Governance News: COVID-19 Special Edition 2 April 2020

Mark Standen
Partner
Email Mark

T +61 2 9921 4902 | **M** +61 412 104 902

Siobhan Doherty
Partner
Email Siobhan

T +61 2 9921 4339 | **M** +61 413 187 544

Kate Hilder
Consultant
Email Kate

T +61 2 9921 8785 |

For queries or to subscribe/unsubscribe to Governance News updates, please contact: kate.hilder@minterellison.com

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COVID-19: Key Developments

Top Story | COVID 19: New blanket restrictions on foreign investment

In light of the COVID-19 pandemic, new rules state that all foreign investment into Australia will now be subject to FIRB screening.

MinterEllison has released an expert summary. This can be accessed on the MinterEllison website here.

Top Story | COVID 19: How the changed FIRB rules affect the ACCC and ATO

As a result of the COVID-19 changes to foreign investment in Australia (outlined briefly in a separate post below), investors that are now caught by the Foreign Investment Review Board (FIRB) regime will also be subject to scrutiny from other regulators.

The MinterEllison team has released an article explaining the implications for investors and what they can do to manage this process. This can be accessed on the MinterEllison website here.

Top Story | COVID-19: additional funding and further restrictions

On 29 March, the Prime Minister announced further restrictions and additional funding to help respond to the COVID-19 pandemic.

You can access MinterEllison's expert summary of the changes on the MinterEllison website here.

Top Story | Understanding the COVID-19 'JobKeeper Payments'

MinterEllison has released an article explaining the government's government wage subsidy and how it will work and outlining the implications for employers. The article can be accessed on the MinterEllison website here.

Commercial property tenancies: The Prime Minister has announced a temporary 6-month moratorium on evictions

As part of a broader relief package currently being worked on, Prime Minister Scott Morrison has announced the National Cabinet has agreed to a temporary moratorium on evictions over the next six months for commercial and residential tenancies in financial distress who are unable to meet their commitments due to the impact of coronavirus.

The National Cabinet agreed to a common set of principles, endorsed by Treasurers, to underpin and govern intervention to aid commercial tenancies as follows:

- a short term, temporary moratorium on eviction for non-payment of rent to be applied across commercial tenancies impacted by severe rental distress due to coronavirus;
- tenants and landlords are encouraged to agree on rent relief or temporary amendments to the lease;
- the reduction or waiver of rental payment for a defined period for impacted tenants;
- the ability for tenants to terminate leases and/or seek mediation or conciliation on the grounds of financial distress;
- commercial property owners should ensure that any benefits received in respect of their properties should also benefit their tenants in proportion to the economic impact caused by coronavirus;
- landlords and tenants not significantly affected by coronavirus are expected to honour their lease and rental agreements; and
- cost-sharing or deferral of losses between landlords and tenants, with Commonwealth, state and territory governments, local government and financial institutions to consider mechanisms to provide assistance.

In addition to this moratorium for commercial tenancies, the Prime Minister said that work has also begun on further measures, including for residential tenancies.

The AFR has since reported that details of the support package may be released on 3 April. The package is expected to include offering commercial landlords relief in the form of: part deferrals and part waivers on commercial rents as well as (potentially) the option to break leases on the grounds of financial hardship.

Tenants and landlords encouraged to negotiate: Mr Morrison encouraged commercial tenants, landlords and financial institutions to negotiate 'a way through' without waiting for the details of any further support.

[Source: Prime Minister Scott Morrison media release 29/03/2020]

Expanded business loan relief measures announced by the ABA: $250 billion worth of loans covered are now able to access a six month deferral of payments

More businesses eligible to defer loan repayments for six months: The Australian Banking Association has announced the expansion of business loan relief measures.

Businesses with total business loan facilities of up to $10 million (up from the $3 million small business threshold) will now be able to defer repayments for loans attached to their business for six months.

In addition, during this period banks have also agreed to not enforce business loans for non-financial breaches of the loan contract (such as changes in valuations).

The new measures will apply in all sectors of the economy, on an opt-in basis, under the conditions that:

- the customer has advised that its business is affected by COVID-19
- the customer was current in terms of existing facilities 90 days prior to applying
- interest is capitalised - meaning either the term of the loan is extended or payments are increased after the deferral period.
- **For commercial property landlords:** provide an undertaking to the bank that for the period of the interest capitalisation, they will not terminate leases or evict current tenants for rent arrears as a result of COVID19

The ABA said that the measures had been developed following discussions with the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC) to provide the appropriate regulatory treatment and that the measures are subject to authorisation by the Australian Competition and Consumer Commission (ACCC).

Interim authorisation granted by the ACCC

The ACCC has provided conditional, interim authorisation for the package. The interim authorisation is conditional on banks providing details of any programs and arrangements to the ACCC before implementation, and seeking ACCC approval in some circumstances (which the ABA has done).

The interim authorisation applies to all ABA member banks who agree to participate. Banks will also be allowed to cooperate in support of future government initiatives.

The ACCC will now seek feedback on the ABA’s application for interim authorisation as well as the substantive application.

[Source: ABA media release 30/03/2020; ACCC media release 30/03/2020]

New Commission established to coordinate advice to the government on the non-medical aspects of the pandemic, including advice about the labour response

The Prime Minister has announced the creation of a new National COVID-19 Coordination Commission (NCCC) to coordinate advice to the Australian government on actions 'to anticipate and mitigate the economic and social effects of the global coronavirus pandemic'. Among other things, the NCCC will assist the government to deploy resources to 'vital tasks' in a 'coordinated and effective manner'.

Mr Neville Power has been appointed Chair. Mr Power will be assisted by an executive board of Commissioners: Greg Combet, Jane Halton, Paul Little, Catherine Tanna and Mr David Thodey (Deputy Chair). They will also be joined by the Secretaries of the Department of the Prime Minister and Cabinet, Mr Philip Gaetjens and Home Affairs, Mr Mike Pezzullo.

The Board will work in tandem with the Chief Medical Officer (CMO) Dr Brendan Murphy, who continues to lead the Commonwealth's health response.

The NCCC will be based in the Department of Prime Minister and Cabinet.

The existing National Coordination Mechanism based in the Department of Home Affairs, which coordinates the cross jurisdictional response to non-health aspects of the pandemic, will report to the NCCC, as will the Coronavirus Business Liaison Unit based in the Treasury Department.

[Source: Prime Minister Scott Morrison media release 25/03/2020]

Boards and Directors

Top Story | An end to the Storm? The Full Federal Court has confirmed that Storm Financial Directors breached their s180(1) duties

On 27 March, the Full Federal Court handed down its decision in Cassimatis v Australian Securities and Investments Commission [2020] FCAFC 52.

Justice Greenwood observed that the 'appeal is said, by the appellants, to present a unique opportunity to examine the content, scope and operation of s 180 of the Corporations Act 2001 (Cth) (the Act) because it is said to be the only case in which the Australian Securities and Investments Commission (ASIC) has alleged that directors acted in contravention of only s 180 of the Act and of no other duty or obligation arising under Chapter 2D.1 of the Act'.

The key question for the Court to determine was whether the primary judge erred in concluding that directors Mr and Mrs Cassimatis, breached their duties under s180(1) of the Corporations Act 2001 (Cth) (the Act) by exercising their powers as directors in a way that caused inappropriate advice to be given to certain vulnerable investors by their company (in breach of s 945A(1)(b) and (c)).

Among other issues, the case includes consideration of the application of stepping stone liability.

Context

The appellants in this case, Mr and Ms Cassimatis were the founders, sole shareholders in, and executive directors of Storm Financial Pty Ltd (Storm). Storm held an Australian Financial Services Licence (AFSL).

Storm's main activity was advising clients to invest in accordance with the 'Storm model', which was both designed by and very closely overseen by the appellants. The Storm model involved borrowing on the family home and entering into margin loans to invest in index funds. Once initial investments took place, clients would be encouraged to take 'step' investments over time. ASIC alleged that this advice was provided to all clients on a 'one size fits all basis' irrespective of the individual circumstances of the clients.

According to the Australian Securities and Investments Commission (ASIC), by the time of Storm's collapse in early 2009, approximately 3,000 of its 14,000 clients had been 'Stormified' and some had sustained significant losses.

ASIC brought proceedings against Mr and Ms Cassimatis centred around the cases of 11 vulnerable customers. The customers in question were each over 50 years old, retired or approaching and planning for retirement, with little or limited income, had few assets (usually their home, limited superannuation and limited savings) and had little or no prospect of rebuilding their financial position in the event of suffering significant loss.

ASIC alleged that: 1) by giving 'inappropriate' financial advice to these vulnerable clients Storm contravened various sections of the Act including s9451A(b) and s9451A(c); and 2) that by permitting/failing to prevent these contraventions, Storm directors Mr and Ms Cassimatis contravened their duties under s180(1).

In Australian Securities and Investments Commission v Cassimatis (No 8) [2016] FCA 1023, the Federal Court found in favour of ASIC.

In appealing the decision, the Appellants contended that: a) the primary judge erred in concluding that there had been contraventions by Storm of s 945A(1)(b) and (c) of the Act because ASIC did not discharge its onus of proof; and b) the primary judge erred in concluding that the Appellants breached s180(1) of the Act.

Full Federal Court's Decision

By a 2:1 majority the Full Federal Court dismissed the appeal. In dissent, Rares J agreed that breaches of s945A had been established, but maintained that ASIC failed to establish that there was any breach of s180(1).

Contraventions of s945A by the company

Broadly, the primary judge accepted ASIC's case that Storm breached s945A(1)(b) and s 945A(1)(c) of the Act because:

- Storm did not adequately assess what would occur if there was a period of 'negative growth' or a 'negative return';
- Storm did not sufficiently take into account in the cash flows it prepared (and which it used to advise the relevant investors) how those investors could fund the strategy during negative periods;
- Storm advised certain vulnerable investors to adopt the 'Storm model' to invest, notwithstanding that this advice was inappropriate given their personal circumstances; and
- the advice to adopt the 'Storm model' was inappropriate even if the investors had been 'balanced investors' rather than 'conservative investors'.

The Appellant's contended that ASIC failed to discharge its onus of proof.

Their Honours Justice Thawley, Justice Greenwood and Justice Rares each rejected this, finding no reason to disturb the primary judge's initial findings. Accordingly, each separately held that this aspect of the appeal should be dismissed.

Contraventions of s180(1)

Grounds for the Appeal

Broadly, the Appellants argued that there was no breach of s180(1) because:

- The breaches of care and diligence are alleged to have occurred while Storm was a solvent company and while Mr and Mrs Cassimatis, as directors, were also the only shareholders. That is, as a solvent company, the Appellants contended that Storm's interests were effectively identical with the interests of its shareholders (Mr and Ms Cassimatis).
- As the holders of all of the issued shares in the company, they maintained that they were entitled to prioritise their (and Storm’s) interest in operating the Storm model over their (and Storm’s) interest in minimising other risks eg the risk of adverse action being taken by ASIC or by dissatisfied investors.
- The Appellants argued that the primary judge gave excessive weight to the 'risks' posed by the Storm model and the 'foreseeability' of those risks. In their view, the primary judge’s findings of 'catastrophic consequences' for the relevant investors was not supported by the evidence.
- The Appellants emphasised the findings of the primary judge that they acted that honestly and that they did not attempt to conceal any information about Storm from any regulator or compliance professional.

