Governance News: COVID-19 Special Edition
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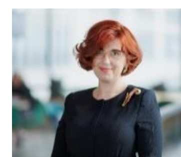
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COVID-19: In Brief | ASIC has released an FAQ on the calculation of estimated retirement impacts relating to the superannuation early access scheme. Separately, the Conexus Institute, Actuaries Institute and Super Consumers Australia have jointly released an Information Sheet 'designed to be consistent' with ASIC's position to assist funds to provide their members with more meaningful estimates 26

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COVID-19: Key Developments

Top Story | Are you covered? COVID-19, directors' insurance & liability risks

MinterEllison has released an article reflecting on the challenges directors are facing in the current circumstances, and will face over the coming months from a risk management perspective. The article provides expert insights into the considerations directors should take into account and the possible consequences of failing to adequately prepare for/meet current challenges.

The article can be accessed on the MinterEllison website here.

Top Story | COVID-19 Restructuring Event businesses to survive and thrive

MinterEllison has released an article reflecting on the critical commercial areas for events businesses to consider when restructuring, in order to best position themselves to thrive post-COVID-19. The article can be accessed on the MinterEllison website here.

COVID-19: The government has directed the ACCC to develop a mandatory code of conduct to govern the commercial relationship between digital platforms and media companies

Key Takeouts

- **Scope/enforcement:** The mandatory Code is expected to cover (among other things) 'the sharing of data, the ranking and display of news content the monetisation and the sharing of revenue generated from news'. It will also 'establish appropriate enforcement, penalty and binding dispute resolution mechanisms'.
- **Timing:** A draft mandatory code will be released for consultation by the ACCC 'before the end of July'. The government's expectation is that the code will be finalised 'soon thereafter'.

Context: As part of the government's response to the Australian Competition and Consumer Commission's Digital Platforms Inquiry Final Report, the government directed the Australian Competition and Consumer Commission (ACCC) to facilitate the development of voluntary codes to address bargaining power imbalances between digital platforms and news media businesses at the end of 2019.

The government indicated at the time if an agreement was not forthcoming, it would develop alternative options to address concerns raised, including the creation of a mandatory code.

[Note: For an expert summary of the government's response to the ACC report, see: Government's support of ACCC Digital Platforms Inquiry 13/12/2020]

ACCC to develop a mandatory code

In a joint statement Treasurer Josh Frydenberg and Minister for Communications, Cyber Safety and the Arts Paul Fletcher said that because of the lack of progress on a voluntary code, including lack of progress towards agreement on the question of payment by digital platforms for content, and the impact of COVID-19 on the media sector (eg sharp decline in advertising revenue) the government has now directed the ACCC to develop a mandatory code.

Announcing the decision, Mr Fletcher and Mr Frydenberg said that 'government is delivering a regulatory framework that is fit for purpose and better protects and informs Australian consumers, addresses bargaining power imbalances between digital platforms and media companies, and ensures privacy settings remain appropriate in the digital age'.

Code coverage?

- **Digital platforms to pay for content** The Code will cover (among other things) 'the sharing of data, the ranking and display of news content the monetisation and the sharing of revenue generated from news'.
- **Enforcement mechanisms:** The mandatory code will also 'establish appropriate enforcement, penalty and binding dispute resolution mechanisms'.

Timing: A draft mandatory code will be released for consultation by the ACCC 'before the end of July'. The government's expectation is that the code will be finalised 'soon thereafter'.

Response? The AFR quotes Nine CEO Hugh Marks as saying, 'We congratulate the government for taking swift and decisive action on this important issue. Now, more than ever, it's important the global technology companies take some responsibility for contributing to our society through financially supporting the creation of quality Australian content…We look forward to working constructively with the government to get the settings in place for this to operate in a simple manner.'

[Sources: Treasurer Josh Frydenberg and Minister for Communications, Cyber Safety and the Arts Paul Fletcher media release 20/04/2020; [registration required] The AFR 20/04/2020]

COVID-19: Committed to a 'market-led solution': The government will engage constructively with Virgin Australia's administrator to ensure Australia maintains two commercially viable airlines

Virgin Australia Group has announced that it has entered voluntary administration 'to recapitalise the business and help ensure it emerges in a stronger financial position on the other side of the COVID-19 crisis'.

Virgin Australia Group CEO Paul Scurrah, said the decision is 'about securing the future of the Virgin Australia Group and emerging on the other side of the COVID-19 crisis…Australia needs a second airline and we are determined to keep flying. Virgin Australia will play a vital role in getting the Australian economy back on its feet after the COVID-19 pandemic by ensuring the country has access to competitive and high-quality air travel.'

Virgin Australia will continue to operate its scheduled international and domestic flights.

The Group's Board of Directors has appointed Deloitte as voluntary administrators and a number of its subsidiaries'. The administrators will be supported by Virgin Australia Group's current management team, led by CEO Paul Scurrah, and will work closely with team members, suppliers, and partners throughout the process.

The statement adds that Velocity Frequent Flyer, while owned by the Group, is a separate company and is not in administration.

Government position: In a statement acknowledging the announcement, Ministers Michael McCormack and Josh Frydenberg said that:

- **The government 'remains committed to two commercially viable airlines operating domestically** across Australia' and that the government will ensure that the 'ACCC strongly enforces competition laws so airlines are able to compete effectively as the industry rebuilds'
- **The government's preference 'continues to be for a market-led solution'.** To this end, the government will 'engage constructively with Virgin Australia's administrator to ensure Australia maintains two commercially viable airlines'. The government's objective is to 'help keep as many employees as possible in their jobs, a second major domestic airline in the sky, prices down and competition maintained so our economy recovers strongly on the other side of the coronavirus pandemic'. Macquarie Group CEO Nicholas Moore has been appointed to lead the government's engagement with the administrator.

[Sources: ASX Announcement: Virgin Australia 21/08/2020; Joint media release Deputy Prime Minister Michael McCormack and Treasurer Josh Frydenberg 21/08/2020]

COVID-19: ASIC cautions firms over lax control frameworks: What works in the office, may not work sufficiently well in the WFH environment

The Australian Securities and Investments Commission (ASIC) has called on firms to ensure 'continued compliance with their regulatory obligations' in light of changed working arrangements due to COVID-19. With many staff working remotely, ASIC said that firms need assess the 'effectiveness of their business continuity plans and alternative working arrangements so as to comply with all regulatory requirements' including ensuring monitoring and supervision controls are in place.

ASIC says that it has 'observed that control frameworks of some firms that were effective when most staff were office-based may not be effective in a broadly home-based environment'. For example, ASIC recently intervened to prevent Sportsbet from offering bets over the S&P/ASX 200 Index following concerns that the bets constituted a financial product that Sportsbet was not licensed to offer. ASIC's action resulted in the withdrawal of the product. According to ASIC, Sportsbet cited challenges in implementing its control framework given many staff were working remotely.

ASIC adds that it is monitoring firms and markets for potential misconduct and will not hesitate to take action in appropriate circumstances. ASIC directs firms to refer to ASIC's guidance around its expectations here.

[Source: ASIC media release 16/04/2020]

In Brief | COVID-19: WFH arrangements the 'new normal' for some workers? Australia-based Optus call centre staff will reportedly be encouraged to work from home permanently post-pandemic because the shift to working from home has been so successful according to The AFR

[Source: [registration required] The AFR 17/04/2020]

Boards and Directors

COVID-19: ASIC Commissioner John Price reflects on directors duties in the context of the current health crisis

Australian Securities and Investments Commission (ASIC) Commissioner John Price has written a short article on directors' duties in the context of COVID-19, which includes reflections on temporary safe harbour protections.

In essence, Mr Price cautions directors to tread carefully:

> 'Given the possible impact of decisions taken during this time on the long-term sustainability of the companies, directors and officers will need to carefully reflect on their fundamental duties to act with due care, skill and diligence and to act in the best interests of the company. This will include reflection on which stakeholders' interests need to be factored into decisions – including employees, investors and creditors. This continues to be the case in areas where temporary relief has been provided from specific obligations under the law'…
>
> 'In a short space of time, companies will be required to focus on and, most likely, recalibrate aspects of their corporate strategy, risk-management framework, and funding and capital management strategy – among other things. Given the possible impact of decisions taken during this time on the long-term sustainability of the companies, directors and officers will need to carefully reflect on their fundamental duties to act with due care, skill and diligence and to act in the best interests of the company. This will include reflection on which stakeholders' interests need to be factored into decisions – including employees, investors and creditors. This continues to be the case in areas where temporary relief has been provided from specific obligations'…

COVID-19 safe harbour provisions

Commenting specifically on directors' duties in the context of COVID-19 safe harbour provisions (ie the temporary amendments to the Corporations Act 2001 (Cth) providing relief for directors from potential personal liability for insolvent trading) Mr Price emphasised the conditional and the limited nature of the changes.

Mr Price observed that directors seeking to rely on the temporary safe harbour will bear the evidential burden of proving that the requirements of the temporary safe harbour provisions are met. 'It may need to be shown that the debt was not effectively incurred before 25 March 2020. If certain conditions are met, the temporary safe harbour relief also extends to a holding company in respect of debts incurred by a subsidiary' Mr Price states.

