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AUSTRALIA CORPORATE UPDATE

July 2014

Easy Money? A New Source of Funding May Soon be Available to Australian Start-ups

In May 2014 CAMAC released its highly anticipated report into Crowd Sourced Equity Funding (**Report**). More commonly known as Crowd Funding, the Report provides a blueprint for how this important source of funding for start-up and venture capital companies might become a reality in Australia.

Currently Australian start-ups cannot legally use Crowd Funding in all but a handful of circumstances. This has meant that early stage Australian companies have been deprived of an important source of funds that is available in most other major jurisdictions – the result being that some of our brightest and most promising start-ups have moved overseas to make their millions. This is money (and jobs and other economic benefits) that otherwise remain in Australia.

The Report considers how an Australian company wishing to raise funds from investors located either within or outside of Australia through Crowd Funding should be regulated, and whether existing legislation is sufficient or new reforms are required.

The Report compares Crowd Funding regulation in other jurisdictions and asks whether those measures would be suitable in an Australian setting. Of particular note was the broad rejection of the majority of proposals either being considered or implemented in the United Kingdom, on the basis that such proposals were too restrictive in nature and not sufficiently supportive and flexible to allow effective Crowd Funding for start-ups.

CAMAC's first conclusion is that the current provisions of the Corporations Act do not support Crowd Funding. This is primarily because of:

- the 50 shareholder limit for proprietary companies - A successful Crowd Funding round can lead to hundreds or possibly thousands of individual investors. In this case, the company would need to convert into a public entity and comply with more onerous compliance and reporting obligations;
- the "20/12" rule prohibiting issues of equity totalling more than AU$2 million to 20 investors in a 12 month period without disclosure to investors in the form of a prospectus (subject to limited exceptions) - As Crowd Funding attracts multiple investors making small investments, the "20/12" rule is clearly inadequate; and
- the onerous ongoing compliance requirements associated with publicly-traded entities - As almost all start-ups using Crowd Funding are small companies with limited resources at their disposal, the costs and requirements of trading publicly are simply too prohibitive. This means that 'going public' is not a realistic option.

The Report makes a number of recommendations as to how Crowd Funding should be regulated in Australia. The report concludes that:

A. A new regulatory system is required: of the proposals considered by CAMAC a number involved amendments to the Corporations Act for public and private companies. CAMAC has rejected this approach and instead recommends the creation of a new 'type' of company called an "exempt public company".

B. Start-ups must be licensed intermediaries: start-ups will not be able to advertise and raise funds directly. They will have to do so through licensed and regulated intermediaries who can only offer securities in start-ups through the internet. Additionally, start-ups will only be able to use one intermediary for each issue of securities in order to avoid the dilution of disclosure information across various platforms for a single issue of securities.

C. A tailored disclosure regime is required: all offers of securities will need to provide sufficient information so that a prospective investor understands the rights that attach to the securities on offer. This will include the class of securities on offer in the entity as a whole (i.e. are there preference shares/classes of preference shares, options, convertible notes etc.) and the type of security class being offered pursuant to the Crowd Funding issue. An explanation of the impact of subsequent offers (i.e. dilution of shareholdings at a later date) should also be included. Importantly, these disclosure requirements **will not** be as onerous as per the current regime in the Corporations Act – i.e. they will not require a prospectus.

D. Certain companies would not be eligible: the following entities would not be eligible to participate in Crowd Funding:

a. Those with a complex corporate structure. This is because Crowd Funding is aimed at start-ups. Crowd Funding should not become a vehicle for sophisticated investors to raise funds for reasons unrelated to the furthering of a particular innovation or idea. The simplest way to ensure this is to prohibit complex corporate vehicles from attaining "exempt public company" status.

b. Listed companies. This is because listed companies can already raise money from the public and are subject to more onerous disclosure and compliance requirements. These entities are also generally large enterprises, which is not the type of vehicle Crowd Funding is designed to assist.

c. Companies with substantial capital. Companies with a large issued share capital should not be entitled to use Crowd Funding, again on the basis that such companies are not really 'start-ups'.

