Governance News

COVID-19 Special Edition

29 April 2020

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COVID-19 Key Developments

COVID-19: Clarification measures to the JobKeeper Rules announced

On 24 April 2020 Treasury announced a number of measures which will be enacted to clarify the operation of the JobKeeper rules. MinterEllison has prepared an expert summary of the measures here.

COVID-19: Getting the global deal done amid the COVID-19 crisis

MinterEllison has released an article providing expert insight into FIRB and ACCC issues impacting global and multinational transactions with an Australian dimension. The full text of the article is can be accessed here.

COVID-19: ASX amends temporary extra placement capacity waiver

MinterEllison has released an expert summary emergency capital raising measures to help listed entities affected by the COVID-19 pandemic. The full text of the article is can be accessed here.

COVID-19: Boiler-plate disclosure is not enough: ASIC supports increased transparency in capital raisings

The Australian Securities and Investments Commission (ASIC) has released a statement expressing support for the Australian Securities Exchange's (ASX) class waiver decision – Temporary Extra Placement Capacity dated 31 March 2020 and the further amendments to the Class Waiver dated 22 April 2020, as well as, the recent publication of the Compliance Update no 04/20.

Enhanced disclosure requirements

In particular, ASIC says that it supports the enhanced disclosure requirements for placement allocations and Share Purchase Plans (SPP) that are being conducted by companies using the temporary emergency capital raising waiver announced by ASX on 31 March 2020 which 'reflect ASIC's expectation that directors must provide transparent disclosure to the market about the capital raising decisions they are making which are required to be in the best interests of the company'.

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

Commissioner John Price said, 'Directors should act in the best interests of the company in making fundraising decisions. They should consider not only speed and certainty of fundraising but also fairness considerations. Companies should be as transparent as possible and be prepared to explain to their shareholders the fundraising decisions they have made'.

'Boiler plate' disclosure is not enough

Noting that issuers are required to give to ASX and ASIC detailed allocation spreadsheets for capital raisings completed in reliance on the class waiver, ASIC says that it will be 'reviewing the allocation spreadsheets and monitoring the disclosures made by companies about placements, rights offers and SPPs to ensure they are accurate, sufficiently detailed and provide meaningful, rather than "boiler plate" disclosure'.

Capital raisings that do not rely on ASX's waiver

ASIC considers that the enhanced disclosure required under ASX's temporary waiver is also appropriate for other capital raisings that do not need to rely on the waiver and accordingly encourages companies to make these types of disclosures for all placements and SPPs.

ASIC says that it will also be continuing surveillance work following on from the findings of Report 605 and will examine the conduct of licensees and directors in capital raising activities beyond those using the temporary emergency capital raising relief.

[Source: ASIC media release 23/04/2020]

COVID-19: MinterEllison's Perspectives on Cyber Risk 2020 report released

MinterEllison's Cyber Risk report identifies trends and attitudes towards cyber risk over the last year. As 2020 ushers in a global pandemic, these risks and concerns have intensified, and the need for action is more urgent than ever.

A brief summary of the report is available here. The full text can be downloaded here.

COVID-19: The community should have confidence in the COVIDSafe app? OAIC has issued a statement outlining privacy protections

The Office of the Australian Information Commissioner (OAIC) has issued a statement confirming that 'important safeguards have been put in place to protect personal information' collected through the government's COVIDSafe contact tracing app.

Australian Information Commissioner and Privacy Commissioner, Angelene Falk said that OAIC 'has worked constructively with the government to provide advice and as it considered the privacy issues' through its Privacy Impact Assessment (which has been publicly released and is available here.)

Commissioner Falk said that the release of the 'Privacy Impact Assessment has provided transparency and accountability for the use of personal information, and supports community confidence in the app' .

In particular, Commissioner Falk welcomed the government's acceptance of the recommendations made to ensure legal safeguards are in place, including the determination under the Biosecurity Act 2015 to protect information collected by the app which 'ensures that the app must be voluntary, and that personal information collected can only be used for purposes related to contact tracing'. It also puts important deletion and time limitations in place.'

OAIC notes that it: a) will have independent oversight of personal information handling by the app and the National COVIDSafe Data Store; and b) can audit the system and investigate complaints from the public about privacy issues.

OAIC says that it will also be reviewing the proposed legislation and monitoring the implementation of recommendations made by the Privacy Impact Assessment.

[Source: OAIC media release 26/04/2020]

The COVIDSafe app - five key considerations

MinterEllison has released an article outlining five key considerations about the COVID-19 app, looking at how privacy is protected. The article can be accessed here.

COVID-19: Business and banking leaders have endorsed and encouraged uptake of the government's COVID Safe App

In separate statements the Australian Banking Association (ABA) and the Business Council of Australia (BCA) have expressed support for, and encouraged take-up of, the government's COVID Safe App.

CBA CEO Jennifer Westacott said 'we'll be working with our members, the biggest employers in the country, to encourage staff to sign up and help keep Australians safe…Uptake of this app will need to be community driven and we welcome the strict privacy safeguards the government has put in place…Governments, businesses and individuals have made the right decisions so far to combat the worst of the COVID-19 pandemic. We now have an opportunity to continue managing the virus and its impacts on our society and economy as we move forward. The costs of failing to manage the health, social and economic costs of this pandemic would be enormous and generations would pay the price. We cannot afford to waste a second of this unprecedented co-operation across society to work towards recovery.'

ABA CEO Anna Bligh said that bank CEOs will be downloading the app themselves and encouraging staff to do the same. She added, 'It's important the community embraces this app as a way of improving the ability of our front line health workers to trace contacts of those who have tested positive to COVID-19'.

[Sources: ABA media release 26/04/2020; Business Council of Australia media release 26/04/2020]

COVID-19: Managing electronic execution while keeping socially distant

New social distancing rules as a result of COVID-19 have led to a renewed and pressing focus on adopting electronic execution. There are several implications and considerations that organisations need to be aware of to ensure their contracts are still enforceable.

MinterEllison has prepared an article providing expert insight into the issue. The full text is available on the MinterEllison website here.

COVID-19: NSW Electronic execution udpate: Certain legal documents can now be witnessed via Skype, WhatsApp, FaceTime and Zoom

To reduce the need for face-to-face contact during the COVID-19 health crisis, *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020* (NSW) temporarily enables certain legal documents to be witnessed using video conferencing technology (audio visual link).

Audio visual link is defined as 'technology that enables continuous and contemporaneous audio and visual communication between persons at different places, including video conferencing'. In his statement announcing the regulations, NSW Attorney General Mark Speakman cited Skype, WhatsApp, FaceTime and Zoom as examples of technology that would meet the definition.

Documents that may be witnessed by audio visual link include: a will, a power of attorney or an enduring power of attorney (EPOA), a deed or agreement, an enduring guardianship appointment, an affidavit (including an annexure or exhibit to the affidavit),or statutory declaration.

The regulations require that the witness must: a) observe the signatory signing the document in real time; b) attest or otherwise confirm that the signature was witnessed by actually signing the document (or a copy of that document); c) be reasonably satisfied that the document the witness signs is the same document (or a copy of that document); and d) endorse the document (or copy of the document) with a statement that specifies the method used to witness the signature of the signatory and the document was witnessed in accordance with the regulations.

Commencement: The regulation commenced on 22 April.

[Sources: NSW Attorney General Mark Speakman media release 22/04/2020; Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020 (NSW)]

COVID-19: The government will provide updates on the economic impact of COVID-19 ahead of the October budget

Treasurer Josh Frydenberg and Finance Minister Mathias Cormann have issued a statement confirming that ahead of the 2020-21 Budget on 6 October 2020:

- the Treasurer will provide a Ministerial Statement to the House of Representatives and the Minister for Finance to the Senate on 12 May 2020. The statement will outline the impact of the coronavirus on the economy and the Government's actions to date.
- The government will also provide an economic update on the economic and fiscal outlook in June, following the release of the March quarter National Accounts.

The statement adds that 'Australia entered the coronavirus crisis from a position of economic strength…The measures we have implemented are temporary, targeted and proportionate to the challenge we face and will ensure Australia bounces back stronger on the other side, without undermining the structural integrity of the budget and maintaining our commitment to medium term fiscal sustainability'.

[Source: Joint media release Treasurer Josh Frydenberg and Minister for Finance Mathias Cormann 28/04/2020]

In Brief | COVID-19: The AICD is calling on the Federal Government to implement an urgent relief package for the NFP and charities sector to support their financial sustainability through the COVID-19 crisis

[Source: AICD media release 23/04/2020]

Boards and Directors

COVID-19: The impact of the pandemic is changing perceptions of the value of technology skills/experience? The AFR reports that CIOs and CDOs are increasingly viewed as CEO material

Snapshot

- The AFR reports that the sudden reliance on technology to keep operating (due to COVID-19 restrictions) has seen a shift in perceptions of the value of technology experience/knowledge in leadership ranks.
- The AFR quotes Chief Digital Officer at Griffith University Many Ross as saying that Chief Information Officers and Chief Digital Officers are increasingly viewed as potential future CEOs both because their technical knowledge/expertise/experience and because because of their experience in crisis management through managing 'mini-crises' eg security breaches and network failures

[Sources: [registration required] The AFR 23/04/2020]

Remuneration

COVID-19: COVID-19: The UK High Pay Centre has released a report into the impact of the economic downturn on executive pay

Report Overview | High Pay Centre Report, How are UK-listed companies responding to the economic shutdown?