He also cautioned that the temporary relief 'does not extend to relief from statutory and common law directors duties. These include the duty to act in the best interests of the company as a whole (which can involve directors taking into account the interests of stakeholders beyond shareholders including creditors when the company is in financial distress). These duties also involve the duty to act with care, diligence and good faith and not to use a director's position or information obtained as a director to gain an advantage or cause detriment to the company'.

Referencing the recent High Court decision in Australian Securities and Investments Commission v King [2020] HCA 4 (see: Governance News 12/03/2020), Mr Price said that the 'duties extend beyond those named as directors to officers of the company to those who have the capacity to significantly affect the financial standing of the company'.

Prudent to seek advice

Mr Price 'encouraged' directors to 'seek advice early from a suitably qualified and independent advisor about the company's financial affairs and the options available to manage the disruption caused by COVID-19. Directors should be wary of approaches by unqualified advisors offering unsolicited assistance in dealing with the challenges COVID-19 presents'.

ASIC's approach to enforcement

Mr Price said that ASIC will maintain enforcement activities and continue to investigate and take action 'where the public interest warrants us to do so, against any person or entity that breaks the law. Whether action is taken depends on the assessment of all relevant circumstances, including what a director or officer could reasonably have foreseen at the time of taking relevant decisions or incurring debts'.

[Source: ASIC media release 20/04/2020]

Corporate Social Responsibility

The FT reports that BlackRock is set to advise the EU on how to integrate sustainability factors into banking regulation

The FT reports that BlackRock's Financial Markets Advisory has secured a €280,000 contract from the European Commission to conduct a study into how EU regulators can integrate environmental, social and governance (ESG) factors into the risk analysis and prudential supervision of banks. BlackRock will also reportedly look at how the EU can boost the growth of green finance and the market for sustainable products.

Reportedly BlackRock's study will be one of many reports and consultations that will inform the Commission's final sustainable finance policy.

The FT observes that separately, the Commission is seeking feedback on a new sustainable finance strategy which aims to embed sustainability into Europe's recovery from the coronavirus crisis. Reportedly, the Commission intends to adopt a plan in the second half of 2020.

The FT comments that BlackRock recently secured a contract to manage assets for the US Federal Reserve (including overseeing the purchase of exchange traded funds) as part of the central bank's COVID-19 response efforts.

[Source: [registration required] The FT 13/04/2020]

In Brief | ShareAction has released a report ranking the world's largest asset managers' approaches to responsible investment. Overall, the report concludes that the majority demonstrate a 'substandard approach' and further that PRI and CA100+ membership is not alone indicative of strong performance on responsible investment

[Source: ShareAction report, Point of No Returns: A ranking of 75 of the world's largest asset managers' approaches to responsible investment March 2020]

Shareholder Activism

Top Story | COVID-19: Global collapse of shareholder activist activity?

Lazard's latest quarterly review of global trends in shareholder activism - Lazard's Review of Shareholder Activism – Q1 2020 - has identified that COVID-19 has dramatically decreased levels of activist activity.

Impact of COVID-19

Levels of activism globally have significantly slowed since the outbreak of the pandemic in March

- **Activity in January/February 2020:** Global activism activity in January and February was in-line with historical averages while capital deployed posted a record $13.1bn. 42 campaigns had been initiated at 42 companies with total capital of and $13.1bn deployed in January and February.

- **Since the outbreak of the pandemic in March, global activism activity has significantly slowed.** March 2020's campaign initiation was the slowest since 2013. This quarter has seen a 38% month-over-month drop relative to February 2020 with weekly capital deployed decreasing from ~2.8bn to ~0.3bn.

- **Global trend:** Dampened activity in March has been consistent across the US, Europe and the Asia Pacific region (APAC)

Impact of COVID-19 on existing campaigns (and on activists)

- **Impact on existing campaigns:** Lazard observes that some larger activists have been able to take advantage of current conditions to increase pressure/opportunistically increase their positions. For example, Lazard identifies that Icahn and Starboard have maintained their heightened level of activity despite the pandemic. In other instances, activists have opted to settle, postpone or withdraw campaigns amid the market volatility: 10 campaigns settled in March and multiple others were withdrawn/postponed due to current conditions.

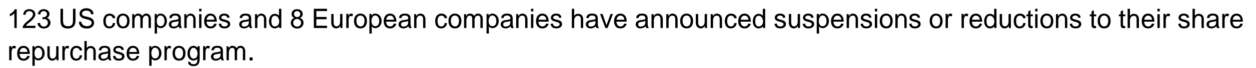
- **Shift in tactics?** No board seats were won through proxy fights in Q1 2020, all 43 were secured through settlements.

- **The impact on activists also varies.** Some smaller activists with lower cash buffers and shorter lock-up periods with LPs have begun to face significant pressure and capital outflows and may be unable to hold positions long enough for the market to recover. In contrast, some outperformers have reportedly employed hedging strategies to mute broader market impacts.

(Necessary) shift in focus

- **Campaigns with an M&A thesis have decreased:** M&A activity has significantly decreased because of COVID-19, with March marking the 2nd slowest month in seven years. Activist campaigns with an M&A thesis have likewise decreased with only 5 of the 16 activist campaigns initiated in March having this objective.

- **Campaigns with a capital returns these have decreased** with only 1 activist campaign having this objective so far in 2020. Lazard attributes the drop to the increased corporate focus on cash preservation. So far, 80 US companies and 201 European companies have suspended or decreased their dividend and



123 US companies and 8 European companies have announced suspensions or reductions to their share repurchase program.

Implications for ESG and shareholder engagement?

- **ESG is predicted to remain a key focus despite the pandemic** given: a) the heightened expectations of large index funds (despite the pandemic); and b) heightened investor focus on governance concerns in light of the crisis (eg actions companies have taken in response to the pandemic, particularly as it relates to human capital management, executive compensation, and business strategy).

- **ESG fund/sustainability oriented fund performance:** Despite the current conditions, environmental, social and governance (ESG) and sustainability-oriented funds outperformed conventional funds globally in Q1. Lazard comments that this strong Q1 performance is in contradiction to recent observations which label sustainability as a 'luxury good'.

On pace for most poison pills since the global financial crisis?

2009 saw 50 poison pills implemented. Q1 2020 has seen 22 implemented (mostly by small and microcap companies) as companies seek to protect themselves from unwelcome activist attacks.

Lazard cautions that despite investors and proxy advisers signalling that they will not automatically oppose poison pills in the current climate (provided there is a valid reason to implement it eg a rapid decline in share price), regardless of market conditions, poison pills with nonmarket, unreasonable terms will likely be rejected.

[Note: Glass Lewis recently released a 'policy note' on Harvard Law School Forum clarifying its existing policies n poison pills and how they will be applied during the COVID-19 pandemic. Glass Lewis says that though it generally opposes the adoption of poison pills because in limiting opportunities for corporate takeovers, they also potentially reduce management accountability, it is not necessarily opposed in the current circumstances provided that certain conditions are met. These conditions are that: a) the duration of the pill is limited to one year or less; b) the company discloses a sound rationale for adoption of the pill as a result of COVID-19; and c) seek shareholder approval of any renewals of the pill. If these conditions are not met, Glass Lewis says that it will recommend opposing the re-election of all board members who served at the time of the pill's adoption. See: Harvard Law School Forum on Corporate Governance and Financial Regulation 11/04/2020]

COVID-19: Predicted impacts on activism going forward?

- **Lazard predicts that the pandemic will create a new class of activist targets** eg companies with complex or vulnerable supply chains.

- **Impact on activist tactics:** The pandemic is likely to result an increased focus by activists on governance failings with regard to human capital, executive compensation, disaster preparedness and risk management which Lazard predicts activists will use to garner sympathies with passive investors' stewardship teams and other governance focused investors.

- **Lazard predicts that levels of activity will increase as the broader economy normalises** and M&A market returns as a viable path to value creation.

[Sources: Lazard's Review of Shareholder Activism - Q1 2020; [registration required] The FT 16/04/2020]

Other Shareholder News

COVID-19: Zero dividends and no bonuses? The FT reports that constraints are expected to be imposed on European companies that receive financial aid

Following the temporary relaxation on state aid rules, the FT reports that financial assistance provided to European Companies is expected to be made conditional.

Capital management: The FT reports companies that receive equity injections by EU member states because of COVID-19, will be required to adhere to a number of conditions. These include that the companies do not: a) buy back shares; b) pay out dividends; or c) provide bonuses.

Companies will also reportedly be required not to take 'excessive risks' or engage in 'aggressive commercial expansion'.

In addition, member states are reportedly expected to put in place measures to 'incentivise redemption' before January 2023.

Exit strategies: Reportedly, businesses that receive an equity injection of more than 20% from a member state will be required to set up an exit strategy from that support and to pay back the aid received by 31 December 2024. If the state's shareholding has not been reduced to below 15% by this deadline, companies will be required to submit a restructuring plan to the Commission for approval.

[Source: [registration required] The FT 16/04/2020]

COVID-19: The FT reports that France, Spain, Austria, Belgium and Greece have extended bans on short selling until mid-May

The FT reports that France, Spain, Austria, Belgium and Greece have extended temporary bans on the short-selling of shares until mid-May, despite pressure from hedge funds to scrap the restrictions. Restrictions in Spain, Austria and Belgium were due to end after the close of business on 17 April and the ban is Greece was reportedly set to expire next week. Reportedly, Italy's ban will continue until mid-June.

