CONTENTS

03 DEVELOPMENTS OF GENERAL INTEREST

03 BREXIT
03 Where next for Brexit?

03 CORPORATE
03 Corporate Reporting – payment practices reporting
03 Equity capital markets – new Prospectus Regulation

04 DISPUTE RESOLUTION
04 New Business and Property Courts of England and Wales
04 Restrictive approach to both litigation privilege and legal advice privilege
04 Supreme Court decision on contractual interpretation
04 High Court strikes down clause as a penalty

05 EMPLOYMENT
05 Discrimination: employers should review their recruitment and promotion processes
05 Shared parental leave: challenge to lack of pay enhancement succeeds at first instance
05 Gender pay gap reporting: regulations in force, reporting so far

06 REAL ESTATE AND PLANNING
06 Real Estate
06 Public register of foreign beneficial ownership of UK property
06 New Electronic Communications Code: Digital Economy Act 2017
06 Minimum Energy Efficiency Standard
07 Assignment of leases and the Landlord and Tenant (Covenants) Act 1995
07 Planning
07 Neighbourhood Planning Act 2017
07 Changes to the Environmental Impact Assessment Regulations
07 Permissions in Principle and Brownfield Registers

08 SECTOR SPECIFIC DEVELOPMENTS

08 BANKING, RESTRUCTURING AND INSOLVENCY
08 EU Bank Recovery and Resolution Directive
08 Article 55 – Contractual recognition of bail-in requirement
08 European Commission proposals for new rules to determine law applicable to third party effects of an assignment of a debt claim
08 Recast Insolvency Regulation
08 Review of the Corporate Insolvency Framework

09 COMPETITION, REGULATION AND TRADE
09 European Commission gets tough on merger control violations – Facebook fined EUR110m for providing misleading information and Altice faced with gun-jumping charges
09 Further evolution of competition litigation in the UK
09 EU Commission publishes final report in e-commerce sector inquiry

09 CONSTRUCTION
09 Publication of NEC4 and other new NEC contracts

10 DEBT CAPITAL MARKETS
10 Prospectus Regulation to replace current Prospectus Directive

10 ENERGY AND ENVIRONMENT
10 Energy
10 Embedded benefits and network charging arrangements
10 Update on the second contract for difference allocation round
10 Capacity market update
11 Environment
11 Trump pulls out of Paris Agreement
11 Minamata Convention on Mercury comes into force
11 Renewed challenge to draft air quality plan
12 Record environmental fines

12 FINANCIAL SERVICES REGULATION
12 FCA Business Plan, Sector Views and Mission
12 SMCR: FCA and PRA guidance on the "duty of responsibility"

13 INSURANCE
13 EIOPA to publish guidance on sound principles for authorisation and supervision of insurers post-Brexit
13 PRA consults on amendments to the Senior Insurance Managers Regime
13 New Airmic guides published for policyholders
<table>
<thead>
<tr>
<th>Page</th>
<th>Section</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>13</td>
<td>TAX</td>
<td>Spring Budget 2017</td>
</tr>
<tr>
<td>14</td>
<td></td>
<td>Criminal Finances Act 2017: failure to prevent the criminal facilitation of tax evasion</td>
</tr>
<tr>
<td>14</td>
<td></td>
<td>Finance Act 2017</td>
</tr>
<tr>
<td>14</td>
<td></td>
<td>Queens's Speech 2017</td>
</tr>
<tr>
<td>14</td>
<td>TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS</td>
<td>New EU content portability regime adopted by Council of the EU</td>
</tr>
<tr>
<td>15</td>
<td></td>
<td>Digital Economy Act 2017 receives Royal Assent</td>
</tr>
<tr>
<td>15</td>
<td></td>
<td>GDPR Compliance: Just under a year to &quot;get your house in order&quot;</td>
</tr>
<tr>
<td>16</td>
<td>REGION SPECIFIC DEVELOPMENTS</td>
<td>AUSTRALIA</td>
</tr>
<tr>
<td>16</td>
<td></td>
<td>Proposed changes to foreign bribery laws and introduction of deferred prosecution agreements</td>
</tr>
<tr>
<td>16</td>
<td></td>
<td>Australian Consumer Law review</td>
</tr>
<tr>
<td>16</td>
<td></td>
<td>Australian legislation becomes even more arbitration friendly</td>
</tr>
<tr>
<td>17</td>
<td></td>
<td>Federal Court clarifies role of criminal fault elements in civil penalty proceedings</td>
</tr>
<tr>
<td>17</td>
<td></td>
<td>Security for costs and the use of ATE insurance</td>
</tr>
<tr>
<td>17</td>
<td></td>
<td>Invalidly filed trade mark applications are incurable: Full Federal Court of Australia</td>
</tr>
<tr>
<td>18</td>
<td></td>
<td>Significant changes to financial assurance and rehabilitation on the cards in Queensland</td>
</tr>
<tr>
<td>18</td>
<td></td>
<td>Union officials must have federal right of entry permit to enter under state OHS Act</td>
</tr>
<tr>
<td>18</td>
<td></td>
<td>Employee bullying claims - employer’s internal investigation stayed by interim order</td>
</tr>
<tr>
<td>19</td>
<td></td>
<td>Electronic conveyancing with Property Exchange Australia Ltd</td>
</tr>
<tr>
<td>19</td>
<td></td>
<td>New National Mortgage Form</td>
</tr>
<tr>
<td>19</td>
<td></td>
<td>Slow rise of corporate PPAs in Australia</td>
</tr>
<tr>
<td>19</td>
<td>CHINA</td>
<td>China’s cybersecurity law and draft implementation rules</td>
</tr>
<tr>
<td>20</td>
<td>HONG KONG</td>
<td>Herbert Smith Freehills leads ASIFMA member working group to formulate best practices for effective development of fintech</td>
</tr>
<tr>
<td>20</td>
<td></td>
<td>Hong Kong’s SFC launches consultation on proposed guidelines on online distribution and advisory platforms and proposes to extend suitability requirement</td>
</tr>
<tr>
<td>20</td>
<td></td>
<td>SFC and HKMA continue to prioritise AML/CFT compliance with six new disciplinary actions in Hong Kong</td>
</tr>
<tr>
<td>20</td>
<td>SOUTH AFRICA</td>
<td>Mining Charter III</td>
</tr>
</tbody>
</table>

Please do not hesitate to contact any of the named people for further information on the items set out below. We would also like to hear whether you wish to receive this update more regularly or have other suggestions for its improvement. Please e-mail your comments to Emily Lew or your relationship partner.
1. BREXIT
1.1 Where next for Brexit?

Formal Brexit negotiations started on 19 June 2017. Whereas the EU indicated that it is ready and keen to go, the UK election has thrown a spanner in the works as far as the UK is concerned. The Conservative Party no longer has a majority in Parliament and so has negotiated a “confidence and supply” agreement with the DUP, one of the major parties in Northern Ireland. Under this agreement the DUP has agreed to support confidence motions, the Queen’s Speech, the Budget and Finance Bills, Brexit legislation and national security legislation. Votes on other matters will be dealt with on a case by case basis. All political parties are positioning their vision of Brexit and their Brexit red lines.

As the early stages of the negotiations can focus on issues which are less politically divisive, such as the rights of citizens exercising their rights of free movement at the time of Brexit, the negotiations will be able to proceed as planned, at least for now. Without intending to speculate on any political outcome, we have compiled a Q&A briefing which aims to answer some commonly asked questions as a result of the recent confusion and to clarify some of the key terminology increasingly used in the context of Brexit.

As had been widely anticipated, the Queen’s Speech on 21 June 2017 was very Brexit focused. It covers a two-year period rather than the usual one year legislative programme, in order to provide sufficient time for Parliament to adopt the legislation by the time the UK leaves the EU on 30 March 2019. It remains to be seen whether the programme will receive the necessary support in Parliament.

Eight of the bills listed in the Queen’s Speech are Brexit related: for further information on these, see our blog post on the Queen’s Speech. The key piece of legislation is the Great Repeal Bill, which will repeal the European Communities Act 1972 and preserve and convert into domestic law the whole body of EU law applying to the UK at the time it leaves the EU, in order to provide legal certainty and avoid a massive void in the UK statute book. In March this year the Government published a White Paper on the Great Repeal Bill (see our briefing) which contains more detail as to how it intends this to work in practice.

The Government recognises that substantial changes will need to be made to a significant proportion of EU-derived law in order to make it work and provide legal certainty in a post-Brexit environment. The current estimate is that these corrections will require between 800 and 1,000 statutory instruments and the Government proposes to deal with this challenge through delegated powers, which will allow ministers to make the necessary amendments by secondary legislation. But such powers may prove controversial, as they will include so-called “Henry VIII” powers under which ministers are able to amend primary legislation through secondary legislation, and it is these aspects of the Great Repeal Bill which may make it difficult to navigate through Parliament.

Should you wish to discuss how Brexit affects you and what to do in response, please contact Dorothy Livingston or Gavin Williams.

2. CORPORATE
2.1 Corporate Reporting – payment practices reporting

Regulations requiring large UK incorporated companies and LLPs to report on their invoice payment practices came into force on 6 April 2017 and apply to financial years beginning on or after that date. Entities within scope must produce a report for every six month period within 30 days of the end of the period. The report must be approved by a director and sent to a centrally-hosted Government website.

The reporting requirement relates to a UK incorporated company or LLP in relation to a financial year if it was a large entity on the dates of its last two balance sheets. UK incorporated parent companies are required to report on their own payment practices if both that parent company and the group it heads were large on the last two balance sheet dates. For these purposes, a company, LLP or group is “large” if it is large for accounting purposes under the Companies Act 2006.

The reporting requirement relates to “qualifying contracts”, being contracts: (i) between two or more businesses; (ii) with sufficient nexus to the UK; (iii) which are for goods, services or intangible property; and (iv) which are not for financial services.

The report must include a range of detailed information, including:

- Narrative information on the entity’s standard business terms and its processes for resolving payment disputes with suppliers.
- Statistics on the average number of days taken to make payments; the percentage of invoices paid in within certain timeframes; and the percentage of payments not paid within agreed terms.
- The availability of e-invoicing and supply chain finance, whether monies are deducted from payments as a charge to remain on the entity’s list of suppliers and whether the entity is a signatory to a payment code.

The Government has produced guidance on the requirements and the Reporting on Payment Practices and Performance Regulations 2017 are available on the legislation.gov.uk website.

For further information, please contact Carol Shutkever or Gareth Sykes.

2.2 Equity capital markets – new Prospectus Regulation

The EU Prospectus Regulation is due to be published which, upon implementation, will replace entirely the current EU Prospectus Directive regime. The Regulation is expected to be published in the Official Journal in June/July 2017.

