SQUIRE SANDERS

AUSTRALIA CORPORATE UPDATE

May 2014

The Revised ASX Corporate Governance Principles and Recommendations – Are You Up To Date?

The ASX has released the revised third edition of the **ASX Corporate Governance Principles and Recommendations**, reflecting recent developments in corporate governance in Australia and internationally.

The key revisions are nine new substantive recommendations, enhanced recommendations on risk, changes to the diversity recommendation and the ability for companies to report governance disclosures on their websites rather than in the annual report.

There are now 29 specific recommendations to give effect to the eight general principles – where ASX listed entities must report and explain their policies and practices where they follow a recommendation or must provide an "if not why not" explanation where they do not conform to a recommendation.

Some of the key changes are as follows:

- **New board recommendation 1.4 (role of company secretary)**: an entity's company secretary should be accountable directly to the board, through the chair, on all matters to do with the proper functioning of the board. This recommendation reflects the dual reporting role of many company secretaries.
- **Change to new recommendation 2.3 (indicators of director independence – tenure)**: in the consultation paper, ASX suggested that it would require an entity to explain a director's independence where such director had been in office for more than nine years. The new recommendation 2.3 however provides a more general test as to whether a director has served "for such a period that his or her independence may have been compromised".
- **New risk recommendation 7.1 (committee for risk oversight)**: an entity should have a risk committee or other committees which oversee risk and if it does not, it should disclose that fact and the processes it employs for overseeing the entity's risk management framework.
- **New risk recommendation 7.4 (sustainability risks)**: an entity should disclose whether it has any material exposure to economic, environmental and social sustainability risks and, if it does, how it manages or intends to manage those risks. "Material exposure" means a real possibility that the risk in question could substantively impact the entity's ability to create or preserve value for security holders over the short, medium or long term.
- **Modification to the diversity recommendation 1.5 (reporting on diversity)**: non-public sector employers with 100 or more employees may streamline their gender reporting by relying on their report of "Gender Equality Indicators" under the *Workplace Gender Equality Act 2012* as satisfying the requirement under recommendation 1.5 to disclose proportions of men and women on the board, in senior executive positions and across the organisation.

The revised requirements must be implemented for an entity's first full financial year commencing on or after 1 July 2014. A copy of the report is available on the ASX website as well as a summary of the changes. If you need any assistance complying with these new requirements, please contact Carly White, Campbell Davidson or Michelle Segaert.

Did You Know?

Here is a snapshot of key regulatory issues and case studies in February, March and April 2014.

Listed Companies/ASX /ECM

Mining, Oil and Gas Entities Reminded to Comply with New Resource Reporting Requirements Under Revised ASX Listing Rules

ASX has reminded all mining, oil and gas entities to adhere to the new annual reporting requirements under Chapter 5 of the ASX Listing Rules in their annual reports. The requirements revise the manner in which mining entities report their tenements, resources and reserves and the manner in which oil and gas entities report their petroleum tenements, reserves and contingent reserves. Listed entities that fail to meet the revised requirements in their annual reports will be required to make supplementary disclosure and may be subject to other ASX enforcement action. If you have any questions relating to your disclosure obligations, please contact Carly White, Campbell Davidson or Michelle Segaert.

ASX Consultation on T+2 Settlement Cycle for Australia Proposed for 2016

A recent consultation paper issued by ASX proposes the introduction of a T+2 settlement cycle for cash market trades in Australia. This proposal will shorten the current settlement period of "trade day plus three days" (T+3) by one business day, creating capital and margin savings for industry, and a faster settlement of transactions for investors. T+2 already operates in a number of major markets, including Germany and Hong Kong, and will shortly be introduced throughout Europe. ASX is proposing to introduce T+2 in the first quarter of the 2016 calendar year and is seeking feedback on whether an earlier implementation date is supported. Further information including the ASX media release is available on the ASX website.

Further Governance-related ASX Listing Rule Amendments Proposed

ASX has issued a supplementary consultation paper (to the initial paper issued in August 2013) on proposed governance-related listing rule amendments. The supplementary consultation paper is available on the ASX website as well as a mark-up of the listing rule changes. The changes complement and give effect to the reforms proposed by the ASX Corporate Governance Council's revised third edition of the Corporate Governance Principles and Recommendations (see above). Some key proposed changes are:

- The requirement for listed entities to disclose on-market purchases of securities for its equity incentive scheme in its annual report;
- The definition of "associate" of a director will include a related party, unless the contrary is established (which is particularly relevant to the application of voting exclusions);
- Changes to proxy forms; and
- Clarification as to how the pro rata exceptions in Listing Rules 7.2 (for underwriters acquiring securities) and 10.12 (for directors acquiring securities) apply.