Confirmation of the primary judge's finding that the Appellants breached s180(1)

In separate judgements, Justice Thawley and Justice Greenwood rejected the Appellant's case and confirmed the primary judge's assessment that the Appellants' conduct was in breach of s180(1).

Justice Thawley quotes from the initial judgement:

'…a reasonable director with Mr and Mrs Cassimatis' responsibilities, and in Storm's circumstances, would have realised that the application of the model to people in the pleaded circumstances was likely to involve inappropriate advice. The reasonable director would have taken some alleviating precautions to prevent the giving of that advice. I reach this conclusion for the detailed reasons given later, but with a strong awareness that it is made in the context that a director's powers to act are, of the very nature of corporations, ones which often require risks to be taken.

Mr and Mrs Cassimatis should have been reasonably aware that the application of the Storm model would be likely to (and did) cause contraventions of s 945A(1)(b) and s 945A(1)(c). The contraventions of s 945A(1)(b) occurred because Storm did not give such consideration to the subject matter of the advice and did not conduct such investigation of the subject matter of the advice as was reasonable in the circumstances. The contraventions of s 945A(1)(c) occurred because Storm provided financial advice which was not appropriate to the investors having regard to the consideration and investigation of the subject matter of the advice that ought to have been undertaken. Those contraventions were not merely likely to occur. They were contraventions which could have (and did have) devastating consequences for many investors in that class and the discovery of those breaches would have threatened the continuation of Storm's Australian Financial Services Licence (AFSL) licence and Storm's very existence'.

Justice Greenwood writes:

…'the contraventions by Storm arose out of a primary failure on the part of the appellants, as directors, to act in accordance with the objective standard of care and diligence required of them by s 180(1), and features of that conduct engaged conduct which brought about the contraventions by Storm of the identified sections of the Act. In my view, that reasoning of the primary judge is entirely sound. No error has been demonstrated in the reasoning as to the principles, or the application of the principles, to the facts.'

Discussion of stepping stone liability

Both Thawley J and Greenwood J, emphasised in their respective judgements that establishing the s945A contraventions, was not of itself proof that Mr and Ms Cassimatis had breached their duties under s180(1).

Justice Greenwood writes,

'…it is critical to keep firmly in mind that…it [ASIC] did not contend that the appellants contravened s 180(1) of the Act because Storm contravened those sections of the Act…The finding of contraventions of those sections [s945A(1)(b) and s945A(1)(c)] of the Act by Storm, and the need for ASIC to make good those contended contraventions, was critical to the case under s 180(1) against the appellants not because the contraventions by Storm of those sections of the Act would give rise to a contravention by the directors of s 180(1) in the form of some sort of dystopian accessorial liability, but rather because the contraventions by Storm, deriving from the conduct of the appellants themselves, as described, contained within it a foreseeable risk of serious harm to Storm's interests (that is, a potential loss of its AFSL; a threat to Storm's very existence; and suit by the vulnerable investors to address the consequences of the advice given to them and thus the contraventions by Storm), which reasonable directors, with the responsibilities of Mr and Mrs Cassimatis, standing in Storm's circumstances, ought to have guarded against.

In failing to guard against that foreseeable harm flowing from contraventions by Storm, the directors failed to discharge the degree of care and diligence required of them by s 180(1)'.

Justice Greenwood goes on to observe that,

'…in this context, shorthand phrases such as stepping stones to liability on the part of a director or officer are unhelpful and apt to throw sand in the eyes of the analysis. The appellants were not found to have contravened s 180 of the Act because the corporation contravened the Act. The contraventions of the Act by Storm were a necessary element of the harm, but not sufficient by themselves to result in a contravention of s 180 by the appellants as directors. The foundation of the liability of the appellants resides entirely in their own conduct in contravention of the objective degree of care and diligence required of them by the statutory standard contained within s 180 of the Act'.

In a similar vein, Justice Thawley writes,

> 'Section 180(1) applies according to its terms. It imposes a duty to meet the specified standard of care in exercising powers and discharging duties… A company's contravention might be a material fact relevant to the question whether a director failed to meet the standard mandated by s 180(1) by exposing a company to risk; but it is not an essential ingredient of liability in the way it is in a case of accessorial liability. The primary judge approached the matter as a question of direct liability of the directors for failing to meet the standard of care and diligence set by s 180(1) and not as a "backdoor method" for visiting accessorial liability upon Mr and Mrs Cassimatis for a proved contravention by Storm'.

Storm's interests

Their Honours Thawley J and Greenwood J (separately) also rejected the Appellant's contention that Storm's interests were identical to, and limited to, the interests of its two shareholders (the Appellants).

Justice Thawley writes,

> 'It is of course relevant to the degree of care and diligence which s 180(1) requires to have regard to the fact that the corporation's interests include the interests of the shareholders and that acquiescence on the part of the shareholders might affect the practical content of what s 180(1) requires…But it is step too far to say that 100% shareholders can approve their own contravention of s 180(1) as directors. Shareholders cannot release directors from the statutory duties imposed by ss 180, 181 and 182.'

ASIC's response

Particular relevance for directors of financial services institutions

In a statement welcoming the Court's decision, ASIC emphasised the relevance for directors of financial services institutions.

Quoting from Justice Greenwood, ASIC directs directors to take note that directors' responsibilities 'included ensuring that investors obtained from Storm (and particularly retail investors exhibiting the five characteristics of vulnerability […]), consideration and investigation of the subject matter of the advice to be given to them (and given to them), as was reasonable in all of the circumstances and that, having regard to those matters, the advice given to those investors was appropriate to each of the 11 investors in question.'

Commissioner John Price said, 'This important decision reaffirms ASIC's view of the importance of directors' duties and the obligations on financial services licensees. We hope that, with this decision, the aftermath of the Storm Financial collapse is now at an end.'

[Sources: Cassimatis v Australian Securities and Investments Commission [2020] FCAFC 52; ASIC media release 27/03/2020]

Diversity

'Lack of diversity presents a systematic risk to portfolios': Glass Lewis says lack of board diversity poses a 'particular risk' given those 65 an older are more vulnerable to the effects of COVID-19

In light of the COVID-19 pandemic, Glass Lewis has outlined some of its key areas of concern, and other likely areas of concern for shareholders ahead of upcoming AGMs. Among other areas, Glass Lewis highlights lack of board diversity as a particular risk.

Lack of board diversity is a 'systemic risk to portfolios'

Glass Lewis highlights the 'lack of age and gender diversity among company directors and to a lesser extent management' as a 'particular risk' given that those 65 and over are more vulnerable to the effects of COVID-19.

As such, 'much like shareholder concerns with overcommitment this lack of diversity presents a systematic risk to portfolios, given directors typically sit on several boards and one sick or deceased director can have a compound effect on the capacity of other directors at those companies, which then spreads to the other companies those directors sit on, and so on' Glass Lewis writes.

Ultimately, Glass Lewis considers that the crisis will highlight weaknesses and strengths in board effectiveness and governance structures. 'In our experience during past crises, well governed companies who made the right decisions during the good times are well prepared and durable during a crisis, and far better positioned to deliver shareholder returns afterwards' Glass Lewis states.

Remuneration

On the issue of executive remuneration, Glass Lewis says that it expects boards to 'proactively seek changes that align with employee and shareholder experiences, recognizing that executives might need to take a pay cut'.

Glass Lewis added that companies that it considers to have a good track record on governance, performance and the use of board discretion prior to the pandemic will be afforded more discretion in our analysis than those that do not.

Disclosure will be critical

Glass Lewis said that it considers effective disclosure and clear reasons for decisions to be 'particularly critical to our exercise of discretion in making judgements about whether changes made as a result of this crisis are justified and address material shareholder concerns'.

Good governance will stand companies in good stead to weather the disruption/impact

Ultimately Glass Lewis considers that companies with strong governance structures already in place will be best-placed to weather the disruption.

'Good governance is relevant in all types of weather, boom or bust, but there is no better way to observe the effectiveness of governance than in a crisis. Those companies with poor structures will be exposed as they seek to rapidly amend glaring weaknesses in their policies. No company is perfect, but in our experience the better governed ones will be well prepared and provide shareholders with certainty, effective disclosure and a consistent approach that reasonably considers the impact of their decisions on shareholders, executives and employees'.

[Source: Glass Lewis blog 26/03/2020]

United States | Gender parity on boards by 2030? Equilar Q4 2019 Gender Diversity Index released

The Equilar Gender Diversity Index tracks changes in board composition on Russell 3000 boards on a quarterly basis as cited in 8-K filings to the Securities and Exchange Commission (SEC).

Some Key Points

- **Rate of progress towards gender parity on boards is increasing:** Equilar predicts board gender parity could be reached by 2030. This is four years earlier than was predicted in Q4 2018 and 18 years earlier than was predicted in Q4 2017.
- **2019 saw the most significant growth for women on corporate** boards since Equilar began tracking in January 2017. Q2 2019 was the first time the percentage of women on Russell 3000 boards exceeded 20%, Q3 further pushed this statistic to 20.9% and Q4 increased again to 21.5%. With over 21% of Russell 3000 board seats belonging to women, 114 companies have boards with between 40% and 50% women. When Equilar began tracking the GDI in January 2017, only 15% of board seats in the Russell 3000 were held by women.
- **All-male boards appear to be prioritising adding women:** Among companies that previously had zero women on their boards, almost 16% added a woman in Q4 2019. By contrast, only 8% of all male boards added a female director in Q4 2018. The percentage of all-male boards is now 7.7% (down from 15.8% one year ago). Equilar attributes this decrease in the number of all-male boards to investor pressure to diversify, including through votes against individual directors. Equilar predicts that this trend will continue over the next decade. In addition, Equilar suggests that legislative efforts may be driving progress on this front.
- **Impact of board quotas - Californian boards are becoming more gender diverse:**

- Women accounted for 23.3% of board members on Californian boards in Q4 2019 (up from 17/4% in Q3 2018) following the passage of legislation mandating board representation.
- Of the top five states with the most Russell 3000 companies, California saw the greatest drop in boards without a female director. Such companies represented 20.3% of all California companies in 2018, but now make up just 1.3% of companies.
- Equilar comments that similar legislation is being considered in other states eg Massachusetts.

Private sector pressure/community expectations

- Equilar comments that there are signs that the private sector is also beginning to step up pressure. For example, Goldman Sachs recently announced that companies must have at least one diverse board member (initially this requirement will focus on women) in order to go public.
- Equilar also suggests that community opinion/public opinion has also pushed progress. 'As we settle into the new decade, efforts in legislation, private enterprise and public opinion will continue to shift the GDI closer to 1.0 [gender parity]. Until then, progress in gender parity will continue to increase with each quarter' Equilar states.