The Regulation seeks to simplify the current regime, in particular, there are broader exceptions from the requirement to issue a prospectus and a reduction in generic and boilerplate disclosure. It will also introduce new requirements on the form and content of risk factors and summaries in prospectuses. In particular, the Regulation requires risk factors to be presented in a limited number of categories depending on their nature, with the most material risk factors mentioned first.
Most of the provisions will be directly effective in Member States two years following publication (although UK implementation is dependent on the timing and terms of Brexit). Two of the provisions amending the exemptions from the obligation to produce a prospectus come into force. These are the exemptions relating to the issue of securities of a class already admitted to trading which is being increased from 10% to 20% and the exemption relating to convertible securities. The FCA has proposed amendments to the UK Prospectus Rules to reflect the provisions that come into force early in its March 2017 Quarterly Consultation CP17/6. For the impact of the Regulation on Debt Capital Markets, please see the entry in that section below.

For further information, please contact Carol Shutkever or Gareth Sykes.

3. DISPUTE RESOLUTION

3.1 New Business and Property Courts of England and Wales

Following a London launch event on 4 July 2017, the “Business and Property Courts of England and Wales” will be the new umbrella term for the business specialist courts across England and Wales, encompassing: the Commercial Court (including the Admiralty Court); the Technology and Construction Court (or TCC); and the courts of the Chancery Division (including those dealing with financial services, intellectual property, competition, and insolvency). The introduction of this new umbrella term will not, however, replace existing individual names. The judiciary’s press release earlier this year stated that the new arrangements will “preserve the familiar practices and procedures of these courts, whilst allowing for more flexible cross-deployment of judges with suitable expertise and experience to sit on appropriate business and property cases”.

For further information, please contact Anna Pertoldi or Maura McIntosh.

3.2 Restrictive approach to both litigation privilege and legal advice privilege

A High Court decision in May 2017 found that litigation was not in reasonable contemplation (so the first limb of the test for litigation privilege was not met) even though a criminal investigation by the SFO was reasonably contemplated: SFO v Eurasian Natural Resources Corporation Ltd [2017] EWHC 1017 (QB). The decision suggests it is likely to be easier to establish that litigation is in reasonable contemplation in the context of civil proceedings than criminal proceedings. However, the decision contains unhelpful comments regarding the second limb of the test for litigation privilege – whether a document has been prepared for the dominant purpose of litigation – which would appear to apply equally to civil proceedings. In particular, the court found that even if litigation was in reasonable contemplation, documents prepared to investigate the truth of allegations made by a whistleblower and decide on next steps were not prepared for the dominant purpose of that litigation. The case also contains a surprising suggestion that documents prepared for the dominant purpose of avoiding contemplated litigation are not privileged (though the Court accepted that advice given in connection with the conduct of litigation may include advice relating to settlement of that litigation once it is in train).

The decision also endorses a restrictive view of who is the “client” for legal advice privilege, as recently applied by the High Court in the RBS Rights Issue Litigation (see our blog post on that decision here).

For further information, please see our blog post on the decision here or contact Anna Pertoldi or Maura McIntosh.

3.3 Supreme Court decision on contractual interpretation

A Supreme Court decision in March 2017 (Wood v Capita [2017] UKSC 24) has sought to reconcile that court’s previous decisions on contractual interpretation, which are widely perceived as pulling in opposite directions. In particular, Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900 is seen as having given a greater role to commercial common sense in interpreting contracts, while Arnold v Britton [2015] AC 1619 re-emphasised the importance of the natural meaning of the words used.

In Wood, however, the Supreme Court emphasises the common ground, describing interpretation as a unitary exercise in which a balance must be struck between the indications given by the language used (in both the clause under scrutiny and the remainder of the contract) and the implications of rival constructions (which is usually thought of as the business common sense approach). As the decision makes clear, the weight to be given to each tool will depend on the circumstances. Some agreements may be successfully interpreted by textual analysis, for example because they have been professionally drafted and their meaning is clear. Others may require a greater emphasis on the commercial background and implications to interpret a disputed provision.

For further information, see our Banking litigation e-bulletin or contact Anna Pertoldi or Maura McIntosh.

3.4 High Court strikes down clause as a penalty

In a decision in February 2017, the High Court held that a clause in a side letter, which allowed a landlord to terminate the side letter and insist on payment of the higher rent set out in the lease, was a penalty and therefore unenforceable: Vivienne Westwood v Conduit Street Development [2017] EWHC 350 (Ch). This is one of the few decisions to have struck down a clause as penal since the Supreme Court substantially rewrote the law on penalties in its decision in Cavendish v Makdessi [2015] UKSC 67 (see our blog post on that decision here). That decision replaced the traditional test of whether a clause is (or is not) a “genuine pre-estimate of loss” with a test of whether it is a secondary obligation which is out of all proportion to the innocent party’s legitimate interest in enforcing the counterparty’s obligations.

The latest decision is of particular interest for its discussion of whether a clause is in substance a secondary obligation which takes effect on breach of a primary obligation, so that the rule on penalties is engaged, or whether it is a conditional primary obligation and therefore falls outside the rule – illustrating that this distinction is a fine one. The practical message is that, whenever a clause takes effect on breach, it would be prudent to assume that the rule on penalties may be engaged. The question of whether it is enforceable will then come down to whether the clause is out of all proportion to the innocent party’s legitimate interest in performance of the contract. The decision also suggests that the question of whether a clause provides for the same consequences irrespective of whether a breach
is minor or serious, which the judge said had long been a hallmark of a penalty clause, remains an important consideration post-Makdessi.

For further information, please see our blog post on the Westwood decision here or Anna Pertoldi or Maura McIntosh.

4. EMPLOYMENT

4.1 Discrimination: employers should review their recruitment and promotion processes

Employers should review whether their policies and practices could be disadvantaging employees with a particular protected characteristic. If so, they should consider whether the policy has a legitimate aim and whether any changes can be made to remove the disadvantage while still achieving that aim.

The Supreme Court in Essop v Home Office (UK Border Agency) [2017] UKSC 27 has ruled that it may be enough to get an indirect discrimination claim off the ground for a claimant to produce statistics showing that the majority of a particular protected group is disadvantaged by a policy, without needing to show why, and that the claimant suffers the disadvantage. In Essop, statistics showed that BME and older candidates had a significantly higher chance of failing a skills assessment required for promotion, although no-one established why this was the case. The statistics were sufficient for an individual within the disadvantaged group to establish prima facie indirect discrimination. It was then for the employer to establish justification, or to show that the disadvantage suffered by the particular claimant was for a different reason to the group and not because of the policy.

Employers should also give careful consideration to requests to adjust recruitment processes where a disabled applicant asserts that the particular method chosen puts them at a disadvantage. A lack of flexibility is likely only to be justified if the employer can show that the specific test correlates exactly with a core competency of the job, and that competency cannot be demonstrated in another way which does not put the applicant at a disadvantage. If the effect of the disability is not clear, employers will either need to seek detailed medical evidence or give the applicant the benefit of the doubt. Adjustments could be giving extra time, or allowing alternative means of demonstrating a capability. In Government Legal Service v Brookes UKEAT/0302/16, the Employment Appeal Tribunal considered that it would have been a reasonable adjustment to allow a job applicant with Asperger syndrome to answer a test with short written answers rather than choose from multiple choice answers.

For further information, please see our blog or contact Peter Frost or Anna Henderson.

4.2 Shared parental leave: challenge to lack of pay enhancement succeeds at first instance

Employers who enhance maternity pay but not shared parental pay should be aware of a first instance decision that, if upheld at higher levels, would require them to change their approach. The tribunal in Ali v Capita Customer Management Limited ET/1800990/16 has upheld a father’s direct sex discrimination claim in relation to his employer's refusal to pay him 12 weeks’ full pay during shared parental leave (SPL), when a mother taking maternity leave would have been entitled to 12 weeks’ full pay (in addition to two weeks’ fully paid compulsory maternity leave).

The tribunal accepted that claimant’s argument that the 12 weeks’ maternity leave were not uniquely for the protection of the mother given her special biological/physiological condition. Following the introduction of SPL, those 12 weeks could be taken by either mother or father and therefore the purpose of that period is for bonding and care of the child, which is not a role exclusive to mothers. The exclusion of fathers from entitlement to the benefits set out in the maternity policy was therefore unlawful direct discrimination. For further details see our blog here.

The judgment does not address the legal arguments in any detail and it may well be confined to the situation where a father has made clear to the employer that he wishes to carry out the “primary caregiver role” during the 12 week period. In this case the tribunal emphasised that the claimant had advised the employer that his wife was returning to work on medical advice due to post-natal depression, which made him best placed to perform that role. Fathers who wish to take shared parental leave concurrently with the mother may find it more difficult to show direct discrimination in this way. Employers should watch out for further developments.

For further information, please contact Tim Leaver or Anna Henderson.

4.3 Gender pay gap reporting: regulations in force, reporting so far

New requirements to report on the gender pay gap came into force for private sector employers with 250 or more employees on 6 April 2017. The first report must be published by 4 April 2018. The detail of the new obligation is set out in our briefing here. Acas published a revised final version of their non-statutory guidance on 3 April 2017, and the changes to the original draft are highlighted in our blog here. The changes include clarification of a number of points, including the treatment of one-off retention or recruitment payments and the hourly pay calculation for atypical workers.

Employers may be interested to view the gender pay gap data uploaded onto the Government website here so far – at the time of writing, only 13 employers have done so. Only the six required metrics are displayed on the government website, along with the name of the director who has signed off the information. It is possible to display the data (and download it onto a spreadsheet) filtered by sector, making comparison easy. There is no facility to display voluntary narratives alongside the figures, but employers can upload a link to their full gender pay gap report on their own website (and seven of those uploaded have chosen to do so, with some full reports including additional adjusted data to illustrate how certain factors have skewed their overall figure).

When capturing pay data, employers may want to consider whether to include data over and above the minimum required, to enable them to better understand the reasons for any gender pay gap but also potentially to review the pay gap in relation to other protected characteristics. The independent Baroness McGregor-Smith Review into diversity and inclusion in the workplace included a recommendation that businesses with more than 50 employees voluntarily publish a breakdown of their workforce by race and pay band, on their website and in the annual report. Further details of the review and the Government’s response are discussed on our blog post here.
Notwithstanding the current political uncertainty, it is noteworthy that all major parties included proposals on extending pay gap auditing in their election manifestos. The Conservative manifesto pledged to broaden disclosure rules on the gender pay gap to include more information, the suggestion being that the data would need to be broken down by age and job-grade, and also to “ask” large employers to disclose their ethnicity pay gap. Labour also proposed pay audit requirements in order to close the ethnicity pay gap.