Key Takeouts

- In response to the COVID-19 downturn, an estimated 37% of FTSE 100 firms (as at 22 April) have reduced CEO pay.
- The report raises concerns that though some companies have acted to reduce executive remuneration in response to the COVID-19 economic downturn, very few have done so through reducing executive bonuses/awards under Long Term Incentive Plans (LTIPs) which are often the most lucrative aspect of executive pay plans.
- The report also raises concerns about the quality of decision making and the resilience/stewardship at large UK listed entities receiving support under the UK government's Coronavirus Job Retention Scheme (scheme) in light of the scale of dividends and executive bonuses paid out over recent years.
- The report suggests that receipt of support under the scheme is likely to further increase pressure on companies to raise their ESG standards.

The UK High Pay Centre has released a report into the impact of the COVID-19 downturn on executive remuneration at FTSE 350 companies.

Some Key Points

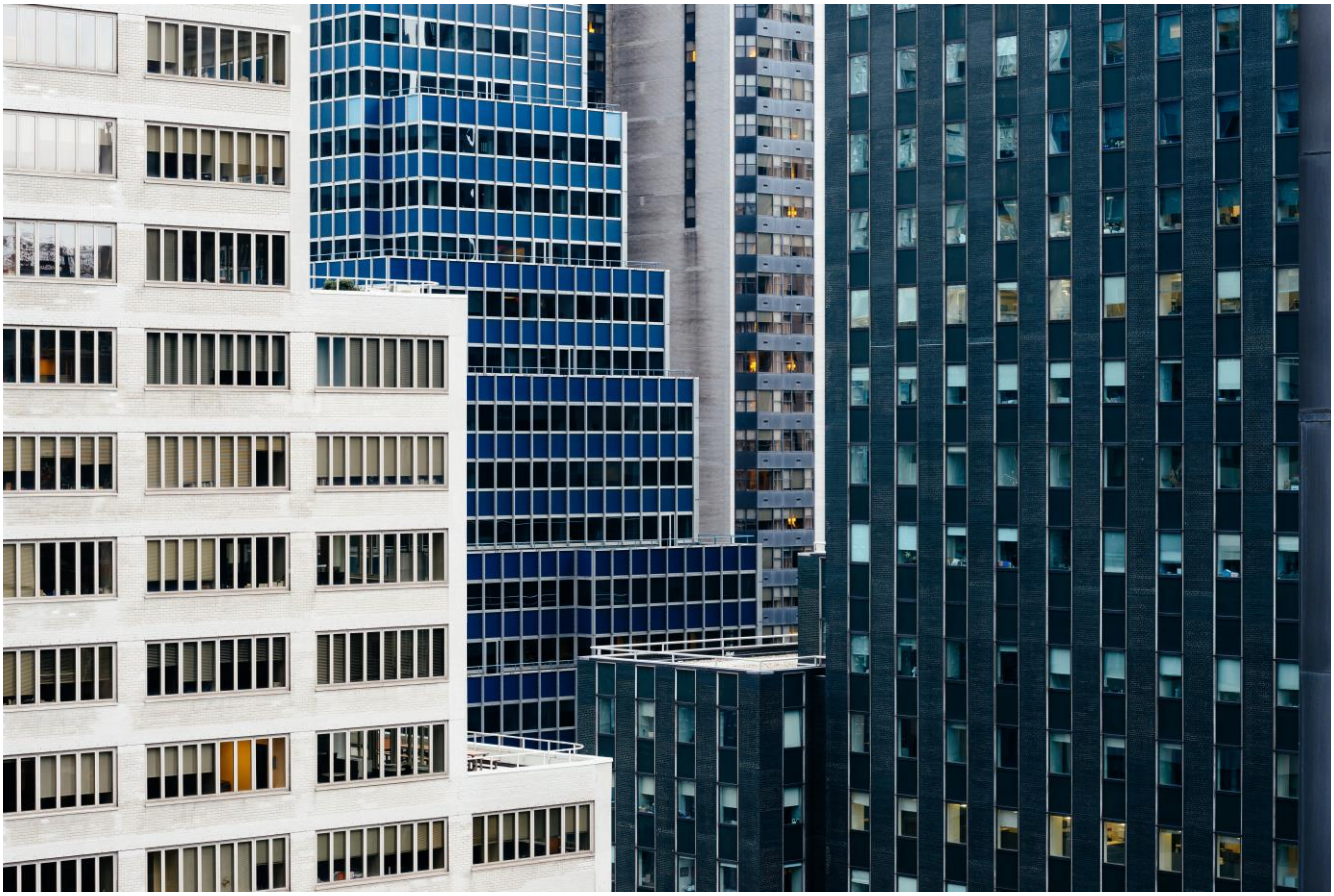
- **Context - The UK Coronavirus Job Retention Scheme:** Under the UK government's Coronavirus Job Retention Scheme, staff of eligible companies will be placed on furlough with 80% of their wage costs covered by public money. The Office for Budget Responsibility has estimated £42 billion as the total cost of the job retention scheme.
- **Take up of government job retention scheme:** As at 22 April, at least 18% of FTSE 100 companies and 26% of FTSE 250 companies (equating to 23% of the FTSE 350) have indicated that they will be taking advantage of the scheme.

- Historical pay trends – questions of 'resilience and stewardship'?: The High Pay Centre found that the FTSE 100 companies known to be using the scheme paid a total £321 million in CEO pay and £26bn in dividends from £42bn profits between 2015 and 2019. This equates to an average per year of £3.6m in CEO pay, £293m in dividends and £472m in profits over the same period. The report argues that 'the rewards lavished on executives and investors in recent years by major companies that now require public funding to sustain them through the shut down raises questions about their resilience and stewardship'.
- Impact of the COVID-19 on executive remuneration to date: In response to the downturn, an estimated 37% of FTSE 100 firms (as at 22 April) have reduced CEO pay.
- Where the cuts have been made: As at 22 April, and estimated 37% of FTSE 100 companies and 31% of FTSE 250 companies (equating to 33% of the FTSE 350) have reduced executive pay.
  - The most common measure of pay reduction has been a 30-50% reduction in CEO salaries (though the Pay Centre observes that it is not always clear whether this represents a reduction to the annual salary or on a pro-rata basis for the duration of the lockdown).
  - 13% have cut the bonuses and long-term incentive payments that comprise the biggest component of executive pay awards.
  - 33% of FTSE 100 companies and 47% of FTSE 250 companies (equating to 42% of the FTSE 350) have either withdrawn proposed dividends in 2020, or made announcements electing not to offer a dividend as a result of the current economic uncertainty. The report suggests it is possible that these figures will increase depending on the impact of the pandemic and the shutdown on companies' results.
  - Some companies have announced pay reductions across senior management teams more broadly by between 7.5 and 20%.
- Design of bonuses/LTIPs may mean the COVID-19 downturn has minimal impact? The High Pay Centre observes that in light of the complex metrics used to award incentive pay, for example, incentives are not awarded based on company earning/shareholder returns alone but are often tied to performance relative to rival companies (rather than absolute terms), it is not inevitable that executive incentives will necessarily be reduced as a result of the shutdown.

Conclusions

- The High Pay Centre considers that the government's Coronavirus Job Retention Scheme to be vital in protecting jobs and living standards throughout the crisis, and is to be welcomed and fully supported as such.
- Inevitable contraversy: Profits, executive remuneration and dividend payments at the companies now using public money to pay the wages of furloughed workers are likely to prove particularly controversial.
- Appropriate to qusetion decision making at companies receiving government support: The High Pay Centre considers that it would be 'excessive to blame companies' for their reliance on the scheme', but that it is appropriate to 'question the resilience of companies that have lavished billions on shareholders and executives in recent years, but now depend on public funding to cover their costs throughout what will hopefully be a brief pause in economic life'.
- COVID-19 is likely to increase pressure on firms to strengthen environmental, social and governance standards? The report suggests that 'future public opprobrium for companies that engage in practices that have damaged the reputation of businesses in recent years such as pollution, pay inequality or tax controversies will be particularly severe for those firms that have required an effective government bailout to sustain them through the shutdown'.

[Sources: High Pay Centre media release 26/04/2020; High Pay Centre Report, How are UK-listed companies responding to the economic shutdown?; The Guardian 27/04/2020]



Pre-pandemic trends in US CEO remuneration: Equilar study identifies there was minimal growth in CEO pay in fiscal year 2019

Equilar has released its analysis of trends in CEO pay at the top 100 largest US companies (Equilar 100 CEOs). The study is based on proxy statement filed by companies before 31 March of this year and therefore reflects 2019 pay packages prior to the COVID-19 health crisis.

Equilar notes that to date, eight of the companies included in the study have made changes to their CEO salaries in some form because of COVID-19.

Some Key Points

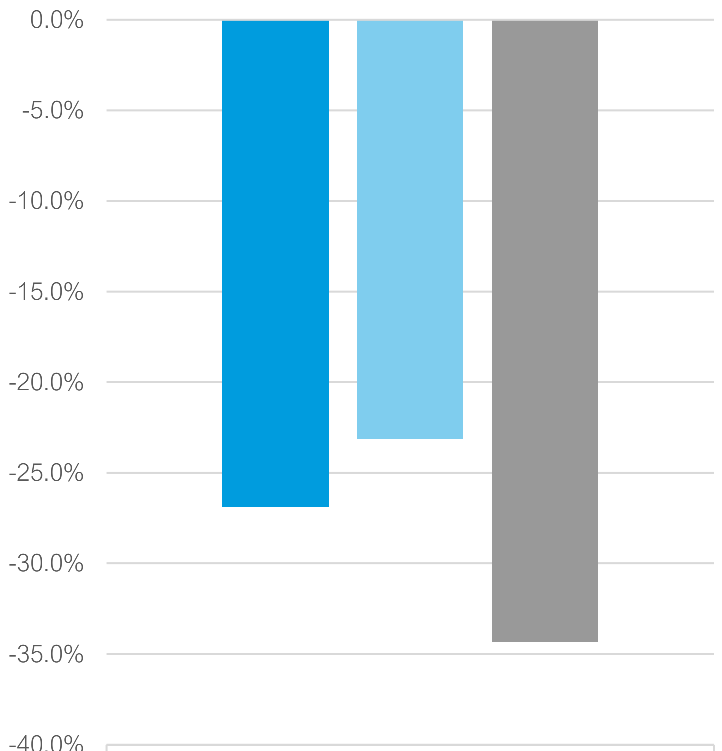
- Mininal change? Equilar 100 CEO pay increased 0.6% in fiscal year 2019.
- Median pay for Equilar 100 CEOs reached $15.7 million. In contrast, median pay last year was $15.6 million. The change in median pay was the same as the previous year's study, except pay actually decreased by 0.6% from 2017 to 2018.
- Narrowing of the gap between worker vs CEO pay: The median CEO pay ratio decreased from 254:1 in 2018 to 252:1 in 2019. Equilar attributes this to 'several factors' including increased median employee pay.
- Similar to last year, women represent less than 10% of Equilar 100 CEOs.

