

Governance News

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Remuneration

Force global banks to suspend bonuses and payouts? Former Chair of the US FDIC argues that taking this step could help prevent the need for future public bailouts

Former chair of the US Federal Deposit Insurance Corporation Sheila Bair has called for global systemically important banks to be required to suspend discretionary bonuses, dividends, and share buybacks, to 'shore up the capital base of the banking system' until the global economy starts to recover from the impact of the COVID-19 pandemic.

'As the coronavirus pandemic shuts down international commerce, central banks must act decisively to prevent it from triggering a global financial crisis... Big banks need to be positioned to absorb impending losses, while simultaneously expanding their balance sheets to support the real economy. They need to remain solvent so that they can continue to lend as the crisis unfolds. As an important first step to achieve this, the US Federal Reserve and other central banks should take co-ordinated action to require systemically important banks to build their capital buffers by retaining their earnings. This means that such banks would suspend all capital distributions, including discretionary bonuses to top executives, until the global economy starts to recover. This simple step, which would include dividends and share buybacks, would potentially free up trillions of dollars of additional loan capacity' Ms Bair writes.

Ms Bair goes on to argue that voluntary measures being taken by certain banks to suspend share buybacks until at least the end of the second quarter of 2020 are a step in the right direction, but ultimately do not go far enough because: a) dividends and executive bonuses have not been suspended; and b) because the suspension 'only lasts for a few short months, with each bank free to reinstate buybacks at any time'.

Given this, Ms Bair maintains that instead, a longer, comprehensive and co-ordinated central bank-directed suspension of capital distributions is necessary. In addition, Ms Bair suggests that doing so could potentially avert the need for future public bailouts, as occurred following the 2008 global financial crisis. 'This time around, central banks should act before banks start falling into trouble. Requiring them to retain their earnings will be an important step in ensuring that the banking system does not let the public down again' Ms Bair states.

[Sources: [registration required] The FT 22/03/2020]

Santander Chair becomes the first European financial executive to take a reduction in pay in response to COVID-19

Key Takeout: According to The FT, Santander Chair Ana Botín is the first European financial executive to take a reduction in pay because of the COVID-19 downturn, although it has become 'common' for executives in other sectors such as aviation and hospitality that have dramatically scaled back operations.

The FT reports that Spanish lender Santander has announced adjustments to executive remuneration, a review of the bonus scheme and the postponement of interim dividend payments in light of the COVID-19 pandemic.

In addition, the bank will also reportedly establish a €25m medical equipment fund to purchase medical equipment and protective clothing (among other items) to help Coronavirus response efforts.

Details: Pay reductions announced

According to The FT:

- Santander Chair Ana Botín has diverted 50% of her pay to the new fund.

According to The FT, Ms Botín is the first European financial executive to take a reduction in pay, although it reportedly has become 'common' for executives in other sectors such as aviation and hospitality that have dramatically scaled back operations.



- CEO José Antonio Alvarez, will also contribute 50% of his final salary and bonus for this year to the fund.
- Non-executive directors on Santander's board will contribute 20% of their earnings, and other senior managers have also agree to donate. Employees are also reportedly being encouraged to make voluntary contributions.
- Santander is also reviewing its bonus policy to ensure that 'the maximum required resources are directed to supporting customers' and businesses in need.

Dividend postponed

- The interim dividend, usually paid in November, will instead be consolidated into the full-year dividend to be paid in May. The Santander board will review the overall 2020 dividend once the 'full impact' is clearer.

[Sources: [registration required] The FT 24/03/2020]

Disclosure and Reporting

UK listed companies asked to observe a two week (or longer) 'moratorium' on the publication of preliminary financial statements

The Financial Reporting Council (FRC) has requested that all listed companies observe a moratorium on the publication of preliminary financial statements for at least two weeks because of COVID-19. This is supported by the Financial Conduct Authority.

'Recent unprecedented events mean that the basis on which companies are reporting and planning is changing rapidly. It is important that due consideration is given by companies to these events in preparing all reporting. The FRC therefore encourages listed companies and their auditors to consider carefully whether they should delay other corporate reports for the next two weeks, such as interim financial statements and final audited financial statements, except where necessary to meet a legal or regulatory requirement' the FRC states.

More measures to be announced? The FRC adds that it is in talks with the Financial Conduct Authority and the Prudential Regulation Authority (PRA) about a 'package of measures aimed at ensuring companies and their auditors take the necessary time in these uncertain times to prepare appropriate disclosures and address current practical challenges'. The three bodies expect to announce the details of this shortly.

[Source: FRC media release 24/03/2020]

Shareholder Activism

The ACCR plans to continue to engage on climate issues at upcoming AGMs: 'the climate challenge has become no less significant and no less urgent' in light of the COVID-19 pandemic' ACCR states

In a media release, The Australasian Centre for Corporate Responsibility (ACCR) has said it intends to work 'as far as possible' with companies to ensure the smooth running of upcoming AGMs, which may either be delayed/held electronically in light of the COVID-19 pandemic but that it's focus on climate issues remains unchanged and its engagement with companies will continue.

'Needless to say, the climate challenge has become no less significant and no less urgent. Our ambition for this work remains undiminished... For the shareholders and partners we work with and support, we will continue to work with you to deliver on the goals and commitments we've made' the ACCR states.

This includes the ACCR confirmed, continuing to engage with Santos Ltd and Woodside Petroleum Ltd on their respective climate stances/planning ahead of upcoming AGMs at both companies.

Resolutions: Identical resolutions (coordinated by the ACCR) have been filed at both Santos and Woodside.

The resolutions call for the respective boards to disclose in annual reporting from 2021:



1. Short, medium and long-term targets for reductions in our company's Scope 1, 2 and 3 emissions (Targets) that are aligned with articles 2.1(a) and 4.1 of the Paris Agreement (Paris Goals);
2. Details of how our company's exploration and capital expenditure, including each material investment in the acquisition or development of oil and gas reserves, is aligned with the Paris Goals; and
3. Details of how the company's remuneration policy will incentivise progress against the Targets.

In their notices of meeting, neither board indicated support for the resolution.

Related News

Woodside to hold a hybrid AGM: Woodside is planning to hold a 'hybrid' AGM (in this case, live streaming the meeting and holding a physical meeting) on 30 April, in light of the COVID-19 advice.

Santos will also live webcast its 3 April AGM and shareholders will be unable to attend in person. The details of Santos' announcement is covered in a separate post in this issue of Governance News.

[Sources: ACCR media release 20/03/2020; Santos ASX Announcement: Notice of meeting; Woodside ASX Announcement: Notice of Meeting 20/03/2020]

The ACCR has announced that it has withdrawn a climate resolution ahead of the Rio Tinto AGM following successful engagement with the company

The Australasian Centre for Corporate Responsibility (ACCR) filed a shareholder resolution with Rio Tinto Ltd in relation to the advocacy on climate and energy policy by its industry associations, ahead of its 7 May AGM.

The ACCR has issued a statement announcing that it has withdrawn the resolution following successful engagement with the company. 'Following extended engagement with Rio Tinto executives, and a commitment by Rio Tinto to improve the oversight and nature of the advocacy by its industry associations, ACCR has withdrawn the resolution'.

The ACCR says that Rio Tinto will publish an agreed statement detailing changes it will make, in advance of its AGM.

[Source: ACCR media release 10/03/2020]

The FT reports that activist Carl Icahn looks to have secured two board seats as part of a settlement being finalised with Occidental

Context: Reportedly, activist Carl Icahn has recently stepped up public pressure on Occidental Petroleum to: 1) make changes to the board, including pushing the termination of Vicki Hollub as CEO and the removal of four directors; and 2) to shift its strategic direction in light of its financial performance. Reportedly Occidental's share price has fallen almost 70% in the past three weeks and its market capitalisation is now less than \$10bn, compared with \$42bn just before its deal to buy Anadarko (which Mr Icahn reportedly opposed) in August 2019.

Settlement is reportedly being finalised: The FT reports that Occidental is understood to be finalising a settlement with Mr Icahn that would give him two board seats. Reportedly, Mr Icahn's nominees are likely to be New York investor, Andrew Langham and Nicholas Graziano. Reportedly a third additional board member – jointly selected by Mr Icahn and the existing board – could also be added..

Occidental also announced that board Chair Eugene Batchelder will step down at this year's board meeting. Mr Batchelder will reportedly be replaced as Chair by Stephen Chazen, who was Occidental's chief executive until 2016.

