A woman with curly hair, wearing a light-colored collared shirt, is looking down at a tablet computer she is holding. The background is a dimly lit office with blurred lights and equipment. A small red square is in the top left corner.

# Governance News

COVID-19 Special Edition

13 May 2020

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# COVID-19 Key Developments

## COVID-19: Hayne reforms and DDO deferred six months

### Key Takeouts

- The government's Hayne Commission implementation timetable has been pushed back six months because of the disruption caused by COVID-19.
- Separately, ASIC has announced that it will defer enforcing design and distribution obligations (DDO) and mortgage broker reforms for six months because of COVID-19.
- Revised FSRC implementation timeline to download: We have prepared a table providing a high level snapshot of the legislation now set to be introduced by the end of 2020 including revised commencement dates, and identifying the recommendations now to be introduced by June 2021. You can download this in PDF by clicking this [link](#)

### Hayne reforms deferred six months

On the 8 May, Treasurer Josh Frydenberg [announced](#) that the government's Financial Services Royal Commission (FSRC) implementation timetable has been pushed back six months to 'enable the financial services industry to focus their efforts on planning for the recovery and supporting their customers and their staff during this unprecedented time'.

Under the updated timetable:

- Measures that the Government had planned to introduce into the parliament by 30 June 2020 (ie the package of draft legislation released on 31 January for consultation), will now be introduced by December 2020.
- The commencement dates in that package of exposure draft legislation have also been pushed back six months.
- Measures originally scheduled for introduction by December 2020 will now be introduced by 30 June 2021.

### Recap of progress towards implementing the Commission's recommendations

Mr Frydenberg said that since the release of the FSRC final report, the government has implemented 24 commitments and has 'substantially progressed a further 35 through consultation and the preparation of draft legislation'.

### Government's announcement welcomed by CHOICE

In a short statement, consumer group CHOICE welcomed the government's announcement. CHOICE CEO Alan Kirkland said that 'a six-month deferral strikes a sensible balance between recognising the reality of these unprecedented circumstances and the need to legislate reforms to protect consumers, who will need this even more in the coming months. We look forward to working with the government to finalise the remaining reforms as soon as possible.'

### DDO and broker reforms deferred for six months

To enable industry participants to 'focus on immediate priorities and the needs of their customers', the Australian Securities and Investments Commission (ASIC) has [decided](#) to defer the commencement dates for:

- the mortgage broker reforms until 1 January 2021 (these obligations were to commence on 1 July 2020)
- the design and distribution obligations until 5 October 2021 (these obligations were originally to commence on 5 April 2021)

ASIC says that the decision 'follows, and is consistent with, the government's decision to defer implementation of the Hayne reforms for six months.

### Details

#### Mortgage broker reforms

Schedule 3 of the [Financial Sector Reform \(Hayne Royal Commission Response—Protecting Consumers \(2019 Measures\)\) Act 2020](#) implements the government's response to recommendations 1.2 (mortgage broker best interests duty) and 1.3 (mortgage broker remuneration). These changes were to commence on 1 July 2020 and have now been deferred to 1 January 2021.

ASIC was due to release guidance on meeting the obligations in May 2020, following consultation.

[Note: On 20 February ASIC released a consultation paper, [CP 327: Implementing the Royal Commission recommendations: Mortgage brokers and the best interests duty \(CP 327\) — and draft guidance](#) on the new obligations for consultation. Broadly, the draft guidance explains ASIC's: a) interpretation of the best interests obligations; b) expectations for meeting the obligations; and c) general approach to administering the obligations. For a summary of CP 327 see: [Governance News 26/02/2020 at p15](#)]

ASIC has said that it expects preparation for the commencement of the reforms to continue. ASIC adds that it will continue to work on finalising the guidance and plans to release it in 'mid-2020'.

### Design and Distribution Obligations

[Treasury Laws Amendment \(Design and Distribution Obligations and Product Intervention Powers\) Act 2019](#) amends the: Corporations Act 2001 to introduce design and distribution obligations in relation to financial products. ASIC was due to release guidance in 2020.