[Sources: Equilar blogpost 23/04/2020]

Corporate Social Responsibility

COVID-19: Companies with stronger ESG ratings have outperformed others during the COVID-19 downturn according to research from Fidelity Investments

Research by Fidelity Investments has identified a 'strong positive correlation between a company's rating on environmental, social and governance (ESG) factors and its resilience during the recent Covid-19-related correction'.



	Falls over the period 19 February to 26 March
Overall falls: S&P 500 Index	-26.9%
Strong ESG companies	-23.1%
Poor ESG companies	-34.3%

ESG factors are a 'meaningful indicator' of financial risk?

According to Fidelity, between 19 February and 26 March, the S&P 500 index fell overall by 26.9%. During the same period companies with strong ESG ratings performed better (falling 23.1%) than those that rated poorly (down 34.3%).

Fidelity found that the same pattern was repeated across almost all industry sectors.

Fidelity observes that though the 'correlation is not causality…a good case can be made, albeit on the basis of a short run of data, that ESG factors are a meaningful indicator of financial risk'.

Fidelity considers that the data supports the premise that 'companies with good sustainability characteristics are better run businesses, with more prudent and conservative management teams. Their resilience during the recent bout of market volatility reflects these positive factors'.

[Sources: Fidelity blog post 20/04/2020]

Institutional Investors and Stewardship

COVID-19: The Future Fund is calling on the government to divert fossil fuel subsidies to repay vulnerable workers who access their retirement savings early because of the impact of the pandemic

As part of its response to the COVID-19 pandemic, The Future Fund is calling on the government to divert funds usually used to subsidise the fossil fuel industry to repay superannuation fund members who elect to access their retirement savings early, under the government's early release of superannuation scheme.

The Future Fund has called on the public to support to support a petition asking the government to 'choose people over profit in this moment. Use the $12 billion that normally subsidises the fossil fuel industry to repay people who borrow from their super. This is a moment where we can outline the future we want to see, reset our system to work for all people, and make important progress on the way. Everyone deserves to have their future protected in the same way, and we stand for everyone'.

[Sources: Future Fund blogpost 22/04/2020; Petition]

COVID-19: The FT reports that large investors are urging drug-makers to collaborate on developing a coronavirus vaccine

Key Takeouts

- The FT reports that large investors including BlackRock, Fidelity Investments, Fidelity International, Aviva Investors, Janus Henderson and Amundi are calling on pharmaceutical companies to collaborate on developing a COVID-19 vaccine.

The FT reports that pressure on pharmaceutical companies to collaborate to develop a COVID-19 vaccine is increasing. Following pressure from the World Health Organisation and other advocacy groups, a number of large institutional investors (BlackRock, Fidelity Investments, Fidelity International, Aviva Investors, Janus Henderson and Amundi) are reportedly calling on pharmaceutical companies to put aside any professional rivalries and work together.

According to The FT, BlackRock is understood to have had talks with pharmaceutical companies about developing and deploying medicines and equipment, including working with industry competitors and regulators. Separately, a group of more than 50 investors managing more $2.5tn in assets, is reportedly set to write to pharmaceutical l companies asking them: a) share any relevant findings on a vaccine (and any other COVID-19 treatments); and b) drop any enforcement of relevant patents.

Reportedly, some companies have already announced that they will collaborate on the project (eg Sanofi and GlaxoSmithKline, which are working on a vaccine together). The FT comments that collaboration of this kind is not unprecedented - the industry has previously joined forces to develop treatments, including on some cancer drugs, when they were unable to do so on their own.

Downward pressure on price? Commenting that there has been a backlash against one company already, perceived to be seeking to profit from treatments, The FT quotes former CEO of Revision Therapeutics Paul Fehlner as saying that in his view, investor expectations are likely to put downward pressure on the eventual price of any drug developed. That is, if there are clear investor expectation that the drugs will be priced affordably, then companies are more likely to price them accordingly.

[Source: [registration required] The FT 24/04/2020]

Most Australian superannuation funds are failing to support shareholder requisitioned ESG resolutions?

Snapshot

- Market Forces research has found that:

– large superannuation funds are 'regularly voting against' shareholder requisitioned ESG proposals at the Australian-based companies in which they invest.
– In two instances funds that supported 0% of shareholder ESG resolutions in Australia in 2019, supported 90% of international ESG resolutions.
– The two funds most likely to support shareholder requisitioned resolutions were: Hesta which supported 'a far greater proportion' of local resolutions than any other fund and BT which supported about 40% across the board.

- Market Forces has called on fund members to call on their fund to support ESG resolutions going forward, including the resolutions at Woodside, Rio Tinto and QBE in the next few weeks.

[Sources: Market Forces media release 23/04/2020]

Concerns over climate leadership: NY pension system supports the push for board change at JP Morgan

Key Takeouts

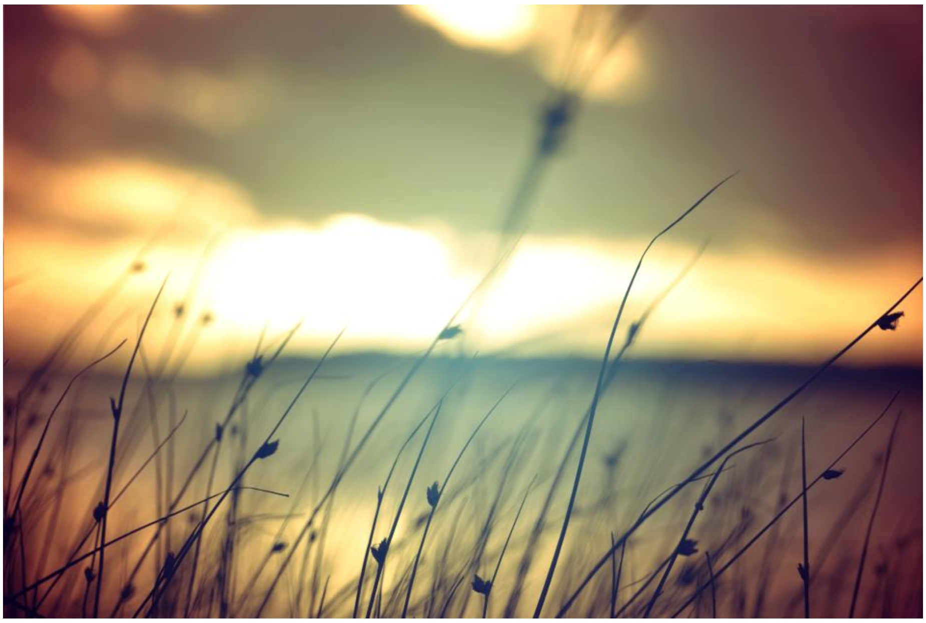
- 'Vote no' campaign: New York City Comptroller Scott M Stringer on behalf of three NY pension funds, has launched a campaign urging JPMorgan Chase & Co (JPM) shareholders to vote against the re-election of lead independent director Lee Raymond at the upcoming AGM citing his long tenure (lack of impartiality) and climate stance/leadership.
- Investor pressure on boards over ESG issues, including climate apepars to be continuing despite the pandemic

New York City Comptroller Scott M Stringer, on behalf of the New York City Employees' Retirement System, Teachers Retirement System of the City of New York and New York City Board of Education Retirement System, has launched a campaign to urge JPMorgan Chase & Co (JPM) shareholders to vote against the re-election of lead independent director (and former ExxonMobil CEO and Chair) Lee Raymond at the company's upcoming AGM.

Concerns?

In a letter to shareholders, Mr Stringer raised two concerns about Mr Raymond's continued role as lead independent director.

- (Alleged) lack of impartiality due to long tenure: Mr Raymond has served on the board of JPM and its predecessor for 33 years and in board leadership roles for 19 years. This, Mr Stringer argues compromises the 'requisite independence of a lead independent director'.
- Climate stance/climate leadership: In addition, the letter raises concerns about Mr Raymond's position on climate change. 'JPM has been the largest global lender and underwriter to the fossil fuel sector, providing $269 billion in financing to fossil fuel expansion from 2016 to 2019. Raymond worked at ExxonMobil for 42 years, including as Chair and CEO, has substantial financial ties to the fossil fuel industry, including to entities financed by JPM, and is on record as a climate change denier'.



In addition, The WSJ reports that Mr Stringer and Climate Action have also raised concerns about Mr Raymond's age. Reportedly the board has waived the usual retirement age of 72 to enable Mr Raymond to continue serving on the board for some years.