[Source: Harvard Law School Forum on Corporate Governance and Financial Regulation 30/03/2020]

In Brief | The WGEA has delayed the start and extended the report submission period for 2020 to assist employers who may need some additional time to prepare and submit compliance reports because of COVID-19-related disruption. The 2019-20 compliance report is now due for submission between 1 May 2020 and 31 July 2020 (though it is possible to submit data from 1 April)

[Source: WGEA media release 25/03/2020]

Remuneration

Large UK banks have agreed to temporarily suspend dividends and buybacks on ordinary shares and cancel payments of any outstanding 2019 dividends in response to the PRA's request

Context: On 31 March the UK Prudential Authority (PRA) wrote to the seven largest systemically important UK deposit-takers – HSBC, Nationwide, Santander, Standard Chartered Bank, Barclays, Royal Bank of Scotland, Lloyds Banking group – requesting that each lender agree to:

- suspend dividends and buybacks on ordinary shares until the end of 2020.
- cancel payments of any outstanding 2019 dividends.

The PRA also said that it expects banks not to pay cash bonuses to staff and also expects that banks will take any appropriate further actions with regard to the accrual, payment and vesting of variable remuneration over coming months.

The full text of the letters can be accessed on the PRA website here.

Response to banks' decision: Also on the 31 March, The UK Prudential Regulation Authority (PRA) issued a statement welcoming the decisions by the banks to suspend dividends and buybacks on ordinary shares until the end of 2020, and to cancel payments of any outstanding 2019 dividends.

The statement reiterates the PRA's expectation that banks will not to pay any cash bonuses to senior staff. The PRA says that it 'is confident that bank boards are already considering and will take any appropriate further actions with regard to the accrual, payment and vesting of variable remuneration over coming months'.

The PRA states that 'although the decisions taken today will result in shareholders not receiving dividends, they are a sensible precautionary step given the unique role that banks need to play in supporting the wider economy through a period of economic disruption, alongside the extraordinary measures being taken by the authorities. We do not expect the capital preserved to be needed by the banks in order to maintain adequate capital positions, but the extra headroom should help the banks support the economy through 2020'.

[Source: PRA media release 31/03/2020]

Shareholder adviser Pirc has urged companies to suspend executive bonuses for the duration of the pandemic

In a blog post, Pensions Investment Research Consultants (Pirc), announced that it has written to 4,000 listed companies around the world urging them to suspend all executive pay (other than base salary) for the duration of the pandemic to 'demonstrate their understanding of the need for restraint' and avoid 'jarring outcomes'.

'Watching medical staff worldwide throw themselves into the battle against Covid-19, without any expectation that they will be paid a single penny extra as a "bonus" for their efforts, but with the expectation that some of them will die, requires us to rethink things fundamentally' PIRC writes.

PIRC went on to say that concerns over executive pay cannot be addressed by making it 'long term'. 'Executives can end up getting big dollops of cash or shares, based on previous performance, just at the moment that things turn bad. There is a real risk of this happening this year, unless boards and directors exercise common sense' PIRC states.

PIRC urges businesses to take the opportunity to fundamentally rethink executive pay structure and ultimately to give consideration to either scrapping variable remuneration entirely, or to making base pay the core component of executive pay packages.

'What is wrong with executives being paid like the rest of us – with a salary. Let's scrap as much of the variable reward, and the plethora of targets that go with it, as possible and make base pay the core component. It's much simpler – which is what everyone says they want – and will leave investors free to spend more time on issues that really matter. More importantly it is much fairer'.

'If directors want to be able to look the frontline medical staff in the eye once this is all over then accepting that they shouldn't need large incentives to get them to work is really the least they can do' PIRC states.

The FT comments that PIRC's letter, and the broader focus on pay comes ahead of many UK companies putting their pay policies for the next three years to a binding vote, as part of a triennial process.

According to The FT, several CEOs (and other executives) are already facing pay reductions in light of the economic downturn caused by the pandemic.

[Sources: PIRC blog 25/03/2020; [registration required] The FT 26/03/2020]

195 global institutional investors have called on companies to consider suspending share buybacks and limiting executive and senior management compensation for the duration of the pandemic

Global institutional investors comprising 195 public pensions, asset management firms and faith-based funds have issued a Statement on Coronavirus Response calling outlining recommended actions for corporations to take to protect their workforces, their communities, their businesses and global markets as a whole during the pandemic.

Recommendations: Broadly, the recommendations include: a) providing paid leave; b) establishing additional health and safety measures; c) maintaining employment; d) maintaining supplier and customer relationships; and e) potentially 'suspending share buybacks and showing support for the predicaments of their constituencies by limiting executive and senior management compensation for the duration of this crisis'.

The statement also suggests possible additional measures such as child care assistance and hazard pay.

Engagement tool: The group encourages investors to use the statement to engage with portfolio companies on the challenges resulting from COVID-19.

195 signatories to date: The statement was coordinated by Domini Impact Investments, the Interfaith Center on Corporate Responsibility (ICCR) and the New York City Comptroller's Office and has been endorsed by 195 investors representing over $4.7 trillion USD in assets under management.

The statement will continue adding signatories after its publication.

[Sources: ICCR media release 26/03/2020; Investor statement on coronavirus response]

GM and Ford are reportedly implementing plans to reduce compensation

The WSJ reports that both General Motors Co and Ford Motor Co have announced plans to reduce remuneration because of the economic impacts of COVID-19 on their operations.

Reportedly GM plans to: a) place 6500 employees who cannot perform their roles remotely on a 'paid absence' and reduce their pay by 25%; b) reduce the salary of 60,000 employees by 20% from 1 April with workers to be repaid in a lump sum by 15 Marc 2021; and c) defer 25%-30% of executive salaries.

Reportedly Ford plans to defer 20%-50% of the pay for its top 300 executives.

[Source: [registration required] The WSJ 27/03/2020]

In Brief | The PRA has called on insurers to exercise prudence when considering any distributions to shareholders or in the context of making decisions on variable remuneration

[Source: PRA letter to insurers 31/03/2020]

Shareholder Activism

Occidental Petroleum Corp has announced it has reached an agreement with activist Carl Icahn

Occidental Petroleum Corporation has released a statement announcing it has entered into an agreement with activist Carl Icahn.

Under the agreement Occidental has agreed to:

- add three new Icahn designated directors to Occidental's Board. Effective immediately Andrew Langham, Nicholas Graziano and Margarita Paláu-Hernández have been appointed to the board.
- The new directors will be represented on the committees of the Board and other newly formed committees, including a new Oversight Committee. The Oversight Committee will work closely with management to provide regular Board input and oversight, and, along with the Board, will be apprised of any inquiries or indications of interest relating to the Company or its assets.
- Four existing directors Spencer Abraham, Eugene Batchelder, Margaret M Foran and Elisse B Walter will retire from the Board effective at the 2020 AGM.

The changes together with the previously announced appointment of Stephen I Chazen as Chair of the Board, means that the Occidental board will be comprised of 11 directors, ten of whom are independent.

Occidental has also agreed to recommend that the Occidental stockholders adopt amendments to the company's restated certificate of incorporation that will 'enhance' their rights to act by written consent, call special meetings and nominate directors at the upcoming 2020 AGM.

The Icahn Group has agreed to: withdraw its slate of director nominees and stockholder proposals at the 2020 AGM; to support the Board's director nominees; and to support amendments to Occidental's restated certificate of incorporation enhancing Occidental's corporate governance.

In addition, the Icahn Group has agreed to petition the Delaware Supreme Court to withdraw its pending appeal before the Court relating to the Icahn Group's books. The Icahn Group has also agreed to certain other customary voting and standstill provisions.

Announcing the agreement, Mr Chazen said that Occidental is 'pleased to reach this agreement with Carl Icahn, and we look forward to working with Carl Icahn's Board members and the rest of the Board and management as a team to navigate the current difficult environment'.

The statement quotes Mr Icahn as saying that he believes 'Oxy is a good company with good assets. We are pleased to have reached this settlement and can now focus on working with Steve Chazen to enhance value for all Oxy stockholders.'

[Source: Occidental Petroleum media release 25/03/2020]

Pay reductions at Occidental? The WSJ reports that in response to the COVID-19 economic downturn, and the steep decline in oil prices, Occidental Petroleum Corp is has said it will: a) reduce salaries for US employees by up to 30%; b) reduce executive salaries by an average of 68%; and c) reduce CEO Vicki Hollub's salary by 81%.

In addition, employee bonuses and perks eg gym memberships and commuter subsidies, will reportedly end in April.

[Sources: [registration required] The WSJ 24/03/2020; 25/03/2020]

Corporate Social Responsibility

RIAA report finds that demand in Australia for ethical investing is at an 'all time high' following the summer bushfires

Report overview | Responsible Investment Association Australasia (RIAA) report, From Values to Riches 2020

RIAA's Values to Riches study reports on the findings of research into consumer demand for responsible and ethical investing.

Some Key Findings

- **9 in 10 (89%) Australians feel it's important that their financial institution invests responsibly** and ethically across the board.
  - 86% of Australians expect their super or other investments to be invested responsibly and ethically
  - 87% of Australians expect the money in their bank accounts, to be invested responsibly and ethically.
- **67% of Australians believe ethical or responsible banks perform better in the long term** and 62% of Australians believe ethical or responsible super funds perform better in the long term (up from 29% in 2017).
- **Most people expect transparency from their provider:**
  - 4 in 5 Australians would like their superannuation fund and their bank/s to communicate the positive and negative impacts their money is having on people and the planet
  - 85% of Australians expect their bank, and 86% expect their superannuation fund, to disclose which companies their money is invested in.
- **Willingness to move money:**
  - Recent weather conditions in Australia have prompted 2 in 5 Australians to think about switching financial institutions (banks, super funds etc) to one which invests ethically or responsibly.
  - Three quarters of Australians would consider moving their banking, super or other investments to another provider if they found out their current provider was investing in companies engaged in activities not consistent with their values.
  - Two thirds (67%) of Australians who don't currently invest in ethical companies, funds or superannuation funds would be most likely to consider doing so in the next 5 years, with 32% saying they would consider doing so in the next year.
  - Half of Australians overall say they would be motivated to invest and save more money if they knew their savings or investments made a positive difference in the world. This was more marked for younger Australians.

- Younger generations/women more willing to act: Overall, the survey found that younger generations, including Millennials and Gen Z, are the segments most likely to act on their beliefs and switch their money to financial institutions that deliver them quality and trustworthy responsible investments.

- **Perceived lack of ethical banking/superannuation options:** 72% of respondents believe there is a lack of credible ethical and responsible banking options to choose from and 66% believe there is a lack of credible ethical and responsible superannuation options to choose from.