E. Only one class of share can be issued: only one class of share could be issued to the crowd, and must be offered on the same basis (i.e. same price, terms and conditions). This is because investors who wish to issue or procure more sophisticated securities should do so on a platform other than Crowd Funding, for the reason that Crowd Funding is intended to be used by start-ups and the 'crowd' is unlikely to be suitably well informed to appreciate multiple types of securities.

F. There should be a cap on amounts raised: there would be a maximum amount that issuers could raise pursuant to Crowd Funding. CAMAC has suggested AU$2 million in 12 months, although by its own admission this figure is arbitrary and would need to be determined appropriately. The rationale for the cap is that AU$2 million would be sufficient for most start-ups and would reduce the temptation for other more sophisticated investors to abuse the start-up regime to raise funds for entities other than small companies in genuine need of capital.

G. Other restrictions: for similar reasons, companies who have become 'too big' for Crowd Funding would also be prevented from using the crowd to raise revenue. Instead, these companies would be required to use the more traditional means of raising capital, including an IPO or placements to sophisticated investors.

What are the benefits of being a "public exempt company"? Simple: you can issue securities to the public without having to comply with the complex, expensive and time-consuming requirements of the continuous disclosure and capital raising provisions of the Corporations Act. This means that start-ups can get the funds they need quickly, whilst also retaining a level of protection for investors.

What next? For its part the Government has kept quiet on the Report and has not indicated whether it favours the recommendations made. This silence may be telling, as it was only in February this year that Malcolm Turnbull was extoling the virtues of the United States' venture capital scene, and lamenting the fact that Australia was lagging behind. The lack of a prompt endorsement of the CAMAC recommendations may indicate that the Government has gone lukewarm in the Crowd Funding idea.

Contact Richard Horton, Michelle Segaert or Carly White if you are interested in understanding Crowd Funding as an alternative funding source for your business.

Did You Know?

Here is a snapshot of key regulatory issues and case studies in May and June 2014.

Listed Companies / ASX / ECM

Are You Compliant With the New ASX Corporate Governance Principles and Recommendations? The 1 July 2014 Deadline is Looming

Changes to the ASX Listing Rules in relation to the recently released 3rd edition of the Corporate Governance Principles and Recommendations come into effect from 1 July 2014.

Mandatory for ASX-listed companies with financial years ending on or after 30 June 2015 and strongly recommended for early opt-in by other ASX-listed companies is compliance with the 3rd edition of the *Corporate Governance Principles and Recommendations* (**Governance Principles**) (together with consequential changes to the ASX Listing Rules and an updated ASX Guidance Note 9) which each take effect from 1 July 2014. This that ASX-listed entities should be taking steps now to cross-check the organisations' compliance against the new Governance Principles and ensure that it has complied with its associated disclosure obligations set out in the new ASX Listing Rule changes (**ASX LR Changes**).

Subject to the commencement timetables described above, ASX Listing Rule 4.10.3 requires listed entities to disclose to the market the extent to which it has followed the ASX Corporate Governance Council's Governance Principles (or the 2nd edition, as applicable) during a particular reporting period on an "if not, why not" basis. These requirements apply to all ASX listed entities regardless of the legal form they take, whether they are incorporated in Australia or overseas, and whether they are internally or externally managed.

Reporting against the third edition Governance Principles and the new ASX LR Changes take effect for listed entities for the full financial year commencing on or after 1 July 2014, i.e.:

- 30 June balance date ⟶ report for FY ending 30 June 2015;
- 31 December balance date ⟶ report for FY ending 31 Dec 2015; and
- 31 March balance date ⟶ report for FY ending 31 March 2016.