Calling on shareholders to vote against Mr Raymond's reelection Mr Stringer said 'we must address the financial and climate risks to JPMorgan associated with fossil fuels now because the city workers who depend on our pension funds for their retirement security cannot afford for us to wait. With JPMorgan management financing more fossil fuel expansion than any other bank, we need the independent members of the board, led by a genuinely objective and climate-competent lead independent director, to hold management accountable for driving JPMorgan's energy finance transition. We are urging shareowners to vote 'no' on Lee Raymond because his long history in the fossil fuel industry and excessive tenure on JPMorgan's board render him unable to fulfil his fiduciary duty as an independent public company director for long-term investors'.

Support for the campaign?

- The WSJ comments Mr. Raymond received the support of nearly 94% of the votes cast by shareholders at the bank's 2019 AGM.
- The WSJ also observes that the three NY city pension funds are not alone sufficient to sway the outcome of the vote given that they only control 2.4 million of the 3 billion shares.
- According to The WSJ, Majority Action has called on shareholders to vote against Mr Raymond's reelection to the board citing concerns about his climate stance and his ability to oversee climate reforms at the bank.

Other leadership concerns: The WSJ reports that Climate Action has also raised concerns about the combined CEO/Chair role at the bank and has urged investors to support a shareholder proposal to split the roles, with an allowance for the policy to be phased in with the next CEO transition. James Dimon has been chairman since 2006 and CEO since 2005.

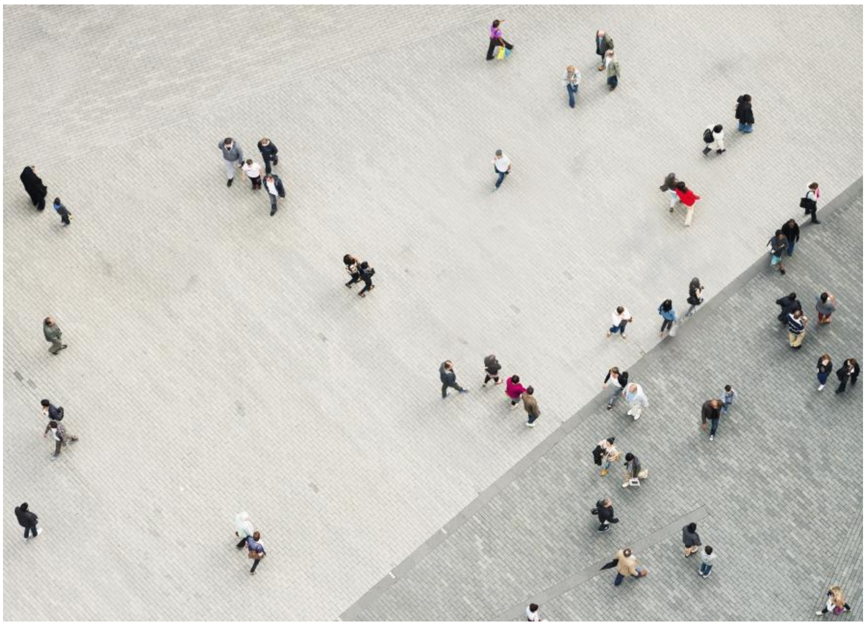
JP Morgan reportedly opposes the measure.

[Sources: New York City Comptroller Scott Stringer media release 23/04/2020; [registration required] The WSJ 22/04/2020]

Korea | Reportedly the introduction of the stewardship Code has led to a decline in the number of outside directors with regulatory/government backgrounds

Business Korea reports that a study into director appointment released by Daishin Economic Research Institute has found that four years after the introduction of the Korean Stewardship Code:

- there has been a rise in the number of outside directors: the ratio of outside directors on the boards of the 137 listed affiliates of the top 30 business groups has risen from 34.5% to 37.3%
- number of directors with government/regulatory backgrounds continues to trend downwards overall: Of the 240 outside directors appointed at this year's ordinary shareholder meetings, just under 30% came from government, supervisory offices and judicial institutions. This appears to continue a downward trend. The ratio of outside directors with similar backgrounds was 31.8% in 2016 and 30.2% in 2019.



- the proportion remains much higher at some entities: For example, the study reportedly found that the ratio of directors with regulatory backgrounds is: 56.5% at Hanjin Group, 45% at Hyundai Motor Group, 36.7% at Lotte Group, 30% in LG Group and 20.8%t in Samsung Group.

[Source: Business Korea 27/04/2020]

Meetings and Proxy Advisers

COVID-19: The first of many? CC Amatil and AMP AGMs go online due to COVID-19 restrictions

Online-only AGM

Coca Cola Amatil will hold its AGM as an online only (virtual) meeting this year because of COVID-19. The notice of meeting gives details of how the AGM will be managed to ensure safety and 'maximise the opportunities for shareholder participation'.

Details

Live webcast: Given the large shareholder base/usual attendance levels, only the board of directors will attend the physical meeting

The meeting will be webcast live via an online platform (details of which are provided in the notice). The notice specifies that shareholders will be able to watch directors, their speeches and the presentation slides on a split screen as well as to listen to/participate in discussion.

Shareholder Participation: The notice outlines a number of measures to ensure there is opportunity for shareholder to participate in the meeting. These include:

- **Direct voting**
- **Opportunity to ask questions live or pre-submit:** Shareholders and proxyholders will be able to ask questions during the meeting via the online platform and to hear all of the discussion, though the notice observes that this is 'subject to' the connectivity of shareholders' chosen devices. In addition, shareholders are able to submit questions ahead of time (using a form provided).
- **Next meeting with shareholders?** The notice states that 'Our Board and Management team always enjoy the opportunity to meet with our Shareholders at our AGMs. Unfortunately, this will not be possible this year. We look forward to being able to connect with you next year in the usual way'.

Related News: AMP AGM update

AMP also announced that it will hold a virtual AGM (shareholders will not attend) due to COVID-19.

The AGM will be webcast live and measures have been put in place to ensure shareholder participation including: ability to pre-submit questions, put questions live during the meeting and proxy voting.

Other companies likely to follow? The AFR comments that in light of the ongoing health crisis, other companies are likely to follow Coca Cola Amatil in holding virtual meetings.

[Sources: ASX announcement Coca Cola Amatil 23/04/2020; AMP media release 23/04/2020; [registration required] The AFR 23/04/2020; [registration required] The Australian 24/04/2020; The SMH 25/04/2020]

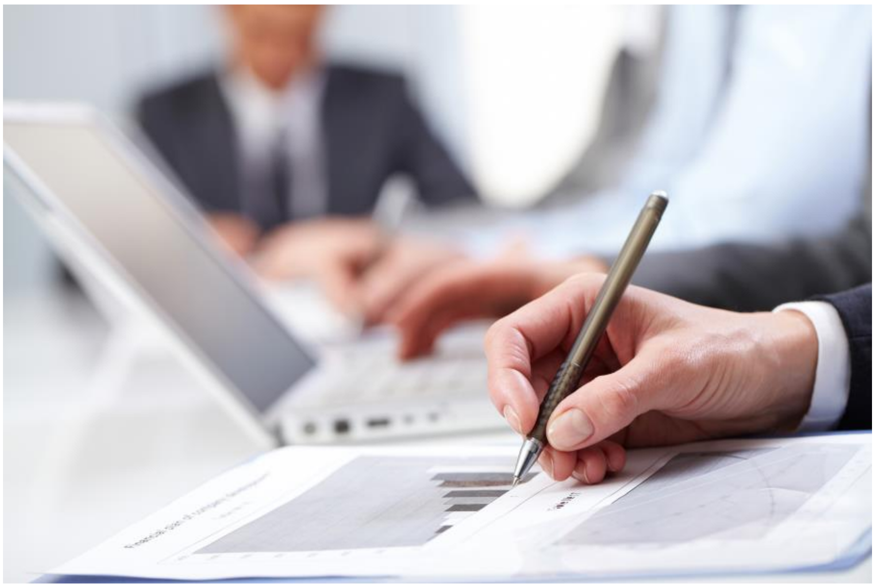
Boeing AGM result: Shareholders register governance concerns by voting to permanently split the CEO and Chair roles

The Boeing Company AGM was held online on 27 April.

Resolutions

- **Re-election of directors:** Reportedly, each of the company's 12 board nominees received a were re-elected. Media reports comment that both Glass Lewis and Institutional Shareholder Services (ISS) separately recommended that shareholders register their concern over the company's handling of the 737 Max issue by voting against key board members.
  - Reportedly, Glass Lewis recommended shareholder vote against the reelection of boar Chair and former audit committee Chair Larry Kellner, on the basis that 'the audit committee failed to mitigate the risk posed by management's decisions and should be held accountable for its oversight'.
  - Separately, ISS reportedly advised shareholders to vote against four board members - Arthur Collins, Edmund Giambastiani, Susan Schwab and Ronald Williams - who had served when the 737 MAX was being

developed and rolled out. In addition, ISS also reportedly said that voting against Boeing CEO David Calhoun is 'warranted, with caution' in light of the company's handling of the 737 issue, and that he will need to show that he can be an 'effective leader of cultural change' at the company going forward.



- **Shareholder requisitioned advisory resolution to split the CEO and Chair roles:** Reportedly, an advisory shareholder requisitioned proposal to permanently split the CEO and Chair roles which was (reportedly) opposed by management, received support from the majority of shareholders (52% support). Reportedly the same resolution received 25% support in 2018 and 34% in 2019. Media reports attribute the result this year to shareholder dissatisfaction with governance standards at the company in light of Boeings handling of issues with the 737 MAX jet.
- **Second shareholder resolution failed to pass:** Reportedly a second shareholder advisory resolution seeking to allow investors to raise matters outside the normal annual meeting cycle received 43% support. The measure was reportedly not supported by the Boeing board.