[Note: On 19 December, ASIC released [ASIC Consultation Paper 325 Design and Distribution Obligations \(CP 325\) and draft guidance](#) for consultation. The consultation paper sets out ASIC's interpretation of the new obligations, the regulator's expectations for meeting them, and ASIC's general approach to administering them. Consultation closed on 11 March. For a summary of CP 325 see: [Governance News 15/01/2020](#)]

ASIC has said that it expects preparation for the commencement of the reforms to continue. ASIC adds that it will continue to work on finalising the guidance and plans to release it in 'mid-2020'.

[Sources: Treasurer Josh Frydenberg media release 08/05/2020; ASIC media release 08/05/2020]

## COVID-19: Virtual AGMs given the nod

### Temporary measures provide companies with legal certainty on virtual AGMs and electronic execution during the COVID-19 health crisis.

[Corporations \(Coronavirus Economic Response\) Determination \(No 1\) 2020](#) does two things.

1. It temporarily removes any legal uncertainty concerning the validity of virtual (online only meetings) by ensuring companies are able to give notice of, convene and conduct meetings by electronic means.
2. It temporarily allows company officers to sign a document electronically (ie the changes enable the entire process of executing a document to be carried out electronically).

Announcing the changes, Treasurer Josh Frydenberg said that they provide 'certainty to companies and boards about how they can meet their legal obligations over the next six months'.

#### Timing

The changes have been put in place because of the COVID-19 restrictions and are now in force. The changes will cease to operate on 6 November 2020.

#### Virtual AGMs

Section 5 of the instrument allows entities that are required or permitted to hold meetings (including AGMs) to do so remotely as online only meetings.

The changes:

- clarify that there is no requirement for physical attendance for purposes such as achieving a quorum
- enable notices to be sent to all those entitled to attend using one or more technologies (including where recipients have not provided an email address)
- allow those attending the meeting to speak using technology
- allow a proxy to be appointed using technology
- require that votes be taken by a poll (not be show of hands) and that each person entitled to do is given the opportunity to vote in real time and if practical, ahead of the meeting.

## Conditions – notice requirements

Where email addresses have not been provided by people entitled to attend the meeting, entities are still required to issue a letter or postcard setting out where the person can view relevant information online and download it.

In addition, the notice of meeting must include information about how persons entitled to attend and participate in the meeting can do so (including by proxy), how participants can vote and ask questions and any other information they need to know to participate using technology.

Where a notice has already been issued: If notice of the meeting has already been issued, a supplementary notice must be issued at least seven days before the meeting with information about how to participate electronically.

## Electronic execution

Section 6 modifies section 127 of the Corporations Act to enable the entire process of executing a document to be carried out electronically.

The [explanatory memorandum](#) states that:

'In practice, there are a wide variety of means by which officers of a company might sign a document electronically. These include:

pasting a copy of a signature into a document;

signing a PDF on a tablet, smartphone or laptop using a stylus or finger;

cloud-based signature platforms like DocuSign'.

'The modification means that signatories do not need to sign the same physical document. Instead, a document could be signed and scanned by the first signatory and then printed and signed by the second signatory, or separate electronic signatures could be applied to fully electronic versions of the document. If these elements are satisfied, then an electronic signature applied under section 127 will be effective to execute a document.'

Announcing the change, Treasurer Josh Frydenberg [said](#) that 'previously, in a number of cases, signatories were required to sign the same physical document. This will ensure that documents are able to be properly executed at a time when ordinary business operations have been disrupted'.

[Sources: Treasurer Josh Frydenberg media release 05/04/2020; Corporations (Coronavirus Economic Response) Determination (No. 1) 2020]

## Changes highlight the need to modernise outdated legal requirements

In separate statements welcoming the changes, the Australian Institute of Company Directors (AICD) and the Governance Institute of Australia (GIA) said that they underline the need to modernise out-moded Corporations Act requirements.

Governance Institute CEO Megan Motto said that the Governance Institute has 'consistently advocated that the requirements of the Corporations Act are holding back digital innovation in the way that companies can engage with their shareholders, particularly in the current environment. In the long term a simplified regulatory framework that accommodates evolving technologies for shareholder communication and enables shareholders to participate will facilitate shareholder rights and improve shareholder engagement'.