For further information, please contact Andrew Taggart, Christine Young or Anna Henderson.

5. REAL ESTATE AND PLANNING

5.1 Real estate

5.1.1 Public register of foreign beneficial ownership of UK property

The Government recently consulted on its plans for a public register, the first of its kind, revealing who owns and controls overseas legal entities that hold UK property or participate in UK government procurement projects over £10 million. The UK, and London in particular, attracts a lot of foreign direct investment and the Government is concerned that some properties are owned anonymously in order to disguise the identity of beneficial owners engaged in illegal activities.

Complementing the people with significant control register introduced in 2016, this initiative is part of the Government’s drive towards corporate transparency. The consultation, which closed on 15 May 2017, would require overseas entities wanting to deal with UK property to first register their beneficial ownership information with Companies House and obtain a registration number, which third parties will be able to check online free-of-charge. Existing overseas property owners would have a year to register their ownership with Companies House, and all beneficial owners would have to update their details every two years.

The Land Registry would not register the title of an overseas company without a valid registration number. Non-compliance would result in restrictions being placed on the property register prohibiting significant transactions (sales, leases over 21 years and mortgages) and may also constitute a criminal offence. If the proposals are implemented, buyers, tenants and mortgagees should insist on registration before entering into transactions, to avert the risk of not getting their transaction registered at HM Land Registry.

For further information, please contact Donald Rowlands or Matthew White.

5.1.2 New Electronic Communications Code: Digital Economy Act 2017

The existing Code has long been declared unfit for purpose, obscurely drafted and hopelessly out-of-date. Introduced in 1984, it failed to keep pace with advances in digital communications’ technology and public demand.

A revised Code was introduced in the Digital Economy Act 2017. It is unclear when it will come into force but it aims to help operators expand their networks and upgrade infrastructure by lowering the cost and simplifying the roll out of such infrastructure (driven in part by rapidly emerging digital technologies and handset capabilities). The new Code has not been welcomed by landowners but the Government has stated that it is simply putting communications on the same footing as other essential utilities such as water and energy.

The changes to the Code will:
- lower the threshold for compulsory imposition of code rights on unwilling landowners, tenants and occupiers;
- reduce rents by ignoring the market value of sites to operators;
- give operators automatic rights to upgrade, assign and share occupation of sites with other network operators at no additional cost and, in most cases, without landowners’ consents;
- remove the current overlap at the end of code agreements between continuation of rights under the Code and security of tenure protection for business tenancies under the Landlord and Tenant Act 1954; and
- give landowners a statutory right to terminate code agreements for redevelopment purposes (but with a vastly-increased notice requirement of at least 18 months).

The new Code may well remove landowners’ incentives to willingly enter into agreements with operators and, in turn, may herald a flurry of court applications by frustrated operators seeking to obtain the additional rights and obligations offered by the new Code.

For further information, please contact Donald Rowlands or Matthew White.

5.1.3 Minimum Energy Efficiency Standard

The Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015, more commonly known as the Minimum Energy Efficiency Standard (MEES), will affect the majority of commercial lettings with effect from 1 April 2018 for new leases (including lease renewals) and from 1 April 2023 for all leases.

“Sub-standard properties” is the new label that will attach to properties with an energy efficiency rating below E. Once in force, landlords may not let, or continue to let, a commercial property with an energy performance certificate (EPC) rating below E until they have either carried out all recommended relevant energy efficient improvement works to bring the property above an E rating, or registered one of the permitted exemptions.

The exemptions will allow landlords to let, or continue to let, sub-standard properties provided that they have registered details and evidence of the exemption on a centralised self-certification register known as the PRS Exemption Register (the PER). This is currently being piloted and is due to open by 1 October 2017 although landlords may register exemptions from 1 April 2017 as part of the pilot.

In February 2017, the Government published guidance on the Regulations addressed to landlords and enforcement authorities containing a lot of practical information. It clarified some important points not covered in the Regulations but simultaneously introduced confusion about their application to protected buildings and the relationship between the Regulations and voluntary EPCs.

Click here to view our e-bulletin.

For further information, please contact Donald Rowlands or Matthew White.
5.1.4 Assignment of leases and the Landlord and Tenant (Covenants) Act 1995

The case of EMI Group Limited v O&H Q1 Limited was due to be heard by the Court of Appeal on 8 May 2017, but the parties settled at the eleventh hour on confidential terms. As a result, the Court of Appeal did not have a chance to consider the High Court’s ruling. The case centred around whether, under the Act, a new lease could be assigned by a tenant to its existing guarantor. The High Court had ruled that this was prohibited by the anti-avoidance provisions in the Act, making the assignment void by operation of law. Therefore the assignor tenant remained liable for performance of its covenants and the guarantor continued to guarantee the tenant’s obligations for the remainder of the term of the lease.

The decision was widely discussed by legal professionals, and it had been hoped that the Court of Appeal would address how the Act is incompatible with the concept of freedom of contract, where willing, legally represented parties wish to take on new or different obligations. Consequently the High Court ruling limits group diligences on a sale or acquisition to check that a new tenancy has not been the subject of an assignment directly to a guarantor.

For further information, please contact Matthew Bonye or Donald Rowlands.

5.2 Planning

5.2.1 Neighbourhood Planning Act 2017

The Neighbourhood Planning Act 2017 received Royal Assent on 27 April 2017, affecting England and Wales. The Act aims to improve supply of land for housebuilding and improve community involvement to speed up delivery of housing. As yet, only provisions enabling the Secretary of State to make regulations are in force. The Act is in three parts: the first two relate to planning and compulsory purchase; the third deals with consequential provisions. It amends various legislation including, the Town and Country Planning Act 1990, the Planning and Compulsory Purchase Act 2004, the Land Compensation Acts and the Compulsory Purchase Act 1965.

Part 1 of the Act makes provisions regarding neighbourhood planning, neighbourhood areas, the preparation of joint development plan documents, restrictions against imposition of certain types of planning conditions (in particular pre-commencement conditions), changes to permitted development rights for Class A4 use (drinking establishments), the appointment of local authorities to oversee the development of New Towns and inclusion on the planning register of further information relating to permitted development rights. Part 2 of the Act introduces a power of temporary possession of land and sets out procedures and rights in relation to it including provisions regarding advance payment of compensation, introduces the “no-scheme principle”, that compensation for compulsory acquisition shall be assessed in the “no-scheme world”, and makes provisions regarding joint acquisition by the Greater London Authority, mayoral development corporations (MDAs) and Transport for London.

The Act is expected to be brought into force on a piecemeal basis in due course.

For further information, please contact Matthew White.

5.2.2 Changes to the Environmental Impact Assessment (EIA) Regulations

The Town and Country Planning (EIA) Regulations 2017 came into force on 16 May 2017, implementing changes to EU Directive 2011/92/EU. Key changes are made to the EIA process, quality control, screening and scoping processes, the content of Environmental Statements (ESs), consultation timeframes, and co-ordination between EIA and the Habitat Regulations Assessment.

An EIA must now assess significant effects of proposed development on defined factors, with a new duty to consider expected significant effects from vulnerability to major accidents or disasters. An ES should now include more information on operational phases, there is a new duty to outline the current state of the environment and anticipated evolution without the project, and it must be prepared by “competent experts”. For screening requests developers must now include standardised information, including likely significant effects of the project, with a new 90 day time limit on making a screening decision. Scoping remains voluntary but a request should now include details of the development’s location and technical capacity, and the ES must now be based on any scoping opinion or direction issued. The minimum consultation period on the ES is extended, and all screening and scoping decisions must now include a “reasoned conclusion”. A number of these changes already reflect best practice. Changes to the EU Directive 2011 have also been implemented for the nationally significant infrastructure planning (NSIP) regime through the Infrastructure Planning (EIA) Regulations 2017. These also came into effect on 16 May 2017.

For further information, please contact Matthew White.

5.2.3 Permissions in Principle and Brownfield Registers

The Housing and Planning Act 2016 (HPA) amended the Town and Country Planning Act 1990 to introduce “permission in principle” for housing-led development on land allocated for development in a “qualifying document”, including development plan documents, neighbourhood plans and brownfield registers. The Town and Country Planning (Permission in Principle) Order 2017 has now been made, applying to England only. It came into force on 15 April 2017 and grants permission in principle for land allocated in Part 2 of a brownfield land register. The order sets out what information a brownfield land register must contain and requires local authorities to keep a register of permissions in principle granted (Part 2A of the register). Permissions in principle under the order expire after five years. They are converted to full planning permission by applying for technical details consent, covering detailed matters such as the design of buildings, development layout and landscaping schemes. This must be done within the five year period. Separate regulations are expected in due course to bring into force permission in principle for sites allocated in development plan documents and neighbourhood plans.

For further information, please contact Matthew White.
### 6. SECTOR SPECIFIC DEVELOPMENTS

#### 6.1 Banking, Restructuring and Insolvency

**EU Bank Recovery and Resolution Directive 2014/59 (BRRD) Article 55 – Contractual Recognition of Bail-in Requirement**

From 1 January 2016, Article 55 of the BRRD obliged EU Member States to make a change in national law which affects a wide range of contracts, including banking contracts. Article 55 is part of complex bank resolution legislation and is intended to give weight, outside the EU, to the powers of the EU resolution authorities to bail in, ie write down or convert into equity, liabilities of a failing in-scope entity to maintain it as a going concern. Broadly, Article 55 requires that if an EU regulated credit institution or investment firm enters into, or materially amends, any liability governed by the law of a jurisdiction outside the EU, it must, from 1 January 2016, obtain a contractually binding acknowledgement and agreement from the counterparty that the liability can be bailed in. Due to the wide range of liabilities to which the requirement applies, in-scope firms have found it very difficult to comply with Article 55 in some areas of business, ranging from trade finance documentation to membership of foreign clearing houses.

Furthermore, despite the final draft of the European Banking Authority technical standards being adopted in March 2016, it is for national regulators to enforce and potentially provide flexibility in the application of the requirement. In the UK, some flexibility has been provided by amendments made to the PRA Rulebook on 1 August 2016 such that UK in-scope entities may request that the contractual recognition of bail-in requirement is dis-applied for “phase two” liabilities (ie unsecured liabilities other than debt instruments) where including the bail-in clause is “impracticable”. FCA-authorised firms may apply for a similar modification direction of the relevant FCA rule where compliance with the rule is impracticable. The FCA direction ends on 30 June 2017 (or earlier if the relevant rule is revoked or amended before then). Notwithstanding these UK modifications, the requirement has continued to be problematic.