Impact of COVID-19: Boeing CEO has reportedly cautioned shareholders not to expect a dividend for several years

Following the cancellation of the dividend ahead of the meeting, the FT reports that Boeing CEO David Calhoun advised shareholders that it could be several years before the company pays a dividend again, given the impact of COVID-19 on global travel and on the company's bottom line. Mr Calhoun also reportedly flagged plans for Boeing to borrow funds and thereafter to focus on rebuilding the balance sheet and paying back the loans, a process that he said could take 'three to five years'.

Planned partnership with Embraer has been terminated

Ahead of the meeting, Boeing announced that it had terminated its Master Transaction Agreement (MTA) with Brazilian jet maker Embraer, under which the parties had planned to create a joint venture comprising Embraer's commercial aviation business and a second joint venture to develop new markets for the C-390 Millennium medium airlift and air mobility aircraft. In a statement, Boeing said that it 'has worked diligently over more than two years to finalise its transaction with Embraer. Over the past several months, we had productive but ultimately unsuccessful negotiations about unsatisfied MTA conditions. We all aimed to resolve those by the initial termination date, but it didn't happen…It is deeply disappointing. But we have reached a point where continued negotiation within the framework of the MTA is not going to resolve the outstanding issues.' The FT reports that Embraer has said it plans to go to arbitration.

[Sources: [registration required] The FT 28/04/2020; [registration required] The WSJ 27/04/2020; Bloomberg 28/04/2020; Boeing media release 25/04/2020; Reuters 25/04/2020; 28/04/2020]

In Brief | COVID-19 AGMs: The Governance Institute has released attendee questions (and accompanying answers) from a recent webinar on the impact of COVID-19 on AGMs

[Source: Governance institute blog 24/04/2020]

Financial Services

Top Story | COVID-19: Anti-hawking and product disclosure rules temporarily relaxed to make it easier for lenders to offer debit cards to cash-reliant customers

Key Takeouts

- To address the imapct of COVID-19 restrictions on consumers reliant on cash, ASIC Corporations (COVID-19 – Distribution of Debit Cards) Instrument 2020/401 temporarily relaxes some hawking and product disclosure requirements to make it easier for lenders to provide debit cards to eligible account holders.
- The ABA estimates that currently 500,000 banking customers, most of whom are over 70 years of age, do not have access to debit cards and that banks expect to issue a 'record number' of cards in the coming weeks
- The Council for the Ageing has welcomed the measure and thanked 'all banks involved for stepping up to take care of their more vulnerable customers in this time of need. We welcome ASIC's flexibility in permitting these offers to happen'.
- The measures commenced on 25 April and will apply until 30 September.

Why the measures are needed

ASIC Corporations (COVID-19 – Distribution of Debit Cards) Instrument 2020/401 is aimed at alleviating the impact of COVID-19 lockdown restrictions (eg difficulties with accessing bank branches to withdraw funds) on consumers who are reliant on cash to make purchases of goods and services by making it easier for authorised deposit institutions (ADIs) to provide them with debit cards.

Details – the measures are limited and conditional

Broadly, ASIC Corporations (COVID-19 – Distribution of Debit Cards) Instrument 2020/401 temporarily:

- relaxes hawking requirements in s922A of the Corporations Act 2001 (Cth) (the Act) to ADIs to offer to provide eligible existing account holders with debit cards through unsolicited meetings at a bank's place of business, or through unsolicited telephone calls. This means that if one of an ADI's existing customers without a debit card is in a branch, the ADI may offer to issue that person with a debit card to ensure they can access their funds during the COVID-19 outbreak. The offer may be for a debit card to access an existing basic deposit product, or for a new basic deposit product and a debit card to access that new product. The explanatory memorandum states that though some ADIs may contact customers to offer to provide them with a debit card, due to the volume of customers involved, others may distribute debit cards to customers by mail without prior contact.
- relaxes product disclosure requirements in Part 7.9 of the Act, to allow the ADIs to comply in relation to basic deposit products, linked non-cash payment facilities and debit cards by providing the information they typically provide with the debit card that is mailed to the eligible account holder.

Consultation

According to the Explanatory Memorandum, before making this Instrument, the Australian Securities and Investments Commission (ASIC) engaged with a targeted range of stakeholders including relevant industry associations and consumer representatives to discuss the proposals and a 'broader range of stakeholders was involved in the design and development of the proposals made possible by the Instrument'.

Announcing the measure Australian Banking Association CEO Anna Bligh said that the ABA and industry had taken a proactive approach to the issue. 'The industry has recognised that as a result of the government's social distancing advice, particularly for older Australians, we must provide additional options for people to do their banking and pay for goods and services...The industry thanks the regulators, in particular ASIC, who have provided the approvals needed on this record-breaking project quickly and efficiently' Ms Bligh said..

Temporary measures only

The Instrument commenced on 25 April and will cease to apply on 30 September 2020.

Australian banks will issue half a million cards in the next few weeks

In a statement, the Australian Banking Association said that, over the next few weeks, banks will issue a record number of debit cards (Mastercard or VISA debit) to the 500,000 customers who don't have them (most of whom 70 years of age or older) to ensure that they are able to pay for their goods and services online or over the phone throughout the COVID-19 pandemic.

The statement confirms that the cards will incur no additional cost to any customer and that bank staff will be on hand to provide practice advice to those unfamiliar with how the cards work

Australian Banking Association CEO Anna Bligh said this was an important step in ensuring no one was left behind when it comes to banking services, regardless of the level of lockdown a community is experiencing because of the COVID-19 health crisis.

The Council of the Ageing has welcomed the measure

Council on the Ageing (COTA) Chief Executive Ian Yates welcomed the measure and thanked 'all banks involved for stepping up to take care of their more vulnerable customers in this time of need. We welcome ASIC's flexibility in permitting these offers to happen'.

[Sources: ASIC Corporations (COVID-19 – Distribution of Debit Cards) Instrument 2020/401; ABA media release 29/04/2020]

COVID-19: Open banking update: The ACCC has released updates on progress towards rolling out the CDR

Key Takeouts

- More time to report (because of the impact of COVID-19): The Australian Competition and Consumer Commission (ACCC) has granted a three month extension to non-major ADIs, including non-major banks, building societies and credit unions, on the deadline to to share Product Reference Data. The new deadline is 1 October.
- Consultation on draft revised rules: The ACCC has also released a draft revised version of the Consumer Data Right Rules (CDR) for consultation. The deadline for submissions is 8 May.
- ACCC is on track to meet July 2020 timeline: ACCC told the Senate Select Committee on Financial Technology and Regulatory Technology that it (and its technology provider) are nearing completion of development of the Consumer Data Right Register & Accreditation Application Platform, and it will still be ready before July, in time to permit data sharing to commence in July 2020.
- The ACCC also advised the committee that major banks have reported that due to the increased workflow as a result of COVID-19 eg handling a significantly higher volume of customer enquiries and applications, they have each reported widespread and rapid reallocation of resources (including CDR resources) to areas of need. In particular, some cyber resources from CDR teams have been reallocated to mitigate the anticipated, heightened cyber-security risk during the pandemic.

Product Reference Data: Temporary exemptions for 'non-major ADIs' to delay 1 July obligations

- Financial Service Providers required to share Product Reference Data (ie information about a bank's rates, fees and features of banking products) by 1 July 2020, have been granted a three month extension, due to the impact of the COVID-19 pandemic.
- The temporary exemptions until 1 October apply to non-major ADIs, including non-major banks, building societies and credit unions, and extend to non-primary brand products offered by the major banks.
- No extension for major banks: The major banks have been sharing product reference data since July 2019. Commencement of the obligations of major banks to share phase 3 Product Reference Data for their primary branded products remains 1 July 2020.

Announcing the changed timeframe, ACCC Commissioner Sarah Court said that the exemptions are being granted 'as an acknowledgement of the intense resource requirements of the industry as a result of the COVID-19 pandemic, and in particular non-major banks that may not be able to prioritise this at this time…We understand that financial providers are dedicating many resources at present to support their customers, however we do encourage providers to share product reference information on a voluntary basis if they are in a position to do so'

Draft revised CDR Rules published for consultation

The ACCC has released a draft revised version of the Consumer Data Right Rules (CDR) for consultation.

Proposed amendments to the Rules include:

- clarifications on the accounts in scope for consumer data sharing for banking data
- new rules on the function of the Accreditation Register and Registrar
- rules relating to the use of the Consumer Data Right (CDR) logo.

[Note: An overview of the proposed amendments is available on the ACCC website here. The Draft Rules - Competition and Consumer (Consumer Data Right) Rules 2020 - are here.]

Timing: The deadline for submissions is 8 May. The proposed amendments are due to come into effect from July 2020

[Sources: ACCC media releases 24/04/2020; 24/04/2020; ACCC COVID-19 update, draft revised Rules published and new General Manager: 24/04/2020]

COVID-19: The impact of COVID-19 on the ACCC's CDR work/timetable

In response to question on notice from the Senate Select Committee on Financial Technology and Regulatory Technology requesting an update on the ACCC's priorities in light of the pandemic, the ACCC provided a brief update on its work progressing the roll out of the CDR and also commented on the impact the pandemic is having on major banks.