AICD CEO and Managing Director, Angus Armour commented that the changes 'highlight the need for a modernisation of outdated Corporations Act requirements post the COVID-19 period. The capacity for technology to improve accountability through visibility and accessibility, and to improve efficiency and manage costs at the same time has been demonstrated across the economy... Our regulations need to adapt to 21st Century technologies to give companies the opportunity to engage with their shareholders across the community.

[Sources: AICD media release 06/05/2020; Governance Institute media release 06/05/2020]

## COVID-19: JobKeeper payments and the decline in turnover test

The ATO has released LCR 2020/1 JobKeeper Payment – decline in turnover test (LCR) providing detailed guidance on what should be included or excluded from the calculation of the decline in turnover test included in the JobKeeper Rules.

You can find MinterEllison's expert summary [here](#).

# COVID-19: The 'next normal': climate change risk governance in a pandemic age – Part 1

## Corporate climate risk assessment and disclosure expectations in FY20.

MinterEllison has released a report providing insights on corporate climate risk assessment and reporting expectations in FY20. It provides a useful resource for sustainability, finance and executive teams in their consideration of governance priorities beyond the immediate pandemic response.

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

## COVID-19: Less prepared than we could be for future crises? Governance Institute report finds that many organisations are not regularly testing their risk/crisis plans

### Report Overview | Governance Institute Risk Management Survey 2020

The Governance Institute's latest Risk Management Survey provides insights into the current risk and governance landscape in Australia.

#### Snapshot

- **About the report:** The report is based on an online survey of 399 governance and risk professionals and senior executives primarily based in Australia. It was conducted in March 2020 (at the onset of the COVID-19 pandemic)
- **Insights into the current governance/risk landscape**
  - Broadly speaking the report found that most organisations have established 'sound structure for managing risk' that is broadly in keeping with the ASX Corporate Governance Council's Corporate Governance Principles and Recommendations. A theme running through the report, is the link between having appropriate structures in place and improved perception of risk function effectiveness.
  - Leaders are setting the right tone? 84% of respondents agreed that risk management is highly valued across their organisation and 72% agreed that risk management is highly valued by other leaders in their organisation. The report considers that this demonstrates that entities and their leaders are 'setting the right tone when it comes to risk management'.
  - What could be done to improve risk management culture? Respondents nominated: having better reporting tools (52%) and raising the 'voice' of risk within the organisation (52%) as the top two ways in which organisations could improve their risk culture. A theme running through the report is the need to improve communication with stakeholders (including within organisations).
  - Impact of the Hayne Commission? Most respondents felt that the risk management function is both more visible and has a higher profile within the organisation as compared with two to three years ago. Respondents also felt that that more time is spent on risk.
- **(Gaps) in the current approach?** The report highlights that organisations are not regularly testing their risk/crisis plans. For example, though 55% of organisations run scenarios around risk events (eg bushfires, lack of access to key people etc) to test their response, few (11%) do so frequently. In addition, risk management frameworks do not always include risks of modern slavery and/or whistleblower protections.
- **COVID-19 preparedness and response:** 28% of respondents felt that their business was well prepared for the impact of COVID-19 and the same number (28%) felt that their business was unprepared. The report identifies the presence/absence of working from home policies/capabilities as a key theme running through the reasons given for these responses.
- **Top five risks facing organisations over the next three to five years:** Respondents ranked damage to brand/reputation (59%), economic shock (53%), increased competition (52%), regulatory change (49%), cybercrime (48%) as the top five risks facing their organisations. The report comments that it is 'worrying' that climate risk is not within this group, given the level of shareholder interest/concern in ESG issues, including climate.
- **The full text of the report** is available on the Governance Institute website [here](#)

## Report Overview

Building on the 2019 annual risk management survey, The Governance Institute's latest report provides insights into the structure/make-up of risk functions across a range of (primarily) Australian organisations, the changes in risk/governance post-Hayne as well as insights into what risk/governance professionals see as the key pressure points/challenges that organisations will face over the next three to five years.

In addition, the report provides insight into how prepared risk/governance professionals feel their organisations to be in terms of facing future crises and how they have responded to the present COVID-19 crisis.

## How risk functions are structured

Broadly speaking the report found that most organisations have established 'sound structure for managing risk' that is broadly in keeping with the ASX Corporate Governance Council's Corporate Governance Principles and Recommendations.