The restrictions were reportedly imposed after a sharp market sell-off (30%) in March and are intended to stabilise stock prices. However, in light of the continued economic impact of COVID-19, regulators have reportedly determined that it is not yet time to lift the ban.

According to The FT, certain hedge funds have questioned the extension on the bans on the basis that: a) there is no evidence that short selling by hedge funds exacerbated the sell-off; and b) the situation has in any case now largely stablished so the measure is no longer needed.

CEO of the AIMA Jack Inglis is quoted as saying that 'to suggest that hedge funds exacerbated the sell-off [by] short selling is absurd…As a small part of the investment funds industry, hedge funds cannot and should not be held responsible for market declines…There is clear evidence that much larger traditional funds were heavily selling stocks and that short sales were just a small part of overall market activity.'

FT quotes CEO of the Managed Funds Association Bryan Corbett as saying that the decision to extend the bans is 'bad for investors, bad for markets, and bad for the economy as a whole. We urge other nations to follow the evidence and avoid any further restrictions on short selling'.

IMF position? According to The FT, the IMF has cautioned authorities about the potential negative impacts on liquidity and investors' ability to agree prices and has said that 'restrictions should be temporary and only implemented within a predictable and reliable framework'.

[Source: [registration required] The FT 16/04/2020]

Regulators

COVID-19: ASIC has released an update on regulatory work changes in light of the evolving health crisis

Key Takeouts

- **Further details released:** ASIC has released detailed information about the impacts of COVID-19 on specific projects. This is available on the ASIC website here.]
- **Not every project is on hold:** Various projects including ASIC's work on climate risk disclosure are continuing. Separately, ASIC Report 659 ASIC regulation of corporate finance: July to December 2019

(REP 569) outlines ASIC's continuing focus/work in this area (this is covered in a separate post in this issue of Governance News below).

- **Business as usual functions not impacted**
- **Enforcement:** While ASIC enforcement action will continue, ASIC said there may be some changes to the timing and process of investigations to take into account the impact of COVID-19.

The Australian Securities and Investments Commission (ASIC) has provided an update on its regulatory work and priorities in response to COVID-19, and set out further details on the ASIC activities that will be impacted.

Announcing the update, ASIC Chair James Shipton made clear that though a number of projects had been deferred, in light of the COVID-19 pandemic and its impact on regulated entities it should not be interpreted as an 'abrogation of' ASIC's regulatory work. Rather, Mr Shipton said that the shift in priorities merely recognises that 'some existing activities and new tasks must take precedence over work we would otherwise be doing'.

ASIC expects entities to treat customers fairly, avoid adding further financial harm or burden to consumers, and act to maintain the integrity and efficiency of markets despite the challenges posed by COVID-19.

Some Key Points

[Note: ASIC has released a table identifying each of the projects impacted. This is available on the ASIC website here.]

- **Onsite supervisory work, including ASIC's Close and Continuous Monitoring Program (CCM), is now not possible** in light of COVID-19 restrictions. In light of this, ASIC says it will continue to monitor firms remotely, including through close working and information sharing arrangements with APRA and continue to draw on established working arrangements with senior executives to both supervise and support firms.

  With respect to the CCM program specifically, ASIC says it is deferring CCM onsite work until further notice, including deferral of publication of ASIC's observation of firms' practices from the CCM program. ASIC will continue to progress its preparation for future thematic onsite reviews.

- **Deferred projects:** ASIC said it has delayed a number of activities not immediately necessary, including consultations, regulatory reports and reviews. These include (among others):
  - **Internal dispute resolution review:** ASIC is deferring the release of the updated standards until further notice.
  - **Executive remuneration review:** ASIC will provide feedback to the individual entities the subject of the review, and continue to monitor executive remuneration developments, but otherwise will defer work on the project until further notice
  - **Review of changes to grandfathered commissions:** ASIC is deferring work on grandfathered conflicted remuneration until further notice and accordingly will not ask product issuers for data at this time. However, 'ASIC expects product issuers to turn-off their grandfathered commission arrangements as soon as possible and by no later than 1 January 2021. All rebates and/or reductions in fees should be passed on to consumers as quickly as possible'.
  - **Review of lender responses to consumers experiencing financial difficulty:** ASIC is deferring the next stage of this work until 30 September 2020. However, ASIC says that it intends to 'actively engage with stakeholders on financial difficulty, in particular around hardship requests resulting from the impact of COVID-19'.
  - **Debt collection industry review:** ASIC is deferring the collection of data for this review until 30 September 2020. ASIC will continue to consult with consumer representatives and monitor developments in the debt collection industry.

- **Travel insurance review:** ASIC is deferring this work on the project until further notice but will consider travel insurance as part of its future review of unfair contract terms under the Hayne Commission program of work.
- **Review of life insurance advice reforms** (ie whether legislative reforms to remuneration for life insurance advice (LIF reforms) which commenced in January 2018, have better aligned the interests of financial advisers and consumers). ASIC is deferring its review of life insurance advice as part of the LIF review until further notice. ASIC will give insurers additional time to comply with data collection notices in relation to the LIF review and will collate that data for future use by the review.

▪ **Some projects will continue:** Though many projects have been deferred, a number will continue (though public consultation and/or the release of reports has been deferred in some cases). These include the following (among others).

- **Work on climate risk disclosure by Australia's listed companies:** ASIC is conducting desk-based surveillance work to assess the level of decision-useful climate related disclosure by listed companies. ASIC is also identifying key challenges faced by companies in this area. ASIC notes however, that discussions with companies have been delayed as a result of COVID-19.
- **Audit inspection program:** ASIC is continuing with inspections of audit files remotely through the use of technology and teleconferences but will not be conducting onsite reviews of audit files until further notice.
- **Total and permanent disability insurance industry responses (follow up to REP 633):** ASIC will contact insurers by the end of April 2020 to seek information about the steps taken so far to meet the expectations outlined in the report.
- **Buy now pay later products follow up report:** ASIC's work on this project will continue but ASIC is deferring the finalisation and release of the follow-up report until further notice. ASIC says it will be engaging with the sector on their responses to COVID-19 and engaging with consumer representatives and closely monitoring the use of small amount and alternative credit products, especially by vulnerable consumers.
- **Review of the ePayments Code:** ASIC's work on this project will continue, but ASIC is deferring the release of its second consultation paper on the Code until the second-half of 2020.
- **Platform fees consultation paper (RG 97):** ASIC will continue to develop its proposals on fees and costs disclosure for platforms. However, ASIC is deferring the public consultation paper until further notice.
- **School banking review:** ASIC is providing school banking providers additional time until 31 July 2020 to respond to ASIC's review findings. ASIC will continue work on drafting the school banking review report.
- **Commencement of changes to fees and costs disclosure requirements for managed funds and superannuation (Regulatory Guide 97):** ASIC is currently working on amendments to address issues that have arisen since the release of the revised Regulatory Guide 97. ASIC is also considering amending the transitional arrangements for Product Disclosure Statements (PDSs) to allow entities to come into the new disclosure regime from 30 September 2020 and requiring any PDS given after 30 September 2022 to comply with the new disclosure regime.
- **Annual member meetings for superannuation funds:** ASIC states that it 'is not intending to defer this requirement or provide relief at this time' but will revisit the issue 'if appropriate'.
- **Insurance in superannuation:** ASIC will continue work on this review 'as capacity allows', but the publication of any report will be deferred until further notice.
- **Surveillance of compliance with changes to fees and costs disclosure for superannuation (RG 97):** ASIC is continuing to monitor and may take action where it identifies non-compliance with the current regime. However, ASIC is deferring its review to align with the timing of the implementation of the revised fees and costs disclosure requirements.

- **Natural disaster working group (claims handling):** ASIC will continue to monitor claims handling and outcomes, utilising existing data sources and reports of misconduct, and will take further action if necessary. However, detailed data requests will be deferred until further notice. ASIC says that insurers 'should be prepared to respond to future data collection notices'.

- **Business as usual functions**
  - **Key functions will remain available,** including registry operations and services, receipt of whistleblower, breach and misconduct reports, and general contact points for industry. '
  - **Reporting of remediation programs will continue** though ASIC (unless specifically told otherwise) it will accept updates from licensees consistent with their own internal firm reporting in lieu of the current form and scheduling of reporting arrangements. ASIC expects that 'once the situation normalises' existing reporting arrangements would resume.
- **Notices and data requests:** ASIC advises that where firms have been issued with a notice or received a request for data or information, and need more time to respond (due to COVID-19 related disruption) firms should contact ASIC to seek an extension.
- **Enforcement:** While ASIC enforcement action will continue, ASIC said there may be some changes to the timing and process of investigations to take into account the impact of COVID-19.
- **FSRC reforms?** ASIC said it will also provide further advice on changes to ASIC work implementing the recommendations of the Hayne Royal Commission in light of changes to the Parliamentary timetable and any future Government decisions on those measures.

[Sources: ASIC media release 14/04/2020; Changes to regulatory work and priorities in response to COVID-19]

COVID-19: Climate risk and oversight of non-financial risk remain focus areas for ASIC: ASIC reports on its oversight of corporate finance activity, including measures taken in response to COVID-19

Report overview | ASIC Report 659 ASIC regulation of corporate finance: July to December 2019 (REP 569)

The Australian Securities and Investments Commission (ASIC) has released the final report on its oversight of corporate finance activity between July to December 2019 (REP 569).