- **Independent ethical/responsible credentials:**
  - 61% of respondents don't trust that superannuation funds claiming to make a positive impact will actually do so.
  - 68% of banks don't trust that banks that claim to make a positive impact will actually do so.
  - 4 in 5 respondents said they would be more likely to invest in an organisation, fund or product that has been certified by an independent third party for its responsible investment practices.

- **Top six environmental and social issues of concern?**
  - Respondents said that they were most concerned about the following issues: 1) renewable energy and energy efficiency (55%); 2) sustainable water management and use (48%); 3) healthcare and medical products (48%); 4) healthy river and ocean ecosystems (45%): 5) sustainable land and agricultural management (43%); and 6) education (42%).

- **Belief that the financial services sector, financial advisers and government have a role to play:**
  - **Government:** Four in five respondents believe that the government should play a role in ensuring Australia's financial system contributes positive social, environmental and economic outcomes for the country.
  - **Financial services sector:**
    - 87% of Australians think Australia's financial services sector has a role to play in generating positive social, environmental and economic outcomes for the country.
    - 4 in 5 (80%) Australians think Australia's financial sector should consider social and environmental impacts, even it means that some financial returns may be lower.
    - Four in five survey respondents indicated that the sector has a role to play in ensuring we are less vulnerable to climate change.
  - **Financial advisers:** Nine in ten Australians believe it's important that their financial adviser provides responsible or ethical options and most (86%) see it as important that their adviser asks them about their interests and values in relation to their investments. 87% would be comfortable discussing their interests/values in relation to their investments with their adviser.

Reportedly, following the bushfires over the summer, there has been an uptick in the number of consumers switching to ethical superannuation options. The Age quotes RIAA CEO Simon O'Connor as suggesting that the shift is a 'clear warning to mainstream super funds - and to the finance sector generally - that they should better reflect the preferences of their investors'.

[Source: RIAA media release 25/03/2020; Responsible Investment Association Australasia report: From Values to Riches 2020; [registration required] The Age 25/03/2020]

Other Shareholder News

Wrong Zoom? The FT reports that SEC has intervened to suspend Zoom Technologies shares after investors confused the company with Zoom Communications (the video calling app)

The FT reports that the US Securities and Exchange Commission (SEC) has suspended shares in Zoom Technologies, a small Chinese company that investors were confusing with Zoom Communications the video-calling app, until 8 April.

Zoom communications has reportedly seen a rise in share price during the COVID-19 pandemic.

Reportedly, shares in Zoom Technologies were also suspended because the company has not issued public disclosures since 2015, raising questions over its finances.

The FT quotes SEC as commenting 'the Commission cautions broker-dealers, shareholders, and prospective purchasers that they should carefully consider the foregoing information along with all other currently available information and any information subsequently issued by the company'.

[Source: [registration required] The FT 27/03/2020]

Meetings and Proxy Advisers

The ASA 'strongly recommends that all companies move to a hybrid AGM format' in light of the COVID-19 outbreak (but does not support virtual AGMs)

Key Takeouts

- ASA has issued a statement expressing support for ASIC's guidelines and the recent guidance from the Governance Institute of Australia.
- ASA has also expressed support for, and encourages companies to hold hybrid AGMs (provided that there is sufficient opportunity for shareholder participation)
- ASA does not support virtual AGMs (ie online only AGMs)

On 25 March the Australian Shareholders' Association (ASA) issued a statement on its position with respect to shareholder meetings and gatherings in light of the COVID-19 coronavirus pandemic.

The ASA 'strongly recommends' all companies move to a hybrid AGM format

The statement expresses support for companies holding hybrid AGMs in the current circumstances (provided that there is sufficient ability for shareholders to participate.

ASA Chair Allan Goldin said 'With Government regulations preventing gatherings, ASA strongly recommends that all companies move to a hybrid AGM format that allows for the AGM to be held at a particular place and allows participation from all shareholders.'

The statement adds that moving to hybrid AGMs has some drawbacks in terms of shareholder participation eg it will 'severely limit questioning of the Board and management' and that in light of this the ASA expects that:

- 'priority to be given to representative shareholders to attend and be heard if entry numbers are restricted'; and
- that both the Australian Securities and Investments Commission (ASIC) and the ASX will 'take appropriate action if a company is found to be denying shareholders the ability to actively participate in shareholder meetings'.

The ASA adds that it does not support virtual (ie online only) AGMs. 'The ASA has been conducting a hybrid AGM for many years and does not find it difficult to organise and run one. We will not tolerate shareholder rights being trampled by companies exploiting loopholes to reduce engagement with retail shareholders' Mr Goldin said.

Support for ASIC and Governance Institute AGM guidance

The statement also expresses support for both the recent guidance issued by the Australian Securities and Investments Commission (ASIC) and by the Guidance issued by the Governance Institute.

[Note: ASIC's COVID-19 AGM guidance can be accessed on the ASIC website here. You can access MinterEllison's expert summary of ASIC's guidance here.]

[Note: The Governance Institute, with the Law Council and the Australasian Investor Relations Association also recently issued AGM guidance. The guidance is accessible on the Governance Institute website here. For a summary, see: Governance News 25 March 2020 at p8]

[Source: ASA media release 25/03/2020]

United Kingdom | Supplementary COVID-19 AGM guidance released in light of 'stay at home' restrictions

Context: On 17 March, the Chartered Governance Institute issued COVID-19 AGM guidance for companies to assist them in planning for/holding their AGM in the current environment. The guidance outlined five options for companies to consider: 1) adapt the basis on which you hold the AGM; 2) delay convening the AGM, if notice has not yet been issued; 3) postpone the AGM, if permitted under the articles of association (Articles); 4) adjourn the AGM; and 5) conduct a hybrid AGM, if permitted under the Articles. The full text of the guidance is here.

Supplementary guidance issued: On 27 March, supplementary guidance on how AGMs can go ahead, in light of 'stay at home' instructions and tighter restrictions on gatherings.

Broadly the guidance recommends that companies encourage shareholders to vote by proxy and emphasises the need for them to make clear that public gatherings of more than two people are not permitted and that anyone seeking to attend the meeting in person will be refused entry.

The guide also includes advice on: a) on how to ensure that the meeting is quorate; b) who should chair the meeting; c) which directors will be allowed or expected to attend the general meeting; and d) where to hold the meeting in the event of the planned venue being unavailable or otherwise inaccessible.

Announcing the release of the supplementary guidance, FRC Executive Director of Corporate Governance and Reporting Paul George, said that: 'These are unprecedented times for business so it is absolutely right companies have flexibility to conduct their general meetings in a safe and proportionate way, while ensuring shareholders remain actively engaged in the process. Companies should familiarise themselves with the guidance and give plenty of thought to any measures they need to take now to ensure compliance with their responsibilities while keeping stakeholders and shareholders informed.'

The guidance was prepared by the Chartered Governance Institute Linklaters LLP, Slaughter and May, Freshfields Bruckhaus Deringer LLP and Clifford Chance LLP. The Financial Reporting Council, the City of London Law Society Company Law Committee, GC100 – the Association of General Counsel and Company Secretaries working in FTSE 100 Companies, the Investment Association and the Quoted Companies Alliance support the guidance. The Department for Business, Energy and Industrial Strategy has also reviewed the guidance.

The full text of the supplementary guidance is available on the Chartered Governance Institute website here.

[Sources: FRC media release 27/03/2020; Supplementary Guidance 27/03/2020]

The Governance Institute has reiterated the need for companies to remain in close contact with shareholders and investors concerning AGM plans in light of the rapidly changing circumstances

Further to the initial COVID-19 AGM guidance (for a summary see: Governance News 25 March 2020 at p8) the Governance Institute has been in discussion with investor representatives and regulators concerning the rapidly changing environment. Governance Institute CEO Megan Motto encouraged companies to keep in regular contact with their shareholders and investors as the situation evolves.

'There are 290 ASX-listed companies who are due to hold their AGM by 31 May and the situation is changing rapidly. Arrangements made last week are no longer feasible this week. We encourage companies to liaise with their shareholders and significant investors about their arrangements and bring them up to date as circumstances change. Encourage them to lodge proxies' Ms Motto said.

Commenting briefly on the supplementary UK Chartered Governance Guidance (covered in a separate post above), the Governance Institute reiterated that companies due to hold their AGMs should ensure the AGM will be quorate, and also consider:

- Contacting their registry and technology provider to discuss arrangements and contingency plans.
- Establishing a dedicated AGM area on the company website.
- Establishing an online shareholder Q&A for the AGM.
- Announcing a shareholder event to be held later in the year.

[Source: Governance Institute media release 01/04/2020]

ASX supports COVID-19 AGM guidance issued by ASIC (and separately) by the Governance Institute, AIRA and Law Council

Commenting briefly on both the guidance issued by the Australian Securities and Investments Commission (ASIC) and the joint guidance from the Governance Institute of Australia, Australian Investor Relations Association, Business Law Section of the Law Council of Australia, the ASX has said that it 'strongly endorses and supports the advice and guidance given in these documents. Where a listed entity has already dispatched its notice of meeting, ASX is supportive of the entity sending supplementary information to its security holders about the meeting and voting procedures electronically, via their website and the ASX market announcements platform'.

[Source: Listed@ASX compliance update 31/03/2020]

Disclosure and Reporting

ASX COVID-19 compliance update: guidance on meeting continuous disclosure obligations and temporary emergency capital raising relief measures announced

In its latest compliance update, the ASX (among other things) outlines its expectations and provided some practical guidance for companies around meeting continuous disclosure obligations in the current environment and announced temporary emergency capital raising relief measures.

In addition, the update covers: a) ASIC and ASX guidance on fair treatment in capital raisings; b) ASX's position on ASIC and joint guidance issued by the Governance Institute, AIRA and the Law Council on upcoming AGMs; c) reporting relief for ASX/NZX dual-listed entities; and d) reporting relief for other listed entities with a 30 September, 31 December or 31 March balance date.

The full text of ASX's latest compliance update is available on the ASX website here.

Some Key Points

COVID-19 – Continuous Disclosure Obligations under Listing Rule 3.1 – no requirement to 'predict the unpredictable'

ASX says that it acknowledges that the current 'rapidly evolving and highly uncertain situation surrounding the coronavirus pandemic' poses particular challenges in terms of disclosure and that different listed entities are being affected in different ways and that it is 'important at the outset to state that a listed entity's continuous disclosure obligations do not extend to predicting the unpredictable'.

ASX expectations

ASX does not expect listed entities to: a) announce information under listing rule 3.1 that comprises matters of supposition or that is insufficiently definite to warrant disclosure and that otherwise meets the requirements of all three limbs of listing rule 3.1A; or b) make forward-looking statements to the market unless they have a clear and reasonable basis for doing so.