These changes, once finalised after the consultation process, will be implemented from 1 July 2014. If you have any questions relating to these ASX Listing Rule changes, please contact Carly White, Campbell Davidson or Michelle Segaert.

Public M&A

ASIC Exercises its Enforcement Powers in Relation to the Mariner – Austock Takeover Bid

ASIC has commenced legal action against Mariner Corporation Limited (**Mariner**) and its current and former directors in respect the company's proposed takeover bid in 2012 for listed financial services company Austock Group Limited (**Austock**). ASIC has alleged:

Mariner was reckless as to whether it could perform its obligations under the proposed bid because it did not have the financial resources to fund the bid or any commitment or assurance from another party to fund the bid at the time of the announcement;

The announcement was misleading because the proposed bid was at a price less than Mariner was permitted to offer and because it misled the market as to Mariner's ability to fund the bid; and

The directors breached their duties by failing to give sufficient consideration to the steps that needed to be taken before making the announcement.

This case highlights ASIC's role in supervising takeover bids and is a reminder to corporates that ASIC will investigate a bidder's ability to finance a proposed takeover at the time a bid is announced. The proceedings are listed for a directions hearing in the Federal Court of Australia in Melbourne on 12 May 2014. If you have any questions relating to takeovers' regulations in Australia, please contact Carly White, Campbell Davidson or Michelle Segaert.

Takeovers Panel Declines to Conduct Proceedings in Relation to a Buyback Effecting a Control Transaction

In an application brought by Totem Holdings, the Panel adjudicated on the effect of a securities buyback offer by Lantern Hotel Group (**Lantern**), to buy back 24.3% of its stapled securities held by Millinium Asset Services Pty Ltd, subject to general meeting approval. Totem Holdings asserted that the buyback would result in:

- Lantern acquiring a greater than 20% interest in its own securities in breach of s.606 of the *Corporations Act 2001 (Cth)* (**Corporations Act**); and
- Otherwise, Torchlight – the largest holder of stapled securities in Lantern – increasing its relevant interest in Lantern from approximately 30% to 40% without paying any premium for control (for more information, see the Takeover Panel's media release).

Totem Holdings also submitted that if Torchlight were allowed to vote on the buyback, this would mean that Torchlight's resulting acquisition of control would not be taking place in an efficient, competitive and informed market. The Panel considered that the buyback offer was unlikely to result in unacceptable circumstances because of the policy of s. 609(7) of the Corporations Act – that is, there is no relevant interest under a conditional agreement requiring a resolution under s.611, item 6 of the Act. The Panel considered that, if the buyback was to proceed and Torchlight proposed to vote to approve the buy-back, a fresh application could be made by ASIC or a person interested. The Panel will publish its reasons for the decision in due course on the Takeovers Panel website.

General Corporate Updates (Including ASIC)

ASIC Cancels 15 Million ASX-listed Shares for Failure to Comply with Substantial Shareholding Notice Provisions Under the Corporations Act

On the basis of an application by ASIC, the Federal Court of Australia has ordered the cancellation of 15 million shares in ASX-listed Australian mining company, Northwest Resources Limited (**Northwest**) that were held by Craigside Company Limited (**Craigside**), a BVI company operating in Hong Kong.

ASIC alleged that although Craigside was the holder of the shares (which represented 7.08% of Northwest's issued capital), it did not have a relevant interest in them and that those persons who did have a relevant interest in the shares had not disclosed their interest to Northwest, contrary to the requirements under the Corporations Act. The proceedings were commenced under section 1325A of the Corporations Act – pursuant to which the Federal Court has jurisdiction to make any orders it considers appropriate if a person states in response to a notice issued by ASIC they do not have particular information about the shares or about persons who have a relevant interest. If you have questions relating to whether you have a relevant interest in securities and your related disclosure obligations under the Corporations Act, please contact Carly White, Campbell Davidson or Michelle Segaert.