The report provides statistical data and guidance on ASIC's regulation of fundraising transactions, financial reporting, mergers and acquisitions, experts, and corporate governance issues and identifies key concerns arising from practices in these areas.

The report also outlines measures taken in response to COVID-19.

Corporate governance

Climate risk

- **Possible further guidance? ASIC is reviewing ASX 100 climate disclosure:** To assist in determining whether further guidance on climate disclosure is required, ASIC is currently examining public climate change related disclosure by 'a number of' (unnamed) ASX 100 companies over the last reporting period with a particular focus on companies reporting under the Financial Stability Board's Taskforce on Climate-Related Financial Disclosure (TCFD) recommendations. ASIC intends to publish its observations once surveillance is complete and will provide direct feedback to the entities involved.
- **Engaging with other regulators to ensure consistency in approach.** ASIC is continuing to liaise with the Australian Prudential Regulation Authority (APRA), the Reserve Bank of Australia (RBA) and Treasury to help ensure a consistent approach to the issue, including on the design of APRA's climate vulnerability assessment (ie APRA's climate change financial risk vulnerability assessment of Australia's largest authorised deposit taking institutions) which is being developed this year and due to be executed next year. This is intended to ensure consistency in the application of scenario analysis and disclosure recommendations.

Oversight of non-financial risk

Referencing the release of Report 631 Director and officer oversight of non-financial risk (REP 631) (see: Governance News 16/10/2020 at p38) ASIC encourages the boards 'of all large listed organisations (including those outside the financial services sector)' to consider the questions around oversight of non-financial risk included in the report and to 'look closely at their own governance practices and accountability structures'.

The key message ASIC says is that entities need to strengthen their oversight of non-financial risk.

ASIC recommends that boards 'actively execute non-financial risk oversight' including by: a) taking ownership of the form and content of information to ensure they are appropriately informed to perform their duties; b) holding themselves and management accountable to operate within risk appetite; and c) considering issues relating to non-financial risk with enough time and frequency to ensure timely and effective oversight.

COVID-19: Measures being taken in response to the impact of the pandemic on corporate activities

The report outlines the measures ASIC has put in place in response to the COVID-19 pandemic. These include the following.

AGMs and financial reporting: ASIC's position as at 20 April 2020

AGMs: ASIC's position as at 20 April 2020

- For companies with a 31 December balance date, ASIC has adopted a formal 'no action' position, confirming that it will take no action if the AGMs are postponed for two months.

[Note: The full text of ASIC's 'no action' position is here. For a summary see: ASIC guidelines for AGMs in a COVID-19 environment 23/03/2020.]

- ASIC says that for companies with 31 March and 30 June balance dates, it has not adopted a formal 'no action' position, but will provide updated guidance over the coming months if necessary.

The Treasurer's powers in relation to AGMs: ASIC says that it is aware that Treasury is currently considering modifying provisions of the Corporations Act relating to general meetings to make it easier for companies to satisfy the statutory requirements for general meetings during the pandemic. ASIC gives no further details but says that it will advise the market of any further developments.

Extension of reporting deadlines

Balance date	Financial reporting
31 December	▪ ASIC says that there are no widespread issues for listed entities in meeting their full-year or half-year lodgement obligations. ▪ ASIC has granted an extension of time to a small number of listed companies, primarily those who had significant operations in certain foreign jurisdictions. ▪ ASIC has extended the deadline for unlisted entities to lodge financial reports by one month for balance dates from 31 December 2019 to 31 March 2020.
31 March	▪ ASIC considers that are widespread indications of any significant issues for listed entities with 31 March 2020 balance dates in meeting their full-year and half-year financial reporting obligations. ▪ ASIC will consider applications to extend the reporting deadline for individual listed entities in appropriate circumstances. These applications should be made at least 14 days prior to the normal reporting deadline.

	▪ ASIC has extended the deadline for unlisted entities to lodge financial reports by one month for balance dates from 31 December 2019 to 31 March 2020.
30 June	ASIC has no 'formal position at this time' but will provide updated guidance as necessary over coming months.

In addition ASIC has granted a one month extension on the submission deadline for full year reports for: proprietary companies and public companies that are not a disclosing entities, managed investment schemes, unlisted disclosing entities, Australian financial services (AFS) licensees that are bodies corporates and also disclosing entities or registered schemes, AFS licensees that are bodies corporates and not also disclosing entities or a registered scheme and AFS licensees that are not bodies corporate.

Unlisted disclosing entities have been granted 75 days and an additional month to submit half-year reports.

Capital raisings

- **Facilitating capital raisings (class order relief for low doc capital raisings)**: ASIC has provided temporary relief to allow 'low doc' placements, rights issues and share purchase plans (SPP) where a listed company has been suspended for a total of up to 10 days in the previous 12-month period. Companies can rely on ASIC Corporations (Trading Suspension Relief) Instrument 2020/289 and ASIC Corporations (Amendment) Instrument 2020/290 without making an individual application (see: ASIC media release 31/03/2020).

- **ASX temporary relief for emergency capital raisings**: ASX has implemented various temporary measures to help facilitate emergency capital raisings by way of temporary class order waivers (class waivers) from the ASX Listing Rules including: a) permitting listed entities to request two consecutive trading halts for up to a total of four trading days to consider, plan or execute a capital raising; b) increasing the 15% placement capacity limit in listing rule 7.1 to 25% for placements of fully paid ordinary securities; and c) waiving the one-for-one cap in listing rule 7.11.3 for accelerated non-renounceable entitlement offers and standard non-renounceable rights issues. The temporary class waivers will expire on 31 July 2020, unless ASX otherwise removes or extends them.

ASIC emphasises that during any COVID-19 related capital raising, it expects directors to continue to act in the best interests of the company (as outlined in Market Integrity Update – COVID-19 Special Issue (31 March 2020)).

Some Key Points: ASIC's regulatory work over the period

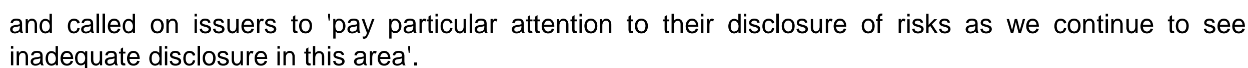
Fundraising

- In the period, 307 original disclosure documents were lodged with ASIC, seeking to raise approximately $6.93 billion. This is an increase on the previous period (1 January 2019 to 30 June 2019) where 216 original disclosure documents were lodged, seeking to raise $3.95 billion.

- There was a significant increase in the magnitude of the largest fundraising offers, with total amounts actually raised in the top ten fundraisings increasing from $2.96 billion in the previous period to $4.49 billion in this period.

- ASIC intervention in fundraising: The number of extensions of exposure periods (14) and interim stop orders (8) was down on the previous period. In the previous period there were 18 extensions of exposure periods and 12 interim stop orders.

- ASIC's top disclosure concerns with prospectuses during the period were: a) inadequate risk disclosure (ie disclosure was inadequate, insufficiently prominent or not tailored); b) disclosure that was 'not balanced'; c) disclosure that did not include sufficient history of directors; d) disclosure that did not adequately explain the business model; and e) unclear/insufficiently detailed disclosure concerning the use of funds. ASIC comments that this is broadly consistent with the findings from the previous period



and called on issuers to 'pay particular attention to their disclosure of risks as we continue to see inadequate disclosure in this area'.

- In 93% of cases, the result of ASIC raising concerns was the issuer providing new or amended disclosure.

Other concerns: Prospectuses for IPOs using a SaleCo and FloatCo structure: ASIC says that it has observed some issues with the use of the SaleCo and FloatCo structure which primarily relate to liability for prospectus disclosures. Specifically, ASIC is concerned that in some cases, the actual business of the issuer or a holding company of the actual business (FloatCo) may not be seeking new capital. ASIC considers that there 'should be nominal capital raising by a FloatCo under a prospectus to ensure the legislative regime in Ch 6D of the Corporations Act applies to all appropriate persons, including the liability regime'.

In addition, ASIC reminds issuers to lodge two prospectuses with ASIC (one for the SaleCo and one for the FloatCo even if they are the same document). ASIC cautions issuers that it two prospectuses are not lodged at the outset, 'and we require a second prospectus to be lodged later, this may delay the issuer's timetable'.

Relief

- **Individual relief from suspension requirement for low-doc rights issues:** ASIC says that in light of the 'unique and novel challenges' faced by companies as a result of the COVID-19 pandemic, it recognises that listed companies may face challenges in satisfying the suspension requirements in s708AA. Accordingly, it will 'closely consider what impact this has had on the circumstances of individual companies when deciding whether to grant relief'.

- **Relief for voluntary escrow arrangements:** ASIC recently consulted - Consultation Paper 328 Initial public offers: Relief for voluntary escrow arrangements and pre-prospectus communications (CP 328) – on proposals to grant legislative relief for: a) voluntary escrow arrangements requested by public companies, professional underwriters and lead managers in connection with an IPO; and b) companies' communications to employees and security holders about an IPO before lodging a prospectus. ASIC says that it expects to release its response, together with any relief by 'mid-2020'.