The report also suggests that there is a link between having 'the right' risk structure/framework in place and better understanding of/stronger risk culture/better risk management within organisations. 'Perhaps the link is that, in establishing a dedicated group to focus on risk, the company makes it clear that it takes risk management seriously. As a result, there is more dedication throughout the organisation to every component of that process, in turn leading to better outcomes' the report states.

- **Most respondents (69%) said that they have an audit/risk committee or equivalent. 28% have a dedicated risk committee**
  - 50% of audit and risk committee members are Non-executive directors (NEDs). NEDs also 'dominate' the risk departments in both not for profit organisations and commercial organisations
  - 23% of audit and risk committee members are drawn from 'management'
  - In government organisations, there is usually a mix of NEDs and management representatives on risk/audit committees
  - The majority of respondents (60%) said their risk committee meets quarterly and 18% said that it meets monthly.
- **38% have a separate risk department**
  - Larger entities, government entities and ASX listed businesses the most likely to fall into this group). Entities with annual revenue over \$10bn were most likely to have a separate risk function (93%)
  - The report found that the average risk department/team had four people, but that there is significant variation: 28% of respondents said that their risk team was smaller (1-2 people), 23% said that their risk team was larger (5+ members)
- **13% of organisations do not have any of these.**

## Risk culture – work to do in better communicating/educating stakeholders

- **Leaders are setting the right tone?** There was a 14% uptick from 2019 in the number of respondents who agreed that risk management is highly valued across their organisation with 84% of respondents in the 2020 survey agreeing that this is the case. 72% of respondents agreed that risk management is highly valued by other leaders in their organisation. The report considers that this demonstrates that entities and their leaders are 'setting the right tone when it comes to risk management'.
- **Risk management is valued but could be better understood?** The report found that though risk management is valued as an idea (outside the of the risk function) there is less understanding within organisations more broadly about what risk management is in practice. There is scope for organisations to better communicate/educate stakeholders around this.
  - 43% of respondents agreed that risk management is widely understood within their organisation, with only 20% agreeing strongly. 26% of respondents disagree/disagree strongly.
  - 54% of respondents agreed that their organisation has a robust risk appetite statement in place. 26% disagree with this.
- **What could help the organisation improve its risk management culture?** Respondents nominated: better reporting tools (52%) and raising the 'voice' of risk within the organisation (52%) as the top two ways in which organisations could improve their risk culture. This was closely followed by leadership from the board (43%) and clarity of purpose/risk strategy (42%). Only 26% of respondents felt more financial resources would improve their risk management culture and only 16% thought suitable reward systems were necessary. This was more marked in larger organisations with larger risk teams.

- **Overall risk reporting is viewed positively:** When asked about their organisation's risk reporting to the board, 49% of respondents said it is only quite effective while 21% think it is not very effective.
- **A correlation between having the right structures in place and better communication?** Risk reporting is more likely to be perceived as effective in companies that have a dedicated risk department or committee (as opposed to those that have a combined audit/risk committee). Where there is no risk committee or equivalent, 39% of respondents said their risk reporting is not effective. The report suggests that this indicates a link between having 'the right' structures in place and improved perceptions of the effectiveness of reporting.

## Impact of the Financial Services Royal Commission

Most respondents felt that risk management had changed in terms of the time spent, the number of meetings and in terms of visibility as compared with 2-3 years ago (pre-Hayne).

The areas in which they felt there had been the most change were the visibility of the risk function: 38% of respondents said that the risk function is more visible now/has a higher profile and in terms of the time spent. said that the Hayne Commission has impacted the risk management function, primarily by making it more visible/raising its profile. Respondents also felt that more time is spent on risk management (30% said that much more time is spent on risk management than previously).

## Perceived strengths and weaknesses in the current approach

- Respondents felt that the risks being best managed by their organisations were risks associated with staff conduct (eg corruption/bribery, harassment, discrimination), legislative (and policy) change/intervention, reputation and regulatory change.
- In contrast, respondents nominated risks associated with talent attraction/retention, disruption/failure to innovate and economic shock as areas where they were less confident of their ability to identify early/manage well.