New Legislation for Companies: Changes for Effecting Shareholder Meetings, Payment of Dividends and Other Matters

Treasury has published an exposure draft Bill and Explanatory Memorandum for proposed amendments to the Corporations Act and the ASIC Act. The draft Bill is a package of amendments including the following proposals:

- The removal of the obligation to hold a general meeting on the request of 100 shareholders;
- Enhancing the disclosure of executive remuneration in Australia;
- Relieving certain disclosing entities from the obligation to prepare a remuneration report;
- Increasing the flexibility of companies to pay dividends;
- Removing the requirement for auditor appointment for certain companies limited by guarantee; and
- Improving the efficiency of the Takeovers Panel.

The proposed amendments to the dividends rules are significant – and will mean that the net assets test in Part 2J of the Corporations Act will be replaced with a pure solvency test and dividend payments will be exempt from the capital maintenance provisions to the extent they are "equal reductions" of capital. The exposure draft and explanatory material are available on the Treasury website. If you have any questions regarding any of these proposed legislative changes, please contact Carly White, Campbell Davidson or Michelle Segaert.

ASIC Updates Guidance to Facilitate Internet Securities Offers

Updated Regulatory Guide 107 "Fundraising: Facilitating Electronic Offers of Securities" updates ASIC's position on the legitimate use and scope of electronic disclosure documents and application forms. ASIC has also issued new Class Order [CO 14/26] to continue relief for the use of personalised or AFS licensee-created application forms and has confirmed that no relief is required for the use of electronic application forms (and has accordingly revoked Class Order [CO 00/44]). This revised policy reflects ASIC's policy objective of ensuring that applications for securities are linked to a particular disclosure document, but providing flexibility to the different technological means by which this may be satisfied, including by electronic messaging in a BPAY payment message, which is similar to the relief recently provided for issuers not being required to collect application forms for the issue of interests in managed investment schemes using the mFund settlement service (see the article in our previous Corporate Newsletter). You can view the updated RG 107 on the ASIC website, as well as the related consultation paper and report. If you have any questions about making an offer of securities electronically, please contact Carly White, Campbell Davidson or Michelle Segaert.

Managed Investment Schemes

Far-reaching Reforms for Managed Investment Schemes Proposed by CAMAC

After the July 2012 Corporations and Markets Advisory Committee (CAMAC) report "Managed Investment Schemes" in which CAMAC recommended managed investment schemes (MIS) be treated as a separate legal entity and be subject to an insolvency regime similar to that which applies for companies, this recent consultation paper raises a broad range of recommendations for changing governance, disclosure and other regulatory aspects for MIS.

Broadly, CAMAC recommends – in the interests of efficacy and to reduce complexity – that the regulatory regime for MIS be aligned with companies.

CAMAC explores introducing a statutory buy-back regime for MIS, introducing measurable criteria for the valuation of scheme assets, assimilating scheme disclosure requirements with the prospectus requirements, making changes to the ways in which responsible entities may amend scheme constitutions, and aligning the procedures for scheme meetings, scheme takeovers and scheme reorganisations with commensurate companies' regulation. It is a 271 page report and responses are due by 6 June 2014. You can download the 2012 report and the 2014 report from the CAMAC website.

Michelle Segaert, partner in our Sydney office, is leading the Squire Sanders team providing submissions to CAMAC. If you wish to provide us with your perspectives, views or comments, please contact Michelle Segaert.

Financial Services Regulation

Asia Region Funds Passport – Treasury Releases Consultation Paper

Treasury has released a consultation paper on the Asia Region Funds Passport, which was jointly issued with government agencies from New Zealand, Singapore, Korea, Thailand and the Philippines. The ministers from these countries signed a statement of intent on the passport at the APEC Finance Ministers' meeting in Bali in September 2013. The purpose of the consultation paper is to seek submissions on the detailed rules and processes for a multilaterally agreed framework for the cross border marketing of managed funds (or collective investment schemes) amongst relevant participating countries in the Asia Pacific region.

The Government has stated it is committed to progressing the passport "as swiftly as possible…as part of its broader commitment to building a stronger economy and creating more jobs". You can read the Government's media release on the Finance Minister website and the draft consultation paper is on the dedicated Funds Passport website. This is an exciting development for Australian fund managers, which if progressed and implemented will offer the opportunity to market eligible Australian funds to Asian investors in participating economies under a streamlined compliance regime. Submissions close on 11 July 2014. Michelle Segaert, partner in our Sydney office, will be providing submissions on the Asia Region Funds Passport, so if you wish to provide us with your perspectives, views or comments, please contact Michelle Segaert.