- **Expansion of the civil penalty regime – no plans to grant relief:** Currently persons liable for defective prospectuses are unable to rely on the due diligence defences (reasonable inquiries and reasonable reliance defences) for a potential breach of s728(4) of the Corporations Act in a civil penalty proceeding. ASIC says that it has 'declined to give any form of relief that would allow an entity to rely on the due diligence defences for a potential breach of s728(4). Our present view is that this kind of significant amendment may be a matter for legislative reform'.

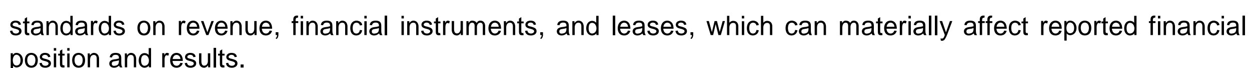
Policy updates

- **Design and distribution obligations:** ASIC consulted on proposed administration of the new design and distribution obligations - Consultation Paper 325 Product design and distribution obligations (CP 325) - in December 2019. ASIC says that it expects to release a regulatory guide 'later in 2020'. No specific timeframe is given.

Financial reporting

- **Key statistics:** During the period, ASIC reviewed the 30 June 2019 full-year financial reports of 200 entities and raised inquiries with 47 entities on 80 matters.

- **Key concerns:** The largest number of inquiries were about impairment of non-financial assets and inappropriate accounting treatments. ASIC calls on directors and auditors to continue to focus on these issues to ensure that the market is properly informed about asset values and the expected future performance implied by those values. ASIC directs directors and audit committees to Information Sheet 203 Impairment of non-financial assets: Materials for directors (INFO 203) to assist when considering whether the value of non-financial assets shown in a company's financial report continues to be supportable. Directors and auditors are also directed to focus on the impact of the new accounting



standards on revenue, financial instruments, and leases, which can materially affect reported financial position and results.

Mergers and acquisitions

- **Key statistics for the July to December 2019 period:** During this period, the number of independent control transactions commenced increased to 41, compared with 29 in the previous period. The number of unique restructure transactions increased to nine, compared with eight in the previous period.

- **Control transactions:**

  - **A large number of control transactions were effected via a scheme of arrangement** rather than a takeover bid continuing previous trends.

  - **ASIC relief and intervention in control transactions:** Companies most commonly applied to ASIC for voluntary escrow relief from the takeovers provisions of the Corporations Act. Relief relating to relevant interests, bid procedure timing and variation of offer terms or bid class were the next most commonly sought relief type. ASIC comments that this is consistent with the previous period.

  - **ASIC interventions in control transactions:** Most regulatory interventions in control transactions related to schemes of arrangement. ASIC raised issues with offer terms, disclosure of equity derivative positions, shareholder classes and bid structures. One of our primary focuses when reviewing schemes of arrangement is to identify and address concerns about shareholder equality that flow through to class composition and fairness considerations.

  - **Equity derivatives and takeover bids:** During the period, ASIC raised concerns about the use of certain equity swap arrangements in the context of control transactions. Change in format: Going forward, ASIC will provide updates and guidance on regulatory issues in the form of a quarterly newsletter rather than in this format.

Policy updates

- **Chapter 6 relief for share transfers using s444GA of the Corporations Act:** In January 2020, ASIC issued Consultation Paper 326 Chapter 6 relief for share transfers using s444GA of the Corporations Act (CP 326) in which it proposed to include guidance in Regulatory Guide 6 Takeovers: Exceptions to the general prohibition (RG 6) about when it would grant relief to facilitate a s444GA transfer of this type. ASIC plans to release its final position on later in 2020.

- **Stub equity:** ASIC issued Consultation Paper 312 Stub equity in control transactions (CP 312) and anticipates that it will release its final response in 'the coming months'.

[Sources: ASIC media release 20/04/2020; ASIC Report 659 ASIC regulation of corporate finance: July to December 2019 20/04/2020]

COVID-19: AFCA gives firms more time to respond to complaints

The Australian Financial Complaints Authority (AFCA) has announced that it will firms nine days of extra time to respond to complaints due to the COVID-19 pandemic. That is, financial firms now have 30 days (instead of 21 days) respond when AFCA notifies them that a complaint has been lodged. AFCA is also providing as standard, a flat 21-day timeframe to provide an initial response, once the dispute reaches the case management stage.

The changes are a temporary measure which AFCA anticipates will be in place for up to six months and will be reviewed and adjusted as appropriate. All internal dispute resolution refer back timeframes remain unchanged.

Announcing the changes, AFCA CEO and Chief Ombudsman David Locke said AFCA said that the extended timeframe 'recognises the pressure some parts of the financial services industry are under, with unprecedented levels of customer queries and financial hardship requests. It also gives consumers more realistic expectations about when they will get a response…Where the parties are unable to resolve complaints by themselves, the extension provides more time to do things like find the documentation required by AFCA'.

[Source: AFCA media release 16/04/2020]

In Brief | The Australian Financial Complaints Authority (AFCA) issued a statement welcoming two separate court decisions - QSuper Board v AFCA Limited and Lam [2020] FCAFC 55 and Investors Exchange Limited v AFCA Ltd and Lornette Pty Ltd ATF Lornette Superannuation Fund [2020] QSC 74 - which it considers 'support the scope of AFCA's fairness jurisdiction in both its superannuation and general divisions, and the approach AFCA has adopted to its decision making'

[Source: AFCA media release 17/04/2020]

In Brief | AFCA has announced the appointments of Natalie Cameron as Investments and Advice Lead ombudsman and Heather Gray as superannuation lead ombudsman. Ms Gray will commence with AFCA on Monday 18 May, while Ms Cameron will start in the role on Monday 22 June

[Source: AFCA media release 17/04/2020]

Financial Services

Hayne referral: ASIC has commenced proceedings against Youi

The Australian Securities and Investments Commission (ASIC) has commenced proceedings in the Federal Court against Youi Pty Ltd (Youi) for alleged breaches of the Insurance Contracts Act 1984 (Cth) (ICA), in connection with its handling of a building and contents insurance claim following an extreme weather event.

The proceedings relate to a case study referred to ASIC by the Financial Services Royal Commission.

[Note: For discussion of the case study see: Financial Services Royal Commission Volume 2 Final Report (p425-428).]

Context

Following a severe hail storm that caused damage to the roof, the policyholder first made an insurance claim in January 2017. Youi accepted the claim on 15 February 2017. However, the roof repairs were not completed until 18 May 2018. Until the repairs to the roof were completed, the property was (allegedly) left structurally insecure and in a condition that allowed further damage to the property.

ASIC's allegations: breach of the Implied Term of Utmost Good Faith

Broadly, ASIC alleges that Youi's handling of the claim, which allegedly resulted in resulted in delays in completing the necessary repairs, and allowed further damage to the property, was inconsistent 'with commercial standards of decency and fairness with due regard to the interests of an insured' in breach of s13 of the ICA.

Relief sought: ASIC is seeking declarations of contraventions of the ICA and ancillary orders, including costs against Youi.

ASIC comments that at the time that this (alleged) (mis)conduct took place, the ICA did not impose any pecuniary penalties for a breach of the duty of utmost good faith and that this has since changed.

[Note: The originating process and concise statement detail ASIC's allegations and the relief sought in more detail. The concise statement is here. The originating process is here.]

Removal of the claims handling exemption?

Following earlier consultation, the government recently released a draft Bill and regulations — [exposure draft] Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Bill 2020: claims handling; [exposure draft] Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers) (Claims Handling and Settling Services) Regulations 2020: claims handling – for consultation.

If passed, the proposed legislation would: 1) remove the exclusion of insurance claims handling and settlement services from the definition of a 'financial service' in the Corporations Act 2001; 2) make handling and settlement of an insurance claim, or potential insurance claim, a 'financial service' under the Corporations Act 2001; and 3) tailor application of the existing financial services regime to the new financial service of handling and settling an insurance claim. Consultation closed on 10 January.

The draft legislation proposes to implement Financial Services Royal Commission recommendation 4.8 (removal of the insurance claims handling exemption). (For a summary of the draft legislation see: Governance News 04/12/2019 at p14.)

[Source: ASIC media release 16/04/2020]

Ten things firms should be doing to prepare for LIBOR transition now: Regulators have said that firms should continue to assume that LIBOR will not be supported beyond 2021, despite COVID-19

Key Takeouts

- The Australian Securities and Investments Commission (ASIC), the Australian Prudential Regulation Authority (APRA), and the Reserve Bank of Australia (RBA) have 'reiterated the importance' of institutions planning and 'acting now to deal with the end of LIBOR' (London Interbank Offered Rate) (which will not be supported beyond 2021)
- ASIC cautions that failure to adequately prepare for the transition could result in 'significant reputational, operational and legal risks to financial institutions could be realised, risking disruptions in financial markets'.
- ASIC has outlined some suggested examples of what it (and what APRA) consider to be 'best practice' for risk mitigation measures and has called on all institutions to consider how these examples may be relevant in the context of their own LIBOR transition planning.

Context: In May 2019, the Australian Securities and Investments Commission (ASIC) wrote to the CEOs of selected major Australian financial institutions – supported by the Australian Prudential Regulation Authority (APRA), and the Reserve Bank of Australia (RBA) – requesting information about their preparations for the end of LIBOR (London Interbank Offered Rate) at the end of 2021.