Practical guidance on disclosure obligations

- **Earnings guidance**: ASX 'strongly encourages' entities who have published earnings guidance to review it and to update if it is no longer current or, 'perhaps more sensibly for most entities in the current highly uncertain climate, to simply withdraw it'. ASX refers companies to: Section 7 of Guidance Note 8 for further guidance.
- **Material operational decisions:** With respect to operational decisions ASX states that 'an entity that makes an operational decision that is likely to have a material effect on the price or value of its securities should immediately announce that decision to the market'. ASX gives a decision to stand down a material number of employees or to close or suspend certain operations or facilities as examples.
- **Capital raisings:** Entities proposing a capital raising to restore their financial position need to announce it to the market under listing rule 3.10.3 as soon as it is committed to proceeding with the capital raising. The ASX refers entities to Section 2 of Guidance Note 30 Notifying an Issue of Securities and Applying for Their Quotation and to Example C in Annexure A to Guidance Note 8 (Worked examples of the operation of Listing Rule 3.1) for further guidance.
- **Entities in financial difficulty:** ASX states that 'a listed entity in financial difficulty is subject to the same disclosure standards under listing rule 3.1 as any other entity. If there is an adverse development affecting the financial condition or prospects of an entity that falls outside the carve-outs to immediate disclosure in listing rule 3.1A and a reasonable person would expect information about that development to have a material effect on the price or value of its securities, the listed entity must immediately disclose that information under listing rule 3.1'. For example, information that the board of a listed entity has appointed an administrator or information that a major lender to the listed entity has declared an event of default and called for the immediate repayment of the outstanding balance of its loan, causing the entity to become insolvent, should also be immediately disclosed to the market. ASX refers entities to Section 5.10 of Guidance Note 8 (Entities in financial difficulties) for further guidance.
- **Decisions not to pay a dividend or distribution**: ASX states that 'an entity that decides to cancel a dividend that it has already determined to pay should immediately announce that fact to the market under listing rule 3.1. The announcement should explain the legal basis for the cancellation (including confirming that the cancellation is authorised by the entity's constitution, where that is a legal requirement).'
- **Trading halts and voluntary suspensions:** Consistent with the guidance in Guidance Note 16 ASX reminds entities that 'if the market is or will be trading at any time after an entity first becomes obliged to give market sensitive information to ASX under listing rule 3.1 and before it can give an announcement with that information to ASX for release to the market, the entity should consider carefully whether it is appropriate to request a trading halt or a voluntary suspension'.
- **The requirement for market announcements to be given to ASX first:** ASX reminds entities of the importance not releasing information that is for release to the market to anyone else, until it has been given to ASX and released by ASX to the market. However, ASX confirms that the application of listing rule 15.7 does not prevent a listed entity from communicating with its employees, customers or suppliers important information relevant to those parties relating to COVID-19, including information about business closures, working from home arrangements etc.

Misleading COVID-19 claims: ASX says that where it has concerns about a COVID-19-related announcement (eg claiming a cure for COVID-19) it's likely response will be to suspend trading in the entity's securities pending further enquiries by ASX to establish that the announcement meets the requirements of the listing rules.

ASX adds that it will not hesitate to use its new power of censure in listing rule 18.8A to censure entities that make misleading COVID-19 claims

Reporting Relief: The ASX says that it has yet to 'discern any major call' from listed entities with a 30 September, 31 December or 31 March balance date requesting an extension to the deadlines for filing their financial statements for the half year (in the case of 30 September balancers) or for the full year (in the case of 31 December or 31 March balancers) under chapter 4 of the listing rules.

Accordingly, ASX will consider any requests on a case-by-case basis. Requests will generally only be granted where there has been an unavoidable delay in having financial statements audited or reviewed.

Temporary emergency capital raising relief measures

In recognition of the fact that many entities will need to urgently raise capital, ASX has announced temporary emergency capital raising measures (in the form of class order waivers) to help facilitate capital raisings in the short term. The Class Waivers will expire on 31 July 2020 unless ASX otherwise decides to remove or extend them.

- **Back-to-back trading halts:** ASX will permit an entity to request two consecutive trading halts, allowing it a total of up to 4 trading days in halt to consider, plan for and execute a capital raising. Entities will need to make it clear in their request for a trading halt that they are seeking two consecutive back-to-back halts of two days each for the purpose of considering a capital raising.
- **A temporary extra Placement Capacity:** ASX will lift the 15% limit on placements in listing rule 7.1 to 25%, conditional on entities that avail themselves of the Temporary Extra Placement Capacity either making a follow-on pro rata entitlement offer under exceptions 1, 2 and/or 3 of listing rule 7.2 or a follow-on offer to retail investors under an SPP, in each case at the same or a lower price than the placement price).
- **A temporary waiver of the one-for-one cap on non-renounceable entitlement offers in listing rule 7.11.3:** The waiver will apply both to accelerated non-renounceable entitlement offers (ANREOs) and standard non-renounceable rights issues.

The full text of the waivers are available via links within the ASX update. The update is available here.

The ASX says that the measures are under review and may be altered/replaced if they are not having the desired effect on capital raisings.

ASIC and ASX guidance on fair treatment in capital raisings

Commenting on the guidance given by the Australian Securities and Investments Commission in its Market Integrity Update - COVID-19 Special Issue – 31 March 2020, the ASX says that it shares ASIC's expectations and that it 'may withdraw the benefit of a Class Waiver in any particular case if ASX considers it is being abused by a listed entity or that a listed entity is otherwise acting unfairly or unreasonably in the circumstances'.

Upcoming AGMs - ASIC 'no action' position and GIA/AIRA/LCA guidance

Commenting briefly on both ASIC's COVID AGM guidance and the joint guidance from the Governance Institute of Australia, Australian Investor Relations Association, Business Law Section of the Law Council of Australia guidance, ASX says that it 'strongly endorses and supports the advice and guidance given in these documents. Where a listed entity has already dispatched its notice of meeting, ASX is supportive of the entity sending supplementary information to its security holders about the meeting and voting procedures electronically, via their website and the ASX market announcements platform'.

[Source: ASX compliance update 31/03/2020]

APRA has announced temporary changes to reporting requirements for ADIs and RFCs because of COVID-19

The Australian Prudential Regulation Authority (APRA) has outlined temporary changes in reporting obligations for authorised deposit-taking institutions (ADIs) and registered financial corporations (RFCs) in response to COVID-19.

Changes

- granting a temporary extension of the notification period for changes to accountability statements and maps under the Bank Executive Accountability Regime (BEAR);

- the introduction of a new reporting standard for ADIs and RFCs regarding lending to small and medium enterprises (SMEs), to support the Commonwealth Government's Coronavirus SME Guarantee Scheme;
- early implementation of APRA's November 2019 proposal to standardise reporting due dates for ADI quarterly forms, only where that represents an extension of due dates, and extending this to RFCs;
- deferral of the introduction of certain new reporting standards until the March 2021 reporting period;
- deferral of APRA's proposal to determine certain ADI data non-confidential until further notice; and
- a continuation of parallel reporting of Reporting Standards ARS 331.0 Selected Revenues and Expenses (ARS 331.0); RRS 331.0 Selected Revenue and Expenses (RRS 331.0) and the ABS Quarterly Business Indicators Survey (QBIS) until the June 2020 quarter.

The full text of APRA's letter to industry which includes further detail on the changes is available on the APRA website here.

The changes apply to all ADIs and RFCs and are effective immediately.

[Sources: APRA media release 31/03/2020; Letter to industry]

Three month extension: AUSTRAC will accept compliance reports for 2019 until 30 June

In light of the COVID-19 pandemic and the associated impact on businesses, AUSTRAC has announced that the deadline for submitting 2019 compliance reports (due to be submitted to AUSTRAC by 31 March 2020) has been extended.

AUSTRAC will accept 2019 compliance reports until 30 June 2020, without risk of compliance action.

In addition, for businesses restricted from opening due to COVID 19 social distancing measures and unable to submit the report, AUSTRAC will take no compliance action.

[Source: AUSTRAC media release 27/03/2020]

UK Financial Regulators announce a package of COVID-19 measures: Extra two months to report and new guidance for companies and auditors

On the 26 March, the UK's Financial Conduct Authority (FCA), Financial Reporting Council (FRC) and Prudential Regulation Authority (PRA) released a joint statement outlining measures intended to ensure the continued flow of information to investors during the pandemic. These include the following.

- **Extra two months to report:** The FCA released a statement allowing listed companies an extra 2 months to publish their audited annual financial reports. That is, companies will not face enforcement action for breach of the transparency directive (DTR 4.1.3R) provided that they publish their results within 6 months of their financial year-end.

  In addition, the statement also confirms that the moratorium on preliminary statements of accounts can end on 5 April. The FCA states that though 'the practice of issuing financial statements earlier than required will add unnecessarily to the pressure on companies and the audit profession at this moment' it is of the view that 'pressure can abate as companies react to the need to re-think and re-plan financial calendars in light of the coronavirus pandemic and the package of measures the 3 regulators are announcing today'.

- **Guidance on the preparation of financial reports:** The FRC released guidance for companies on preparing financial statements in the current circumstances. The guidance covers (among other things) advice on the preparation of: the strategic report and viability statement; financial statements (eg going concern and material uncertainties; significant judgements and estimation uncertainty).

  With respect to the preparation of the strategic report and viability statements, the FRC stresses that:

  - the requirement for boards to have a 'reasonable expectation' of the company's viability over the period of assessment 'would naturally carry a much lower level of confidence' given the current rapidly evolving environment;

- the importance of being clear on the company's specific circumstances and the degree of uncertainty about the future;
- when presenting a company's viability statement, its board should draw attention to any qualifications or assumptions as necessary. The board should describe the limits of the predictions, the level of confidence with which they have been made and identify the uncertain future events that could prove critical to viability. Similarly, the key assumptions made and the future scenarios considered should be explained.
- The FRC states that 'at this time, the need for fuller disclosure is paramount'.

The PRA has also released guidance the approach that should be taken by banks and other financial institutions in assessing expected loss provisions under IFRS9.

- **Guidance for auditors on overcoming the challenges in obtaining audit evidence:** The FRC released a 'bulletin' for audit firms to provide guidance to auditors, carrying out audit engagements that may be affected by Covid-19. The guidance includes a non-exhaustive list of factors auditors should be considering when carrying out audit engagements in the current circumstances, along with guidance on how they might be addressed. The FRC says it may issue further guidance, if it is required as the situation develops and that it will withdraw the Bulletin when 'circumstances return to normal'.

[Sources: Joint statement by the FCA, FRC and PRA 26/03/2020; FRC guidance: Company Guidance Update March 2020 (COVID-19); FRC COVID-19 Bulletin March 2020; PRA guidance: Letter from Sam Woods 'Covid-19: IFRS 9, capital requirements and loan covenants']

Markets and Exchanges

ASX is replanning the CHESS replacement implementation timetable: Consultation on a new schedule will open in June

ASX is replanning the CHESS replacement implementation timetable due to: a) uncertainty resulting from the unfolding COVID-19 pandemic; b) user feedback on timing and requested functionality changes; and c) the need for ASX to complete aspects of its own readiness.