However, keep in mind that ASX is actively encouraging its listed entities on best practice grounds to adopt the new Governance Principles earlier than they are prescribed to do so and opt-in. In any event, there are a number of steps required to ensure compliance with the new rules irrespective of your reporting date. To assist with readiness for compliance with the new Governance Principles, ASX listed entities should consider the following non-exhaustive action list :

- Check that processes are in place to undertake appropriate checks on new directors or candidates for election as director (recommendation 1.2) – i.e. background checks.
- Check that the entity has written agreements with each director and senior executive setting out the terms of their appointment (recommendation 1.3).
- Ensure that the company secretary is accountable directly to the board, via the chair, on all matters to do with the proper functioning of the board (recommendation 1.4).
- Review director induction programs and have the board or nominations committee periodically review the skills and knowledge of directors for gaps and consider professional development opportunities to fill those gaps (recommendation 2.6).
- Create and disclose a 'board skills matrix' to set out the mix of skills and diversity which the board has and is hoping to achieve in its membership (recommendation 2.2).
- CEO and CFO to provide the board with a declaration that, in their opinion, the financial records of the entity have been properly maintained, the financial statements are compliant and give a true and fair view of the entity's financial position and the opinion has been formed on a sound risk management system (recommendation 4.2).

- Auditor must be present at the AGM (recommendation 4.3) – this recommendation will mainly impact entities incorporated outside Australia not subject to ss250PA, 250RA and 250T of the Corporations Act. Entities will also need to consider how shareholders may direct questions to the auditor if they are not able to attend the meeting (see recommendation 6.3).
- Ensure that information about the entity's corporate governance is kept up to date on the entity's website (recommendation 6.1).
- Ensure that the entity has a monitored email address for security holder communications (recommendation 6.4), articulate your investor relations program (recommendation 6.2) and document and disclose the entities' policies/procedures for encouraging shareholder participation at general meetings (recommendation 6.3).
- If the entity has a risk committee, review the composition of the committee and that the correct disclosures are made in relation to the committee. If the entity does not have a risk committee articulate the processes the board employs to oversee the entity's risk management framework to satisfy itself that it is sound (recommendation 7.1).
- If the entity does not currently have a risk process currently, institute a process for the board or a committee of the board to review its risk management framework at least annually to satisfy itself that it continues to be sound (recommendation 7.2). A disclosure that this review took place during the relevant reporting period must be contained in the entity's annual report.
- If the entity has an internal audit function, explain how it is structured and what role it performs. If the entity does not have an internal audit function, articulate the processes the entity employs for evaluating and continually improving the effectiveness of the entity's risk management and internal audit functions (recommendation 7.3).
- Consider the entity's economic, environmental and social sustainability risks and associated disclosure requirements (recommendation 7.4).

Following on from our May 2014 update on this topic, ASX has since released the following important resources:

- the final version of its ASX LR Changes – you can view a mark-up of the new ASX LR Changes; and
- the final version of the new Appendix 4G that must be released to the market at the same time as a listed entity's annual report (Listing Rule 4.7.3) is available on page 22 of the Appendix. The Appendix 4G is intended to assist investors to locate where a company's governance disclosures are available and provides a checklist for all Governance Principles in respect of:
  - whether the Governance Principles have been followed or not for the whole reporting period;
  - whether this fact is stated in the corporate governance statement included in the entity's annual report, or a description of where else it was stated (egg URL); and
  - if not followed for the whole period, whether an explanation was included in the Corporate Governance Statement or elsewhere;
- slides from the national ASX roadshow in June 2014 on the new Governance Principles presented by Kevin Lewis, Chief Compliance Officer for the ASX; and
- GIA presentation: "Transitioning to the Third Edition".

If you would like any advice in relation to the changes to the Governance Principles or how to comply with the recommendations please contact *Carly White*, *Campbell Davidson* or *Michelle Segaert*.

Public M&A

Global M&A Indicators Indicate Positive Growth for Q1 2014

The International Institute for the Study of Cross-Border Investment and M&A has published its quarterly review of M&A trends for the first quarter of 2014 (**Q1**) on 24 May 2014 (the **IISCBI Review**).