Reportedly, Ms Hollub will retain her role as CEO,

[Sources: [registration required] The WSJ 19/03/2020; [registration required] The FT 23/03/2020]

The WSJ reports that Impala is pushing for board representation at Harley Davidson

Push for board seats: The WSJ reports that Impala Asset Management has nominated two candidates - former AT&T Inc executive, Leo Hindery Jr and former president of Nascar, Brent Dewar - to sit on the Harley-



Davidson Inc (Harley) board. According to The WSJ, Impala has said that its board nominees will provide valuable perspectives on Harley's strategy as well as critical input about the company's next permanent CEO.

Reportedly the move by Impala follows a period of private engagement with the Harley board on the strategic direction of the company and the company's leadership. According to The WSJ, Impala wrote to the board in January pushing for a change in board composition and stating that it did not have confidence in Harley's former CEO Matt Levatich. Following discussions, Impala maintains that Harley terminated Mr Levatich, a claim Harley disputes. Harley's position is reportedly that Mr Levatich stepped down as CEO and is assisting in a leadership transition through to the end of March.

Details of what changes Impala is looking for are unclear as yet? Impala has reportedly said it plans to provide further detail on its views on Harley at some point in future, but has decided to hold off doing so immediately because of the coronavirus pandemic.

Response from Harley: Reportedly Harley maintains that its nine board nominees have a deep understanding of the company and its markets and are 'more capable than the Impala nominees to lead our company forward.' Harley has also reportedly questioned whether Impala's candidates would add additional skills or diversity to the board, given their 'stated skill sets are already well represented'.

[Source: [registration required] The WSJ 18/03/2020]

Corporate Social Responsibility

United Kingdom | The High Pay Centre argues that government assistance to large companies should be conditional

Key Takeout: The UK High Pay Centre has released a discussion paper calling for the government's bailouts of large businesses to be made conditional on meeting various social and environmental conditions.

These include, among others: a) giving the government shareholder voting rights (ie a public stake with government voting rights commensurate to the value of the financial support provided); b) imposing maximum pay ratios between the highest-paid and median employees; and c) worker representation on boards and full trade union recognition.

It's also suggested that bail out agreement should include a requirement to targets against the UN Sustainable Development Goals and Paris Agreements to measure the social and environmental impact of businesses.

The case for making bailouts conditional

The UK High Pay Centre has released a discussion paper calling for government COVID-19-related assistance to large businesses should be made conditional on meeting various social and environmental conditions.

The paper argues that the assistance package is an opportunity for government to learn from the 'lessons of the global financial crisis' when bank bailouts were not made conditional on industry addressing 'well-documented problems in the sector' eg excessive executive remuneration.

Further, the High Pay Centre argues that the failure to impose conditions on bailouts in the past led to lasting reputational damage to the banking sector and more broadly to the reputation of business generally with the belief that high paid executives benefited from

Bailed out companies should be required to:

1. **Make the government a shareholder in the business:** The High Pay Centre proposes that companies should be required to give the government a stake in the business (with voting rights attached) proportionate to the value of funding provided. This, the Centre argues, would ensure that the government is in a position to advocate for responsible business practices over the longer term eg the government would be able to push businesses to meet climate targets.



2. Provide worker representation on boards and full trade union recognition:

- Worker representation on boards both ensures diversity in the board room and ensures that boards 'better understand what is happening in all levels of their company. To date, though the 2018 Corporate Governance Code recommends worker directors as one option for improve accountability, the take up of the option has been low to date.
- Trade union membership results in, on average an 8% pay premium for low and middle workers compared with their non-union counterparts.

3. Comply with government-imposed maximum pay ratios between the highest-paid and median employees at an initial ratio of 10:1, to enable bail-out funding to do more for low and middle earners

4. Commit to address productivity challenges: The High Pay Centre argues that low levels of productivity, attributable to underinvestment in innovation, research and training could also be addressed through requiring companies to:

- commit, to 'paying the real living wage' (ie an independently accredited hourly wage level) to staff, including to contracted staff within a set timeframe; and
- commit not to pay share buybacks or 'unsustainable levels of dividend in future'.

5. Commit to Fair Tax Mark accreditation, which The High Pay Centre argues would promote more responsible tax corporate practices.

6. Set targets against the UN Sustainable Development Goals and Paris Agreement to measure the social and environmental impact of businesses. The High Pay Centre notes that this is already a key demand of many investors, and would promote sustainable business practices.

7. The government should use the honours system to recognise the efforts of business leaders navigating their companies through the crisis, in reciprocation of commitments to responsible business practices as outlined above.

The High Pay Centre argues that by imposing these conditions, 'the government would create an environment in which responsible boards could lead those companies affected by the coronavirus back to sustainable success in a manner aligned with the interests of wider society. Public attitudes towards business leaders would move from resentment to respect, belatedly redressing the damage inflicted in the aftermath of the global financial crisis over a decade ago'.

[Source: High Pay Centre media release 18/03/2020]

Meetings and Proxy Advisers

Top Story | ASIC guidelines for AGMs in a COVID-19 environment

On Friday, 20 March 2020 the Australian Securities and Investments Commission (ASIC) released guidelines for upcoming annual general meetings (AGMs) for Australian public companies in the light of the impact of COVID-19, the new social distancing requirements and the restrictions which are now being imposed on indoor non-essential gatherings.

MinterEllison has prepared an expert summary of the guidance. This is available on the MinterEllison website [here](#).

The full text of ASIC's guidance is available [here](#).

Guidance on the available options: The Governance Institute, AIRA and the Law Council of Australia have released COVID-19 AGM guidance

In light of the COVID-19 pandemic and associated restrictions on gatherings, the Governance Institute of Australia, the Australasian Investor Relations Association and the Business Law Section of the Law Council of Australia have released AGM guidance – [Guidance – Covid 19 and the impact on AGMs](#) - to assist businesses to adapt/respond to the evolving COVID-19 environment.



[Note: The guidance takes into account the Australian Securities and Investments Commission AGM guidance (released on the same day). ASIC's guidance is [here](#). You can access an expert summary of ASIC's guidance on the MinterEllison website [here](#).]

Announcing the release of the guidance, Law Council President, Pauline Wright, emphasised the importance of ensuring AGMs provide a reasonable opportunity for shareholders to participate in the meeting, including having a reasonable opportunity for shareholders to ask questions, make comments and to vote.

'While noting that each company's situation will be different, having plans in place is imperative. This includes checking relevant provisions of the company's constitution and coordinating with share registries, making sure shareholders are kept regularly updated and are given the maximum opportunity to have their say' Ms Wright said.

Available options for companies

The [guidance](#) outlines several options for companies whose AGMs are scheduled to occur soon, to consider in light of the COVID-19 pandemic and the associated restrictions. The guidance notes that in light of the fact that the situation is evolving, companies may ultimately have to use more than one of these options.

Accompanying each option is a list of issues companies should consider. Below is a high level overview of each option and some of the suggested considerations.

The guidance states companies will need to consider their individual circumstances, including their constitutions and any other relevant matters.

Option	Some suggested issues to consider
Adapt physical AGMs	<ul style="list-style-type: none"> ▪ Ensure the AGM will be quorate. ▪ Director attendance: The guidance states that though it is good practice for as many directors as possible to attend the AGM, (other than the Chair) this is not a legal requirement, and it therefore does not invalidate the meeting if some (or most) are unable to attend. It's suggested that directors could be available for questioning via video link, rather than in person. ▪ Auditor attendance: As the auditor of the company is required to attend the AGM, provisions for the auditor to attend should be arranged in line with the rules of the company's constitution. The guidance suggests that companies should check with their auditor in advance to discuss arrangements for minimising their personal risk (as they are likely to be attending numerous AGMs) ▪ Confirm the position with the venue provider: ensure that the venue is still prepared to host the AGM and that appropriate sanitisation arrangements are in place. Also, consider booking a fall back venue or (constitution permitting) supplemental venues to limit the number of attendees at a single venue. ▪ Introduce appropriate safety measures. ▪ Restrict the number of non-shareholder attendees and communicate this to attendees along with other social distancing measures. Have arrangements in place to minimise queuing in the venue. ▪ Dispense with the provision of refreshments and any other complimentary offerings before and after the meeting. ▪ Pre-register attendees. Encourage shareholders to provide email addresses and mobile phone numbers as part of pre-registration, to facilitate shareholder communications and urgent updates. ▪ Constitution permitting, consider including provision for direct voting in the notice of meeting and encourage shareholders to use this method.