Developments at the EU level (in November 2016) indicate that change should be on the way with the release by the European Commission of a draft amending Directive of the European Parliament and Council and a Communication on “Call for evidence: EU regulatory framework for financial services”. The call for evidence refers to the need to reduce unnecessary regulatory constraints on banks’ ability to finance the wider economy and one of the examples given is to ensure that the contractual recognition of bail-in requirement can be applied pragmatically. It also acknowledges some of the difficulties which banks are facing when trying to comply and proposes a replacement Article 55. Although the current drafting of the proposed replacement does not appear to achieve the desired aim, it is to be hoped that Article 55 may become less problematic for in-scope entities during 2017.

For further information, please contact **William Breeze**.

#### 6.2 European Commission proposals for new rules to determine law applicable to third party effects of an assignment of a debt claim

The European Commission launched a consultation in April 2017 on its proposals for new EU rules to be put in place to determine the law which will govern the effectiveness, as against third parties, of an assignment of a debt claim. Currently, the Rome I Regulation (EC No 593/2008) does not address which law governs the effectiveness of an assignment against third parties, and national law differs. The Commission sees this, as well as questions about priority between competing third parties, as a crucial aspect of ensuring legal certainty in cross-border business operations. The three possible approaches suggested are:

- the law applicable to the assigned claim (which is the approach taken under English law);
- the law of the contract between the assignor and the assignee; or
- the law of the assignor’s habitual residence.

For further information, please contact **William Breeze**.

#### 6.3 Recast Insolvency Regulation ((EU) 2015/848)

A recast version of EC Regulation 1346/2000 on insolvency proceedings, which seeks to harmonise the regulation and enforcement of insolvency proceedings among EU Member States by providing for the affairs of insolvent companies and individuals to be administered in the jurisdiction in which they have their centre of main interests, came into force on 26 June 2015. The Recast Insolvency Regulation applies to relevant insolvency proceedings as of 26 June 2017. Changes include:

- a new three month “look-back” period which will be relevant when determining a debtor’s centre of main interest and which aims to reduce abusive forum shopping;
- new procedural rules to improve co-ordination between insolvency practitioners in group insolvency situations; and
- the creation of a new Europe-wide insolvency register.

For further information, please contact **Laurence Elliott**.

#### 6.4 Review of the Corporate Insolvency Framework

In May 2016, the Insolvency Service published a consultation paper setting out a number of options designed to improve the existing corporate insolvency regime. The four main areas being considered are:

- a new three month moratorium for distressed companies;
- a widening of the definition of essential supplies to allow distressed companies to maintain business-critical contracts;
- the introduction of a flexible restructuring plan that would bind both secured and unsecured creditors and introduce a “cram-down” mechanism; and
- amending the rules regarding priorities to allow rescue financing to be put in place.

For further information, please contact **Laurence Elliott**.
The responses to the proposals were not, in general, positive. The Government published a summary of the responses on 28 September 2016 and is understood to be continuing to review the proposals in light of the responses received. Further developments in 2017 are therefore awaited.

For further information, please contact Laurence Elliott.

7. COMPETITION, REGULATION AND TRADE

7.1 European Commission gets tough on merger control violations – Facebook fined EUR110 million for providing misleading information and Altice faced with gun-jumping charges

On 18 May 2017, the European Commission imposed a record fine of €110 million on Facebook for providing incorrect/misleading information to the Commission during its review of Facebook’s acquisition of WhatsApp under the EU merger regulation (EUMR). The fine dwarves fines for similar breaches under the previous version of the EUMR, but is less than half of the maximum possible. The Commission has indicated that it is investigating a series of similar infringements.

On the same day, the Commission issued a Statement of Objections to Altice alleging it had breached the EUMR’s standstill obligation by exercising control over PT Portugal before receiving clearance for the transaction (ie gun-jumping), including by interfering in commercial decisions and exchanging competitively sensitive information.

These developments demonstrate that the Commission is cracking down on violations of the EUMR rules and will not hesitate to issue heavy penalties on infringers, and comes against a backdrop of similar procedural toughness by merger control authorities worldwide. It is essential that merging companies understand and comply with all applicable merger control rules, ensuring that all information submitted is complete and accurate, and limiting pre-completion conduct and integration planning to that acceptable under the gun-jumping rules.

See our e-bulletin for more detail.

For further information, please contact Kyriakos Fountoukakos, Sergio Sorinas or André Pretorius.

7.2 Further evolution of competition litigation in the UK

Private enforcement of competition law continues apace in the UK, with important recent developments in relation to new procedural mechanisms increasing the risk profile for potential defendants.

On 31 March 2017 the Competition Appeal Tribunal (CAT) issued a judgment on the first “class action” application under the competition collective redress regime (against Pride Mobility Scooters). This judgment clarified a number of important issues – including that the certification process does not involve a US-style mini-trial, and that the fact that the impetus to bring an action came from a law firm is not fatal to approval of an applicant as a suitable representative. On the facts, the CAT adjourned the certification hearing and allowed the applicant to file an amended application and expert evidence to correct flaws identified by the CAT. She subsequently withdrew the application, on the basis that damages were unlikely to exceed costs. The CAT’s decision on certifying the second class action application – a £14 billion claim against MasterCard – is awaited.

On 26 May 2017 the CAT issued its first judgment in a “fast track” case, conducted under a procedure designed to enable claims to be brought more quickly and cost-effectively, including via the use of cost caps. The CAT found that the Law Society of England and Wales had abused a dominant position in breach of competition law by requiring solicitors to purchase training from it to maintain Conveyancing Quality Scheme accreditation. This judgment follows a number of previous fast track cases in which the parties settled shortly after the claim was issued, and is likely to further encourage use of the procedure by claimants.

See our e-bulletins here and here for more detail. For more information, please contact Stephen Wisking or Kim Dietzel.

7.3 EU Commission publishes final report in e-commerce sector inquiry

On 10 May 2017 the EU Commission published its final report in the e-commerce sector inquiry launched in May 2015 as part of a wider Digital Market Strategy, which aims to achieve better access for consumers and businesses to online goods and services across the EU. The aim of the sector inquiry was to examine prevailing market trends in the e-commerce sector and identify potential barriers to competition in e-commerce markets. In relation to consumer goods the report identifies a number of trends in retail business practices aimed at increasing control over product distribution in an online sales context. The exclusion of online distributors from the network, online pricing restrictions including resale price maintenance and dual-pricing, restrictions on selling on online marketplaces and restrictions on cross-border sales and geoblocking are all identified as potential competition law issues.

As a result of some of the findings from the inquiry the Commission opened three investigations earlier this year into the online sale of consumer electronics, video games and holiday accommodation. More recently it started an investigation into Nike, Universal Studios and Sanrio which focuses on territorial restrictions in the licensing of brands to merchandising manufacturers. Commissioner Vestager has indicated that further investigations are to follow. A number of businesses have also adjusted their commercial practices on their own initiative in order to make it easier for consumers to make cross-border purchases which in turn allows them to benefit from lower prices and wider choices.

See our e-bulletin here for more detail.

For further information, please contact Kyriakos Fountoukakos or Susan Black.

8. CONSTRUCTION

8.1 Publication of NEC4 and other new NEC contracts

NEC will issue NEC4, their new Engineering and Construction Contract (ECC) in June 2017. This form of contract is in common use in the UK and elsewhere, particularly for infrastructure projects. At the same time or shortly afterwards, they will issue an Alliance contract in a consultative form. This is a multi-party contract intended to be entered into by most or all of the participants in a project. It is also intended that a Design-Build-Operate contract will be issued in or shortly after June 2017.
10. ENERGY AND ENVIRONMENT

10.1 Energy

10.1.1 Embedded benefits and network charging arrangements

On 20 June 2017, Ofgem published a decision notification confirming its March 2017 “minded to” decision on changes to embedded benefits which will reduce the residual element of triad avoidance payments from the current level of approximately £47/kW to approximately £3-7/kW when the proposals are implemented (according to National Grid estimates). The changes will be phased in over three years starting from 1 April 2018 so that the reduction in payments receivable by small embedded generators is staggered, giving the market time to adjust.

In the notification Ofgem acknowledged that its decision was likely to affect stakeholder investment decisions in respect of the 22 June 2017 Financial Commitment Milestone (FCM) for the 2015 capacity auction.

Shortly after publishing its March 2017 “minded to” decision on embedded benefits Ofgem also launched a consultation on whether to proceed with a significant code review (SCR) on residual transmission and distribution charging. This consultation closed on 5 May 2017 and Ofgem has indicated that if it decides to go ahead with the review the launch statement will be published in summer.

For further information, please contact Silke Goldberg.

10.1.2 Update on the second contract for difference allocation round

The application window for the second contract for difference (CfD) allocation round for less-established technologies opened on 3 April 2017 and closed on 21 April 2017. Ofgem has until 2 August 2017 to assess qualification appeals. The auction round will end, and applicants will be notified of the outcome, on 11 September 2017.

Developers allocated CfDs in this second and future allocation rounds will have to repay any State aid specifically attributable to the relevant project before the start date set out in the CfD. While the Government offered guidance on what it thinks could be such aid, the courts could reach a different conclusion so the risk of payments in the development and pre-development phase (eg grants) being held to be aid and therefore repayable will ultimately sit with the developer (and is also likely to impact lender behaviour).

Ahead of this round the Government also tightened up the definition of foreseeability in the change in law clauses, to make it clear that a judicial review impacting the project (though not, by definition, against the developer) would be treated as foreseeable provided it can be shown that the developer knew or should have known of such action.

However, the Government did not restrict the extension of time available on the occurrence of a force majeure event under the CfD and decided not to introduce measures to mitigate the risk of underestimating load factors and overspending on the Levy Control Framework, or to make changes to current measures to deter speculative bidding for CfDs. Clarification on the treatment of storage on CfD sites was provided.

For further information, please contact Silke Goldberg.
10.1.3 Capacity market update
In March 2017, Ofgem launched a consultation on a number of proposed changes to the capacity market rules. Ofgem is “minded to” take forward, or partially take forward, 20 of the proposals submitted by stakeholders and delivery partners as well as four amendments it put forward.

One of the proposed changes would remove the option for capacity market auction applicants to defer the provision of “Relevant Planning Consents” until after pre-qualification on the basis that the costs of deferral outweigh any benefits and that the majority of conditionally pre-qualified applicants that choose to defer planning consent submissions ultimately fail to submit them and therefore fail to pre-qualify.

Ofgem intends to provide an update on the implementation of the proposals being taken forward later this year.

On 7 June 2017, Ofgem published its annual report on the operation of the capacity market in 2016/17 (covering the 2016 T-4 Auction, the 2017 Early Capacity Auction and the 2017 DSR Transitional Auction), and on 15 June 2017 National Grid published its operational plan, setting out the key milestones and activities required to deliver the 2017/18 auctions. The 10 week prequalification window will run from 24 July to 29 September 2017. The T-1, year-ahead, auction will start on 30 January 2018 and the T-4, four-year-ahead, auction will start on 6 February 2018.