(Indicative) timing

- Tranche 2 rule consultation deadline moved from 3 April to the end of May.
- ASX will consult on a new schedule, including a new go-live date, in June 2020.
- The July 2020 target of opening an Industry Test Environment (ITE) remains unchanged. That is, ASX is plans that the ITE will be open for developers (on an optional basis) from July 2020. Subject to feedback received as part of the June consultation, ASX aims that the ITE will eb open to all users by October 2020.

Announcing the changes, ASX Deputy CEO Peter Hiom said that though the ASX remains committed to implementing the CHESS replacement system, and that work continues on the project, delaying the consultation on the new schedule is necessary in the circumstances given the existing pressure on business.

'We are conscious of the importance of providing a new schedule, and the need to get the valuable input of CHESS users. Right now, however, in this environment of heightened volatility and activity levels, the industry needs to focus on day-to-day operations. We will therefore wait until June to consult on the new timetable when we expect everyone will have more time to consider the replan and better assess the implications of COVID-19. We will then announce the new schedule' Mr Hiom said.

Mr Hiom went on to say that 'ASX remains fully committed to CHESS replacement. We continue to progress the project…The investments we are making in the new system and in distributed ledger technology are for the long-term benefit of the financial services industry and the Australian economy'.

[Source: ASX media release 25/03/2020]

Regulators

ASIC market integrity update: COVID-19 special edition released

In its 31 March Market Integrity Update, the Australian Securities and Investments Commission has: a) reminded directors of listed companies of their duties (in the context of equity raising during the pandemic); and b) outlined its expectations of market intermediaries in relation to business continuity and back-up arrangements.

Equity raisings during the COVID-19 pandemic: expectations of directors

ASIC has reminded directors of listed companies that when deciding on the timing and structuring of any capital raising, they are expected to 'continue to act in the best interests of the company'.

ASIC says that this requires directors to balance a range of considerations such as the need for quick and certain capital, and the cost to and possible dilution of existing shareholders.

In addition, ASIC reminds directors of the importance of considering 'fairness between shareholders – both institutional and retail – in capital raisings'.

ASIC refers directors to ASIC Report 605 Allocations in equity raising transactions which outlines a number of better practices for directors of listed companies to consider when raising capital. These include proactive engagement with advisers associated with the transaction to understand their allocation recommendations and consideration of the impact of capital raising on existing security holders.

Expectations of market intermediaries in relation to business continuity and back-up arrangements

ASIC expects market intermediaries to monitor the effectiveness of their business continuity plans and alternative working arrangements to ensure financial services are provided efficiently, honestly and fairly.

More particularly, ASIC expects market intermediaries to:

- Identify critical systems and staff as part of their business continuity plans and ensure back-up arrangements operate as planned with allocated resources, including human and technological resources (eg location, capacity, internet load and systems licences). Market intermediaries should allocate more than one person to back up critical staff if required.
- Undertake periodic and frequent testing of remote working access and critical systems/technology.
- Monitor the effectiveness of cyber resilience arrangements given increased numbers of staff working remotely and the increased use of email. For example, some market intermediaries have observed an increased number of phishing emails. In response they've circulated warnings to staff not to click on links in emails received from unknown sources.
- Assess the potential disruption to services and functions provided by offshore intra-group entities and have in place contingency arrangements to ensure the continued operation of critical services and functions.
- Engage with external third-party service providers to ensure their business continuity arrangements are operating effectively and they have contingency arrangements to ensure the continued provision of services.
- Consider whether additional testing of outsourced and off-shored services are necessary to maintain the efficient, honest and fair operation of their business, especially services in jurisdictions where it may be difficult to maintain adequate controls over staff working from home.
- Hold frequent meetings with supervisory staff to monitor the effectiveness of their business continuity plans and supervision arrangements, and update their plans and arrangements as required.

Supervision of staff

Where alternative working arrangements are in place and staff are working remotely or split across different sites, ASIC expects market intermediaries to:

- Have in place a management structure that ensures its operations and processes are supervised by one or more persons who have appropriate supervisory skills, knowledge and experience. ASIC says that it expects that governance, incident management and escalation forums, including compliance committees, will continue to operate.

- Maintain written supervisory procedures specifying the staff responsible for supervision of their business operations and processes, identified by name or title and position. ASIC also expects market intermediaries to maintain records relating to the allocation of, and any changes to, supervisory responsibilities given to supervisory staff.
- Have in place adequate arrangements to manage conflicts of interest and handle confidential information, where staff continue to be physically situated together (eg at a disaster recovery site). This may include segregation of relevant teams and the approval of seating plans by compliance staff.
- Supervisory staff should be allocated to supervise teams at physical sites in-person where possible. For example, some market intermediaries have disaster recovery sites exclusively for their use with secure access and appropriate segregation of staff within the space. In these instances, compliance, legal and supervisory staff are commonly distributed between the main and disaster recovery sites.
- Adhere to their existing policies for staff working remotely and the use of mobile devices. Where policies need to change to reflect the current conditions, they should be robustly reviewed and approved by compliance and other control functions to ensure they do not introduce any undue compliance, conduct or operational risk. For example, ASIC suggests that where staff work from home they should be set up so they can't be overheard, their screens can't be seen by others at home and phone calls are recorded (or there are other equivalent record-keeping arrangements). They should also be required to lock their screen or log-off when they leave their computer. In addition, ASIC suggests that market intermediaries should consider what additional monitoring of staff practices and behaviour is necessary when working from home (e.g. whether more or fewer calls are being made from work/recorded lines and whether login patterns change unexpectedly).
- Record conversations concerning client instructions and orders given by phone, where obliged to do so. There should be protocols in place to ensure a market participant's compliance with their mandatory recording obligations under the market integrity rules. Only authorised communication channels should be used and this should be monitored. In the rare instance this isn't possible, the participant must ensure there is some form of written record. For risk mitigation, this should be followed by electronic confirmation by the client as soon as possible.

Market intermediaries should contact their ASIC Intermediary Supervisor if there:

- are any significant changes to business continuity or supervision arrangements that may affect their ability to meet their regulatory obligations or provide financial services in accordance with their licence authorisations
- is a risk of significant financial impact to the market intermediary.

ASIC says that though market intermediaries are experiencing delays in the review and processing of surveillance system alerts, they should continue to report any suspicious activity to ASIC.

ASIC says that it is 'committed to working constructively and pragmatically' with ASIC-regulated market intermediaries in light of the difficulties they may encounter in complying with regulatory obligations because of the impact of COVID-19.

[Source: ASIC Market Integrity Update 31/03/2020]

BIS has delayed Basel III reforms for one year because of COVID-19

On 27 March, the Basel Committee's oversight body, the Group of Central Bank Governors and Heads of Supervision (GHOS), announced that the planned implementation date for Basel III reforms would be deferred in order to provide additional operational capacity for banks and supervisors to respond to the immediate financial stability priorities resulting from the impact of the coronavirus disease (Covid-19) on the global banking system.

Revised implementation timeline for the outstanding Basel III standards

- The implementation date of the Basel III standards finalised in December 2017 has been deferred by one year to 1 January 2023. The accompanying transitional arrangements for the output floor has also been extended by one year to 1 January 2028.
- The implementation date of the revised market risk framework finalised in January 2019 has been deferred by one year to 1 January 2023.
- The implementation date of the revised Pillar 3 disclosure requirements finalised in December 2018 has been deferred by one year to 1 January 2023.

Not expected to impact capital strength of the global banking system: GHOS considers that the revised timeline will not 'dilute the capital strength of the global banking system, but will provide banks and supervisors additional capacity to respond immediately and effectively to the impact of Covid-19'.

[Source: BIS press release 27/03/2020]

APRA has announced it will defer capital its scheduled implementation of the Basel III reforms in Australia by one year

The Australian Prudential Regulation Authority (APRA) has announced that, consistent with the recent decision by the Basel Committee on Banking Supervision to defer the international agreed start dates for the Basel III standards from January 2022 to January 2023, it will defer its scheduled implementation of Basel III reforms by twelve months.

The measure is intended to help support authorised deposit-taking institutions (ADIs) in dedicating the necessary time and resources to maintaining their operations and supporting customers in response to COVID-19.

No impact on the level of capital banks are required to hold: APRA comments that as Australian ADIs are well-capitalised and already meeting the ‘unquestionably strong’ benchmarks set by APRA in 2017, they already have sufficient capital to meet the new requirements. In light of this, APRA says that its announcement 'does not impact the level of capital ADIs are required to hold'. Rather, it defers adjustments that will need to be made to the re-allocation of capital across various portfolios.

Details: revised implementation dates for standards impacted

Standards	**Revised date**
▪ APS 116 Capital Adequacy: Market Risk	1 January 2024
▪ APS 110 Capital Adequacy (including the introduction of the capital floor, leverage ratio requirement, simplified framework, and improving the transparency, comparability and flexibility of the capital framework) ▪ APS 112 Capital Adequacy: Standardised Approach to Credit Risk ▪ APS 113 Capital Adequacy: Internal Ratings-based Approach to Credit Risk ▪ APS 115 Capital Adequacy: Standardised Measurement Approach to Operational Risk ▪ APS 117 Capital Adequacy: Interest Rate Risk in the Banking Book ▪ APS 330 Public Disclosures	1 January 2023 APRA comments in relation to the implementation of APS 115 that it will defer the commencement of APS 115 for **all** ADIs until 1 January 2023. Banks currently using the advanced measurement approach to operational risk (AMA banks) will be allowed to opt-in to the new standardised approach for an earlier implementation from 1 January 2022 should they wish to do so. APRA says that it will 'formally amend the commencement date for APS 115 in due course'. The additional time will also allow APRA to finalise the revised reporting standard over the next 12 months.

[Source: APRA media release 30/03/2020]

'Rainy day' planning means the financial system is well placed weather the COVID-19 crisis says APRA Chair Wayne Byres

Writing in The AFR, Australian Prudential Regulation Authority (APRA) Chair Wayne Byres writes about the work that has been undertaken, and the measures implemented since the global financial crisis (GFC) to prepare for 'the proverbial rainy day'. Due to this work, Mr Byres states, 'Australian financial institutions are better able to cope during the current emergency'.

Some Key Points

- **Focus on building resilience is core to APRA's mandate: Mr Byres said that since the GFC, APRA** has pursued an agenda of building financial sector resilience with substantial reforms to strengthen capital frameworks and liquidity requirements, and mitigate operational and contagion risk. Mr Byres then gave a number of examples, including in the banking sector: raising the quality and quantity of capital, bolstering liquidity, improving the stability of funding, conducting regular stress tests and reinforcing sound lending standards in the mortgage and commercial property lending market. As a result of these reforms, Mr Byres said that compared with their international peers, Australia's largest banks are well capitalised and benefit from strong credit ratings and better placed to 'cope' during the current pandemic.
- **Strong capital buffers mean that banks are well-placed to cope:** Mr Byres said that APRA's objective in building up the capital strength of the system has been to ensure it is available to be drawn upon if needed. 'The substantial buffers are now available to do the job they were designed for – providing confidence in the financial resilience of the banking system and helping to keep credit flowing at the time when it is most needed'.