The IISCBI Review reports a strengthening appetite for M&A across the globe and predicts that global M&A activity will reach US$ 3 trillion in volume for full year 2014 which great news for the Australian M&A market and companies seeking offshore buyers. The IISCBI Review highlights the following as evidence indicative of improved M&A activity for 2014:

- eight deals over US$10 billion in Q1 2014 and global M&A volume of US$756 billion for Q1 2014 (almost double the M&A volume for Q1 2013);
- 81% increase in cross-border deal activity compared with Q1 2013, accounting for US$245billion in Q1 2014;
- more than 21% increase in private equity deal activity from Q1 2013, accounting for 18% of global M&A volume in Q1 2014;
- cross-border deal activity expected to account for 32% of global M&A volume, with annualised volume of US$980 billion for 2014;
- strongest Q1 2014 for energy & power, real estate and media/entertainment sectors (noting the Comcast/Time Warner Cable transaction of approx. US$45billion);
- resurgence in deal-making activity in Europe for Q1, up 33% compared with Q1 2013 and up 88% compared with Q2 2013;
- Chinese deal-making for Q1 2014 down 13% compared with 2013, while Japanese M&A is up 124% from a particularly slow 2013; and
- emerging market transactions accounted for 17% of global deal activity in Q1 2014.

If you would like further information on our cross-border M&A capabilities, please contact Campbell Davidson (head of our Australian Global Corporate practice) or Carly White.

Section 606 Takeovers Law Breach Upheld by Federal Court Bid in Respect of President's Club

On 5 June 2014, the Federal Court has dismissed an application by Queensland North Australia Pty Ltd for judicial review of the Takeovers Panel (**Panel**) orders pursuant to a declaration of unacceptable circumstances in relation to The President's Club Limited (**President's Club**) activities handed down in July 2012 (*Queensland North Australia Pty Ltd v Takeovers Panel* [2014] FCA 591). The application was dismissed with costs.

On 26 June 2012, President's Club, an unlisted public company that operates a time share scheme at the Palmer Coolum Resort, made an application to the Takeovers Panel in relation to its affairs. Queensland North Australia Pty Ltd (a company associated with Clive Palmer, **QNA**) and its associates gained control of 44.44% of the issued share capital of President's Club, by way of QNA's acquisition of:

- firstly, 98% of Coeur de Lion Holdings Pty Ltd (**CDLI**), the holder of approximately 41.4% of the shares in President's Club; and
- subsequently, a further 2.9% of the shares in President's Club.

On 27 July 2012, the Panel found that the acquisitions constituted contraventions of section 606 of the Corporations Act and thereby gave rise to unacceptable circumstances.

Section 606 of the Corporations Act prohibits the acquisition of a "relevant interest" in voting shares if the person acquiring the interest does so in relation to shares in a Company entered into by or on behalf of that person which, because of the transaction, the acquisition causes a person's voting power in the entity to increase:

- from under 20% to above 20%; or
- from a starting point of between 20% and 90%.

There are a number of exceptions to the prohibition in section 606, including acquisitions of less than 3% in every 6 months (the "creep exception" in item 9 of section 611), which QNA purported to rely on in respect of its acquisition of 2.9% in President's Club. The creep exception enables patient shareholders to conduct a "takeover by stealth" to achieve effective control of a company without paying a premium.

The Panel ordered CDLI, QNA and their associates be prohibited from exercising their voting rights or making any further acquisitions and disposals of shares in President's Club, subject to the right of QNA (or an associate of it) to make a takeover bid for the remaining shares in President's Club on certain terms (which right has not been exercised).

On 21 September 2012 QNA and others applied for judicial review of (among other things) the making of the declaration and orders.

If you have any questions relating to takeovers in Australia and potential Panel intervention in control scenarios, please contact our experts Carly White, Campbell Davidson or Michelle Segaert.