For further information, please contact Simon Caridia.

10.2 Environment
10.2.1 Trump pulls out of Paris Agreement
The US ratified the Paris Agreement in September 2016. However, on 1 June 2017 Donald Trump announced he would pull the US out of the climate agreement. The treaty permits a signatory to withdraw at any time after three years from when it has ratified the agreement, such withdrawal to take effect one year after the notification of withdrawal (Article 28). This would mean the withdrawal process for the US would take until 2020 to complete and in the meantime the US would still be bound by the terms of the agreement. This move by Trump has been very controversial amongst other signatories, businesses and throughout the US. However, it has in fact prompted US States and mayors to pledge to abide with the agreement regardless as well as the announcement of an alliance between China and the EU to take a leading role in tackling climate change.

For further information, please contact Julie Vaughan.

10.2.2 Minamata Convention on Mercury comes into force
The Minamata Convention on Mercury is a global treaty to protect human health and the environment from the adverse effects of mercury and was agreed and adopted in 2013. It needed 50 ratifications in order to come into force: on 18 May 2017 this milestone was reached and the Convention will therefore become legally binding for all its parties from 16 August 2017. The Convention replaces prior voluntary attempts by countries to control mercury use that had proved ineffective. Key features include a ban on new mercury mines, the phase-out of existing ones, the phase out and phase down of mercury use in a number of products and processes, control measures on emissions to air and on releases to land and water, and the regulation of the informal sector of artisanal and small-scale gold mining. The Convention also addresses interim storage of mercury and its disposal once it becomes waste, sites contaminated by mercury, as well as health issues. The first Conference of the Parties to the Convention will take place from 24 to 29 September 2017 in Geneva, Switzerland.

The EU has now ratified the Convention and adopted a new Mercury Regulation on 17 May 2017 to implement the Convention’s requirements. The new Regulation replaces the existing 2008 EU ban on mercury exports, whose primary objective was to inhibit worldwide mercury supply. The Regulation includes putting an end to all uses of mercury in industrial processes and prohibiting any new use of mercury in products and industry, unless proven that it is needed for the protection of health and the environment. It also includes controls on the use of mercury in dental amalgam. There is only a short deadline to achieve compliance; the new Regulation will enter into force 20 days after its publication in the EU’s Official Journal (which occurred on 24 May 2017) and will take effect from 1 January 2018. As such, it will then form part of EU-derived environmental laws that are expected to continue in force in the UK after Brexit. If your business involves the use of mercury you should check now how this may impact you.

For further information, please contact Julie Vaughan.

10.2.3 Renewed challenge to draft air quality plan
The Government published on 5 May 2017 its second attempt at the national air quality plan. The draft plan, according to a court order already made against the Government, must set out measures to achieve compliance with EU limits on nitrogen dioxide air pollution in urban areas within the shortest possible time. The Government’s draft issued for public consultation places the burden on local authorities rather than introducing national scale initiatives to be led by central Government, and has been widely criticised as weak and ineffective. ClientEarth’s CEO (James Thornton) has stated that this new draft is “even worse than the previous effort, which has already been ruled illegal by the High Court”. ClientEarth had requested the Department for the Environment, Food and Rural Affairs to improve the plan to address “major flaws”, but was refused. Consequently, ClientEarth will be taking the Government back to court for the third time.

The Government is bound to issue a final plan by 31 July 2017. It is currently unclear how the latest legal challenge will affect the contents of the plan or the deadline. It is possible that further measures to curb air emissions will significantly impact major infrastructure development projects coming forward for planning approval. However, further measures to restrict diesel vehicle usage may result in changes to the vehicle taxation regime and/or development of proposals for a diesel scrappage scheme, and provide a further boost to sales of electric vehicles.

For further information, please contact Julie Vaughan.
10.2.4 Record environmental fines

Thames Water has been fined over £20 million for six pollution incidents on the River Thames that occurred between 2012 and 2014. Repeated illegal discharges of untreated raw sewage into the river resulted in environmental damage and the death of birds, fish and invertebrates. Out of the total figure of £20 million for the six cases, the highest fines were £8 million and £9 million. Previously the highest fine for an environmental offence had been £2 million. The Court found that culpability for two of the offences was reckless and the other four offences involved negligence. The judge held that Thames Water had been guilty of “disgraceful conduct” and harm was “entirely foreseeable and preventable”; furthermore, the fines must be borne by the company and felt by its shareholders, without impacting Thames Water’s customers.

Tesco has also been fined in June 2017 for pollution to a river due to a leak from a petrol filling tank at one of its petrol stations. The pollution incident occurred in 2014 and involved 23,500 litres of petrol entering the watercourse, which resulted in a significant impact on fish, other aquatic life and residents nearby. Tesco was ordered to pay a large environmental fine (£3 million) as well as a health and safety fine (£5 million).

For further information, please contact Julie Vaughan.

11. FINANCIAL SERVICES REGULATION

11.1 FCA Business Plan, Sector Views and Mission

In April 2017, the FCA published its Business Plan for 2017/2018, setting out details of the specific areas of work the FCA is prioritising for the next year, as well as key trends in, and implications for, the markets and firms regulated by the FCA, and emerging risks that may require future regulatory response. The FCA’s cross-sector priorities for the year ahead include work on the following areas:

- firms’ culture and governance;
- financial crime and anti-money laundering;
- promoting innovation;
- technological change and resilience;
- treatment of existing customers; and
- consumer vulnerability and access to financial services.

For the first time, the FCA published “Sector Views” alongside the Business Plan. The Sector Views cover both conduct and, where relevant, prudential perspectives. Covering all the markets which the FCA regulates, there are seven sector views: retail banking, retail lending, general insurance and protection, pensions and retirement income, retail investments, investment management, and wholesale financial markets. A number of the sectors are further divided into sub-sectors reflecting types of products and/or services within that sector.

In addition to the Business Plan and Sector Views, the FCA published “Our Mission 2017: How we regulate financial services”. The Mission is a high-level document which sets out the FCA’s strategic decision-making framework. It explains:

- the intervention framework that facilitates consistent regulatory judgments;
- the concentration of resources on issues within the FCA’s regulatory remit and circumstances in which the regulator will engage on activities outside the perimeter; and
- the introduction of a wider and more systematic measurement of the impact of interventions and the way on which these will be reported.

A more detailed briefing on this topic can be found here.

For further information, please contact Karen Anderson or Clive Cunningham.

11.2 SMCR: FCA and PRA guidance on the “duty of responsibility”

In May 2017, the FCA and PRA issued policy statements setting out guidance on their approaches to the “duty of responsibility” under the Senior Managers and Certification Regime (SMCR). Under the duty of responsibility, the FCA and the PRA can take enforcement action against Senior Managers if they are responsible for the management of any activities in their firm in relation to which their firm contravenes a regulatory requirement, and they do not take such steps as a person in their position could reasonably be expected to take to avoid the contravention occurring or continuing.

The regulators’ new guidance concerns:

- considerations relevant to the determination as to whether a Senior Manager was responsible for the management of any of the firm’s activities in relation to which a contravention of a relevant requirement by the firm occurred;
- the steps a person in the position of the Senior Manager could reasonably be expected to take to avoid the contravention occurring (or continuing); and
- considerations relevant to the determination as to whether or not a Senior Manager has taken such steps.

The FCA’s guidance clarifies that a Senior Manager will not be bound by a finding of the Regulatory Decisions Committee, a court or a tribunal to which they are not party or privy.

One important consideration to which the FCA would expect to have regard, when determining whether or not a Senior Manager has complied with the duty, is whether the Senior Manager acted in accordance with their statutory, common law and other legal obligations, including, but not limited to, the Conduct Rules set out in the FCA Handbook. There is considerable guidance on the reasonable steps a Senior Manager must take in the Conduct Rules. Senior Managers might find it helpful to have regard to the guidance on the duty when considering how to comply with the Conduct Rules.

The PRA considers that its guidance is consistent with the FCA’s guidance. Both sets of guidance took immediate effect.

For further information, please contact Karen Anderson or Clive Cunningham.
12. INSURANCE

12.1 EIOPA to publish guidance on sound principles for authorised and supervision of insurers post-Brexit

Recent comments in an interview (dated 30 May 2017) given by Gabriel Bernardino, Chair of the European Insurance and Occupational Pensions Authority (EIOPA), and in a speech (dated 8 June 2017) concern the implications of Brexit for the insurance industry.

Mr Bernardino noted that:

- EIOPA is closely monitoring developments linked with the Brexit negotiations and is not yet able to form a firm position on the likely impact on the conduct of insurance supervision and insurance products.
- Subsidiaries established by UK insurers in the 27 remaining EU Member States (the EU27) as a response to the loss of passporting rights need to be subject to proper supervision. Empty shells or “letter boxes” in the EU27 are not acceptable. Sound supervision demands the appropriate location of management and key functions, including sound outsourcing and reinsurance policies.
- EIOPA is closely monitoring any possible effects of Brexit on financial stability and consumers. In due course, it expects to publish guidance for supervisory authorities in the EU27 on sound principles for authorisation and supervision in the context of the UK’s withdrawal from the EU. IT will then monitor implementation of the guidance closely.

For further information, please contact Alison Matthews or Geoffrey Maddock.

12.2 PRA consults on amendments to the Senior Insurance Managers Regime (SIMR)

The PRA has published a consultation paper (CP8/17), which includes the following proposed changes to the Senior Insurance Managers Regime (SIMR):

- creating a new Senior Insurance Management Function (SIMF) – the Chief Operations function (SIMF24);
- creating a new Prescribed Responsibility (PR) for the firm’s performance of its obligations in respect of outsourced operational functions and activities;
- creating a new SIMF – the Head of Key Business Area function (SIMF6), for individuals who are responsible for large business areas or divisions within a firm;
- requiring that the Chairman function (SIMF9) (Chair) and Chief Executive Officer function (SIMF1) (CEO) roles may not be held by a single individual at “large firms” (as defined); and
- requiring that a Non-Executive Director (NED) oversight SIMF role at a “large firm” that is part of a group may not be performed by a group executive (ie an individual performing some executive function within that same group).

The PRA also proposes to require Solvency II insurers and large non-Directive firms (NDFs) to have a policy to promote diversity among board members.

This consultation paper is relevant to all Solvency II insurance firms and to large NDFs. Comments should be submitted by 22 September 2017. The PRA intends to publish the final rules in the fourth quarter of 2017.

For further information, please contact Alison Matthews or Barnaby Hinnigan.