Option	Some suggested issues to consider
	<ul style="list-style-type: none"> ▪ Include an insert in the AGM materials package encouraging direct voting or proxy voting and advising how to send questions in advance and the methods of updating shareholders as the situation evolves. ▪ Establish a dedicated AGM area on the company website ▪ Establish an online shareholder Q&A for the AGM. ▪ Consider announcing a shareholder event to be held later in the year. The guidance suggests that although this would not be the AGM, companies may wish to offer shareholders, particularly retail investors, the opportunity to engage with directors later in the year.
Adjourn the AGM	<p>The guidance states that a company should only consider adjournment if it has issued its AGM notice and does not have postponement provisions in its constitution.</p> <p>In this case, similar considerations to those under delay the AGM (see above) apply.</p>
Apply to ASIC for an extension of time to hold the AGM	<p>Public companies, as defined in the Corporations Act, can apply to extend the time within which they hold their AGM under section 250P of the Act. The guidance suggests that in the current climate, it is probable that ASIC will grant extensions.</p> <p>The guidance suggests that this option may be more practical for smaller public companies such as companies limited by guarantee.</p>
Delaying the AGM	<p>The guidance outlines a number of ways that companies may be able to delay/postpone their AGMs, including relying on ASIC's two month no-action position.</p> <p>Where companies do elect to defer/postpone their AGMs, the guidance suggests that consideration should be given to the following:</p> <ul style="list-style-type: none"> ▪ Update the market. If the time and date of the AGM have been publicised, an update announcement should be made. ▪ Liaise with ASX: Listed companies should ensure that the ASX is briefed on revised meeting arrangements, and an updated draft of the meeting notice is provided to them (if relevant). ▪ Review annual authorities. Check the dates on which any standing authorities approved at the previous AGM expire. ▪ Remuneration report: The business of the AGM for listed companies must include an advisory vote on their remuneration report, and accordingly, that means the deadline for holding the AGM effectively applies to those requirements as well. ▪ Dividend payments: Delaying the AGM may mean that the company's final dividend is not paid on the expected date. If the timing is considered important, the payment of an interim dividend in lieu could be considered.
Conduct a hybrid AGM, if permitted under the company's constitution	<p>Constitution allowing, companies may be able to conduct a hybrid AGM (a combination of a physical and electronic meeting).</p> <p>If a company has already issued its AGM notice for a physical-only meeting, but its constitution allows a hybrid AGM, it can change to a hybrid AGM. In this case,</p>



Option	Some suggested issues to consider
	<p>an announcement should be made to reflect this decision, and the website should be updated.</p> <p>The guidance suggests that companies conducting a hybrid AGM should make shareholders aware that they can participate fully in the AGM electronically.</p> <p>The guidance notes that holding a hybrid meeting does not preclude shareholders from attending in person. As such, it's suggested that consideration should be given to the issues listed under Adapt physical AGMs above.</p>
<p>Conduct a virtual AGM.</p>	<p>Companies may consider relying on ASIC's 'no-action' position, to conduct a virtual AGM (online-only AGM), or to hold the AGM up to two months past the prescribed deadline.</p> <p>The Guidance states that the effect of ASIC's position is that, during the period it is in place, ASIC will not take proceedings against a company for holding an online AGM even though it does not comply with the technicalities of the Corporations Act.</p> <p>The Guidance observes that ASIC's position 'is not able to address issues that arise from shareholders expressing concern that the format of the AGM does not meet Corporations Act requirements or requirements of the company's constitution'.</p> <p>The guidance flags that avenues to secure further regulatory relief are being investigated – but are not yet in place.</p> <p>Companies who elect to rely on ASIC's no-action stance, may also apply to the Court to address a procedural irregularity.</p>

Opportunity to update constitutions

The guidance also suggests that if companies have not already issued their meeting notice, they should consider including a special resolution in the notice of meeting, to update the constitution to permit hybrid and online meetings and direct voting, and other provisions to provide flexibility for holding meetings.

Current legislative position

The Guidance observes that the current situation exposes many of the 'shortcomings of the current legislative environment'. For example, the need to 'bring the Corporations Act into the 21st century and to ensure it is technology neutral'.

The Guidance states that the Governance Institute, the Law Council of Australia and the Australasian Investor Relations Association have been actively engaging with ASIC, ASX and Treasury on legislative options to help systems and services work more effectively in tackling the outbreak of Covid 19 and will keep members updated.

[Sources: Guidance – Covid 19 and the impact on AGMs; Governance Institute media release 20/03/2020; Law Council of Australia media release 23/03/2020]

Glass Lewis has updated its US and Canadian guidelines on virtual AGMs in light of COVID-19

In light of the COVID-19 pandemic and the changing expectations and restrictions on public gatherings, Glass Lewis has revised its Canadian and US policy guidelines concerning the use of virtual-only meetings for the duration of the 2020 proxy season.

Key changes



For the duration of the 2020 proxy season (1 March 2020 through to 30 June 2020), Glass Lewis has said will take into account 'the extenuating circumstance of the COVID-19 pandemic' when applying its policy on virtual-only shareholder meetings.

During this period, Glass Lewis says that provided the company discloses, at a minimum, its rationale for holding a virtual-only meeting, including citing COVID-19, it will 'generally refrain' from recommending shareholders vote against members of the governance committee. .

For all shareholder meetings occurring after June 30, 2020, Glass Lewis will apply its standard policy on virtual shareholder meetings. Even if the pandemic continues well beyond this date, Glass Lewis considers that companies have been given sufficient time to address shareholder concerns as outlined in its standard policy.

Should companies opt to continue holding virtual-only shareholder meetings in subsequent years, Glass Lewis expects future proxy statements to include 'robust disclosure concerning shareholder participation'. Examples of effective disclosure include:

- addressing the ability of shareholders to ask questions during the meeting, including time guidelines for shareholder questions, rules around what types of questions are allowed, and rules for how questions and comments will be recognized and disclosed to meeting participants;
- procedures, if any, for posting appropriate questions received during the meeting and the company's answers, on the investor page of their website as soon as is practical after the meeting;
- addressing technical and logistical issues related to accessing the virtual meeting platform; and
- procedures for accessing technical support to assist in the event of any difficulties accessing the virtual meeting.

[Note: Glass Lewis' updated guidelines for the US (p48) are [here](#), and for Canada (p37) are [here](#). Guidelines for Australia have not been similarly revised.]

[Source: Harvard Law School Forum on Corporate Governance and Financial Regulation 23/03/2020]

Santos shareholders to attend AGM via webcast because of COVID-19

Santos Ltd has announced that due to the COVID-19 threat, and in light of the Australian government's ban on public gatherings of 100 or more people, it is unable to allow shareholders to physically attend the AGM scheduled for 3 April.

Rather than deferring the AGM, Santos intends to go ahead on the scheduled date and to make it accessible to shareholders via a live webcast.

Shareholder participation and proxy voting

- The AGM will be made accessible to shareholders via a live webcast which will include the facility for shareholders to ask questions in relation to the business of the meeting. Instructions to join the webcast will be published on the Santos website.
- Santos has also invited shareholders to submit questions in advance of the meeting. Instructions on how to do this will be published on the Santos website.
- All resolutions will be decided based on proxy votes. These must be received by 10:00am Adelaide time on Wednesday 1 April 2020. Lodgement instructions (which include the ability to lodge proxies electronically) are set out in the Notice of Meeting and on the Santos website.

Shareholders are also encouraged to monitor the Santos website for any further updates in relation to arrangements for the AGM given the evolving situation.

[Source: Santos Ltd ASX Announcement: 23/03/2020]

Institutional Shareholders and Stewardship



United States | Asset manager support for shareholder initiated ESG resolutions has risen to 46% in the last five years according to analysis by Morningstar

Analysis by Morningstar of the voting behaviour of some of the largest asset managers over the period 2014-2019 has identified that:

- Overall, there has been an uptick in asset-manager proxy voting support for ESG-related shareholder resolutions, with average support across 50 large fund families rising from 27% to 46%
- Funds offered by Allianz Global Investors, Blackstone, Eaton Vance, and PIMCO were the most likely to support shareholder-proposed ESG resolutions in 2019, voting for these resolutions more than 87% of the time.
- Five of the 10 largest fund families, voted against more than 88% of ESG-related shareholder resolutions.
- Nineteen of 23 resolutions that received more than 40% support would have passed if supported by just one of the largest two asset managers. Morningstar observes that failure of large fund groups to vote in support ESG-related shareholder resolutions was the key barrier to their passage.