A Lesson from the Takeovers Panel on the Importance of Avoiding Misleading Statements and Disclosure Inadequacies in Takeovers Documents

On 6 June 2014, the Takeovers Panel made a declaration of unacceptable circumstances in response to an application by Norton Gold Fields Limited (**Norton Gold**), in relation to the affairs of Bullabulling Gold Limited (**Bullabulling**). (see TP 14/35)

Norton Gold had made an off-market takeover bid for Bullabulling announced on 17 April 2014. Bullabulling's letter to shareholders dated 30 April 2014 and target's statement dated 14 May 2014 contained a statement indicating that 41.8% of Bullabulling shareholders did not intend to accept the bid (**Rejection Statements**). The Rejection Statements were compiled from verbal and written statements, including comments from an internet stock discussion board. The Panel found that the inclusion of the Rejection Statements in the letter and target's statement was misleading and gave rise to unacceptable circumstances, on the basis Bullabulling:

- did not inform rejecting shareholders how the statements would be used;
- did not obtain consent to use the statements; and
- failed to disclose how the statements were compiled, the qualifications to which some statements were subject and that the statement were indications of views held at a certain point in time rather than of future actions.

The Panel accepted an undertaking from Bullabulling in lieu of a declaration of unacceptable circumstances.

The Takeovers Panel also found that the inclusion of statements by Norton Gold in its bidder's statements indicating Bullabulling shareholders representing 6.6% (and later 5.39%) of Bullabulling's issued shares intend to accept the Offer (**Acceptance Statements**), was also misleading, as Norton Gold had failed to disclose its association with one of such shareholders. The Panel also accepted an undertaking from Norton Gold in respect of the misleading Acceptance Statements.

This Panel decision highlights the importance of truth in takeovers. ASIC Regulatory Guide 25 at RG 25.71 – 25.78 provides guidance as to the kinds of misleading statements bidders and targets must not make to shareholders about acceptances.

Please contact Carly White, Campbell Davidson or Michelle Segaert for more information or further guidance on the takeovers disclosures.

Defects in Substantial Holder Notices Lead to Takeovers Panel Declaration of Unacceptance Circumstances in Relation to Northern Iron Limited Substantial Holdings

On 20 June 2014 the Takeovers Panel made a declaration of unacceptance circumstances and orders against a substantial holder in Northern Iron Limited (**Northern Iron**), a company listed on the ASX, in relation to defects in substantial holder notices (see TP14/33).

The Panel formed the view that the disclosure by Northern Iron's largest shareholder, Dalnor Assets Ltd (**Dalnor**) in its 20 May 2014 letter and 22 May 2014 revised substantial holder notice was deficient because it did not disclose all information required under the tracing and substantial holding notice provisions pursuant to section 671B of the Corporations Act. For example, the revised substantial holding notice did not identify every person who has a relevant interest and did not contain details of any relevant agreement through which the parties disclosed have a relevant interest or provide a copy of relevant documents, including the SPA Fund Memorandum.

Pursuant to section 671B of the Corporations Act, a person to lodge notice in the prescribed form with both the listed company and ASX if:

- a person acquires, or disposes of, a "relevant interest" in 5% or more of "voting shares" – a "substantial holding" (section 9);
- a person's substantial holding increases or decreases by at least 1%;
- a person makes a takeover bids for shares in a listed entity,

In essence, a person will have a "relevant interest" in securities if:

- they are the holder of the securities;
- they have the power to exercise, or "control" the exercise, of a right to vote attached to those securities; or
- they have the power to dispose of, or exercise "control" over a power to dispose of, the securities.

Such "control" also extends to "control" exercisable through a trust, agreement or practice or through bodies corporate it "controls" and is concerned with the practical influence the person can exert (rather than the rights they can enforce) over the body corporate's financial or operating policies. Control is defined in section 50AA of the Corporations Act.

Also to be included in the substantial holder notice is a list of any "associates" who hold a relevant interest in the securities including the nature of the association and details of the associate's relevant interest (section 671B(3) Corporations Act).

A substantial holder must give full (rather than minimal or technical) disclosure as well as details of any agreement relevant to the substantial holding or relevant association.