Some Key Points

- ACCC work remains on track: The ACCC said that it (and its technology provider) are nearing completion of development of the Consumer Data Right Register & Accreditation Application Platform, and it will still be ready before July, in time to permit data sharing to commence in July 2020.
- The ACCC said that there has been 'widespread disruption to the work of Consumer Data Right teams across all participants' due to COVID-19 restrictions causing loss of productivity/temporary delays. For example the ACCC said that some Data Recipients have reported: challenges maintaining or securing funding to continue their work on the CDR; inability to progress technology development (especially where they were relying on Information Technology resources in other countries more severely impacted by COVID-19); loss of key clients due to COVID-19; and difficulty obtaining Information Security Control Audit Certificates due to travel restrictions in Australia or overseas, and competing business priorities. The ACCC said that some Data Recipients have had to temporarily pause their work on the CDR while others have expressed a wish to press ahead without delay.
- Major banks (data holders) have reported that due to the increased workflow as a result of COVID-19 eg handling a significantly higher volume of customer enquiries and applications, they have each reported widespread and rapid reallocation of resources to areas of need.
- Major banks have also temporarily re-allocated CDR cyber-security resources to assist in mitigating predicted heightened cyber-security risk to the banking sector (as a result of COVID-19). To reduce the risk from technology change at a time of strained resources, major banks also reported temporarily freezing non-essential technology changes.

[Source: Senate Select Committee on Financial Technology and Regulatory Technology, Written Questions on Notice to the ACCC 28/02/2020]

COVID-19: Stricter rules for BNPL and payday loan sector?

Key Takeouts

- Pressure on the government to mandate relief measures? The government is reportedly under presure from Federal Labor to follow the UK in directing buy now, pay later companies (BNPL) and payday lenders to implement specific relief measures to protect customers impacted by the COVID-19 health crisis. According to the AFR, the government has said it has no intention of doing so, but has encouraged the sector to follow the banks in implementing appropriate relief measures.
- Progres law reform? Reportedly Federal Labor has also called for the government to prioritise/progress legislation that would introduce a range of amendments to the Credit Act to enhance the consumer protection framework for small amount credit contracts and consumer leases.

Federal Labor has reportedly called for the government to mandate relief measures

The AFR reports that Federal Labor has called on the government to require payday lenders and buy-now-pay-later providers to implement relief measures to protect vulnerable customers impacted by the COVID-19 crisis. Federal Labor member Milton Dick is quoted as saying, 'more than ever people are struggling with bills and loss of income particularly those in the lower income households, so we must see some reforms'.

Shadow Assistant treasurer Stephen Jones also called for the government to prioritise law reform.

'Now more than ever it is critical to protect vulnerable Australians from unscrupulous lenders. We can use the May sitting of Parliament to reform the sector. The is legislation waiting to restrict the amount of money that payday lenders could lend to 10% of a borrower's income from 20%. There has been two prime ministers, four ministers responsible and multiple parliamentary inquiries and these vital laws have not been passed. The vested interests in the Liberal party room should step aside in the interests of consumers' Mr Jones reportedly said.

[Note: On 28 November 2016 the government released its response to the Review of the Small Amount Credit Contract laws. The government has since consulted on exposure draft legislation — National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2017 (PayDay Lending Bill) — proposing to implement its response to the recommendations. The Bill has since been introduced by the Labor party and by private members but has failed to progress. This appears to the legislation Mr Jones is referring to.]

Unnecessary

Assistant Treasurer Michael Sukkar has reportedly said that though the government has no intention of directing buy now pay later providers and/or high-interest payday lenders to implement specific relief measures, (eg directing them to temporarily defer interest payments as has occurred in the UK), he does encourage them to follow the example of the banks and do so.

'The banks have stepped up to the plate and are playing their role as part of Team Australia at this time, and I would encourage other lenders to do the same to help their borrowers get to the other side of the COVID-19 health crisis. Importantly, the government will remain vigilant and will not stand for predatory behaviour by lenders who seek to take advantage of Australians during this time.'

The AFR makes no reference to whether Mr Sukkar made any comment in response to calls to progress the Payday lending Bill.

Reportedly Afterpay has said that specific directions are unnecessary as it does not charge interest and that already stops all late fees for people in hardship, arranging a repayment plan that matches people's abilities.

[Sources: [registration required] The AFR 23/04/2020]

Top Story | ACCC Home Loan Price Inquiry: Interim report findings released

Report Overveiw | ACCC report, Home Loan Price Inquiry Interim Report

Key Takeouts

- The interim report examines home loan prices charged by the big four banks (ANZ, CBA, NAB and Westpac) between 1 January 2019 and 31 October 2019 and more particularly, the factors in the banks' decisions on headline variable rates.
- The report found that despite the fact that average interest rates charged on home loans fell between January 2019 and October 2019:
  - maintaining profitability was a key consideration (though not the only consideration) for the big four banks when deciding whether to reduce mortgage rates in line with Reserve Bank of Australia (RBA) cash rate cuts during 2019
  - reductions in funding costs to banks do not automatically flow through to customers
  - existing bank customers tend to pay more for their loans in comparison with new customers ('loyalty tax')
  - a lack of price transparency (due to the fact that discounts are not reflected in headline rates) makes comparisons between products difficult and continues to cost customers.
- The ACCC said that the findings underline 'the importance of customers with existing loans reviewing their home loan products on a regular basis' and ACCC Chair Rod Sims called on customers to 'shop around'.
- Similarly, announcing the release of the report, Treasurer Josh Frydenberg said that the findings 'underline the importance of greater transparency and competition in the sector and need for customers to remain highly engaged and shop around to get access to the best deal – including from their existing financial institution.
- The ACCC's final report, which will be delivered to the Treasurer on 30 November 2020 (the deadline has been extended because of COVID-19) will consider barriers to consumers switching to alternative home loan suppliers.

Context

On 14 October 2019, the Treasurer issued a direction to the Australian Competition and Consumer Commission (ACCC) to conduct an inquiry into the market for the supply of home loans. The ACCC released its interim report on 27 April 2020.

The interim report focuses on prices charged for home loans since 1 January 2019, taking into account:

- the difference between advertised interest rates and interest rates paid by customers;
- the difference between interest rates paid by new and existing customers; and
- home loan suppliers' pricing decisions following changes in the RBA's target for the cash rate, including the extent to which changes were due to suppliers' cost of funds and the timing of the suppliers' announcements.

The final report will consider impediments to consumer switching.

Interim Report: Key Findings

Maintaining profitability was a key consideration

The interim report found that the big four banks balanced a range of factors when making their headline variable rate decisions following the cash rate reductions in 2019 but that recovering profits was central to their decisions to not always fully pass through the lower rates to mortgage customers.

Commenting on this, ACCC Chair Rod Sims said that 'the banks were attempting to shore up their profitability during a period of low interest rates…It was their strong preference, after the RBA's cuts, not to further reduce the rates customers were earning on some deposit products as they approached zero per cent. The banks' reluctance to cut these deposit rates led them to anticipate lower profits, which they aimed to recover by not always fully passing through cash rate cuts to their mortgage customers'.

The report also found that the big four banks benefited from a sustained decrease in their funding costs during much of 2019. According to the ACCC, though the headline rates for owner-occupier home loans with principal and interest repayments fell overall during 2018 and 2019, the banks' funding costs fell even more over the same period. ACCC Chair Rod Sims suggests that this sheds 'an important light on bank decision making' and raises 'questions about whether banks could, at the time, have passed on a higher proportion of those RBA cash rate cuts to their mortgage customers.'

Loyalty tax? On average customers with new loans continue to pay lower interest rates than customers with existing loans

The report found that:

- At the end of September, customers with new owner-occupier loans with principal and interest repayments were paying on average, 26 basis points less than customers with existing loans. Further, the difference was 'usually even more significant for customers with older loans'. This is attributed to the banks' focus on offering increasingly large discounts on new loans.
- The banks were aware that existing loan customers 'generally paid higher interest rates than their customers with new loans'. According to the report, routine pricing documents considered by decision makers showed either that, across their variable rate home loan portfolios, discounts were larger for new loans; or that customers with new loans, on average, were paying lower interest rates than customers with existing loans.
- The ACCC observes that the findings underline 'the importance of customers with existing loans reviewing their home loan products on a regular basis'.

Average discounts on existing loans also increased during this period

The report also found that the average discount on existing loans increased over the period 30 September 2018 and 30 September 2019.

The ACCC considers that there are three key reasons behind this: 1) some customers with existing loans, who previously paid a relatively high interest rate, discharging their existing home loans, including by refinancing to a new loan or new lender; 2) some customers with existing loans obtaining a price reduction on their current loan that saw their interest rate become the same as or closer to interest rates applying to new loans; and 3) some customers who previously obtained a ‘new loan’ rate (either as a buyer of a new property or after refinancing) becoming a customer with an existing loan at a later time.

Comparison remains difficult for consumers

The report found that comparisons between home loan options are not straightforward for customers because headline variable rates (which do not reflect discounts) were not an accurate indicator of what most consumers should expect to pay.

According to the ACCC, as at 31 October 2019, 89% of variable rate home loans with the big four banks received a discount (advertised and/or discretionary) off the bank’s relevant headline variable rate and 59% were charged at least 90 basis points less than the relevant headline variable rate.

According to the report, the gap between headline variable rates and the average interest rates paid by customers increased for each of the big four banks between 30 September 2018 and 31 October 2019 due to an uptick in the number of customers receiving a discount.

New tools designed to help home loan customers compare prices, negotiate with lenders and switch loans to obtain a better deal

The report highlights a number of tools that are expected to assist borrowers in obtaining a better deal on their home loans. These include:

- Open banking: The ACCC observes that the Consumer Data Right, which will apply first in the banking sector (Open Banking), will improve consumers’ ability to compare and switch between home loan products and suppliers.
- ASIC interest rate transparency tool: The Australian Securities and Investments Commission’s (ASIC) Moneysmart Mortgage calculator will shortly be enhanced to include information on average interest rates for new loans across borrower and repayment types. The calculator will provide consumers with a benchmark against which they can compare offers from lenders or their current interest rate.