Morningstar attributes the upward trend in asset manager support for shareholder initiated ESG resolutions to rapidly changing investor attitudes toward the materiality of the sustainability issues that the resolutions address. 'It shows that asset managers, as a group, are becoming increasingly willing to use their proxy votes to support transparency and better governance of sustainability concerns' Morningstar concludes.

[Source: Harvard Law School Forum on Corporate Governance and Financial Regulation 23/03/2020]

BlackRock has announced its five 2020 engagement priorities and accompanying KPIs

BlackRock has outlined its 2020 engagement priorities.

Commitment to increased transparency

BlackRock will enhance its own disclosures around its stewardship activities including by: a) moving from annual to quarterly voting disclosure; b) providing prompt disclosure around key votes including an explanation of voting decisions; and c) enhanced disclosure around engagement with companies.

Five key priorities for 2020

In 2020, BlackRock will focus on sustainability-related issues and relevant disclosures in five key areas: These priorities been mapped to specific United Nations Sustainable Development Goals, such as Gender Equality and Clean and Affordable Energy.

Each priority is accompanied by a 'globally relevant; key performance indicator, to make BlackRock's expectations as clear as possible. The KPIs also state that BlackRock will hold individual directors to account for oversight of the KPI.

The table below provides a high level overview of the five key focus areas/accompanying KPIs.

Priority Area	KPI
Board quality	<p>A key focus for BlackRock is board oversight of management, ie what oversight measures are in place and how effectively boards oversee and counsel management.</p> <p>To assist in evaluating this, BlackRock expects to have access to a non-executive, and preferably independent, director(s) who have been identified as being accessible to shareholders where appropriate.</p> <p>BlackRock says it will hold the most senior non-executive director, eg chairman or lead independent director, accountable for ensuring such a role is identified.</p>
Environmental risks and opportunities	BlackRock expects companies with which we have already engaged on TCFD-aligned reporting to disclose sufficient detail across the four pillars of the TCFD



Priority Area	KPI
	<p>framework and provide a timeframe within which the company will report fully in line with the eleven recommendations.</p> <p>BlackRock says that it will hold members of the relevant committee, or the most senior non-executive director, accountable for inadequate disclosures and the business practices underlying them.</p>
Corporate strategy and capital allocation	<p>BlackRock expects that as part of long-term strategy and capital allocation, companies should publicly articulate how sector relevant sustainability risks and opportunities, eg those identified in the SASB framework, are integrated into business strategy.</p> <p>BlackRock will engage with companies to review its reporting expectations and encourage them to make the connection between long-term planning and business-relevant sustainability risks and opportunities.</p> <p>BlackRock will hold the most senior non-executive director accountable if, within an agreed timeframe, the company has not provided adequate disclosures and made progress on the business practices underlying them.</p>
Compensation that promotes long-termism	<p>BlackRock expects that executive pay is 'adequately aligned with performance and shareholder investment return' and more particularly, expects pay outcomes to be correlated with a business relevant long-term performance metric, eg 3-5 year total shareholder returns or returns on invested capital.</p> <p>BlackRock will also evaluate company-wide structures, 'as we believe compensation, including base, bonus, and pension contributions, is an important element of a company's ability to retain and attract talent at all levels and provides insight into a company's human capital management in practice'.</p> <p>BlackRock will hold compensation committee members accountable for pay outcomes.</p>
Human capital management	<p>BlackRock's expectation is that boards oversee human capital management strategies and expects companies to disclose information about the board's role in overseeing the company's human capital practices, including an explanation of the type of information reviewed and how frequently.</p> <p>BlackRock will hold members of the relevant committee, or the most senior non-executive director, accountable.</p>

The FT quotes global head of BlackRock's investment stewardship team, Michelle Edkins as saying that BlackRock wants to see progress from companies on these issues regardless of the COVID-19 pandemic.

'We are looking at these [issues] long term. These are not new issues...Companies can still demonstrate that they have effective leadership. In times of crisis that becomes more apparent, not less apparent' Ms Edkins reportedly said.

[Sources: BlackRock Investment Stewardship Engagement Priorities for 2020 March 2020; [registration required] The FT 18/03/2020]

India | SBI Funds Management adopts stewardship code as mandated by Sebi

Context: In December, the Securities and Exchange Board of India (SEBI) issued a [circular](#) notifying mutual funds (ie all Mutual Funds, asset management companies, trustee companies, boards of trustees of mutual funds, all alternative investment funds) of SEBI's decision to require them to adopt a stewardship code.

SEBI explains that the requirement has been introduced in response to the increasingly important role institutional investors play in capital markets globally. Institutional investors, SEBI says are 'expected to shoulder greater responsibility towards their clients/ beneficiaries by enhancing monitoring and engagement



with their investee companies...Such increased engagement is also seen as an important step towards improved corporate governance in the investee companies and gives a greater fillip to the protection of the interest of investors in such companies'.

The Stewardship Code is due to commence from the financial year beginning 1 April 2020.

First mutual fund has reportedly adopted the Code: The Economic Times of India reports that SBI Mutual Fund (a joint venture between SBI and asset manager Amundi) has become the first fund house to implement the stewardship code in India. which requires the fund house to monitor its investor companies and establish voting policies.

[Source: Economic Times of India 17/03/2020]

Markets and Exchanges

NYSE to (temporarily) move to fully electronic trading because of COVID-19

From 23 March, the New York Stock Exchange (NYSE) will temporarily close trading floors and move to electronic trading because of coronavirus.

In a statement NYSE said its 'markets are fully capable of operating in an all-electronic fashion to serve all participants' and that 'robust, regularly tested contingency plans [are] in place to initiate fully electronic trading on its exchanges that have physical trading floors'.

The statement says that Intercontinental Exchange will continue to monitor events to determine the appropriate time to re-open the NYSE trading floors.

[Source: NYSE media release 18/03/2020]

Regulators

APRA has paused the majority of planned policy/supervision initiatives to focus instead on monitoring the impact of COVID-19

APRA has announced that it has suspended the majority of its planned policy and supervision initiatives (as outlined in January 2020) in response to the impact of COVID-19 until 'at least 30 September'.

APRA Chair Wayne Byres said 'APRA set out an expansive policy and supervision agenda in January, but right now it is more important that banks, insurers and superannuation trustees – as well as APRA – devote their energy and resources to responding to the impact of COVID-19'.

Mr Byres went on to say that the regulator will be 'working with financial institutions to balance the need for timely data and information on current conditions with institutions' ability to effectively manage their own response. Given the rapidly evolving environment in which everyone is operating, we will continue to closely monitor the extent and impact of COVID-19 on APRA-regulated entities to consider if any further modifications to our supervisory and policy activities are necessary'.

Pausing other planned policy/supervision initiatives until 30 September

APRA says that it is pausing all substantive public consultations and actions to finalise revisions to the prudential framework that are currently underway or upcoming, including consultations on prudential and reporting standards.

APRA says it will keep the situation under review, but presently does not plan to recommence consultation on any non-essential matters before 30 September 2020.

Exceptions?

APRA says it may continue to progress certain data reporting initiatives where they are critical to meeting its mandate in the current environment, including new data collections related to the impacts of COVID-19.

Implementation dates/transition timeframes may be extended



In addition, APRA says it is also reconsidering the implementation dates and transition timeframes for prudential and reporting standards that have been recently finalised but not yet implemented.

APRA adds that it will provide details of any adjustments 'shortly'.

Monitoring the impact of COVID-19 is now APRA's primary focus

Monitoring the impact of COVID-19 on the financial and operational capacity of regulated institutions is now, APRA says, its primary focus.

APRA says that its refocused supervision effort will involve frequent 'communication with entities monitoring key financial settings, such as capital and liquidity and responding accordingly. Engagements with entities will be conducted 'virtually' unless 'absolutely necessary'.

[Source: APRA media release 23/03/2020]

APRA has announced a six month suspension of the APRA Connect data collection solution project

The Australian Prudential Regulation Authority (APRA) has announced the temporary suspension of its program to replace APRA's Direct to APRA (D2A) data collection tool.

The purpose of the suspension is to 'provide some relief to entities and ensure flexibility for resourcing of work to ensure the financial resilience of entities and the provision of ongoing customer service'.