FOFA Changes – the Exclusion for General Advice from the Ban on Conflicted Remuneration Ban has been Significantly Narrowed

The Government has issued the draft legislation for its wind-back of the FOFA regime – the new legislation is referred to as the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014. The legislation has significantly narrowed the general advice exemption to the ban on conflicted remuneration – whereas the January 2014 announcement exempted all general advice, the draft legislation only exempts general advice given by employees of licensees in respect of their own financial products, where the adviser has not provided personal advice in the past 12 months. The other key change is the requirement for advisers to consider their best interests duty in assessing whether it is appropriate to provide scaled advice. The Bill has been referred to the Senate Finance and Public Administration Legislation Committee for inquiry and report by 16 June 2014 and accordingly the outcome of the legislation may not be known until 1 July 2014, the date when FOFA is to be significantly implemented (post certain grandfathering arrangements). The Government's announced legislative changes and Regulatory Impact Statement are available on the Australian Government website. If you need assistance understanding the FOFA reforms and recent Government changes, please contact Michelle Segaert.

Derivatives Reform – the New Trade Reporting Regime

In March 2014, ASIC published some helpful presentations on the status of Australia's OTC derivatives reform, being implemented by ASIC as part of the G20 derivatives reform commitments. Although, Australia's share of the global OTC derivatives market is small (approximately 2%), ASIC has been at the forefront of the G20 reforms and in 2013, issued rules and regulatory guides related to trade repositories and OTC derivatives transaction reporting for principal entities trading OTC derivatives within ASIC's jurisdiction. Trade reporting rules are being phased in for relevant entities between October 2013 and October 2015.

There are no trade repositories licensed in Australia as yet, however, the first are expected to be licensed by mid-2014, and until that date, reporting is required to be made to offshore trade repositories (as prescribed by regulations). A recent ASIC presentation which provides a summary of the reforms and process to date is available on the ASIC website. ASIC Regulatory Guide 249 Derivative Trade Repositories are available on the ASIC website.

Interesting Cases

High Court's View on the Limitations of a Reasonable Endeavours Obligation

The recent decision of the High Court in *Electricity Generation Corporation v Woodside Energy Ltd [2014] HCA7* confirms that a "reasonable endeavours" obligation may not require a party to undertake to do something to the extent it conflicts with a party's own business interests and accordingly, the scope of the undertaking to use 'reasonable endeavours' may be qualified by reference to matters affecting that party's business interests (i.e. commercial or operational matters) in the use of those endeavours. Parties entering into contracts using reasonable endeavours clauses should be aware of the following key points:

- a reasonable endeavours obligation is not an absolute obligation;
- the nature and extent of a reasonable endeavours obligation is conditioned by what is reasonable in the circumstances, including whether there may be any negative circumstances, factors or aspects which may affect the obligee's business; and
- it may be helpful to be more prescriptive in drafting the standard for what is required for a reasonable endeavours obligation

A summary of the judgment is available on the High Court of Australia website.

Tax Developments

Draft Tax Ruling on Employee Remuneration Trusts

On 5 March 2014 the ATO released TR 2014/D1 relating to the tax treatment of employee remuneration trust arrangements. In the past, the Commissioner has issued various private tax rulings on employee remuneration trust arrangements which had allowed income tax deductions for employer contributions to employee remuneration trusts which had acquired shares in the employer to be provided to employees under existing or future equity based remuneration plans.

The draft ruling indicates that the ATO is now seeking to limit the circumstances in which deductions will be available to the employer. The draft ruling also indicates that there may be significant difficulties for private companies establishing employee remuneration trusts, as the arrangement may attract the application of Division 7A (treating contributions as deemed dividends). It is unclear how the ruling applies to employee share trusts where the employees are subject to tax under Division 83A.

The consultation process ended on 18 April 2014 and it is expected that significant clarifications and changes will be made before the final ruling is issued. Further changes to the rules for employee share schemes (particularly for start-ups) are expected as part of the May Budget.

Tax Acumen – a Snapshot of GST and Other Indirect Tax Issues (April 2014)