Specific feedback on their preparations was provided to institutions who responded to ASIC's request. General feedback has now been released.

Feedback from institutions

- **The responses confirmed that the overall impact of LIBOR in Australia is substantial**: The aggregate notional LIBOR exposure of respondents is approximately A$10 trillion, with 40% of that expected to mature after the end of 2021 (when the continuation of LIBOR will no longer be supported by the UK Financial Conduct Authority).
- **The level of preparedness across different industry segments varied** with some respondents demonstrating that significant planning was underway for LIBOR transition while in other cases work was 'yet to commence in earnest'.
- **Responses also indicated that entities are continuing to write LIBOR-linked contracts** (due to liquidity concerns in alternative reference rates (ARRs)).

- **The regulators consider it imperative for institutions to take steps to plan and act now** to 'deal with the end of LIBOR' or risk potential 'significant reputational, operational and legal risks to financial institutions could be realised, risking disruptions in financial markets'.

Impact of COVID-19?

ASIC states that though it recognises that 'disruptions from the COVID-19 pandemic may affect some institutions' transition plans', it expects institutions to 'continue under the assumption that the end of 2021 remains the target date'.

As such, the expectation is that institutions take steps to prepare accordingly.

Best practice: 10 considerations for institutions to consider in the context of their own LIBOR transition planning

ASIC outlines a number of examples of actions that have been taken by the 'better prepared' respondents which it considers 'best practice' in preparing for and mitigating risks of LIBOR transition.

1. **Formalise a LIBOR transition program** identifying risks, mitigation strategies, and timelines. The program should be overseen by an 'appropriate senior manager' responsible for/accountable for program delivery.

2. **Conduct a comprehensive assessment of how LIBOR affects an institution's business and quantify LIBOR-related risks.** ASIC observes that the ability to repeat the identification process easily will assist institutions in monitoring their LIBOR exposure over time. ASIC adds that the writing new LIBOR-based contracts expiring post-2021 should be' carefully justified and closely monitored'.

3. **Seek legal advice on contract amendment and fall-back provisions.** 'Starting this process early is the most prudent approach' ASIC states.

4. **Assess readiness of IT systems and infrastructure and ensure they can process contracts that reference overnight rates.** Institutions are encouraged to explore how they can transact in various ARRs if they have not already done so. Plans to update and test these systems as transition progresses should also be prioritised.

5. **Keep up to date with market developments and coordinated actions being taken by industry.** Well progressed institutions were observed to maintain up-to-date information on market accepted protocols and upcoming key events. ASIC adds that various industry consultations and guidance on good practice, including results for pre-cessation fall-backs by the International Swaps and Derivatives Association (ISDA), are expected to be finalised in 2020 and it 'encourages' institutions to adopt these recommendations.

6. **Plan for both base and alternative scenarios, including the adoption of various ARRs**. ASIC suggests that conducting scenario analysis under the assumption that no additional transition time will materialise is the most prudent approach. ASIC further suggests that term rate expectation should also be managed. 'Although there are multiple benchmark administrators currently developing term rates based on ARRs, institutions should be prepared for a range of scenarios, including one whereby no term rates will be available post-LIBOR cessation' ASIC states.

7. **Ensure clients are aware of transition risks** through client outreach/communication programs.

8. **Initiate LIBOR transition training programmes for relevant stakeholders**, including staff members, boards and senior management. Institutions are also advised to prioritise client-facing stakeholders and ensure they are familiar with the language used in benchmarks reform, including the range of possible alternative reference rates.

9. **Consider conduct related issues associated with the transition, including the potential for conflict of interest, fair treatment of clients, and asymmetry of information.** ASIC intends to release additional conduct related information and industry guidance on LIBOR transition in 2020.

10. **Ensure there is adequate due diligence, risk assessment, and contingency planning in relation to third-party service providers in the context of LIBOR transition**. 'The responsibility of transition success should be shared between institutions and their service providers. It is important for institutions to do everything they can to ensure they have obtained the best available option' ASIC states.

[Sources: ASIC media release 8/04/2020; Public feedback on 'dear CEO letter' 08/04/2020]

COVID-19: APRA has announced new commencement dates for six prudential and reporting standards

The Australian Prudential Regulation Authority (APRA) has announced new commencement dates for six prudential and reporting standards.

In revising its implementation dates, APRA says it sought to balance the need to ensure its prudential framework remains fit for purpose by enabling APRA-regulated entities to focus their time and resources on dealing with the impact of COVID-19.

Industry	Prudential Standard/Policy Proposal	Original commencement date	New commencement date
Cross-industry	CPS 226 Margining and Risk Mitigation for Non-Centrally Cleared Derivatives (phase-in of initial margin requirements)	1 September 2020, 2021	1 September 2021, 2022 APRA will defer the next two phase-in periods of initial margin requirements for non-centrally cleared derivatives as set out in CPS 226 by 12 months, consistent with the joint decision by the Basel Committee on Banking Supervision and the International Organisation of Securities Commissions.
	CPS 234 Information Security (third-party arrangements transition provision)	1 July 2020	Six-month extension to 1 January 2021 will be considered on a case-by-case basis APRA says that it will consider requests for a six-month extension by regulated entities on a case-by-case basis. Entities seeking an extension must advise APRA of the nature of their third-party arrangements, and how they are monitoring the risks associated with these arrangements.
Banking	APS 220 Credit Risk Management APS 222 Associations with Related Entities ARS 222.0 Exposures to Related Entities ARS 222.2 Exposures to Related Entities – Step-in risk	1 January 2021	1 January 2022 APRA says that it expects ADIs not to actively increase exposures to their overseas banking and insurance subsidiaries without prior consultation with APRA.

APRA says that it will formally amend the commencement dates for affected prudential and reporting standards in due course.

Product responsibility under the BEAR: APRA notes that its work on product responsibility under the Banking Executive Accountability Regime (BEAR) has now been included into its work on the Financial Accountability Regime (FAR). APRA says that it intends to release more information on product responsibility when the government consults on the exposure draft legislation and the implementation timeframe for the FAR.

[Source: APRA media release 16/04/2020]

COVID-19: From next week, superannuation funds will be required to provide APRA with weekly data on the on the early release super scheme

From 29 April, superannuation funds will be required to provide the Australian Prudential Regulation Authority (APRA) with weekly data including the number and value of early release benefits paid to superannuation members and the processing times of those payments, to assist the government, APRA and other stakeholders in monitoring the take up of the new scheme and to 'ensure licensees are processing eligible applications in a timely manner'.

Firms are expected to use the Early Release Initiative (ERI) data collection form provided by APRA to report data on a weekly basis. This form (and accompanying worked example and FAQs) is available on the APRA website here.

Data will be published: APRA intends to publish the data at both the industry and fund level.

Timing: The first ERI data collection is due on 29 April 2020 for information as at 26 April 2020.

New reporting standard? APRA says that reporting 'is expected on a best endeavours basis' but that APRA will implement 'reporting through a legally binding reporting standard if the response from industry does not meet the objectives of the data collection'.

[Sources: APRA media release 21/04/2020; Reporting requirements for superannuation entities]

COVID-19: Early release of superannuation scheme: APRA says that it expects funds to release funds to members within five days in most cases

The Australian Prudential Regulation Authority (APRA) has published two new frequently asked questions (new FAQs 11 and 12) setting out its expectations for superannuation trustees on the release of benefits under the COVID-19 temporary early access to superannuation provision.

Processing times for early release of superannuation: payments should usually be made within five business days (with some flexibility)

APRA expects that:

- payments will generally be made within **five business days** of receipt of a determination from the ATO (unless the RSE licensee's automated checking has identified a red flag)
- in 'exceptional' cases, where a 'red flag' has been identified and additional fraud or other verification steps are required, or where the payment is being made from interests held in defined benefit funds 'APRA expects the RSE licensee to make payments as expeditiously as possible' (but does not specify a timeframe beyond this)

APRA 'also acknowledges that these timeframes may extend slightly where an RSE licensee experiences a high volume of applications at any particular time'.

APRA adds that the process differs from the usual process for making payments under existing early release grounds, as the application process has additional security controls, and RSE licensees are exempt from undertaking upfront customer verification in accordance with their anti-money laundering and counter-terrorism financing (AML/CTF) obligations.

APRA is 'unlikely to take action against an RSE licensee should a fraudulent payment/s occur' (provided the APRA's guidance is followed)

APRA says that though the AML/CTF Rule exempting RSE licensees from undertaking up-front customer verification means that RSE licensees will, in most cases, have less RSE licensee-verified information upon which to form a view about a payment, APRA considers that 'for the majority of applications it will be reasonable for RSE licensees to depart from their usual fraud control measures in order to ensure payments are made to members as soon as practicable'.

APRA says that should a fraudulent payment(s) occur, APRA 'would be unlikely to take action against an RSE licensee, provided that the licensee is able to 'satisfactorily demonstrate to APRA that it has followed the approach set out in these FAQs'.

In a statement welcoming APRA's guidance Assistant Minister for Superannuation, Financial Services and Financial Technology Jane Hume said 'given the importance of cash flow for many people at this critical time, the Morrison Government expects super funds to be paying members their money as quickly as possible, and within five business days…This is an opportunity for the super funds to demonstrate their commitment to their members at the time they need it the most.'