How long will the project be on hold? APRA says that it expects the suspension to last 'at least six months' and that all APRA Connect go live dates will be delayed accordingly. APRA says that it will advise entities when the program will restart when the external environment stabilises.

Entities should continue to use current systems: During this period, APRA says that entities will need to continue to use Direct to APRA (D2A) and other current reporting channels.

APRA also reminds entities who have not yet done so that AUSkey will retire at 11:59pm (AEDT) on Friday 27 March 2020 and they need to take steps before that date, to ensure they have continued access to APRA systems.

[Note: More information on this point is available on the APRA website [here](#)]

[Source: APRA media release 24/03/2020]

ASIC to shift regulatory focus to prioritise COVID-19 challenges

The Australian Securities and Investments Commission (ASIC) in coordination with the Council of Financial Regulators (COFR) has announced that, until 'at least 30 September 2020,' the 'challenges' arising from the COVID-19 pandemic will be its key focus.

ASIC says that it will also continue to priorities matters where there is the risk of significant consumer harm, serious breaches of the law, risks to market integrity and time-critical matters.

Some Key Points

- **Key business as usual functions will be maintained** including registry operations and services, receipt of whistleblower, breach and misconduct reports and general contact points for industry.
- **ASIC says it will maintain its enforcement activities** and continue to investigate and take action in the public interest, against any person or entity that breaks the law. The focus of enforcement activities during this period will be on actions necessary to prevent immediate consumer harm, egregious illegal conduct and other time critical matters.
- **ASIC will also work with financial institutions to further accelerate the payment of outstanding remediation** to customers.

Pausing a number of short-term activities



- **ASIC has suspended a number of short-term activities**, not considered to be time-critical, including: consultation, regulatory reports and reviews. For example, ASIC has temporarily paused work on: the ASIC report on executive remuneration, updated internal dispute resolution guidance and a consultation paper on managed discretionary accounts. ASIC says that stakeholders will be notified of deferred consultation/publications relevant to them.
- **ASIC will also suspend its enhanced on site supervisory work** such as the Close and Continuous Monitoring Program.

Engaging with industry

- **Relief or waivers from regulatory requirements will be provided where warranted.** This will include, requirements on listed companies associated with secondary capital raisings and audits in addition to the 'take no action stance' already announced in relation to the timing of AGMs until 31 July and the conduct of AGMs electronically.
- **ASIC will take account of the circumstances** in which lenders, acting reasonably, are currently operating when administering the law.
- **Information gathering notices:** ASIC has provided new guidance to its staff to be mindful that many notice recipients may be facing significant disruption.

Related News: COVID-19 information

ASIC has also published an update setting out actions it is taking, and where market participants, public companies, insurers, small businesses, investors and consumers can find COVID-19 information.

This update can be accessed [here](#).

[Sources: ASIC media release 23/03/2020; 24/03/2020]

AFCA will modify its approach to dispute resolution because of the impact of COVID-19

The Australian Financial Complaints Authority (AFCA) has said it will modify its approach to dispute resolution to take into account all regulatory and legislative changes announced as part of Australia's COVID-19 response.

AFCA Chief Executive Officer and Chief Ombudsman David Locke said that AFCA 'will take into account the unprecedented circumstances that financial firms are currently operating in when considering any complaints that may arise, as well as any revised regulatory standards or guidance that may apply...AFCA's approach to handling COVID-19 related complaints will align with the statements released recently by the Council of Financial Regulators'.

[Note: This appears to be a reference to the Council of Financial Regulator's statements of 16 March ([here](#)) and 23 March ([here](#)).]

The statement confirms that:

- AFCA has activated its business continuity plan which ensures that services will continue to be available 'under changing conditions'.
 - AFCA's staff are transitioning to work from home.
 - AFCA's main phone number and the new hotline (see below) will continue to operate, though some staff may only be available via email.
 - Complaints can continue to be lodged online via afca.org.au or via email at info@afca.org.au
 - All meetings involving external guests will be conducted via video- or telephone-conferencing rather than face-to-face.
 - Events have also been postponed: Member Forums and Group Liaison Meetings will be replaced by webinars at a later date. The upcoming legs of the AFCA Roadshow will be rescheduled when safe to do so.



- AFCA has setup an online COVID-19 information hub that is regularly updated with information for consumers and small businesses (afca.org.au/covid-19).
- A new support hotline (1800 337 444) will be in operation from 24 March to ensure a priority service is provided for those impacted by the COVID-19 pandemic
- Complaints about COVID-19 will be prioritised and fast-tracked to ensure those impacted have their issues resolved as quickly as possible. AFCA adds that it will 'take into account the circumstances and context in which lenders and other financial firms are currently operating when considering complaints. AFCA understands that firms may be putting in place alternate staffing arrangements and may not be in a position to quickly act on requests for information'.
- AFCA supports the changes to responsible lending obligations proposed by the government and the initiatives designed to assist small businesses that encounter financial difficulty or require additional access to credit due to the impact of the COVID-19 pandemic.

Guidance for financial firms

AFCA encourages financial firms to continue to both: a) work 'constructively and reasonably' with affected consumers and small businesses during any period of disruption, particularly consumers and small businesses in hardship, or who may be experiencing difficulty repaying debt; and b) openly communicate about delays they may be experiencing in decision making, claims or complaints handling due to the impact of COVID-19 on their business.

[Source: AFCA media release 23/03/2020]

RBA has announced will establish a temporary swap line for the provision of US dollar liquidity with the US Federal Reserve

The Reserve Bank of Australia (RBA) has announced that it will establish a temporary reciprocal currency arrangement (swap line) for the provision of US dollar liquidity with the US Federal Reserve.

The RBA and the Federal Reserve will establish a US\$60 billion swap line to provide US dollars in exchange for Australian dollars. The US dollars will be made available to local market participants by the RBA in US dollar repurchase agreements (repos) against Australian dollar-denominated securities. The US dollar repos will be allocated through an auction process.

The RBA says it will announce its US dollar repo auctions via the electronic news services (Reuters – RBA37, Bloomberg – RBAO08). Operational details for participants in these auctions will be made available shortly as a Technical Note on US Dollar Repos.

Similar arrangements with eight other countries: The Federal Reserve will also establish temporary arrangements with the Banco Central do Brasil, the Danmarks Nationalbank, the Bank of Korea, the Banco de Mexico, the Norges Bank, the Reserve Bank of New Zealand, the Monetary Authority of Singapore and the Sveriges Riksbank.

The Federal Reserve has standing US dollar swap lines with the Bank of Canada, the Bank of England, the Bank of Japan, the European Central Bank and the Swiss National Bank.

[Sources: RBA media release 20/03/2020; [registration required] The Australian 20/03/2020]

RBNZ confirms that cash and other payment systems are 'ready for COVID-19'

The Reserve Bank of New Zealand (RBNZ) has issued a statement confirming that cash and other payments systems are 'ready for COVID-19' after public interest and discussion about cash availability and use.

RBNZ Assistant Governor Christian Hawkesby said that RBNZ and the banking system 'have plenty of cash on hand to meet demand under any circumstances'

Mr Hawkesby said that RBNZ has at 'least two years' worth of replacement cash available to feed into the system if required...The banks and electronic payments systems are prepared, resilient, and will keep operating. When people are shopping, there will be cash and other payments systems available to support that'.



RBNZ went on to remind consumers and retailers to practice good hand hygiene. 'Retailers should use common-sense when it comes to cash. Businesses are not obliged to accept cash, but declining it may end up disadvantaging people who rely on its use. These people are more likely to be young, elderly, poor, disabled or financially excluded. Have respect and care for each other' Mr Hawkesby said.

[Source: RBNZ media release 19/03/2020]

In Brief | APRA has released a request to all ADIs and registered financial corporations to extend the parallel run period for the Economic and Financial Statistics data collection to the June 2020 quarter in order to maintain a consistent data source for the March and June 2020 quarters during the current period of uncertainty, and to capture the impact of COVID-19

[Source: APRA media release 20/03/2020]

Financial Services

Top Story | Covid-19: Government helps the securitisation industry and non-bank lenders compete

The Australian government and the finance industry have together announced a series of funding packages and other initiatives to support the Australian economy through the challenging economic times ahead.

MinterEllison's experts have released an article concisely summarising the key measures and their implications. This can be accessed on the MinterEllison website [here](#).