12.3 New Airmic guides published for policyholders

Herbert Smith Freehills has assisted Airmic, the UK association for those with a responsibility for risk management and insurance, alongside others, in preparing three new guides for policyholders that were launched at the Airmic conference in June 2017. The guides, which can be accessed by clicking on the links below, aim to assist policyholders in relation to some of the key issues currently facing corporate insureds.

- The Insurance Act: 10 months on

The Insurance Act has now been in force for 10 months, and many policyholders will have experienced their first “post-Act renewal”. This paper reports on how the Act has changed the way insurers, brokers and buyers interact with each other during the placement process, and provides guidance for policyholders on how to ensure they are gaining full benefit of the Act.

- Cyber risk: understanding your risk and purchasing insurance

This paper aims to help risk managers lead the cyber risk conversation. The paper (which is an update of Airmic’s 2012 paper on the cyber insurance market) provides a framework for policyholders to assess their cyber risks, before summarising the cover available and the underwriting information required to buy such cover.

- Complex property claims: a short guide

This new paper examines the major obstacles that can impede the expeditious resolution of large or complex property damage insurance claims. It examines the challenges that a risk manager may face, and identifies the key internal and external stakeholders they need to interact with from the moment of the loss through to settlement.

For further information, please contact Paul Lewis.

13. TAX

13.1 Spring Budget 2017

The Spring Budget was presented on 8 March 2017. Tax measures announced were low-key, perhaps reflecting a desire for stability in the face of uncertainty generated by Brexit, and also perhaps influenced by the forthcoming move to an annual Autumn Budget.

New tax announcements included a number of tax avoidance measures such as the removal of the ability for businesses to convert capital losses into trading losses and a consultation on HMRC’s process for risk profiling large businesses, as well as a reduction in the tax-free dividend allowance. The increase in the rate of class 4 National Insurance Contributions for the self-employed, which was also announced, was subsequently abandoned by the Government.

A link to our tax briefing on the Spring Budget can be found here.

For further information, please contact Isaac Zailer or Howard Murray.
13.2  Criminal Finances Act 2017: failure to prevent the criminal facilitation of tax evasion

The Criminal Finances Act 2017 received Royal Assent on 27 April 2017. The Act creates two new criminal offences for corporates and partnerships, one in relation to UK taxes and the other for foreign tax evasion offences. An entity will commit an offence where it fails to prevent an associated person (broadly, someone acting for or on its behalf) from criminally facilitating either a UK tax evasion offence or an equivalent offence under foreign law. Both new offences have extra-territorial effect, although the second offence (regarding foreign tax evasion) requires the entity or the facilitation to be linked to the UK. For each offence, it will be a defence for the entity to show that it had reasonable procedures in place to prevent such facilitation, or that it was not reasonable to expect it to have such procedures. Draft guidance has been published, setting out principles which may be used to inform these prevention procedures. The new offences are expected to come into force by September 2017, but an official announcement of the implementation date is awaited.

For further information, please contact Isaac Zailer or Howard Murray.

13.3  Finance Act 2017

The Finance Bill 2017 was published in full on 20 March 2017, incorporating draft legislation for various significant reforms, including changes to the tax deductibility of corporate interest expense, reform of the corporation tax loss regime, amendments to the Substantial Shareholding Exemption and changes to the taxation of non-UK domiciled individuals.

With a general election subsequently called for 8 June, leaving insufficient time for Parliament to consider the full Bill, the majority of the provisions, including all of the above reforms, were dropped. The remainder of the Bill, including rules on salary sacrifice arrangements and “IR35” rules for off-payroll working in the public sector, received Royal Assent on 27 April 2017.

The expectation is that most, if not all, of the provisions dropped will return in a post-election Finance Bill, though we await official confirmation of this position following the election, and of the timing of publication. If this is the case, it remains unclear when those “deferred” provisions will have effect. This is a particular issue in relation to the provisions, such as those listed above, which were due to have effect from 1 April or 6 April 2017.

For further information, please contact Isaac Zailer or Howard Murray.

13.4  Queen’s Speech 2017

The Queen’s Speech, in which the Government’s proposed legislative programme for the next Parliamentary session is set out, took place on 21 June 2017. An extended two year session of Parliament was proposed, in order to deal with the legislation associated with Brexit. During that time, there will be three Finance Bills, commencing with a Summer Finance Bill which is expected to be introduced shortly and “will include a range of tax measures including those to tackle avoidance”. No further details of its content were provided. Tax will also feature in a new Customs Bill, which will provide domestic legislation to replace EU customs legislation and modify elements of the indirect tax system, allowing the UK to operate a standalone customs and indirect tax regime on exit from the EU. The notes accompanying the Speech confirm that in order to provide continuity for businesses, the customs legislation will, in the most part, be based on existing EU law. A National Insurance Contributions (NICs) Bill will also be introduced, to legislate for the NICs changes announced at Budget 2016 and Autumn Statement 2016 (including the abolition of class 2 NICs but expressly excluding the proposed increase in class 4 contributions for the self-employed, put forward in Spring Budget 2017 but withdrawn shortly afterwards).

For further information, please contact Isaac Zailer or Howard Murray.

14.  TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS

14.1  New EU content portability regime adopted by Council of the EU

On 8 June 2017, the Council of the European Union adopted the new Regulation on cross-border content portability, whereby EU citizens will be able to make full use of their paid online content services (across film, sport, television, music, e-books and gaming) wherever they are in the EU. After the Regulation is published in the EU Official Journal, service providers will have a nine month period to prepare for and ensure compliance with the rules before they become directly applicable throughout the EU in early 2018.

This follows an informal agreement reached in respect of the Regulation on 7 February 2017 between the European Parliament, the Member States and the European Commission and subsequent formal approval by the European Parliament on 18 May 2017.

These rules form part of a wider initiative introduced by the European Commission in 2015 (and are the first in a series of measures relating to modernisation of EU copyright rules) aimed at breaking down the barriers to the so-called Digital Single Market where individuals and businesses can seamlessly access and exercise online activities irrespective of their nationality or place of residence.

The rules will require online content service providers to enable their users to access content wherever they are in the EU based on verification of each user’s country of residence (using, for example, payment details or IP addresses). The regime will only apply to paid online content (providers of free services will continue to have discretion as to whether to make their services portable or not).

Whilst the Regulation is of obvious benefit to consumers, the measures have met criticism from a variety of industry stakeholders who are concerned that the new rules will have a detrimental effect on traditional territorial licensing models which enable rights-owners to sell rights on a territory-specific basis as opposed to making their content available throughout entire regions.

The likely impact of the new Regulation remains to be seen but one could argue that it represents a step forward in the alignment of EU regulation with digital technology developments.

For our full article please click here.
**14.2 Digital Economy Act 2017 receives Royal Assent**

The [Digital Economy Act](http://example.com) finally received Royal Assent on 27 April 2017 and the final text was published at the beginning of May 2017. First introduced in the House of Commons in July 2016, it has been the subject of much scrutiny and debate by both Houses of Parliament.

It covers a wide assortment of areas falling under the “digital economy” umbrella but at its heart it seeks to “modernise the UK for enterprise” – focusing on improving access to digital communication services (including through improved connectivity and infrastructure), supporting new digital industries and enhancing protections for citizens using those services.

Some of the areas covered by the Act include:

- a new direct marketing code to be introduced by the Information Commissioner’s Office (ICO) that will have statutory status, strengthen enforcement action and further protect individuals’ rights against so-called nuisance calls and spam emails;
- a range of measures relating to Government digital services including those intended to improve the delivery of public services and sharing of personal data between certain public authorities;
- a new Broadband Universal Services Obligation providing end users with a legal right to request a minimum broadband connection (initially set at 10Mbps);
- a new Electronic Communications Code to replace the one currently in force and which aims to lower the cost and simplify the rollout of mobile and superfast broadband infrastructure (see further the entry in the Real Estate section above); and
- increasing penalties for online copyright infringement to equalise the penalties with the laws on physical copyright infringement.

Much of the Act is not yet in force. It features staggered commencement dates and many of the provisions being commenced (and the detail provided) by secondary legislation.

It remains to be seen whether the Digital Economy Act 2017 will in fact achieve its aim of building “a more connected and stronger economy”, as envisaged by Matt Hancock, Minister of State for Digital and Culture.

To read our full article on the Digital Economy Act 2017, please click [here](http://example.com).

**14.3 GDPR Compliance: Just under a year to “get your house in order”**

The European Commission published its first draft of the [EU General Data Protection Regulation (GDPR)](http://example.com) in January 2012, which set out a comprehensive reform of the current existing EU regime. The reform was designed to give citizens more control and protection over their personal data. In April 2016, the final text of the GDPR was formally approved.

The GDPR then entered into force on 25 May 2016 with a two year implementation period before it comes into effect. This period gives organisations until 25 May 2018 to prepare for the new rules to apply.

In particular, the GDPR:

- has a broader scope than the current EU Directive - it will apply to organisations located outside the EU that offer goods and services to EU citizens or monitor their behaviour;
- includes enhanced compliance requirements; and
- gives rise to increased risk exposure for non-compliance – with maximum penalties for certain breaches under the new tiered sanctions being up to EUR 20 million or 4% of annual worldwide turnover, whichever is the greater.

With just under 12 months for organisations to get their houses in order, compliance teams should be looking carefully at their existing arrangements and the underlying systems and controls they currently have in place.

In the meantime, at the European level the Article 29 Working Party (WP29) has adopted finalised GDPR guidelines and FAQs on data protection officers, data portability and lead supervisory authorities, and intends to release further guidance on other priority areas later this year. The UK Information Commissioner’s Office (ICO) has also issued a range of guidelines to assist organisations with compliance, including a constantly evolving “Overview of GDPR” which is intended to form the ICO’s guide to the GDPR.

For further information please contact Duc Tran and Claire Wiseman.
15. **AUSTRALIA**

15.1 Proposed changes to foreign bribery laws and introduction of deferred prosecution agreements

The Australian Government has recently consulted on two key corporate crime reforms.

First, on 31 March 2017 the Government released a public consultation paper which sets out the Government’s proposed model for implementing deferred prosecution agreement (DPA) schemes in Australia.

A DPA is a voluntary, negotiated settlement between a prosecutor and (generally) a company, whereby prosecutors agree to defer prosecution if the company: (a) agrees to comply with a series of conditions, usually including a financial penalty; (b) potentially admits to an agreed statement of facts; and (c) agrees to programs to improve future compliance. In appropriate cases, a DPA provides a means of resolving offending by corporate entities for serious corporate crimes such as fraud, bribery and other economic crimes. One issue still under consideration for the Australian scheme is whether an admission of guilt will be required.