[Sources: APRA media release 16/04/2020; APRA Frequently Asked Questions; Assistant Minister for Superannuation, Financial Services and Financial Technology Jane Hume media release 16/04/2020]

COVID-19: Early release of superannuation scheme: Temporary relief to support industry to provide affordable and timely financial advice

The Australian Securities and Investments Commission (ASIC) has announced temporary relief measures to assist industry in providing consumers with affordable and timely advice during the COVID-19 pandemic.

Key Points

ASIC Corporations (COVID-19 – Advice-related Relief) Instrument 2020/355 provides temporary relief to:

1. allow financial advisers not to give a Statement of Advice (SOA) to a client when providing advice about the early release scheme, subject to several conditions;

2. permit registered tax agents to give advice about the early release of superannuation to their existing clients without needing to hold an Australian financial services (AFS) licence, subject to several conditions;

3. give advice providers up to 30 business days (instead of 5 business days) to give a SOA after time-critical advice is provided; and

4. enable a Record of Advice (ROA) to be given instead of an SOA, in certain defined circumstances to existing clients of financial advisers.

Temporary no action position

ASIC has also issued a temporary no-action position for superannuation trustees to expand the scope of personal advice that may be provided by, or on behalf of, the superannuation trustee as 'intra-fund advice'. Intra-fund advice is provided free of charge to the recipient of advice.

Further Detail

ASIC Corporations (COVID-19 – Advice-related Relief) Instrument 2020/355: Temporary (and conditional) relief to facilitate advice about early access to superannuation

ASIC Corporations (COVID-19 – Advice-related Relief) Instrument 2020/355 provides relief in relation to the early release of superannuation scheme from the requirements to: a) give an SOA to clients (including when a superannuation trustee gives personal advice to a member); and b) hold an Australian Financial Service (AFS) licence for registered tax agents to give limited advice to their existing clients on the scheme.

The relief measures are temporary and conditional on:

- the client approaching the advice provider for the advice (ie the advice must be unsolicited). ASIC states that it considers 'any means of contact with a client' to be 'unsolicited unless it takes place in response to a positive, clear and informed request from the client for financial product advice about the early release of superannuation scheme'.

- the advice provider providing the client with an ROA: the advice provider (ie the financial adviser or the registered tax agent) keeping, and giving to their client, a record of the advice (ROA) which meets content requirements in the Instrument.

- the advice fee (if any) being capped at $300.

- **Temporary (and conditional) extension of time (30 days) to provide SOAs:** To assist financial advisers in meeting the increased demand for time-critical financial advice (due to the impact of COVID-19) ASIC has provided temporary relief to give advice providers up to 30 business days (instead of 5 business days) to give an SOA after time-critical advice is provided.

- **The relief can only be relied on in certain circumstances:** An advice provider may only rely on this temporary relief measure in circumstances where: a) the client expressly instructs the adviser that they require the COVID-19 advice on an urgent basis because of the adverse economic effects of COVID-19; b) the advice provider reasonably considers this advice is required on an urgent basis because of the adverse economic effects of COVID-19; and c) if the advice involves a recommendation to acquire a financial product and a cooling off period applies, the relevant written statement must be given about the client's rights when the client is given the advice.

- **Existing disclosure requirements continue to apply:** ASIC adds that in addition to these conditions, the existing disclosure requirements in s946C of the Corporations Act still apply eg the disclosure about conflicts and product replacement advice in subsection 946C(2) of the Act that must be provided at the time the advice is provided to the client.

Temporary (and conditional) relief to enable an ROA to be given in certain circumstances

ASIC Corporations (COVID-19 – Advice-related Relief) Instrument 2020/355 provides relief to financial advisers to allow the provision of an ROA to existing clients even though: a) the clients' personal circumstances may have changed as a result of the COVID-19 pandemic; and b) the client sees a financial adviser from the same AFS licensee or practice, but not their original financial adviser.

The measure is subject to the following conditions: a) the client expressly instructs the financial adviser that they require the advice due to the economic effects of COVID-19; b) the financial adviser reasonably considers that the client needs this advice due to the economic effects of COVID-19; c) the client sees the same financial adviser or a financial adviser from the same AFS licensee or practice, but not their original financial adviser; and d) the present advice is in relation to a class of financial product(s) that the client was given advice in relation to previously by the providing entity (or the associated providing entity).

ASIC states that a financial adviser may only rely on this relief if they keep a record of the advice and give this ROA to the client.

No action position

ASIC has also issued a temporary no-action position for superannuation trustees to expand the scope of personal advice that may be provided by, or on behalf of, the superannuation trustee as 'intra-fund advice'. (Intra-fund advice is provided free of charge to the recipient of the advice.)

From 14 April 2020 until 25 September 2020, ASIC does not intend to take regulatory action against the trustee of a regulated superannuation fund solely for failure to comply with s99F of the Superannuation Industry (Supervision) Act 1993 (SIS Act) provided that:

- personal advice is provided by the trustee, or another person acting as an employee of, or under an arrangement with, the trustee;
- the advice is directly focused on advising the member on whether the member should access the COVID-19 early release scheme and is not about other topics or subject matter; and
- the advice addresses: a) the member's need for the early release of superannuation monies (eg cashflow and budgeting relevant for the member); b) government benefits available to the member (eg JobKeeper Payment, income support payments, household support payments, etc); c) the member's alternative sources of support or relief (eg loan or rent relief, existing financial resources and access to the COVID-19 early release scheme from another superannuation fund); and d) the impact on the member's retirement income by accessing the COVID-19 early release scheme, including making reference to household circumstances as needed to provide appropriate advice to the member.

Duration of temporary relief: ASIC says it will consider market developments and consult with key stakeholders before revoking the Instrument of relief and provide 30 days' notice to the industry.

The no action position for superannuation trustees expires when applications for early release can no longer can made.

Surveillance activity: ASIC says it will conduct surveillance activities to monitor the advice provided under the relief, to ensure that advisers, registered tax agents and superannuation trustees are acting in the interests of their clients and members.

AFCA has welcomed the changes: In a statement welcoming the measures, the Australian Financial Complaints Authority (AFCA) said it will take into account ASIC's changed approach to advice about early access to superannuation when dealing with complaints that arise due to COVID-19.

AFCA CEO and Chief Ombudsman David Locke said that AFCA 'strongly welcomes ASIC's relief measures to facilitate advice about early access to superannuation…We note that this includes changes to who can advise people about the early release of their superannuation, and what records these advisors must keep…We will take these changes into account – including the form of the advice and the timeframe extensions – when dealing with complaints that arise due to COVID-19.'

[Sources: ASIC media release 14/04/2020; AFCA media release 21/04/2020]

COVID-19: No need for dividends to be banned and no need for the RBA to provide superannuation funds with liquidity support (at the moment)? The AFR has published an interview with RBA Governor Philip Lowe

The AFR has published a Q&A with Reserve Bank of Australia (RBA) Governor Philip Lowe in which he gives his views on (among other things): the economic outlook in coming months and the timing of the recovery; his views on the payment of dividends by banks; and on the RBA's possible role in assisting superannuation funds to meet liquidity challenges arising from the early release of superannuation scheme.

Some Key Points

- **Economic outlook/timing of the possible recovery:** Commenting briefly on the timing of the possible recovery (in light of recent positive health news) Mr Lowe said that if restrictions are able to be eased, and the virus remains under control, 'that within three or four months we'll start the recovery'. Mr Lowe added that he expects 'the next few months are going to be very difficult and today's data from the RBA is saying that there was a 6% decline in the number of jobs in the country in the past three weeks reminds us just how significant the contraction is. So I hope the effort that we've all put in to reduce the incidence of the virus continues and we can start recovering in a few months' time'.

[Note: Mr Lowe delivered an economic and financial update on 21 April in which he speaks about the immediate outlook for the economy, the nature and speed of the recovery and outlines the impact that the RBA's COVID-19 response package has had to date in more detail. Among other things, Mr Lowe flags that the impact of the pandemic will be felt for some time to come. 'Whatever the timing of the recovery, when it does come, we

should not be expecting that we will return quickly to business as usual. Rather, the twin health and economic emergencies that we are experiencing now will cast a shadow over our economy for some time to come'. The full text is available on the RBA website here.]

- **Priorities for driving productivity post-pandemic:** Asked for his views on what the government's priorities should be to reinvigorate productivity Mr Lowe declined to 'advocate for particular policies' and instead highlighted various policy areas, identified through reports that have been commissioned into the issue, where change should be considered.

  …'we should be looking at how we build and price infrastructure…we should be looking at how we train our students and our workforce so they've got the skills for the modern economy…we should be looking here at how various regulations promote or perhaps hinder innovation and…we should be looking at the flexibility and complexity of our industrial relations system' Mr Lowe said.

- **Early release of superannuation scheme:** Asked whether superannuation funds with liquidity issues should be able to participate in the repo facility Mr Lowe said that at present, the RBA considers that there is no need.

  '..the liquidity withdrawal from the super fund industry as a whole is perfectly manageable for some funds. The withdrawals are going to be quite large though and those funds will have to shrink. Some of the scenarios suggest that up to 20 or 25% of the funds under management could be withdrawn for some particular funds'.