SME relief package: Banks to defer loan repayments for six months for small businesses

The Australian Banking Association has announced that Australian banks will defer loan repayments for six months for small businesses who need assistance because of the impacts of COVID-19.

Australian Banking Association CEO Anna Bligh said that the measures will apply to 'more than \$100bn of existing small business loans and depending on customer take up, could put as much as \$8 billion back into the pockets of small businesses as they battle through these difficult times'.

Ms Bligh added that the approval process has been fast tracked to ensure customers are able to access support as soon as possible and that banks have already commenced contacting customers to offer assistance.

Ms Bligh encouraged any small business who has not already been contacted to contact their bank to apply.

The ABA's statement adds that the measure was developed following discussions with APRA and ASIC to provide the appropriate regulatory treatment. The measure is subject to authorisation by the ACCC.

[Source: ABA media release 20/03/2020]

Related News

The AFR reports that National Australia Bank and Westpac Banking Corp are offering six-month loan holidays to mortgage customers in addition to other product changes.

[Source: [registration required] The AFR 20/03/2020]

APRA to contact banks to advise of the specific reporting treatment for loans subject to COVID-19 support arrangements

On 23 March, the Australian Prudential Regulation Authority (APRA) said that it plans to contact banks to advise them of the specific reporting treatment for loans subject to COVID-19 support arrangements (ie arrangements provide affected borrowers with an option to defer their repayments for a period of up to six months).



APRA will require ADIs to report to APRA, and publicly disclose, the nature and terms of any repayment deferrals and the volume of loans to which they are applied. ADIs must also still continue to provision for these loans under relevant accounting standards.

APRA also confirmed that the Coronavirus SME Guarantee Scheme announced by the Commonwealth Government yesterday is to be regarded as an eligible guarantee by the government for risk-weighting purposes.

[Source: APRA media release 23/03/2020]

Quantitative easing: The RBA has announced a range of measures to support the economy through the disruption caused by COVID-19

The Reserve Bank Board has announced a 'comprehensive package' of measures to support the economy through the disruption caused by COVID-19.

Measures include:

- **Purchase of government bonds:** Commencing 20 March, the RBA will purchase government bonds in the secondary market. The RBA has set a target for the yield on 3-year Australian government bonds of around 0.25%.
- **A three-year (\$90bn) funding facility to authorised deposit-taking institutions (ADIs) at a fixed rate of 0.25 per cent.** ADIs will be able to obtain initial funding of up to 3% of their existing outstanding credit. The RBA says that 'they will have access to additional funding if they increase lending to business, especially to small and medium-sized businesses'.
- **A reduction in the cash rate target to 0.25%.** The RBA says it will not increase the cash rate target until progress is being made towards full employment and it is confident that inflation will be sustainably within the 2–3% target band.
- **Exchange settlement balances at the Reserve Bank will be remunerated at 10 basis points,** rather than zero as would have been the case under the previous arrangements.

In addition, the RBA will continue to provide liquidity to Australian financial markets by: a) conducting one-month and three-month repo operations in its daily market operations until further notice; and b) conducting longer-term repo operations of six-month maturity or longer at least weekly, as long as market conditions warrant.

The statement concludes by saying that 'Australia's financial system is resilient and well placed to deal with the effects of the coronavirus. The banking system is well capitalised and is in a strong liquidity position. Substantial financial buffers are available to be drawn down if required to support the economy'. The RBA says it is working closely with other regulators and with the government to help ensure financial market continue to operate effectively and credit remains available to households and businesses.

The RBA adds that the measures outlined complement 'the welcome fiscal response from governments in Australia' which together will 'support jobs, incomes and businesses through this difficult period and they will also assist the Australian economy in the recovery'.

The ABC comments that the measures outlined go beyond those implemented during the global financial crisis or in the aftermath of the 9/11 attacks and are in line with similar measures being implemented by other central banks including the US Federal Reserve.

[Sources: RBA media release 19/03/2020; ABC News 19/03/2020]

Australian Office of Financial Management to invest \$15 billion in wholesale funding markets used by smaller banks and non-ADI lenders

Treasurer Josh Frydenberg has announced an investment of up to \$15 billion to enable smaller lenders (ADIs and non-ADIs) to continue supporting Australian consumers and small businesses.

Details



- The Australian Office of Financial Management (AOFM) will be provided with an investment capacity of \$15 billion to invest in wholesale funding markets used by small ADIs and non-ADI lenders.
- The government will provide the AOFM with investment guidelines that will outline the basis on which the AOFM is to undertake the investments.
- The assets being purchased by the AOFM will not be limited to residential mortgage backed securities. The AOFM will also be able to invest in a range of other asset backed securities and warehouse facilities.

The measures (in addition to those announced by the RBA) will ensure continued access to affordable credit

Announcing the measures Mr Frydenberg said that the government's 'actions will enable customers of smaller lenders to continue to access affordable credit as the world deals with the significant challenges presented by the spread of coronavirus'.

Mr Frydenberg added that the measures will complement the Reserve Bank of Australia's (RBA's) announcement of a \$90 billion term funding facility for authorised deposit-taking institutions (ADIs) that will also support lending to small and medium enterprises. 'Combined, these measures will support the continued ability of lenders to support their customers and in doing so the Australian economy'.

Next steps and timing: Mr Frydenberg said that enabling legislation will be introduced in the week commencing 23 March 2020. The AOFM is expected to be able to begin investing by April.

[Source: Treasurer Josh Frydenberg media release 19/03/2020; [registration required] The AFR 19/03/2020]

APRA adjusts bank capital expectations in light of COVID-19: APRA tells lenders it's OK not to meet 'unquestionably strong' capital levels (provided minimum capital requirements are met)

The Australian Prudential Regulation Authority (APRA) has issued a statement advising that it has 'adjusted its expectations' regarding bank capital ratios.

APRA says that it envisages that banks, especially those planning to take advantage of new facilities announced by the Reserve Bank to promote the continued flow of credit, may need to use 'some of their current large buffers' to facilitate ongoing lending to the economy. In light of this, APRA says that provided that 'banks are able to demonstrate they can continue to meet their various minimum capital requirements, APRA would not be concerned if they were not meeting the additional benchmarks announced in 2016 during the period of disruption caused by COVID-19'.

APRA Chair Wayne Byres commented that the regulator 'has been pursuing a program to build up the financial strength of the system for many years, when banks had the capacity to do so. As a result, the Australian banking system is well-capitalised by both historical and international standards. APRA's objective in building up this capital strength has been to ensure it is available to be drawn upon if needed in times such as this. Today's announcement reflects the underlying strength of the system: even if the banking system utilises some of its current large buffers, it will still be operating comfortably above minimum regulatory requirements'.

[Sources: APRA media release 19/03/2020; [registration required] The AFR 19/03/2020]

What to expect in the next update to the MySuper heatmap: APRA has released new MySuper Heatmap FAQs

The Australian Prudential Regulation Authority (APRA) has released a new set of frequently asked questions (FAQs) to announce plans to update the MySuper Product Heatmap in June 2020 with latest fees and costs data.

Some Key Points

- **June update:**
 - **June update to the 2019 heatmap to include expanded fees and costs metrics:** In June, APRA will publish the concise and expanded 'fees and costs' metrics included in the December 2019 heatmap with updated data. APRA says that its decision to solely publish fee data reflects



the purpose of the update which is 'to show actions taken by trustees to address areas of underperformance, which APRA considers to reasonably be expected to have occurred since the heatmap was published in December 2019'. APRA writes that investment performance and sustainability, which can be expected to over a longer timeframe, will be reflected in future heatmap publications.

- **Ensuring updated fees/costs are included in the June update:** APRA says that trustees can ensure updated fees and costs are included in this update, by making a request to submit an ad-hoc submission of Reporting Standard SRS 703.0 Fees Disclosed. Any submissions of Reporting Standard SRS 703.0 Fees Disclosed received by APRA by 5pm on 29 May 2020 via Direct to APRA (D2A) will be included in the update. Any updated fees and costs submitted to APRA after this date will be included in the next iteration of the heatmap, planned for release in December 2020.
- **Fee increases as well as fee reductions will be published:** Noting that some trustees have said that they're increasing fees as a result of the Protecting You Super reforms, APRA says that it will publish **all changes** fees and costs submitted on Reporting Standard SRS 703.0 Fees Disclosed by 5pm on 29 May 2020.
- **APRA is not publishing rolling updates:** APRA says that a small number of trustees have resubmitted changes to their Strategic Asset Allocation in Reporting Standard SRS 533.0 Asset Allocation and their investment performance in Reporting Standard SRS 702.0 Investment Performance. APRA says that pending validation, the revised data will be reflected in the next iteration of the heatmap, planned for release in December 2020.