The substantial holder provisions are designed to ensure investors in public and listed entities are aware of the identity and interests of shareholders in a position to influence or control the entity and to ensure that the market is not misled about ownership and control of these companies.

Failure to disclose a substantial holding or comply with a disclosure notice from ASIC or the company is a strict liability offence (section 671B of the Corporations Act). Non-compliance may result in the imposition of fines and/or remedial orders (section 9 and 1325A of the Corporations Act). The failure to disclose a substantial holding may also give rise to a civil claim for compensation by any person damaged by the contravention (section 671C of the Corporations Act) to which it is a defence in proceedings to such claim where the breach results from inadvertence or mistake or because they were not aware of a relevant fact or occurrence. ASIC or the company may direct the holder of the substantial holding to make a disclosure to the market and disclose its interest in the company (section 672A of the Corporations Act). The company itself is required to maintain a register of relevant interests held in the company in accordance with section 672DA. Failure to do so is a strict liability offence (section 672DA(5)).

If you need guidance about lodging or complying with the substantial holding provisions please contact Carly White, Campbell Davidson or Michelle Segaert for more information.

General Corporate Updates (including ASIC)

When Will a Director be Personally Liable for a Company's Breach of Industrial Law?

The recent Federal Court decision of *Potter v Fair Work Ombudsman* [2014] FCA 187, has clarified the circumstances in which a director will be held personally liable for a company's breach of industrial law.

Ms Potter was the director of a call centre company that failed to pay its employees in accordance with the relevant Modern Award between January and December 2009. At first instance, the Federal Circuit Court found that Ms Potter was personally liable as an accessory to the company's actions, because was she responsible for deciding each employee's wages and was "knowingly concerned" in the company's underpayments.

Ms Potter was partially successful in appealing the decision by arguing that she did not know that the relevant Award applied until July 2009, when she received professional advice on the matter.

The Federal Court accepted this argument, and held that for a director to be personally liable as an accessory to a company's breach of industrial law, that person must have actual knowledge of the essential facts that constitute the breach. Accordingly, Ms Potter was only liable for the underpayments made after July 2009, the time that she possessed actual knowledge of the Award's application.

This decision departs from previous case law where directors have been held personally liable for underpayments even though the director did not know that employees were being underpaid.

While the decision may provide some comfort to company directors, it is worth noting that the defence of ignorance of the law will not successfully avoid accessorial liability if a court finds that a director was wilfully or recklessly ignorant.

For further information about corporate governance compliance issues, please contact Carly White, Campbell Davidson or Michelle Segaert for more information.

Managed Investment Schemes

ASIC's Increased Financial Requirements for Custodians and Asset Holders is Starting on 1 July 2014

The one year grace period for custodians and asset holders who obtained their AFSLs before 1 July 2013 to comply with ASIC's increased financial requirements is ending on 1 July 2014.

The key changes include:

- The doubling of the minimum net tangible asset (NTA) requirement for custodians and asset holders (without an external custodian) from AU$5 million to AU$10 million, and
- A new requirement for wholesale fund managers to hold at least AU$150,000 in liquid assets if they are an incidental provider of custodial or depository services.

Read more in our article: ASIC's Increased Financial Requirements For Custodians And Asset Holders Is Set To Kick In On 1 July 2014. If you have any questions about these new financial requirements, please contact Michelle Segaert.

High Court Decision Permits an Investor's Mandatory Redemption Rights to Apply, Notwithstanding the Scheme is Illiquid

In *MacarthurCook Fund Management Ltd v TFML Ltd* [2014] HCA 17 (14 May 2014) the High Court of Australia has unanimously held that a member of a scheme does not 'withdraw' from a scheme (as such term is understood under Chapter 5C of the Corporations Act merely by reason of a responsible entity performing an obligation, or exercising a power compulsorily, to redeem the interest of the member. The High Court held that a mandatory redemption by the responsible entity may be effected, while the scheme is illiquid, without meeting the withdrawal offer procedures regulated in Chapter 5C, Part 5C.6 of the Corporations Act. The High Court further held that for the Chapter 5C withdrawal offer procedures to apply to the redemption by a member from an illiquid scheme, there must be some act of volition on the part of the member. You can read the High Court's decision on the High Court of Australia website. If you have any questions about this decision and what it means for your managed investment scheme, please contact Michelle Segaert.