Secondly, on 4 April 2017 the Government released another public consultation paper which proposes reforms to the foreign bribery offences under the Criminal Code Act 1995 (Cth). The proposed amendments will significantly lower the burden on prosecutors to successfully prosecute for foreign bribery in Australia. The proposed key changes include:

- creating a new offence of recklessly bribing a foreign official – the current offence requires “intention” to bribe a foreign official; and
- creating a new corporate offence for failing to prevent bribery – this is akin to the wide reaching offence under the UK Bribery Act.

Submissions regarding the proposals under both consultation papers closed on 1 May 2017. The submissions are currently in the process of being reviewed by Government. There is no publicly available information regarding the timeframe for completion of that review, and next steps.

For further information, please contact Paul Wenk, Jacqueline Wootton or Tania Gray.

15.2 Australian Consumer Law review

Consumer Affairs Australia and New Zealand (CAANZ) has undertaken the first review of the Australian Consumer Law (ACL) since its inception in 2011 and has released its final report.

Below are the key legislative proposals that all businesses should be aware of.

- **Consumer guarantees:**
  - consumers entitled to a refund or replacement or repair without the need to prove a “major failure” where a product fails to meet the statutory consumer guarantees within a short specified period of time;
  - multiple non-major failures can amount to a major failure; and
  - enhance disclosure in relation to extended warranties.

- **Product safety:**
  - traders obliged to ensure the safety of their products before placing them on the market;
  - clarify and strengthen the obligations on businesses to voluntarily recall a product by:
    - introducing a statutory definition of “voluntary recall”; and
    - increasing the penalties for failure or refusal to notify a voluntary recall;
  - strengthen the ACCC’s compulsory information-gathering powers.

- **Penalties:**
  - increase maximum financial penalties to the greater of:
    - the maximum penalty (of AU$10 million); or
    - three times the value of the benefit the company received from the act or omission; or
    - if the benefit cannot be determined, 10% of annual turnover in the preceding 12 months.

- **Expand the scope of the ACL:**
  - increase the AU$40,000 threshold for business purchases to AU$100,000;
  - amend the Australian Securities and Investments Commission (ASIC) Act to clarify that all ACL-related consumer protections also apply to financial products; and
  - extend the unconscionable conduct protections to publicly-listed companies.

- **Unfair contract terms**
  - extend the unfair contract term protections to contracts regulated by the Insurance Contracts Act 1984 (Cth).

For further information or assistance, please contact Peter Holloway, Jason Betts, Patrick Gay, Melanie Bouton or Aoife Xuereb.

15.3 Australian legislation becomes even more arbitration friendly

Australian legislation becomes even more arbitration friendly as it now incorporates the UNCITRAL Model Law on International Commercial Arbitration in all of its States and Territories and is set to reform its International Commercial Arbitration Act (Cth) which applies to international arbitrations.

- **All Australian States and Territories are now Model Law jurisdictions**

By introducing the Commercial Arbitration Act 2017 (ACT) with effect from 4 April 2017, the Australian Capital Territory is the last Australian State to adopt the Model Law.

The Model Law has been a very successful instrument in harmonising arbitration laws across the globe, having been adopted by 74 countries (covering a total of 104 jurisdictions), including all major arbitration centres.
Anticipated arbitration reforms in Australia

The Civil Law and Justice Legislation Amendment Bill 2017 is an omnibus bill which proposes to make certain amendments to the Australian International Arbitration Act 1974 (Cth).

The key proposed change will make it easier for foreign awards to be enforced in Australia. Australian courts have differed as to what an award creditor may be required to establish that the award debtor is a party to the relevant arbitration agreement when the award debtor is not named as a party in the agreement itself. Other courts have held that the evidentiary burden on an award creditor prior to enforcement was limited to the production of the relevant arbitral agreement and the award.

The Bill proposes to decide this inconsistency in favour of the less onerous requirement.

For further information, please contact Brenda Horrigan or Elizabeth Macknay.

Federal Court clarifies role of criminal fault elements in civil penalty proceedings

The Federal Court has clarified that ASIC is not required, when seeking civil penalties for a contravention of a provision of the Corporations Act 2001 (Cth), to prove any fault elements imposed by the Commonwealth Criminal Code for a criminal offence under the same provision (such as intention or recklessness).

Uncertainty arose earlier this year when a Full Court of the Federal Court in Gore v Australian Securities and Investments Commission [2017] FCAFC 13 suggested, in obiter, that in civil penalty proceedings ASIC must prove the criminal fault elements specified in the Criminal Code for the provision in question, where the provision gives rise to alternative routes of civil penalty proceedings or criminal proceedings, even if ASIC proceeds only by the civil penalty route and does not lay a criminal charge. This had the potential to create significant difficulties for ASIC and other regulators in civil proceedings, as it would require them to prove not only the specific requirements proscribed in the provision to a civil standard, but also the requirements for establishing criminal fault under Chapter 2 of the Criminal Code.

In April 2017, ASIC applied for clarification of this issue by way of a separate question in its civil proceedings against Whitebox Trading Pty Ltd and Mr Johannes Bosshoff, in which ASIC is seeking civil penalties for alleged breaches of the market manipulation provisions.

Allsop CJ ordered the hearing of a separate question on 12 May 2017. On 21 June 2017, a differently constituted Full Court (Allsop CJ, Middleton and Bromwich JJ) held that the comments in Gore were incorrect. The Full Court noted that the Corporations Act uses norms proscribing conduct, with civil and criminal consequences attaching separately to those norms. As a result, ASIC need only show a failure to comply with the norm on the balance of probabilities to make out a contravention of a civil penalty provision, and look to the text of the individual norm provision to determine what is required to establish a contravention (including as to any mental element).

For further information, please contact Andrew Eastwood, Cameron Hanson or James Emmerig.

Security for costs and the use of ATE insurance

On 21 June 2017, the Federal Court of Australia clarified the circumstances where an “adverse costs” (or “after the event” (ATE)) insurance policy constitutes sufficient security for the defendant’s costs: see Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited [2007] FCA 699.

Security for costs is an important tool for defendants, to ensure that unsuccessful proceedings do not disadvantage defendants when later recovering its (potentially significant) legal costs from plaintiffs. Typically, security is provided in the form of payment into court or an unconditional bank guarantee. Plaintiffs are increasing offering security by way of ATE insurance (which commonly covers their exposure to adverse costs orders, among other things).

In this instance, the Court held that an ATE insurance policy did not satisfy the threshold for security, due to the potential obstacles to defendants in recovering costs under the policy. This included: the defendants not listed as insureds under the policy; the inability for defendants to compel the plaintiff to sue on the policy if the insurer refuses to meet any legitimate claim; the risk of cancellation; exclusions from liability, which affected the insured’s legal entitlements under the policy.

Though it ordered that security be provided in the traditional form, the Court confirmed that an ATE insurance policy could constitute sufficient security, if plaintiffs can establish that the likely coverage response and enforceability is sufficiently certain for defendants. Care should be taken by both plaintiffs and defendants in negotiating security.

For further information, please contact Jason Betts, Guy Narburgh, Christine Tran or Cherissa Zhou.

Invalidly filed trade mark applications are incurable: Full Federal Court of Australia

The Full Federal Court of Australia has overturned previous case law and ruled that a trade mark application filed by an entity other than the owner is invalid and cannot be cured by subsequent assignment to the true owner. It is critical that the original applicant is the owner.

This means that a trade mark registration resulting from an application filed in the wrong name is also invalid and cannot be relied upon for enforcement, as a defence to trade mark infringement, or for any other purpose under the Trade Marks Act (Cth).

Ownership of a trade mark arises through one of: a) authorship and prior use; or b) authorship, filing of a trade mark application and intention to use or authorise use of the trade mark. That is, the Trade Marks Act provides for registration of ownership, not ownership by registration.

In Pham Global Pty Ltd v Insight Clinical Imaging Pty Ltd [2017] FCAFC 83, Mr Pham applied for a trade mark of which he was not the owner. The owner, being the author and intended user of the trade mark, was a company of which Mr Pham was a director and had control, yet the Court found that the deficiency in the trade mark application could not be cured, rendering the application invalid.

Companies must carefully consider which entity in a corporate structure is the true owner of a trade mark for the purpose of new applications.
The original applicant of existing trade mark registrations should also be reviewed to ensure that the registrations are valid and enforceable.

For further information, please contact Celia Davies or Jeremy Herz.

15.7 Significant changes to financial assurance and rehabilitation on the cards in Queensland

Rehabilitation obligations and the provision of security by mining operators have been controversial topics in Australia recently. On 4 May 2017 the Queensland Government released the first two of six discussion papers outlining proposed changes to Queensland’s financial assurance (FA) and rehabilitation frameworks for miners. If adopted, the reforms will have significant impacts for operational costs, decisions to place mines on care and maintenance and the structure of mine transfer deals.

The Financial Assurance Framework Reform Discussion Paper (FA Paper) contemplates dramatic changes to the current FA Regime including:
- assigning FA arrangements to resource companies based on their size and level of credit/insolvency risk;
- phasing out discounts on FA and use of company approved calculators;
- pooling FA into an interest-earning Rehabilitation Fund for certain resource companies;
- introducing new options for the delivery of FA, such as insurance bonds;
- clarifying the obligations of operators for sites in care and maintenance; and
- strengthening the assessment of financial capability of mine owners/investors.

The Better Mine Rehabilitation for Queensland Discussion Paper (Rehabilitation Paper) discusses site-specific mining operations and proposes:
- using life-of-mine plans to outline operational and rehabilitation matters at all stages of mine life;
- enforcing progressive rehabilitation requirements in life-of-mine plans; and
- introducing performance-based incentives for the management of rehabilitation.

The FA Paper and the Rehabilitation Paper were open for public consultation until 15 June 2017. Further discussion papers are scheduled for release in the second half of 2017, with legislative changes to begin taking effect in mid-2018.

For further information, please contact Madeleine Simpson.

15.8 Union officials must have federal right of entry permit to enter under state OHS Act

An important Full Court decision in the Federal Court has clarified federal right of entry requirements for Australian employers. On 2 June 2017, the Full Court held that union officials must have a federal right of entry permit under the Fair Work Act 2009 (Cth) when entering a site as an assistant to a health and safety representative (HSR) under a state safety act (the Victorian Occupational Health and Safety Act 2004 (OHS Act)).

The decision (Australian Building and Construction Commissioner v Powell [2017] FCAFC 89) overturned the first instance decision by Justice Bromberg, who found that union officials could enter a site as an assistant to a HSR without a federal permit because the Victorian OHS Act did not confer a “right” to enter premises on the union official for the purposes of section 494 of the Fair Work Act. Section 494 prohibits a union official from exercising a “State or Territory OHS right” unless the official is a federal permit holder.