  It also means that the banking system is able to take advantage of the measures announced over the past couple of weeks by the government and the Reserve Bank to support the continued flow of credit to businesses and industries affected by COVID-19. 'If the banking system utilises some of its current large buffers, it will still be operating comfortably above minimum regulatory requirements' Mr Byres said.
- **Business continuity plans - APRA considers that so far, the impact of COVID-19 has been 'manageable':** Mr Byres said that over the past few months, APRA has been in contact with the industry to monitor the implementation and performance of business continuity plans. APRA has used it pandemic planning guidance as a benchmark to assess the readiness of institutions to cope with disruption as they respond to the impact of COVID-19. Mr Byres said that 'to date, that impact – in terms of core payment and service functions – has been manageable'. Mr Byres added that the transition to 'work from home' 'has been relatively seamless – evidencing a resilience that could not realistically have been envisaged even a few years ago'.
- **APRA is cooperating with agencies/international peers:** Mr Byres said that APRA is working closely with the other agencies of the Council of Financial Regulators, the government, and international peers to monitor and assess the impact of COVID-19 on the financial system. Mr Byres emphasised the importance of the continued operation of financial markets in the current circumstances. 'To support the economy, it is crucial that over the coming months the financial system remains stable and resilient, and that markets are open and orderly' Mr Byres said.
- **'Rainy preparation' is paying dividends now:** Mr Byres concluded by saying that 'no one can be complacent. The environment will continue to rapidly evolve, and there is no hiding from the fact that financial institutions – and their regulators – will be severely tested in the months ahead. Yet what is now becoming clear is that there has been considerable investment, over the years and behind the scenes, in preparing for the proverbial rainy day. That is proving very valuable now'.

[Source: [registration required] The AFR 30/03/2020]

Competition must, and will, survive the 'current crisis' says ACCC Chair Rod Sims

In his address to the Australian Financial Reviews Banking & Wealth Summit 2020, Will competition survive the current crises?, Australian Competition and Consumer Commission (ACCC) Chair Rod Sims spoke about the necessity for competition to survive the current crisis given the critical role it (ordinarily) plays in the economy and the important role it will play in getting the economy running again when the crisis is past.

Temporary and necessary measures, for example, the authorisation of what would otherwise anti-competitive activity must not be allowed, Mr Sims said, to impact the structure of the economic system post-crisis. 'At a time of crisis such as in war or with a pandemic, where there is a common enemy to fight for the nation's survival, and so a sense of national purpose, co-ordination is both efficient and carries little or no downside. Without a common enemy, in normal times of course, co-ordination leads to complacency, inefficiency and higher prices' Mr Sims said.

Mr Sims also cautioned the business community not to 'expect a different, or lenient approach to merger assessments during this crisis. Our objective will be to protect the competitive structure of the economy, and not to see anti-competitive increases in market power, or the rise of so-called "national champions".'

Establishment of the COVID-19 taskforce

Mr Sims also spoke about the establishment of the COVID-19 taskforce and its role during the pandemic. 'Its role is to quickly intervene in emerging consumer issues and help consumers understand their rights when dealing with cancelled events or services, warn about the inevitable scams, and deal with poor behaviour including price gouging' Mr Sims said.

Other work will continue

Digital Platform Inquiry: Mr Sims said that the ACCC's work in other areas will continue. For example, he said that the digital platform inquiry work will continue, 'albeit with a more flexible approach given that this crisis will affect the ability of industry to respond and contribute'.

Open Banking – pushing for existing 1 July 2020 launch (but some flexibility in this is required): Mr Sims said that Open Banking (the consumer data right in the context of the banking sector) is on track. 'The ACCC has had extensive discussions with banks and other stakeholders about the impacts of COVID-19 on the introduction of the CDR regime. The vast majority want to press ahead, and build on the work to date' Mr Sims said. Mr Sims added that the timetable now needs 'be flexible, and the ACCC is likely to provide some more specificity on this in the coming weeks, but we are continuing to work to launch on July 1 2020 for sharing consumer transaction data'.

[Source: ACCC Chair Rod Sims' address at the Australian Financial Review Banking & Wealth Summit Crisis Briefing, Will competition survive the current crises? 30/03/2020]

In Brief | ACCC has adjusted its regulatory priorities in light of COVID-19: While our 2020 Compliance and Enforcement Priorities remain in place, we will re-focus our efforts to those priorities of most relevance to competition and consumer issues arising from the impact of COVID-19

[Source: ACCC media release 27/03/2020]

Financial Services

APRA and ASIC have written to RSE licensees outlining their expectations during the period of disruption caused by COVID-19

In a joint letter to all registrable superannuation trustees (RSEs), the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC) have outlined their expectations regarding: a) liquidity; b) communication (with members and with regulators); c) insurance in superannuation; d) cyber-risk and e) business resilience, in light of the COVID-19 pandemic.

Fact sheets

To assist trustees understand their 'new and ongoing responsibilities during this period', APRA and ASIC have published superannuation frequently asked questions (FAQs) on their websites which they have undertaken to update periodically.

APRA's FAQs are here. ASIC's FAQs are here.

Some Key Points

- **Liquidity needs to be a priority for funds:** The regulators say that monitory liquidity to ensure funds have the means to fulfil their payment obligations, including the early release of superannuation payments recently announced by the government has been a primary area of focus for regulators and must 'necessarily also be a top priority for trustees who bear ultimate responsibility for maintaining sufficient levels of liquidity to sustain the operation of their funds'.

  The letter states that Trustees are expected to be: 1) undertaking regular and detailed liquidity stress testing, ensuring that scenarios reflect changes in future net cash flows of the RSE, member behaviour and market conditions; 2) identifying specific areas for heightened attention with respect to liquidity, such as increased member switching activity or deterioration in the liquidity profile of their investments, and taking appropriate action; and 3) assessing the impact on liquidity of their liabilities and contractual commitments, such as currency hedging programs, and reviewing their securities lending arrangements.

  In addition, the regulators expect trustees to ensure that the valuation of unlisted and illiquid assets remains appropriate and consider whether any assets need to be revalued.

- **Communication**

  - **Proactive communication with members is expected:** Trustees are expected to 'communicate often, clearly and accurately to their members'. The regulators state that communication 'should also be balanced, factual, provide context and be member-centric across all communication channels'. Trustees are directed to have regard to the official government information sources and its financial impacts.

  - **Prompt response to member questions:** Trustees are expected to make responding 'promptly, clearly and accurately to members' questions' an operational focus subject to monitoring/improvement. In particular, the regulators say that 'being able to draw on complaints information to action and adjust communications and resourcing to meet member needs is likely to be key at this time'.

  - **Communication with regulators:** Trustees are expected to respond to requests for information but response to requests for information and also to proactively communicate with regulators, 'particularly where emerging or evolving risks are identified'.

- **Insurance in superannuation:** To promote understanding of life insurance cover provided through superannuation trustees should:

  - understand how members' insurance may be affected by economic conditions and public health restrictions eg policy clauses relating to employment, work hours, and exclusions (such as pandemic clauses);

  - consider how members' insurance might be affected by a reduction in account balances due to market downturns and the early release of funds by some members;

  - communicate these impacts clearly to their members in an accurate and balanced manner; and

  - work closely with their insurers, assist members who may face additional challenges in making a claim – for example, difficulties with obtaining medical appointments or providing evidence of disability.

- **Cyber risk and scams:** The regulators have called on trustees to be 'more vigilant about their members' interests and promptly share intelligence with the regulators' in light of heightened risks (scams/potentially increased vulnerability due to altered working arrangements).

- **Key business activities are expected to be 'operationally resilient'**: In order to help trustees focus their resources and attention on responding to the impact of COVID-19, both APRA and ASIC are postponing a range of new and planned regulatory initiatives. However, the regulators remind funds that 'unless APRA or ASIC has granted specific relief, trustees' legal, regulatory and reporting obligations remain unchanged'.

  Trustees are expected to ensure that key business activities eg administration, are operationally resilient to ensure ongoing processing of member benefits. The regulators expect that trustees are scenario testing their critical functions and determining (in conjunction with outsourced providers) essential staffing levels and contingency plans to ensure essential member transactions proceed in a timely manner, particularly where such activities are undertaken offshore.

- **Commitment to 'constructive and pragmatic approach':** The regulators state that they both 'encourage early and regular engagement in these cases [cases where trustees experience challenges in meeting requirements as a result of impacts of COVID-19] and trustees can expect a constructive and pragmatic approach. To the extent that non-COVID related requests from either regulator remain outstanding, trustees may seek an extension from the relevant regulator where necessary'.

[Source: APRA/ASIC Joint Letter to RSE Licensees 01/04/2020]

Early access to super: Assistant Minister Jane Hume confirms that the ATO will be responsible for assessing applications for the early release of superannuation by members impacted by the Coronavirus

In her address to the AFR Banking and Wealth Summit on 30 March, Assistant Minister Jane Hume spoke about the government's early access to superannuation policy, the impact on funds and the government's expectations of industry.

Ms Hume also confirmed that the ATO will be responsible for assessing applications, observing that the administration of the measure will be as simple as possible, and will utilise existing mechanisms.

Details

Ms Hume said that:

- Application can be made from mid-April 2020 directly to the ATO through the myGov website. A person will need to certify that they meet the eligibility criteria.
- The ATO will verify the applicant, assess the application, record the bank account details, and make a decision. The ATO will then direct the nominated super fund to release the requested amount to the bank account specified by the member.
- Ms Hume said AUSTRAC has also confirmed that superannuation funds can rely on the ATO's customer verification.
- The member does not need to contact the superannuation fund at all in the process.

Ms Hume said that funds are being asked to respond to the ATO's requests and releases funds to members in a timely manner.

Ms Hume commented that though some funds had expressed support for the measures, others had raised concerns. Ms Hume said that, 'discomfort is no excuse to not release members’ money – their own money – in a time of need. Any fund who refuses a member access to their money after an ATO determination is essentially admitting that their investment governance was cavalier or their systems inadequate. I can’t imagine a bigger signal to members, to the media and to regulators. And when everyone is making sacrifices, patience is short for those who can’t pull their weight'.

Ms Hume also said that 'if the coming period reveals a super fund has been managed in a way that would prevent members accessing their money promptly, APRA’s directions powers – especially sections 131D and 133 of the SIS Act, updated last year by the Parliament – gives APRA new teeth that may well be tested'.

[Sources: Assistant Minister Jane Hume media release 30/03/2020]

Expanded early access to superannuation should not pose a problem for superannuation funds argues Liberal Senator Andrew Bragg

Writing in The SMH, Liberal Senator Andrew Bragg argues that industry opposition to the government's decision to expand early access to superannuation is misplaced.