[Source: MySuper Heatmap Frequently Asked Questions 19/03/2020]

In Brief | The senate economics legislation committee has recommended that Treasury Laws Amendment (Your Superannuation, Your Choice) Bill 2019 be passed. The Committee also recommended that a review be conducted in two years and the government 'considers changes as suggested by submitters to further improve superannuation arrangements'

[Source: Senate Economics Legislation Committee Report: Treasury Laws Amendment (Your Superannuation, Your Choice) Bill 2019 [Provisions] 20/03/2020]

In Brief | As part of a financial support package for home owners and businesses affected by the economic impacts of COVID-19, the RBNZ has announced a six month principal and interest payment holiday for affected mortgage holders and SME customers

[Source: RBNZ media release 24/03/2020]

In Brief | The Bank of England has announced a number of measures aimed at alleviating operational burdens on PRA-regulated firms and Bank-regulated financial market infrastructures in the wake of the Covid-19 outbreak including suspending all stress testing for major banks for 2020

[Source: Bank of England media release 20/03/2020]

Risk Management

Responding to the impacts of COVID-19: MinterEllison's insights

To assist business is keeping up to date with, and responding to COVID-19 related developments, MinterEllison's expert team is publishing regular updates on our website [here](#).

COVID-19: Pandemic planning for APRA regulated entities

MinterEllison has released an article outlining the steps APRA-regulated entities should consider in the context of their pandemic planning, including consideration of APRA's CPG 223 Pandemic Planning.

This can be accessed on the MinterEllison website [here](#).



The WSJ reports that most US directors believe they already have effective crisis plans in place

Corporate directors, after spending weeks in crisis mode, have begun to plan for the long-term fallout from the coronavirus pandemic on their operations.

The WSJ reports that a survey of 190 directors (predominantly serving on public company boards), conducted by the National Association of Corporate Directors (NACD) has identified that:

- most directors believe (71%) their company has effective crisis-management plans already in place
- 14% of directors said they have reviewed insurance policies and risk-transfer mechanisms that cover supply chains and property
- Largest disruption to business resulting from the pandemic?
 - 28% of directors nominated lower demand for their products
 - 19% nominated lower employee productivity
 - Other concerns reportedly included supply chain disruptions and capital markets volatility.
- Delay investment: 13% of directors said their companies have decided to delay a planned investment for 2020 because of COVID-19. Reportedly, the NACD is of the view that this number is set to rise over the coming weeks as directors shift their focus from immediate and urgent concerns about workplace safety to longer termed decisions aimed at minimising the financial impact of pandemic.

[Source: [registration required] the WSJ 18/03/2020]

Insolvency and Restructuring

Top Story | COVID-19: Putting Safe Harbour in the spotlight

MinterEllison Partner, Michael Hughes has published an article reflecting on how Safe Harbour will be implemented during the downturn prompted by COVID-19.

The article can be accessed on the MinterEllison website [here](#).

[Note: The article was released prior to the passage of the Coronavirus Economic Response Package Omnibus Bill 2020 passed the senate on 23 March.]

Top Story | COVID-19 response - six month suspension of insolvency laws

MinterEllison Partner, Michael Hughes has released an article providing expert insights into the implications of the government's six month safe harbour announcement.

The article can be accessed on the MinterEllison website [here](#).

[Note: The article was released prior to the passage of the Coronavirus Economic Response Package Omnibus Bill 2020 passed the senate on 23 March.]

Six month safe harbour: Temporary relief for directors in response to the coronavirus

The Coronavirus Economic Response Package Omnibus Bill 2020 passed the senate on 23 March.

Among other things, the Bill includes measures aimed at assisting businesses to get through what the Treasurer termed in his second reading speech as a 'temporary period of insolvency' and to assist them to recover following the COVID-19 downturn.

These measures include amending the Corporations Act 2001 (Cth) to: a) temporarily increase the threshold for a creditor to initiate bankruptcy proceedings; b) increase the time period for debtors to respond to a bankruptcy notice; and c) extend the period of protection a debtor receives after making a declaration or intention to present a debtor's petition.



In addition, the Bill also provides temporary relief for directors from any personal liability for trading while insolvent.

Six month safe harbour

Directors: Schedule 12 to the Bill amends the Corporations Act 2001 (Cth) to provide temporary relief for directors from their personal duty to prevent insolvent trading, by introducing a new six month safe harbour.

A director may rely on the new temporary safe harbour in relation to a debt incurred by the company if: a) the debt is incurred in the ordinary course of the company's business; b) the debt is incurred during the six month period starting on the day the new law commences, or a longer period as prescribed by the regulations; and c) the debt is incurred before any appointment of an administrator or liquidator of the company during the temporary safe harbour application period.

The explanatory memorandum says that for example, loans to move some business operations online and debts incurred through continuing to pay employees during the Coronavirus pandemic are intended to fall under the new provision.

Holding companies: A holding company may also rely on the temporary safe harbour for insolvent trading by its subsidiary if it takes reasonable steps to ensure the temporary safe harbour applies to each of the directors of the subsidiary, and to the debt, and if the temporary safe harbour does so apply.

Evidential burden

A new definition of evidential burden applies in relation to the temporary safe harbour. Evidential burden in relation to a matter, 'means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist'.

This means that in circumstances where unlawful insolvent trading is alleged, a director or holding company needs to be able to point to/adduce evidence that the safe harbour provision applies.

The explanatory memorandum explains it is appropriate for the evidential burden to fall on the director or holding company seeking to rely on the temporary safe harbour because:

1. matters such as whether the debt incurred was in the ordinary course of the company's business;
2. whether and when the debt was incurred or a liquidator or administrator was appointed, and whether the corporation takes reasonable steps to ensure that the temporary safe harbour provision applies are peculiarly within the knowledge of the director or holding company; and
3. it is significantly more difficult and costly for an opposing party to disprove the fact that:
 - for a company director – that the debt incurred was within the ordinary course of the company's business, the period in which the debt was incurred and whether an administrator or liquidator was appointed before the debt was incurred; and
 - for a holding company – that the directors of the subsidiary had the benefit of the temporary safe harbour and the holding company took reasonable steps to ensure the temporary safe harbour applied to the director and the debt.

'Flexibility in the Corporations Act'

In addition, Schedule 8 of the Bill enables the Treasurer, by legislative instrument to:

- determine that, due to the Coronavirus, specified classes of persons are exempt from specified obligations in the Corporations Act or the Corporations Regulations; or
- modify specified obligations under the Corporations Act or the Corporations Regulations to enable specified classes of persons to comply with those obligations during the Coronavirus crisis.

The Treasurer may amend an instrument at any time before the instrument ceases to be in force in accordance with subsection 1362A(4).

Temporary provision only



The provision is temporary and is intended to 'facilitate the continuation of business during the Coronavirus'.

On this basis, an instrument made by the Treasurer under section 1362A(1) ceases to be in force at the end of the six month period beginning on the day after the instrument is made, or an earlier time, if specified.

The Treasurer cannot make an instrument under subsection 1362A(1) after the end of the period of six months beginning on the day this section commences.

[Sources: Coronavirus Economic Response Package Omnibus Bill 2020; Minister's second reading speech; Explanatory memorandum]

Response: The Law Council has welcomed the changes

In a statement released on 23 March, the Law Council welcomed the Federal Government's approach.

Law Council President, Pauline Wright said "It is important that businesses have a safety net to make sure that once the crisis has passed, they can resume normal business operations... We welcome these measures to assist otherwise profitable businesses that may find themselves facing financial distress during this time... These changes will make sure that companies have the confidence to continue to trade and keep the economy going"

[Source: Law Council of Australia media release 23/03/2020]

Other News

Top Story | Latest COVID-19 Government stimulus package: new support for business

The Commonwealth Government announced a consolidated package of fiscal and balance sheet support to assist businesses and individuals, now worth \$189 billion.

MinterEllison Partner, Siobhan Doherty has prepared an expert summary. This can be accessed on the MinterEllison website [here](#).

The legislative package to implement the government's economic response to COVID-19 has passed both houses

The [Coronavirus Economic Response Package Omnibus Bill 2020](#), a package of legislation to implement the government's economic response to the spread of the coronavirus/COVID-19 announced between 12 and 22 March 2020, passed both Houses on 23 March.