The Full Court disagreed with Justice Bromberg’s assessment, finding that a State or Territory OHS right is exercised when a union official enters a site as an assistant to a HSR, and that a federal permit is thus required. The harmonised work health and safety jurisdictions in Australia have similar provisions to the Victorian OHS Act, meaning the decision has broad implication for Australian employers.

For further information, please contact Rohan Doyle, Wendy Fauvel or Asher Lindsay.

15.9 Employee bullying claims – Employer’s internal investigation stayed by interim order

A recent decision in the anti-bullying jurisdiction of the Australian Fair Work Commission has highlighted the (potentially complicated) interaction between employee bullying complaints and an employer’s internal investigation process.

In Lynette Bayly [2017] FWC 1886 (5 April 2017), the Commission made an interim order staying an employer’s internal investigation of a complaint, thereby:
- preventing the employer from finalising a draft investigation report;
- preventing any disciplinary action in connection with the investigation; and
- preventing termination of the complainant’s employment, until such time as the matter is determined.

The substance of the bullying complaint was that the allegations against Ms Bayly (the complainant), and an internal investigation of those allegations, were acts of unreasonable behaviour and constituted bullying conduct. The employer in response argued that the investigation and any proposed disciplinary action to follow would constitute reasonable management action.

In making the interim order, the Commission found that:
- Ms Bayly’s claims, if supported by evidence, would support a finding that she was “bullied” in accordance with the Fair Work Act;
- the employer’s continuation and finalisation of its investigation could be found to be a continuation of the relevant unreasonable behaviour; and
- if Ms Bayly were dismissed it would significantly compromise her capacity to have her bullying application heard and determined.
The further development of this matter is of interest, as this is the first published interim order made in an anti-bullying matter and very few matters result in final orders.

For further information, please contact Patricia Low or Catherine Berry.

15.10 Electronic conveyancing with Property Exchange Australia Ltd (PEXA)

All property transactions involving the Australian state land registries are transitioning to the new national electronic conveyancing platform, PEXA, to facilitate electronic lodgement pursuant to the Electronic Conveyancing National Law. It is important that your organisation is aware of the implementation timeline of PEXA and is trained in its use to ensure that property transactions are completed properly, efficiently, and are legally effective.

By 1 July 2019 and 1 August 2019 use of PEXA will become mandatory for all conveyancing transactions in New South Wales and Victoria respectively. Until then, the mandatory use of PEXA will apply to certain transactions in a staggered manner. Currently, all authorised deposit-taking institution (ADI) standalone mortgages are required to be discharged by lodging relevant land registry documents through the platform.

The transition to electronic lodgement is not a mere change in process. When a particular transaction transitions to electronic lodgement with PEXA, there is a legal requirement for lodgement to be completed in such a way. For example, in Victoria under the Transfer of Land Act 1958 (Vic) and the Registrar’s Requirements for Paper Conveyancing Transactions, a standalone discharge of mortgage, where the mortgagee is an ADI, must be lodged using an Electronic Lodgement Network ie PEXA. The Registrar may refuse registration if lodgement is not completed in accordance with this legal requirement. From 1 August 2017, mortgages and discharges of mortgage in connection with refinancing transactions must be lodged through PEXA where both mortgagees are ADIs.

For further information, please contact Lucy McCullagh.

15.11 New National Mortgage Form

As part of a national movement to electronic conveyancing, a new National Mortgage Form (NMF) has been developed by the Australian Registrars National Electronic Conveyancing Council in consultation with a number of industry bodies.

The purpose of the NMF is to standardise the content and presentation of mortgages lodged through all lodgement channels with land registries in all Australian States and Territories. From 22 July 2017, all Australian states and territories will have the opportunity to use the NMF. A six month transitional period will be available for old forms that will be accepted for lodgement by the relevant land registry up to 31 December 2017.

The key changes that the NMF will bring to mortgages are:

- the terms and conditions are restricted to 4,000 characters which are to be typed into the electronic NMF.

To meet these new requirements, Herbert Smith Freehills is drafting a set of national standardised operative terms and conditions that will meet the 4,000 character limit. In addition, the firm is drafting a Terms Deed that will form part of the suite of finance documents available for a financing transaction with the intention that the relevant provisions from our current precedent mortgage document that are not carried across to the new operative terms and conditions can be captured under this document.

For further information, please contact Lucy McCullagh.

15.12 Slow rise of corporate PPAs in Australia

The Independent Review into the Future Security of the National Electricity Market report released this month concluded that Australia is at a critical turning point. Ongoing uncertainty around emissions reduction policies and the challenge of integrating variable output renewable electricity generators are contributing to rising electricity prices. The report recommended for Australia to adopt a Clean Energy Target to drive clean energy investment and deliver better electricity prices for customers.

In other parts of the world, major energy users have become active participants in electricity markets by entering into power purchase agreements (PPAs) directly with renewable energy generators to hedge electricity costs.

Before Telstra (one of Australia’s leading telecommunications and technology companies) signed a long-term synthetic PPA to develop a 70MW solar farm in Emerald (Queensland), big corporates in the Australian market have been slow to uptake the economic and environmental advantages that PPAs can offer. Financial risk management and surging retail energy prices were key drivers for Telstra to “buy” the entire output of the Emerald solar farm through a popular “contract for difference” structure.

Similar board decisions rather than government intervention could drive investment into Australian clean energy infrastructure beyond 2017. However, it can be challenging to balance the expectations of corporate off-takers that may regard PPAs as standard procurement contracts with renewables developers who may need to ensure project bankability. The Australian wholesale energy market structure and its regulatory settings also present some complexity for corporates seeking corporate PPAs. Risk allocation is unique when large users are prepared to pay higher prices for the terms that they want. Key issues include the provision of credit support and compliance with the internal off-taker policies (for example, occupational health and safety and data security) which in each case can ultimately impact the bankability of projects.

For further information, please contact Nick Baker and Peter Davis.

16. CHINA

16.1 China’s cybersecurity law and draft implementation rules

The Cyberspace Administration of China (CAC) published the Trial Measures for Security Review of Network Products and Services (Trial Measures) on 2 May 2017, which mark the first step towards
establishing a nationwide security review regime for network products and services. Companies providing or procuring these products and services in China should follow closely the development of the regime to ensure compliance. Please see our e-bulletin here for more details.

For further information, please contact Karen Ip or James Gong.

17. HONG KONG
17.1 Herbert Smith Freehills leads ASIFMA member working group to formulate best practices for effective development of fintech


The guide was developed by a member working group at ASIFMA led by Herbert Smith Freehills. The working group has agreed 10 best practices for policymakers and regulators in Asia Pacific to consider as they support the development of fintech in the financial services industry. The best practices acknowledge the delicate balance required between encouraging fintech innovation, and ensuring customer protection and market integrity.

The best practices are released at a time of rapid development in fintech and increased involvement by financial regulators. Our e-bulletin regarding the best practices and the recent initiatives taken by regulators in the region to support fintech development can be accessed here.

For further information, please contact William Hallatt, Hannah Cassidy, Mark Robinson or Grace Chong.

17.2 Hong Kong’s SFC launches consultation on proposed guidelines on online distribution and advisory platforms and proposes to extend suitability requirement

On 5 May 2017, the Securities and Futures Commission (SFC) of Hong Kong launched a three-month consultation in relation to proposed guidelines on online distribution and advisory platforms (Proposed Guidelines). The aim of the Proposed Guidelines is to provide tailored guidance and clarity on the design and operation of online platforms in compliance with existing regulatory requirements, including the suitability requirement.

Significantly, the Proposed Guidelines extend the suitability requirement to the sale of certain complex products on an online platform. This extension also applies in circumstances where no solicitation, recommendation or advice has been provided.

Depending on consultation feedback and whether this proposal is implemented, the SFC will also consider extending this new basis for triggering the suitability requirement to the offline environment. Submissions on the Proposed Guidelines must be received by the SFC no later than 4 August 2017.

Please click here to read our overview of the rationale, scope and key focus areas of the Proposed Guidelines. The Consultation Paper issued by the SFC and accompanying Proposed Guidelines can be found on the SFC’s website here.

For further information, please contact William Hallatt, Hannah Cassidy or Natalie Curtis.

17.3 SFC and HKMA continue to prioritise AML/CFT compliance with six new disciplinary actions in Hong Kong

Between early March and mid-April 2017, the Securities and Futures Commission (SFC) and the Hong Kong Monetary Authority (HKMA) in Hong Kong have collectively taken disciplinary actions against five regulated entities and an individual relating to breaches of anti-money laundering (AML) and counter financing of terrorism (CFT) regulatory requirements. The entities were fined amounts ranging from HK$2.6 million to HK$7 million, whereas the individual was banned from re-entering the industry for nine months.

Both the SFC and the HKMA have made it clear that AML and CFT compliance will continue to be a priority in 2017, and the recent disciplinary actions demonstrate swift action on their part. The SFC has set up a temporary specialised team within its Enforcement Division to tackle know-your-client and AML/CFT control failings. The raft of disciplinary actions serves as a warning that the SFC and the HKMA are prepared to impose tough sanctions and that regulated entities should take action now to ensure compliance with the relevant requirements.

Our bulletin discussing the disciplinary actions and takeaway points can be found here. Since the publication of the bulletin, the SFC has further disciplined the senior officers of two of the regulated entities which were disciplined earlier – see press releases issued on 22 May 2017 and 19 June 2017.

For further information, please contact William Hallatt, Hannah Cassidy or Vicky Man.

18. SOUTH AFRICA
18.1 Mining Charter III

The Reviewed Broad-Based Black Economic Empowerment Charter for the South African Mining Industry (Mining Charter III) was published by the Department of Mineral Resources (DMR) on 15 June 2017, when it also came into effect.

The Chamber of Mines within hours of the Charter’s publication issued a media statement in which it observed that it “rejects the unilateral development and imposition of the DMR’s Charter on the industry, and is of the view that the process that was followed by the DMR in developing its version of the Reviewed Mining Charter has been seriously flawed.” The Chamber further indicated that it would approach the High Court for an urgent injunction to suspend its implementation, pending the launch of judicial review proceedings.

The changes brought about by Mining Charter III are significant and include, among others, the requirement that applicants for new prospecting rights must have a minimum of 50% plus one Black Person shareholding; applicants for new mining rights must have a 30% Black Person shareholding; and existing prospecting and mining right holders are required to increase their Black Person shareholding to 30% (from 26%) within 12 months of 15 June 2017. This could be extremely costly to mining companies and their shareholders. In addition, Mining Charter III also significantly increases mining companies’ Black procurement and employment equity requirements.

For further information, please contact Natalie Curtis.
A detailed analysis of the changes brought about by Mining Charter III and the consequences of these changes is set out in our client briefing available here.

For further information, please contact Peter Leon, Patrick Leyden or Ernst Müller.
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