2018](#) quantifies the views of the importance of ethics and what is the actual level of ethical behaviour within Australian society. The index fell six points since last year, from 41 to 35. Results show that banking, finance and insurance are seen as the most unethical industries.

Why does it matter?

According to [The Ethics Centre](#), "organisations will find it difficult, if not impossible, to operate effectively if they do not enjoy the trust and confidence of the community." This is echoed by [Steven Spurr](#), CEO Edelman Australia; "Trust is an important business metric, because it's essential to your social licence to operate."

What should directors do?

Stakeholders see boards and directors as ultimately responsible for the company's culture and the behaviours of people in their company. Directors must work at engendering transparency and honesty throughout the organisation and put in place the necessary measures so that people feel safe to report on issues without fear of retribution. Directors must also demonstrate the behaviours they want the organisation to have – walk the talk.

The board must set the 'tone at the top'. They should develop an ethical framework (including a clearly espoused purpose, supported by values and principles) that sits at the heart of the governance framework.

Royal Commission – good governance is the missing element

Even before the Financial Services Royal Commission, trust in banks had eroded because of exorbitant profit margins and executive bonuses, conflicts of interests, high fees and poor customer service. Since the Royal Commission began its hearings, the revelations of misconduct across banks and other financial services institutions have become a daily occurrence. Worse still is the revelation that all have failed at some level.

The appalling behaviours of banks cover bribery, forging documents, lying to customers and regulators and charging fees to customers who have died. The superannuation industry fared no better, with revelations of massive fees, breaches of duty by fund trustees and charging fees for no service and then destroying the evidence. More recently, the Commission has been looking at the insurance industry, with yet more revelations, such as selling inappropriate policies to clients, selling policies to people with an intellectual disability, applying outdated policy exclusions to avoid paying claims and aggressive cold-call tactics, which are banned by law.

Each instance of misconduct unearthed by the Commission is yet another example of failed governance. In its [submission](#) on key policy issues to the Royal Commission, Treasury concluded that, "the extent and types of misconduct evident during the Commission's hearings point to some serious failings - persistent failures to meet legal obligations, engaging in conduct that clearly falls below community standards and expectations, delays or failures in reporting breaches to the regulator and resistance to compensating consumers when misconduct or other problems are identified.

“While it is for the Commission to reach a judgment on how systemic these problems and the underlying causes are, *prima facie* these outcomes reflect instances of failures of leadership, governance and accountability at an industry, firm and business unit level. Where misaligned incentives and conflicts of interest have been present, the underlying failings and the poor outcomes have been exacerbated.”

The fallout for companies, directors and officers is likely to continue, with lawyers already recommending criminal charges against NAB and CBA, and law firm Slater and Gordon launching what is possibly the largest class action in the nation’s history against the big banks.

What should directors do?

Governance practices are in the spotlight - directors and boards must work hard to ensure they have the right governance framework in place for their business. Acting in the best interests of the company should not come at the cost of shareholders or customers - a balance of a strategic and moral approach to governance and oversight is needed. Directors must employ strong governance practices that support the organisation to meet the expectations and needs of all stakeholders.

Update to Corporate Governance Principles

The ASX Corporate Governance Council has consulted on proposals to update and issue a 4th edition of its Corporate Governance Principles and Recommendations, first introduced in 2003.

While the standards of corporate governance in Australia remain high by international standards, the Council recognises the need to regularly assess and evolve the Principles and Recommendations to address emerging domestic and global issues in corporate governance.

In May 2017, the Council resolved to commence work on a 4th edition to address issues, including:

- social licence to operate;
- corporate values and culture;
- whistleblower policies;
- anti-bribery and corruption policies;
- an apparent slowing in the rate of progress in achieving gender diversity at board level;
- a recommendation from the Senate Economics References Committee for increased guidance around carbon risk;
- cyber-risks; and
- other areas for improvement identified by KPMG in a review commissioned by the ASX Education and Research Program on the adoption of the recommendations in the third edition of the Principles and Recommendations.

The Council’s proposed changes anticipated and respond to some of the governance issues identified in recent enquiries, such as the Hayne Royal Commission. It is intended that the draft be finalised over the coming months and that the 4th edition of the Principles will take effect for an entity’s first full financial year commencing on or after 1 July 2019.

ASX News

Lodging your notice of meeting for your AGM

Listed companies must hold their AGMs within 5 months of their financial year end. As most ASX listed entities have a year-end of 30 June, they must hold their AGMs by 30 November. Companies proposing resolutions impacting on certain Listing Rules are required to lodge their notice of meeting with the ASX for review prior to mailing to shareholders. The review may take up to 5 business days and needs to be considered in light of the statutory notice period required for shareholder meetings.

Dividend and distribution information – period ending 30 September 2018

As 30 September 2018 falls on a Sunday, it cannot be used as a record date. Therefore, entities should use 28 September 2018 as the record date, in which case they will need to announce the dividend or distribution by no later than 24 September 2018 (Day 0 in the Appendix 6A Paragraph 1 timetable).

ASX Operating Rules

On 7 September, ASX released its [response to consultation](#) on proposed amendments to the ASX Clear Operating Rules and the ASX Settlement Operating Rules to: (i) support the removal of the Registered Holder Collateral Cover Authorisation form for client accounts; and (ii) enable a third party to take a security interest over collateral and excess cash where prescribed conditions are met. This document summarises feedback received from stakeholders on ASX's April consultation and ASX's response to that feedback. Subject to regulatory clearance, the rule amendments will be effective 1 March 2019.

ASIC news

ASIC industry funding – what you need to know

This is the first year of the new funding model for ASIC and the deadline for regulated entities to register and submit initial information is [27 September](#). ASIC has provided [detailed instructions](#) of what you need to do and a [checklist](#) on business activity metrics. Small proprietary companies will go through a simplified process whereby they pay an additional \$4 on top of their annual review fee.

ASIC enhances its international powers

ASIC has signed a *Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information* with the International Organisation of Securities Commission (IOSCO). This enhances [ASIC powers](#) to assist foreign regulators and to request reciprocal assistance from fellow signatories.

ASIC Corporate Plan 2018–2022

ASIC's latest [Corporate Plan](#) articulates its updated vision, mission and the strategic plan to achieve them.

RG267 Oversight of the Australian Financial Complaints Authority

ASIC has released [RG267](#) to provide clarity on the move to a single complaints scheme. The Australian Financial Complaints Authority (AFCA) will start accepting complaints from 1 November 2018 and financial firms required to be members must register by 21 September 2018.

ASIC reports on corporate finance regulation

[Report 589](#) *ASIC regulation of corporate finance: January to June 2018* provides statistical data and includes relevant guidance about ASIC's regulation of fundraising transactions, experts, mergers & acquisitions and corporate governance issues.

Sources of information: Ashurst; Australian Government; Australian Institute of Company Directors (AICD); Australian Securities and Investments Commission (ASIC); Australian Securities Exchange (ASX); Governance Institute of Australia; The Ethics Centre.

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