The legislative package contains the following Bills:

- Coronavirus Economic Response Package Omnibus Bill 2020 (the Omnibus Bill)
- Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Bill 2020 (the Cash Flow Boost Bill)
- Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Bill 2020
- Australian Business Growth Fund (Coronavirus Economic Response Package) Bill 2020
- Assistance for Severely Affected Regions (Special Appropriation) (Coronavirus Economic Response Package) Bill 2020
- Structured Finance Support (Coronavirus Economic Response Package) Bill 2020
- Appropriation (Coronavirus Economic Response Package) Bill (No 1) 2019–2020, and
- Appropriation (Coronavirus Economic Response Package) Bill (No 2) 2019–2020.

High Level Snapshot

The table below provides a high level summary of some of the measures included (it is not a comprehensive summary of all measures).



Measure	Description and Date of Effect
<p>Enhancing the instant asset write-off</p>	<p>Schedule 1 of the Omnibus Bill amends the income tax law to increase the cost threshold below which small business entities can access an immediate deduction for depreciating assets and certain related expenditure (instant asset write off) from \$30,000 to \$150,000, from 12 March 2020 to 30 June 2020.</p> <p>Schedule 1 to this Bill also amends the tax law to:</p> <ul style="list-style-type: none"> ▪ provide access to an instant asset write-off to entities with an aggregated turnover of \$10 million or more but less than \$500 million (up from the existing cap of \$50 million); and ▪ make the instant asset write-off available for depreciating assets and certain related expenditure costing less than \$150,000, from 12 March 2020 to 30 June 2020. <p>Date of effect: These measures will take effect on or after 12 March 2020.</p>
<p>Accelerating depreciation deduction</p>	<p>Schedule 2 of the Omnibus Bill amends the income tax law to temporarily allow businesses with aggregated turnovers of less than \$500 million in an income year to deduct capital allowances for depreciating assets at an accelerated rate.</p> <p>Date of effect: These measures will take effect on or after 12 March 2020.</p>
<p>Boosting cash flow for employers</p>	<p>The Boosting cash flow for employers and Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Bill 2020 (the Cash Flow Boost Bill) provides for the Commissioner to make payments referred to as cash flow boost payments comprising the first cash flow boost and the second cash flow boost payments.</p> <p>The first cash flow boost payments are required to be made by the Commissioner to eligible entities for periods from March 2020 to June 2020.</p> <p>The Cash Flow Boost Bill also provides for the Commissioner to make the second cash flow boost payments upon lodgement of activity statements for periods from June to September 2020 to entities that were entitled to the first cash flow boost.</p> <p>Schedule 3 to this Bill make consequential amendments to various Acts arising from the Cash Flow Boost Bill.</p> <p>Date of effect: The Cash Flow Boost Bill provides for the Commissioner to make payments to eligible entities in respect of periods from March 2020 and the quarter ending March 2020.</p>
<p>Reducing the superannuation minimum drawdown rates</p>	<p>Schedule 10 to the Omnibus Bill amends the Superannuation Industry (Supervision) Regulations 1994 (SIS Regulations) and Retirement Savings Accounts Regulations 1997 (RSA Regulations) to give effect to the government's announced measure to reduce the minimum payment amounts for account-based pensions (and for the equivalent annuity products) by half for the 2019-20 and 2020-21 financial years.</p> <p>Date of effect: The day after this Bill receives Royal Assent.</p>
<p>Providing for early release of superannuation</p>	<p>Schedule 13 to the Omnibus Bill amends the SIS Regulations and RSA Regulations to allow individuals affected by the adverse economic effects of Coronavirus to have up to \$10,000 released from their superannuation or retirement savings account on compassionate grounds.</p>



Measure	Description and Date of Effect
	<p>Each person is permitted to have up to two releases (meaning they can have up to \$20,000 released in total) – one for an application made during the 2019-20 financial year and another for an application made during the 2020-21 financial year.</p> <p>Any applications for this release must be made within six months of the amendments commencing.</p> <p>Schedule 13 also amends the Income Tax (Transitional Provisions) Act 1997 (ITTP Act 1997) to ensure that any such amounts that are released are not subject to tax.</p> <p>Date of effect: The day after this Bill receives Royal Assent.</p>
<p>Temporary relief for financially distressed individuals and businesses</p>	<p>The Bill includes measures aimed at assisting businesses to get through what the Treasurer termed in his second reading speech as a 'temporary period of insolvency' and to assist them to recover following the COVID-19 downturn.</p> <p>These measures include amending the Corporations Act 2001 (Cth) to: a) temporarily increase the threshold for a creditor to initiate bankruptcy proceedings; b) increase the time period for debtors to respond to a bankruptcy notice; and c) extend the period of protection a debtor receives after making a declaration or intention to present a debtor's petition.</p> <p>In addition, the Bill also provides temporary relief (six month safe harbour) for directors from any personal liability for trading while insolvent.</p> <p>[Note these measures are covered in more detail in a separate post in this issue of Governance News under the heading: Insolvency and Restructuring]</p> <p>Date of effect: The day after this Bill receives Royal Assent.</p>
<p>Providing flexibility in the Corporations Act</p>	<p>Schedule 8 of the Bill enables the Treasurer, by legislative instrument to:</p> <ul style="list-style-type: none"> ▪ determine that, due to the Coronavirus, specified classes of persons are exempt from specified obligations in the Corporations Act or the Corporations Regulations; or ▪ modify specified obligations under the Corporations Act or the Corporations Regulations to enable specified classes of persons to comply with those obligations during the Coronavirus crisis. <p>The Treasurer may amend an instrument at any time before the instrument ceases to be in force in accordance with subsection 1362A(4).</p> <p>Temporary provision only</p> <p>The provision is temporary and is intended to 'facilitate the continuation of business during the Coronavirus'.</p> <p>Date of effect: The day after this Bill receives Royal Assent.</p> <p>[Note these measures are covered in more detail in a separate post in this issue of Governance News under the heading: Insolvency and Restructuring]</p>

[Source: Coronavirus Economic Response Package Omnibus Bill 2020]

NSW enacts emergency measures Bill in response to COVID-19

NSW parliament passed the COVID-19 legislation amendment (emergency measures) Bill 2020 on 24 March.



The Bill amends a raft of legislation with the aim NSW Attorney General Mark Speakman said of: 1) addressing existing legal barriers that may get in the way of social distancing; 2) enabling agencies and institutions to continue functioning; and 3) giving the government flexibility to flexibility act further should the public health emergency escalate.

For examples, the Bill includes (among others) measures to:

- enable a police officer to arrest a person if the police officer suspects on reasonable grounds that the person is contravening a public health order relating to the COVID-19 pandemic
- allow a relevant allied health professional to provide certification of ability to work (for the purposes of the Motor Accident Injuries Act 2017 and the Workers Compensation Act 1987)
- allow supermarkets to open during the April public holidays for this year only
- enable criminal trials to be 'conducted in an appropriate way during the COVID-19 pandemic', by enabling a witness in a trial to give evidence before the trial in a pre-recorded evidence hearing, allowing the original evidence of a witness recorded in a trial to be used in a new trial, and enabling a court to order a judge alone trial in certain circumstances
- enable the Corrective Services Commissioner to grant parole to certain inmates, if satisfied that releasing the inmate on parole is reasonably necessary because of the risk to public health or to the good order and security of correctional premises arising from the COVID-19 pandemic. Mr Speakman said, prior to the Bill's passing, that this was a power 'we hope we will never have to use but the evolution of the pandemic may require it'.

Mr Speakman said that 'the Government contemplates that if the power were used it would be in relation to lower risk or vulnerable inmates to be prioritised for potential release, such as older inmates nearing completion of their sentence'.

Generally, all measures have sunset clauses of between six months to 12 months. The commencement date is the day of Assent.

[Source: COVID-19 legislation amendment (emergency measures) Bill 2020]

In Brief | Federal Budget deferred: The government has decided to defer the 2020-21 Budget until 6 October 2020 to provide more time for the economic and fiscal impacts of COVID-19 to be better understood. Announcing the decision, the Treasurer and Minister for Finance said that the extra time will enable the government to 'maintain its focus on dealing with the immediate health and economic impacts of the coronavirus pandemic'

[Source: Joint media release: Treasurer Josh Frydenberg and Minister for Finance Mathias Cormann 20/03/2020]