The ACCC and the Treasurer encourage consumers to 'shop around'

Commenting on the report findings ACCC Chair Rod Sims encouraged customers to 'shop around'. Despite the COVID-19 pandemic and the accompanying potential financial stress consumers might be under, Mr Sims encouraged customers to take the time to review their loan options.

'Our analysis shows…that even a small further reduction in interest rates could potentially save thousands of dollars over the life of a mortgage. Consumers should consider this carefully when it is time to re-engage with their lender. For example, a customer with an average-sized new, owner-occupier, principal and interest mortgage of $386,000 could save about $5000 on interest payments in the first year if they went from having no discount to receiving the big four banks' average discount of 128 basis points' Mr Sims said.

In a similar vein, in a statement acknowledging the release of the report, Treasurer Josh Frydenberg said that the findings 'underline the importance of greater transparency and competition in the sector and need for customers to remain highly engaged and shop around to get access to the best deal – including from their existing financial institution.'

Mr Frydenberg added that the findings also 'underscore the government's continued commitment to a number of major reforms to increase competition across the banking industry, including implementation of the Consumer Data Right which will empower consumers to more easily compare and switch between home loan products and lenders'.

Finally, Mr Frydenberg said that the government has been focussed on ensuring that its actions in responding to the pandemic support competition, including through: the $15 billion in funding provided to the AOFM to invest in wholesale funding markets used by small ADIs and non-ADI lenders; and enabling a broad cross-section of lenders to participate in the Coronavirus SME Guarantee Scheme, with 39 lenders now approved to participate in the Scheme.

[Sources: ACCC media release 27/04/2020; ACCC report, Home Loan Price Inquiry interim report 27/04/2020; Treasurer Josh Frydenberg media release 28/04/2020; [registration required] The Age 28/04/2020; [registration required] The Australian 28/04/2020; [registration required] The SMH 28/04/2020]

COVID-19: Uptake of the government's early access to super scheme: The ATO has approved 456,000 applications totalling $3.8 billion so far

In a press conference on 23 April, Treasurer Josh Frydenberg gave an update on the government's early access to superannuation scheme.

- Mr Frydenberg said that:
  - The Australian Tax Office (ATO) has so far approved 456,000 applications, totalling $3.8 billion. The applications are now wth superannuation funds for payment within the next five days.
  - The average withdrawal is approximately $8,000 (which is below the $10,000 annual limit)
- Reportedly industry modelling shows that many more members than Treasury predicted are likely to access to the scheme. According to The AFR, Treasury forecasts initially indicated 1.3 million members would draw down $27bn from their retirement savings between now and late September, but industry modelling predicts that the number could be closer to $50bn.
- Industry Super has cautioned members against accessing the scheme as anything other than a last resort given the impact that dipping into savings early ccould have on retirement outcomes.

JobKeeper scheme - Banks to fast-track bridging finance loan applications

- Prime Minister Scott Morrison also spoke spoke about the need for banks to ensure swift access for businesses to bridging finance from banks to help pay staff until the JobKeeper supplement flows through in May. Mr Morrison said, 'I am aware that there has been some frustration amongst businesses, in particular, in accessing bridging finance with banks…I have no doubt the banks are aware of that as well and we need to be addressing that. Early on in this crisis, the bank's decision to pass on the cash rate reductions and provide deferments and waivers of various arrangements for businesses and individuals is very much welcome. But that needs to be continued. It is important that the banks stay up to the mark here…we need those turn around times to improve'.
- The ABA issued a statement outlining meausres to fast track any outstanding applications including a commitment by banks to set up 'special hotlines' to help manage the applications and also to bring 'Jobkeeper-related applications to the front of the queue and work with the ATO to accelerate the assessment process'.

[Sources: Transcript: Joint press conference, Treasurer Josh Frydenberg and Prime Minister Scott Morrison 23/04/2020; Industry Super media release 24/04/2020; ATO media release 22/04/2020; ABA media release 23/04/2020; [registration required[The Australian 23/04/2020; [registration required] The Australian 24/04/2020]

COVID-19: ASIC outlines its expectations of insurers during the COVD-19 pandemic

Key Takeouts

- The Australian Securities and Investments Commission (ASIC) has written to general insurers and separately to life insurers outlining its expectations of their responses to the COVID-19 health crisis.
- Broadly, ASIC expects insurers to:
  - handle insurance claims with utmost good faith and to deal with complaints genuinely, promptly, fairly and consistently. ASIC expects directors to seek 'affirmation through board reporting' industry code commitments are being met and that claims are being handled appropriately.
  - be 'flexible in dealing with consumers' specific circumstances including considering how they can best respond to assist customers to continue to maintain their cover eg consider offering premium 'holidays', deferrals, or reductions for a reasonable period of time.
  - 'communicate proactively, clearly and accurately' with consumers about their insurance cover, recognising the rapidly changing situation they are facing.
- COVID-19 data collection: ASIC will seek data on Covid-19 claims after the 'operational impact' of the pandemic subsides. The letter gives details of the 'minimum' data insurers should be collecting and flags that the regulator will engage with relevant industry associations and with insurers directly on further details 'shortly' with a view to minimising the regulatory burden.

Expectations general and life insurers

In separate letters, the Australian Securities and Investments Commission (ASIC) has written to general and life insurers outlining its expectations of the way in which it expects them to respond to the COVID-19 pandemic.

Board affirmation that industry Code of Practice commitments are being met

- General Insurers: Boards are expected to seek affirmation that 2020 General Insurance Code of Practice commitments are being met ahead of the January 2021 deadline

  In light of the hardship being faced by many 'if not most' customers because of COVID-19, ASIC calls on general insurers to ensure that they are meeting the commitments made in the 2020 General Insurance Code of Practice (the 2020 Code) 'to provide value, transparency and fairness; and promote trust, integrity and respect'. ASIC says that though Insurance Council Australia (ICA) members and other Code participants are transitioning to comply with the new commitments by January 2021, the COVID-19 health crisis warrants accelerating the transition. ASIC is therefore seeking, 'a commitment to meet the additional consumer protections contained in the 2020 Code, particularly those related to vulnerability and financial hardship…We also expect that you, as directors, will seek affirmation through board reporting that the Code commitments are being met'.

- Life Insurers: Boards are expected to seek affirmation that Life Insurance Code of Practice commitments are being met.

  Likewise, ASIC calls on life insurers to stand by the commitments made in the Life Insurance Code of Practice (the Code): to be honest, fair, respectful, transparent and timely. ASIC expects that directors will 'seek affirmation through board reporting that the Code commitments are being met'

ASIC expects insurers to consider how they can support consumers in financial hardship to maintain cover

General insurers

- ASIC expects generatl insurers to work with consuemrs to find a way to enable them to maintain their cover: ASIC expects that insurers will not 'automatically cancel or lapse policies for non-payment of premiums' but instead 'continue cover for those policies for a reasonable period of time, while working through further options that may be available to the consumer to retain their cover. ASIC suggests that this might include: offering: premium 'holidays', deferrals, or reductions for a reasonable period of time.
- Offer renewed cover/making changes to policy terms/price: ASIC states that though it acknowledges general insurers need to manage their risk exposure 'we ask insurers to act flexibly to ensure that changes are fair to consumers, taking into account the individual circumstances. ASIC gives requests to extend travel insurance cover as an example stating that policy holders who are delayed/unable to return to Australia will be 'particularly

vulnerable' and that 'insurers should be cognisant of this when considering requests to extend travel insurance taken out prior to the known event'.

- Potentially reduce or refund premiums for travel insurance and/or motor vehicle insurance: ASIC says it would 'welcome the opportunity' to discuss other measures to support policyholders impacted by the pandemic including 'any consideration that insurers have given to reducing or refunding premiums on policies where the risk of loss has fallen significantly as a result of the Covid Pandemic' eg travel insurance for future travel that can no longer be undertaken, and motor vehicle insurance where the motor vehicle is being used much less.

Life insurers

- ASIC also expects life insurers 'to try to find workable options to allow consumers in hardship to continue their cover'. This includes giving consideration to 'going beyond the hardship provisions of the Code' and reviewing options for premium ‘holidays’ or deferrals for consumers who are no longer able to pay premiums due to reduced income. ASIC notes that some insurers have already moved to introduce these measures in response to the bushfires of 2019-2020 and considers that a 'similar approach is just as important now'.

Proactive communication with consumers

ASIC expects both general and life insurers to proactively communicate with consumers concerning options to enable them to maintain their cover. Insurers should 'consider whether outcomes will be fair for consumers if they have to actively "opt in" or make a request in order to receive any benefit insurers offer in response to the pandemic...If an insurer relies on consumers to contact them to discuss options for retaining their cover, this can result in inconsistent and unfair outcomes for policyholders' ASIC writes.

ASIC considers that vulnerable consumers will be under considerable stress and 'would benefit if the insurer automatically extends the cover and undertakes proactive contact with the consumer, without the need for any action by the consumer'.

Complaints handling: directors should seek board affirmation that complaints are being handled appropriately

ASIC expects insurers to handle insurance claims with 'utmost good faith and to deal with complaints genuinely, promptly, fairly and consistently. ASIC also expects that 'directors seek affirmation through board reporting that this is happening'.

ASIC also expects insurers to modify internal practices/requirements as necessary/appropriate to ensure that they not adversely impact on the time taken to process claims.