Financial Services Regulation

Enhanced Protections for Retail Investors Investing Through Platforms Coming into Effect on 1 July 2014

From 1 July 2014, new Class Order [13/762] '*Investor directed portfolio services provided through a registered managed investment scheme*' will be introduced (replacing Class Order 02/296), imposing additional requirements on platform operators dealing with retail investors wishing to benefit from exemptions from certain managed investment scheme, fundraising, financial product disclosure and other investor rights requirements under the Corporations Act. Such exemptions only apply where the platform operator is investing into registered managed investment schemes on behalf of clients. If a platform operator wishes to acquire interests in an unregistered managed investment scheme for clients, the exemptions under Class Order [13/72] do not apply. ASIC recognises that such exemptions should apply in circumstances where a responsible entity of a relevant registered managed investment scheme has the onus of meeting the regulatory requirements for retail investor protection. However, ASIC has imposed some further and new requirements on platform operators seeking to rely on this Class Order to enhance protection for retail investors. From 1 July 2014, platforms must meet the following additional requirements (this list is not exhaustive but sets out key changes):

- specific disclosures must be made about:
  - key differences in the rights of members of an IDPS-like scheme as opposed to investing directly- at a minimum the disclosures must cover cooling off rights, voting rights and withdrawal rights
  - the consequences for members who do not opt in to receive continuing financial advice
  - how members may make a complaint about the platform operator, product issuer or financial adviser, and
  - how the responsible entity selects the investments on the IDPS-like scheme (including the process applied and factors considered)
- there must exist (and be available free of charge) a voting policy including information about the responsible entity of the IDPS-like scheme's voting practices on company and scheme resolutions and a policy for members who do not opt in to receive financial product advice, and
- the responsible entity of an IDPS-like scheme must take reasonable steps to facilitate the resolution of disputes between its members and product issuers of accessible financial products, including informing members whether issuers have internal dispute resolution.

For ASIC Regulatory Guide 148 'Platforms that are managed investment schemes and Class Order [13/762], you can read a Guide on the Updates to RG 148 or view the ASIC Class Order. If you have any questions regarding these new requirements, please contact Michelle Segaert.

The Commodity Futures Trading Commission (CFTC), ASIC and Reserve Bank of Australia Sign a Memorandum of Understanding (MOU)

In conjunction with recent global derivative and clearing reforms, the CFTC, ASIC and the Reserve Bank of Australia have signed an MOU regarding the co-operation and the exchange of information in the supervision and oversight of clearing organisations that operate on a cross-border basis in both the United States and Australia. The MOU calls for communication between the CFTC and Reserve Bank of Australia, including event-triggered notifications, request-based information sharing and periodic meetings. A version of the MOU is available from the CTFC website, as well as a CFTC press release regarding the MOU.

PPSR

Change to the Meaning of "Motor Vehicle" Under the PPSA is Effective from 1 July 2014

From 1 July 2014, the definition of "motor vehicle" under the *Personal Property Securities Regulations 2010* (Cth) will be narrowed. A "motor vehicle" will be defined as a self-propelled device having **both** a speed of at least 10km/h **and** having one or two motors that have a power greater than 200W. The current definition only requires a motor vehicle to have one of these characteristics.

What is a "Security Interest" Under the PPSA?

In *Sandhurst Golf Estates Pty Ltd v Coppersmith Pty Ltd* [2014] VSC 217, the Victoria Supreme court considered the meaning of 'security interest' under the PPSA.

This case indicates that to be registrable, a security interest must have arisen consensually, and must not have been based on equitable relief obtained from a court. Equitable relief obtained from a court is not a registrable interest because such a security interest would not "in substance secure payment or performance of an obligation", which is required under section 12 - Meaning of security interest under the PPSA. You can also view a copy of the unreported judgment.