  Mr Lowe went on to say that in light of the fact that the funds have a month to prepare and more time before withdrawals take place, he is 'confident that they will be able to meet the liquidity demands from their members'.

  'If the Reserve Bank was to provide a liquidity support facility, it would need to pass the public interest test and we need to be able to conclude that it was needed to support the stability of the financial system. At the moment, we're not in a position to conclude that'.

- **Payment of dividends by banks:** Asked whether he would prefer banks to forgo paying dividends until the economic impact of the pandemic is clearer, Mr Lowe expressed support for APRA's position that it is appropriate for financial institutions to 'cut bank dividends' but not necessarily cancel them, adding that in his view there is no need for dividends to be 'banned'.

  'You've got to remember that Australia's banks have very high levels of capital ... so they have the ability to pay dividends and some Australians rely on those dividends for their income. So there's a balance to be struck and by cutting back dividends from where they were over the past couple of years, I think we're moving in the right direction to strike the right balance. But I don't think they need to be banned' Mr Lowe is quoted as saying.

[Source: [registration required] The AFR 21/04/2020]

COVID-19: APRA has released a new data collection reporting standard to support the government's implementation of the Coronavirus SME guarantee scheme

Context: Under the Coronavirus SME Guarantee Scheme, the government will provide (eligible) lenders with a 50% guarantee for (eligible) new unsecured loans to small and medium enterprise (SME) lenders. The Scheme will be available for new loans made by participating lenders until 30 September 2020.

More detail about the scheme is available here.

New data collection reporting standard released: To support the implementation of the scheme, the Australian prudential Regulation Authority (APRA) has released a new data collection reporting standard - ARS 920.0 Australian Government Small and Medium Enterprise (SME) Guarantee Scheme - to collect data on key metrics including number of loans approved, number of loans impaired, and number of guarantee claims made and paid, from participating financial institutions. Institutions will be required to report on a weekly basis.

Timing: APRA says that in light of the need to provide the data to government promptly, the usual consultation process for new reporting standards will not apply. The first data collection is due on **1 May** for information as at 17 April 2020.

[Source: APRA media release 17/04/2020]

The Federal Court has made interim orders restraining Mayfair Platinum and Mayfair 101 from promoting debenture products and using prohibited phrases in advertising pending a final determination

Context: As previously reported in Governance News (Governance News 8/4/2020 at p8) The Australian Securities and Investments Commission (ASIC) has commenced proceedings in the Federal Court against Mayfair Wealth Partners Pty Ltd (trading as Mayfair Platinum), and Online Investments Pty Ltd (trading as Mayfair 101) (collectively Mayfair) in connection with the promotion of two debenture products to wholesale investors. Broadly, ASIC alleges that the advertisements on Mayfair's websites and online media were misleading or deceptive because they falsely represented that:

- the products were comparable to bank term deposits and had a similar risk profile to term deposits when they were debentures with a significantly higher risk profile
- the principal investment would be repaid in full on maturity, when investors might not receive capital repayments on maturity or at all, and because Mayfair could elect to extend the time for repayment for an indefinite period
- the products were specifically designed for people seeking 'certainty and confidence in their investments', when investors might not receive interest and/or capital repayments, and could lose some, or all, of their investment
- the products provide capital growth opportunities, when they do not.

Mayfair either denies making these representations, or denies that they are misleading or deceptive, or are likely to mislead or deceive.

As an interim measure, pending the final determination of the proceeding, ASIC applied for an interlocutory injunction to prevent Mayfair from promoting, receiving investment into, and issuing, the Mayfair Products.

Interim orders made: On 16 April 2020, the Federal Court made interim orders restraining Mayfair from promoting their debenture products and prohibiting the use of specific words and phrases in their advertising. The Court declined to restrain Mayfair from issuing and accepting new investments in the Mayfair debenture products.

The interlocutory injunction will continue until further order of the Court.

Mayfair's response: The AFR quotes Mayfair group founder James Mawhinney as saying that from his perspective it's 'business as usual'.

'Regardless of whether or not there is in fact an injunction in place with respect to those two products, we have other products the group is offering and other products the group will shortly release…From our perspective it is business as usual. The show goes on.'

The AFR quotes Mr Mawhinney as reiterating Mayfair's position that Mayfair's advertising/promotion of its products is not misleading or deceptive as claimed by ASIC and that its advertisements were always targeted at wholesale and sophisticated investors, rather than retail investors.

[Sources: ASIC media release 17/04/2020; Australian Securities and Investments Commission v Mayfair Wealth Partners Pty Ltd [2020] FCA 494; [registration required] The AFR 19/04/2020]

COVID-19: In Brief | ASIC has released an FAQ on the calculation of estimated retirement impacts relating to the superannuation early access scheme. Separately, the Conexus Institute, Actuaries

Institute and Super Consumers Australia have jointly released an Information Sheet 'designed to be consistent' with ASIC's position to assist funds to provide their members with more meaningful estimates

[Sources: ASIC updated FAQs: 16/04/2020; Super Consumers Australia, Conexus Institute and Actuaries Institute joint media release and information sheet 16/04/2020]

In Brief | The government has reappointed Carolyn Kay and Jane Wilson to the Future Fund Board of Guardians for a further term. Ms Kay and Dr Wilson joined the Board in 2015

[Source: Joint media release Treasurer Josh Frydenberg and Minister for Finance Mathias Cormann 16/04/2020]

Risk Management

Crisis Planning and Communication

Communicating a positive CEO/executive COVID-19 diagnosis: Suggested considerations to assist in planning and communicating effectively

A recent post on Harvard Law School Forum reflects on the challenges faced by CEOs and CFOs in managing communications around their own health, and more particularly around communicating that they have tested positive for COVID-19.

Public health obligation if not a clear legal requirement? The authors observe that though currently, the Securities and Exchange Commission doesn't require disclosures around the health of a CEO (including Covid-19 illness), some CEOs/executives are electing to disclose their diagnosis. The authors view disclosure as 'a clear obligation to disclose a positive case due to public health concerns and the need for leaders to set an example of transparency'.

Planning COVID-19 disclosure

The article sets out a number of suggested steps for companies to consider taking to plan for and to manage communications in this context.

- Early planning: It's suggested that companies should agree on a communication strategy to enable them to act quickly, decisively and clearly should the CEO/other executive test positive.
- Clarity about who is in charge: Companies should agree on how responsibilities/decision-making will be delegated, should it be necessary to avoid unnecessary confusion on the part of employees, investors and customers.
- Prioritise employees in communications: The authors emphasise that employees should be told first. The communication should (as far as possible) reassure them about the health and safety of the executive and the steps the company is taking to assure the health and safety of the team, as well as the continuity of business as usual. It's suggested that the communication should have a personal tone (rather than a business tone) and ideally should be in the form of a personal communication – a note, or if possible a video - from the CEO. 'Taking the right tone of empathy and calm will allow stakeholders to trust that they are part of the solution when told the truth about the facts' they write.
- Demonstrate leadership: The authors consider that when a CEO tests positive, 'it's an opportunity for them to set an example for the community of being strong, brave, and disciplined about the steps everyone should take to protect themselves and others'. Doing so, may also have other benefits such as also removing the stigma and promoting 'togetherness in the fight'.

[Source: Harvard Law School Forum on Corporate Governance and Financial Regulation 14/04/2020]

Cybersecurity and Technology

FSB consults on effective practices for cyber incident response and recovery

The Financial Stability Board (FSB) has released a consultation report - Effective Practices for Cyber Incident Response and Recovery – outlining practices (providing a 'toolkit) to assist financial institutions in their cyber incident response and recovery activities.

A threat to global financial stability: The FSB considers that 'cyber incidents pose a threat to the stability of the global financial system. In recent years, there have been a number of major cyber incidents that have significantly impacted financial institutions and the ecosystems in which they operate. A major cyber incident, if not properly contained, could seriously disrupt financial systems, including critical financial infrastructure, leading to broader financial stability implications'.

Structure of the 'toolkit'

The paper outlines 46 suggested practices across seven areas.

1. Governance: frames how cyber incident and recovery is organised and managed.
2. Preparation: to establish and maintain capabilities to respond to cyber incidents, and to restore critical functions, processes, activities, systems and data affected by cyber incidents to normal operations.
3. Analysis: to ensure effective response and recovery activities, including forensic analysis, and to determine the severity, impact and root cause of the cyber incident to drive appropriate response and recovery activities.
4. Mitigation: to prevent the aggravation of the situation and eradicates cyber threats in a timely manner to alleviate their impact on business operations and services.
5. Restoration: to repair and restore systems or assets affected by a cyber incident to safely resume business-as-usual delivery of impacted services.
6. Improvement: to establish processes to improve response and recovery capabilities through lessons learnt from past cyber incidents and from proactive tools, such as tabletop exercises, tests and drills.
7. Coordination and communication: to coordinate with stakeholders to maintain good cyber situational awareness and enhances the cyber resilience of the ecosystem.

Timing and next steps: Feedback is due by 20 July 2020. The final toolkit, taking on board the feedback from this public consultation, will be sent to the October G20 Finance Ministers and Central Bank Governors meeting and published.

[Source: FSB media release 20/04/2020; Consultation report: Effective Practices for Cyber Incident Response and Recovery]