General Insurers

- Travel insurance claims: ASIC says that insurers must ensure that consumers are not discouraged 'intentionally or inadvertently' from making claims eg in the context of travel insurance claims where there are differences between policies and insurers about when the COVID-19 pandemic became a known event, where 'ASIC expects insurers to encourage consumers to lodge their claims, so that it can be fairly and thoroughly assessed'.
- ASIC further expects that insurers will:
  - not deny claims solely because consumers do not notify the insurer of their change in circumstances (eg changed working conditions) due to the pandemic;
  - 'take reasonable steps to manage claims efficiently and effectively within best practice timeframes, noting the constraints of social distancing and staff working from home';
  - take all practical steps to source repairers and parts to help ensure that property and motor vehicle repairs are not avoidably delayed by travel restrictions;
  - waive or alter requirements that are impractical due to the effects o COVID-19 eg requirements that consumers attend face-to-face interviews for motor claims under investigation;
  - not refuse to assess or pay claims because the consumer is unable to pay the excess up front rather than have it deducted from the claim settlement.

ASIC expects insurers to proactively apply the Urgent Financial Need of Benefits provisions in section 7.7 of the 2014 Code for all affected claimants, including travel insurance claims made by customers overseas and unable to return to Australia.

Life Insurers

- TPD claims: ASIC expects insuresr to be flexible in their treatment of consuemrs whose personal and/or working conditions have changed as a result of COVID-19 eg where these working conditions impact their income protection or Total or permanent disability (TPD) claim outcome. In particular, ASIC expects insurers to 'proactively apply the Urgent Financial Need provisions in sections 8.27 to 8.30 of the Code for all affected claimants, including consumers making a Covid Pandemic related income protection or TPD claim'.

- Insurance in superannuation: n light of the 'range of insurance related issues that arise due to the effects of the Covid Pandemic on superannuation fund balances' ASIC 'encourages insurers to work proactively with superannuation trustees to arrive at fair outcomes for members making insurance claims'.

Communication to consumers about coverage

ASIC expects insurers to communicate proactively, clearly and accurately with consumers about their insurance cover, recognising the rapidly changing situation they are facing.

- General insurers are asked to ensure that any new and significant COVID-19 related exclusions on policy renewal is clearly disclosed; and that the policies are not offered to people unlikely to be able to claim under them. Information about key coverage limitations in existing products such as waiting periods and exclusions for pandemics must be clearly and prominently disclosed.
- Life insures are asked to work 'in close collaboration with superannuation trustees to ensure trustees understand how members' insurance may be affected by economic conditions and public health restrictions' eg policy clauses relating to employment, work hours, effects of accessing super benefits early and exclusions, and to help trustees communicate these effects clearly to their members in an accurate and balanced manner. In addition, ASIC expects that information about coverage limitations in existing products (eg work-hour requirements, exclusions for specific high risk occupations and exclusions for pandemics) is communicated clearly on websites.

COVID-19 data collection

ASIC will seek data on Covid-19 claims after the 'operational impact' of the pandemic subsides: ASIC says that it 'does not currently intend to seek data on claims connected to the Covid Pandemic over the coming months; but does plan to do so once the operational impact of the pandemic subsides.

In light of this, ASIC says that:

- general insurers should, 'at a minimum, identify claims under a general insurance product where the loss event is connected to the effects of the Covid Pandemic'.
- life insurers should 'at a minimum, identify claims where the primary or secondary cause of loss or injury is connected to the Covid Pandemic.

ASIC says it will engage with the relevant industry associations (the ICA and the FSC) and with insurers directly on likely data requirements in more detail 'shortly' and will work to ensure the the regulatory burden placed on insurers by data requirements is minimised.

In addition, ASIC will work with APRA to ensure COVID-19 related work is managed effectively and efficiently.

[Sources: ASIC media release 27/04/2020; Letter to general insurers, Letter to life insurers]

The Consumer Action Law Centre has called (among other things) for an inquiry into insurance affordability in light of climate change and the associated more frequent extreme weather events

The Consumer Action Law Centre's (CALC's) submission to the Royal Commission into National Natural Disaster Arrangements outlines the insurance and financial challenges faced by communities in the aftermath of the Black Summer bushfires (eg difficulties associated with choosing, and claiming on, home insurance policies) which CALC considers have been compounded by the impacts of COVID-19.

CALC CEO Gerard Brody said, 'There's a serious risk that home insurance could become unaffordable following the recent bushfire season, leaving many underinsured or not insured at all…These risks are only compounded given how many people have lost income due to the Covid-19 crisis. Many of the regional communities that were affected by the bushfires rely on the hospitality and tourism industries. They were only just beginning the recovery effort, when disaster struck again.'

The submission makes thirteen recommendations to improve insurance outcomes in light of climate change and the associated more frequent extreme weather events.

Broadly, these include:

- Holding an independent inquiry into the affordability of insurance having regard to the rising levels of financial difficulty and the worsening impacts of climate change
- Making it easier for consumers to compare policies by: a) standardising key definitions in insurance contracts, including the definition of 'fire'; and b) modernising 'standard cover' so that people can compare and choose suitable insurance policies;
- Passing the outstanding Hayne reforms to insurance, including a ban on unsolicited selling of insurance, a deferred sales model for all add-on insurance, and reforms to the duty of disclosure especially those impacting insurance claims handling, as a matter of urgency to ensure fair treatment of people by insurance companies;
- Establishing a permanent insurance price monitor
- Increasing funding to community legal centres that advise and represent people in their disputes against insurance companies to reduce the power imbalance and ensure fair outcomes for people.

[Note: The full list of recommendations is summarised in Appendix A p20 of the submission which can be accessed here.]

[Sources: Consumer Action Law Centre media release 27/04/2020; Full text of the submission]

In Brief | COVID-19: Zip co-founder Robert Gray has reportedly said he expects there will be fewer BNPL providers in the market post-COVID-19 as some smaller providers are likely to struggle to survive the economic downturn

[Sources: Business Insider 27/04/2020]

In Brief | COVID-19: The House of Representatives Standing Committee on Economics will focus on insurers' response to the recent bushfires and the COVID-19 crisis, as well as check in on progress towards implementing Hayne Commission recommendations during video-hearings on 28 and 29 April

[Note: The daily programs for the hearings are available on the parliamentary website here. Transcripts of the hearings had not yet been uploaded onto the parliamentary website at time of publication. Transcripts will be available after the hearings on the parliamentary website here]

[Source: House of Representatives Standing Committee on Economics media release 23/04/2020]

In Brief | COVID-19: Additional time to report: Two new instruments - ASIC Corporations (Extended Reporting and Lodgment Deadlines – Unlisted Entities) Instrument 2020/395 and ASIC Corporations (Amendment) Instrument 2020/396- implement temporary measures to facilitate financial reporting by unlisted entities during the COVID-19 pandemic

[Sources: Explanatory memorandum ASIC Corporations (Extended Reporting and Lodgment Deadlines – Unlisted Entities) Instrument 2020/395 and ASIC Corporations (Amendment) Instrument 2020/396]

Accounting and Audit

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In Brief | COVID-19: Reportedly internal audit teams in more than half of Australian companies are undertaking critical control reviews of their operations, in response to an expected uptick in fraudulent/corrupt behaviour because of the COVID-19 shutdown

[Note: The NSW Independent Commission Against Corruption (ICAC) has released guidance for public officials — Managing corrupt conduct during the COVID-19 outbreak — to draw attention to: a) the fraud and corruption risks that arise during periods of disruption and economic downturn; and b) measures that may assist in protecting government funds. The guidance flags that the COVID-19 pandemic and the related economic downturn have intensified all three factors that have been shown to be collectively conducive to fraud: (1) financial pressure, (2) opportunity and (3) rationalisation.]

[Sources: [registration required] The Australian 22/04/2020; KPMG media release 17/04/2020]

Insolvency and Restructuring

—

COVID-19 highlights the need for permanent insolvency reform? A proposal to reform the recapitalisation process in Australia

The AFR reports that Moelis is in 'constructive' talks with Treasury about a proposal intended to improve the existing recapitalisation process by incentivising directors to work towards a recapitalisation (where feasible).

Why is longer-term reform needed?

According to The AFR, Moelis and other (unnamed insiders) consider that the prospect of being held personally liable should their company be found to have traded whilst insolvent, acts as a disincentive for directors to work towards a recapitalisation (where that may in fact, be feasible).

What's being proposed?

According to The AFR, Moelis proposes the creation of a new oversight/review mechanism to enable directors of financially distressed companies to secure protection from personal insolvency trading liability while executing a recapitalisation plan.

- Establishment of a new Safe Harbour Asset Recapitalisation Panel (the panel/SHARP): According to The AFR, under the proposal, directors of ASX companies and large listed vehicles in financial distress would be able to apply to a new panel, the Safe Harbour Asset Recapitalisation Panel (the panel/SHARP), for review/approval of recapitalisation plans. Subject to the panel's approval of the plan, directors would receive protection from insolvent trading liabilities during their attempts to execute it.
- Who would sit on the panel: It's proposed that the panel would call on a roster of experts in much the same way that Takeovers Panel does. It could potentially include: a company director (preferably with experience in restructures), a corporate lawyer, an insolvency professional and an adviser, such as an investment banker, corporate adviser or capital markets specialist.

- How the review process would work: Upon application by the directors of a financially distressed firm, the panel would assess the recapitalisation plan. This would involve assessing: a) the company's chance of survival; b) the fairness of the proposal to various stakeholders (such as creditors and debt holders); and c) the prospects of the company continuing as a going concern. In undertaking their assessment, the panel would have power to seek further submissions from the company or other stakeholders.
- Open to others to apply to the panel: Stakeholders of financially distress firms would also have the option to apply to the panel to seek review of directors' stance/thinking on reconstruction.

Moelis Australia joint CEO Chris Wyke is quoted as saying, that the reforms are intended to enable directors to 'properly focus on reconstruction, and not simply throw away the keys because they are concerned about their personal liability'.

The AFR reports that this is one of several proposals being put forward in light of the likely impacts of the COVID-19 downturn.

[Source: [registration required] The AFR 27/04/2020]

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