If you have any questions regarding PPSR issues, please contact Tracey Wong, Tom Lennox or John Poulsen.

Government Review of the Personal Property Securities Act 2009 (Cth) (PPSA)

The Government's review of the PPSA announced in April 2014 is still under consultation. The review is targeting the operation and effects of the PPSA, awareness and understanding of the PPSA, and in particular, the effect the PPSA has had on small businesses and consumers. Submissions on small business issues closed on 6 June 2014 and all other submissions are invited until 25 July 2014. An interim report will be released on 31 July 2014 with the final report due on 30 January 2015. For more information, you can download the terms of reference for the review.

If you have any questions regarding PPSR issues, please contact Tracey Wong, Tom Lennox or John Poulsen.

Tax Developments

Proposed Changes to Dividend Rules need to be Understood from a Tax Perspective

The proposed legislative changes under the *Corporations Legislation (Deregulatory and other Measures) Bill 2014* to remove the net assets test from the tests required under section 254T of the Corporations Act to be met by companies wishing to pay a dividend need to be understood from a tax perspective.

While the proposed amendments to section 254T may make it easier to pay dividends from a Corporations Act perspective, the Australian Taxation Office has previously issued a ruling (TR2012/5) which states that in a number of circumstances, a dividend paid in compliance with section 254T cannot be franked even if the company has sufficient franking credits. This can particularly occur when the company's net assets (either before or after payment of the dividend) are less than the share capital. The payment of a dividend which is unfrankable can have serious adverse consequences for the shareholders. Before paying any dividends, directors should consider the Commissioner's views on whether the dividend can be franked. We will keep you updated as to when these proposed changes come into effect. In the meantime, if you have any questions about these proposed changes, please contact Louise Boyce or Michelle Segaert.

Are You FATCA Ready? 30% Withholding Imposed on Non-participating Foreign Financial Institutions with US Sourced Income from 1 July 2014

Non-US financial institutions in Australia – including banks, investment funds and trusts – that have US sourced income and investments need to be ready for the Foreign Account Tax Compliance Act (**FATCA**) changes being implemented from 1 July 2014.

If you are unsure if FATCA applies to you, we recommend you seek advice immediately as to whether your investments may be subject to the new withholding taxes (at 30% of US source income) from 1 July 2014.

FATCA is new legislation under the laws of the US that enables the US Internal Revenue Services (**IRS**) to identify and collect tax from US residents that invest in assets through non-US entities and requires foreign financial institutions to gather and report certain information to the IRS in respect of US residents.

If a foreign financial institution does not enter into an agreement with the IRS, under which it agrees to identify its US accounts and comply with verification and due diligence procedures prescribed by FATCA, this may result in a punitive 30% withholding tax applying to US sourced payments to that financial institution. A broad range of Australian financial institutions are affected by the legislation, including banks, investment funds and custodial and trustee institutions. Further, FATCA will require a participating foreign financial institution to withhold 30% of any pass through payment to a recalcitrant account holder or to a non-participating foreign financial institution.

Foreign financial institutions were required to have registered with the IRS (through a secure online portal at www.irs.gov/fatca) by 25 April 2014 to ensure the issuance of their Global Intermediary Identification Number (**GIIN**) by 30 June 2014. The FATCA changes are being phased in from 1 July 2014 to 31 March 2017.

In April 2014, Australia and the US signed an intergovernmental agreement (**IGA**) to assist with the facilitation of FATCA, meaning that all financial institutions located in Australia will be required to comply with the terms of the IGA. This is currently creating a considerable compliance and administrative burden for Australian financial organisations, including the requirement to review customer accounts to determine whether they are reportable accounts (US citizens or US tax residents) under the IGA. If you need any assistance to ensure your organisation is FATCA ready, please contact Michelle Segaert, Louise Boyce or Joshua Fitzpatrick.