Mr Bragg writes that:

- Superannuation funds are obliged by the Australian Prudential Regulation Authority (APRA), to have in place a sound investment governance framework for the selection, management and monitoring of investments and funds.
- Superannuation funds are expected to have 'more than adequate liquidity to endure even the harshest downturn in markets and customers switching between funds and investment options'.
- Existing hardship grounds for early access to superannuation already existing. The new measures 'streamline' these requirements to enable consumers to access their funds without having to wait until they are at risk of losing their home.
- 'Retirement savings are the private nest eggs of Australian workers. Those who are facing financial hardship in the current crisis need access to their money now'.

If funds are liquidity constrained it is not the result of the government's policy

Mr Bragg goes on say that 'what the government is asking the industry to do is modest, reasonable and necessary' in the circumstances. According to treasury estimates, he maintains, the policy is expected to result in less than 1% of total superannuation savings being withdrawn.

Given this, Mr Bragg suggests that if 'some super funds are liquidity constrained' it is not the result of the government's policy by rather must 'stem from issues pre-dating notification of the government's stimulus package, and even the outbreak of the pandemic itself' for example by overextending into illiquid assets such as infrastructure and property.

'The past 100 years has delivered a depression, a World War and a range of unpredictable events which have damaged the economy and investment returns. Trustees have to prepare for these events and invest prudently for the proverbial rainy day' Mr Bragg writes.

Further, 'if prevailing market conditions require superannuation funds to sell assets at depressed prices, and therefore exacerbate poor investment performance, members should be asking hard questions of their fund's management team and trustee board'.

Mr Bragg concluded by stating, 'the impact of the coronavirus on the domestic and global economy is clearly unexpected and severe. It should not give cover to super funds for imprudent practices. Attempts by funds to deflect criticism is simply abdicating responsibility for mismanagement'.

[Source: The SMH 30/03/2020]

The AIST has warned consumers about scams involving the newly-announced early-release super measures

The Australian Institute of Superannuation Trustees (AIST) has issued a statement cautioning consumers about 'unscrupulous operators' offering to assist them in taking up the government's expanded early access to superannuation measures which allow certain individuals suffering financial hardship to access up to $10,000 of their superannuation in 2019-20 and a further $10,000 in 2020-21.

AIST CEO Eva Scheerlinck reminded consumers that there 'is no need to involve a third party and there are no fees involved'. The AIST encouraged consumers to report any suspicious behaviour to the Australian Securities and Investments Commission (ASIC) through its online complaint form.

Ms Scheerlinck also said that there is no need for consumers to 'panic and rush through an application' given the measures do not commence until mid-April.

Ms Scheerlinck reminded those planning to apply through MyGov for early release to their personal details were up to date by visiting their super fund's website.

The statement concludes by 'urging people' in financial hardship to explore other support options before accessing their superannuation, which should be a last resort.

[Source: AIST media release 26/03/2020]

The European Banking Federation says banks should not pay dividends for the financial years 2019 and 2020 until at least 1 October 2020

The European Banking Federation has said the region's lenders should not pay dividends for the financial years 2019 and 2020 until at least 1 October 2020 and separately, that listed banks should not undertake share buybacks for 2020. Both measures, would better position them to lend more to companies and consumers impacted by the pandemic.

In a short statement acknowledging the European Central Bank's (ECB) recommendation on banks dividend distributions, the European Banking Federation (EBF) said that banks should not pay dividends for the financial years 2019 and 2020 until at least 1 October 2020, in order to allow a total of 30 billion euro of additional capital of the highest quality to be kept within the system.

In a separate statement the EBF said that it had written to the ECB Chair calling for, among other measures, listed banks not to either accrue dividends or undertake share buybacks to maintain maximum capital preservation for 2020.

President of the EBF Jean-Pierre Mustier said that 'under these difficult circumstances, banks, more than ever, stand with their customers. Exceptional times call for exceptional measures. We hope that the economic conditions will have normalized by October. By then European banks boards should be able to re-assess their dividend and share buy-back strategy'.

[Sources: European Banking Federation media releases 27/03/2020; 27/03/2020; [registration required] The FT 27/03/2020]

Systemic Risk Council recommends banks should cease equity buybacks, dividends and be ready to suspend bonuses in order to maximise their capacity to lend

The Systemic Risk Council (SRC) has issued a statement outlining a number of proposed measures that G20 leaders should consider implementing in response to the COVID-19 pandemic.

Among other things the SRC states that increased demand for credit from consumers and businesses should be met as far as possible via the banking system. To facilitate this, the SRC recommends (among other things) that:

- **Banks should cease equity buy backs and dividends and be ready to suspend bonuses:** 'Banks should immediately cease all equity buy backs and dividends, and should be ready to suspend bonuses to a thick layer of senior and other highly remunerated staff in order to maximise their capacity to lend'.
- **Regulators should permit banks to use their capital buffers to increase lending**, and 'exercise prudent forbearance toward fundamentally sound borrowers, even if that reduces regulatory capital ratios in the short run'.

In addition, the SRC recommends that supervisors should oversee a 'careful and appropriately gradual deleveraging of trading books by banks, dealers, and funds, including derivative books and repo and securities-lending books that are not supporting, including through market making, participants in the real economy or long-term investment institutions'.

[Source: Systemic Risk Council media release 19/03/2020]

APRA has postponed the implementation of Reporting Standard HRS 605.0 Private Health Insurance Reforms Data Collection

The Australian Prudential Regulation Authority (APRA) has delayed the implementation of Reporting Standard HRS 605.0 Private Health Insurance Reforms Data Collection (HRS 605.0) to allow private health insurers (PHIs) to focus their resources on handling the impacts of COVID-19. The changes were initially scheduled to commence for the quarter ending June 2020.

Further changes: In response to feedback from industry, APRA has identified the need for 'two small amendments' to HRS 605.0 namely: 1) removing co-payment from Tables 2 and 3; and 2) adding an additional dimension (column) to Table 4 to separately collect psychiatric services.

[Note: Marked-up versions of these tables can be found in the appendix to this letter to industry available on the APRA website here.]

Consultation delayed: Consultation on these changes will be delayed until September 2020 at the earliest. APRA will advise entities when consultation on HRS 605.0 opens in due course.

Timing: Under this scenario, the first collection would be for the quarter ending March 2021.

[Sources: APRA media release 31/03/2020; Letter to industry 31/03/2020]

In Brief | The AFR reports that in recognition of the financial hardship facing many members as a result of the COVID-19 pandemic, Australia's four biggest health insurers, Medibank, Bupa, HCF and NIB, have abandoned plans to increase premiums on 1 April

[Source: [registration required] The AFR 30/03/2020]

In Brief | IT News reports that the CBA and Westpac have moved to temporarily scrap merchant service fees for electronic card payments to support businesses in the downturn caused by the pandemic

[Source: ITNews 30/03/2020]

In Brief | Tax and Super Australia has called for the superannuation guarantee amnesty to be extended for a further six months to give employers whose businesses have been impacted by COVID-19 more time

[Source: Tax and Super Australia 20/03/2020]

In Brief | Banking (BEAR) determination No 1 of 2020 specifies the timeframe (30 days) for lodging changes to accountability statements and maps. The determination came into effect on 30 March and is due to sunset on 1 April 2030

[Source: Banking (BEAR) determination No 1 of 2020]

In Brief | Westpac has announced that acting Westpac Group CEO Peter King has been appointed CEO. In addition, Westpac announced that annual short term bonuses for the CEO and the group executive have been cancelled

[Source: Westpac ASX announcement 2/04/2020]

Risk Management

Miners asked to submit COVID-19 plans: The QLD government has asked resources companies implement additional COVID-19 precautions to protect workers

The Queensland government has asked resources companies to implement additional COVID-19 precautions for fly-in fly-out (FIFO) workers, drive-in-drive-out (DIDO) workers, staff in mining camps and remote and regional resource communities.

In addition to following the public health protocols issued to date, the Chief Health Officer has asked that mining companies put in place the following measures.

In camps:

- infection control in kitchens and food preparation areas.
- suitable accommodation for self-quarantine
- maintaining social distancing in camps, including for recreational activities, including outdoor sport
- limiting movement of workers from camps and into the broader community
- no more ‘hot bedding’ to limit contact between employees

- cleaning each room thoroughly between uses, including changing and washing linen.

On transport:

- avoiding close contact during transport, including reducing the numbers of people travelling on buses and aircraft.
- thorough cleans between passenger loads getting off, and those getting on
- temperature testing at airports for passengers boarding aircraft
- people with symptoms not travelling, and to immediately isolate, and seek medical advice.
- reducing FIFO and DIDO during the COVID-19 to minimise the mass movement of people.

All mines in Queensland are being asked to provide a COVID plan that covers their workers.

Mines Minister Anthony Lynham said all state, territory and national resources ministers are in agreement that the resources sector remains essential to Australia's economy, but that public safety is the 'number one priority'.

'We expect that all companies will continue to improve their operations and constructively engage with stakeholders, including workers and the local councils,' Dr Lynham said.

[Source: QLD Minister for Natural Resources, Mines and Energy Anthony Lynham media release 26/03/2020]

Restructuring and Insolvency

United Kingdom | Temporary COVID-19 relief for companies and directors announced

UK Business Secretary Alok Sharma has released a statement announcing a range of COVID-19 measures, including measures aimed at supporting companies to avoid insolvency/temporary relief for directors.

Measures include:

- **Three month safe harbour for directors:** a three month suspension of wrongful trading laws (ie under the UK Insolvency Act 1986 it is an offence for a company director to continue to trade if they know the business is unable to avoid going into liquidation). Mr Sharma said that the measures is intended to enable 'directors to keep their businesses going without the threat of personal liability'. The suspension will apply retrospectively from suspending 1 March 2020 for three months.
- **Other measures:** The Business Secretary has also announced that the government will make changes to enable UK companies undergoing a rescue or restructure process to continue trading, giving them breathing space that could help them avoid insolvency. This will also include enabling companies to continue buying supplies, such as energy, raw materials or broadband, while attempting a rescue,

Announcing the measures, Mr Sharma said that the measures will 'reduce the burden on business, giving bosses much-needed breathing space to keep their workers employed and their companies going'.

The IoD supports the measures

Prior to the government's announcement, The Institute of Directors issued a media release calling on the UK government to both: a) relax existing insolvency obligations - including a moratorium on the current offence of wrongful trading - on a temporary basis in order prevent a large numbers of company collapses; and b) temporarily suspend of the ability of creditors to present winding-up petitions.

In a statement welcoming the government's announcement, Director General of the Institute of Directors (IoD) Jonathan Geldart said that the IoD 'is very pleased the government has listened to the concerns of directors and announced these welcome measures. During the current crisis, directors are facing immense challenges and these are pragmatic steps to provide relief during this unprecedented period. The temporary suspension of "wrongful trading" insolvency provisions will help to avert entirely preventable corporate collapses. It's absolutely right that the Government should look to prioritise jobs and business survival.'

[Sources: [registration required] The FT 26/03/2020; 29/03/2020; IoD media releases 25/03/2020; 28/03/2020]