## (Gaps) in risk management frameworks?

- **Whistleblower protections :** 51% of respondents said that their risk management framework incorporates whistleblower protections and 26% said it was included elsewhere. 15% of respondents said that whistleblower protections were not included and 9% were unsure.
- **Modern Slavery obligations:** 37% of respondents indicated that modern slavery obligations are no included in their risk management framework and almost a quarter (22%) said they were unsure. 22% said it was included.

## Level of preparedness for future crises?

The report found that many organisations are not regularly testing their risk/crisis plans:

- Though 55% of organisations run scenarios around risk events (eg bushfires, lack of access to key people etc) to test their response, only 11% of these do so frequently.
- Organisations with dedicated risk departments are more likely to run scenario testing.
- 39% do not run scenario testing.

## Level of preparedness for COVID-19?

- 28% of respondents felt that their business was well prepared for the impact of COVID-19
- 44% of respondents felt that their business was somewhat prepared for the impact of COVID-19
- 28% felt that their business was unprepared for the onset of COVID-19

Perhaps unsurprisingly, the report identifies the presence/absence of robust business continuity plans and working from home policies/capabilities as a common theme in the responses. Those respondents who had no existing policies/whose staff were not able to work remotely felt least prepared for the current crisis.

The report observes that 'the pandemic has exposed gaps in the crisis management and business continuity capabilities of both businesses and governments' and suggests that there is opportunity for organisations to improve their planning for/preparation for future crises including by conducting regular testing of business continuity/crisis plans.

The report also suggests that business continuity plans could usefully include, going forward, provision for the actions to be taken in the event of a future pandemic/similar crisis.

The report goes on to note that respondents were surveyed at the outset of the COVID-19 pandemic, and suggests that it will be interesting to see whether/the extent to which the responses change in the next survey.

Finally, the report includes a discussion of new risk management initiatives that respondents have implemented in response to COVID-19 many of which centre around technology/digital innovation eg digital meetings/technology to support remote decision making/communications. The report observes that some respondents are also planning for/preparing for the heightened level of cyber-risk that flows from rapid innovation/changed working environment.

Top risks facing organisations

Top 5 risks over the next 3 years: Respondents ranked damage to brand/reputation (59%), economic shock (53%), increased competition (52%), regulatory change (49%), cybercrime (48%) as the top five risks facing their organisations.

Top 5 risks over the 5 years: Respondents ranked regulatory/legislative change (59%), disruption/failure to innovate (53%), damage to brand/reputation (52%) and cybercrime (49%) as the top five risks for organisations over the next 5 years.

### **A mistake to de-prioritise climate risk?**

32% of respondents would have ranked climate risk within their top five risks over the next five years.

24% of respondents said they would rank climate risk within the top five risks facing their organisation over the next three years.

Commenting on this the report states, 'Respondents did not rank environmental risk as a top concern over the coming three to five years, indeed it fell towards the bottom of the list. This is worrying when we consider the increased emphasis that shareholders are placing on sustainable finance and environment, social and governance (ESG) factors'.

### **About the survey**

The report is based on 393 responses to an online survey conducted in March.

The respondents were primarily Australia-based risk/governance professionals working in a range of sectors, and for a range of different organisations. 39% of respondents identified as senior governance/risk professionals, with 17% identifying as C-suite level. Most respondents were based in NSW (30%), QLD (22%) or Victoria (21%). Only 5% were based overseas.

[Sources: Governance Institute of Australia media release 12/05/2020; Full text: Governance Institute of Australia Risk Management Survey 2020; Key Statistics]

## **COVID-19: The unfolding economic impact: Is the economy facing a possible economic 'cliff' in October?**

### **Key Takeouts**

- **The economic impact of COVID-19 is not expected to be as severe in Australia as elsewhere, but the recovery will still take some time**
- **A potential 'economic cliff' in October?** It was suggested that the combined impact of a rapid wind back of JobSeeker and JobKeeper packages, combined with the ending of temporary support from lenders (eg loan holidays) at the end of September could deliver a shock to the economy in October.
- **Economic reform?** One outcome of the pandemic is increased appetite for economic reform. Potential tax reform (stamp duty reform) and reform of the planning system (reduction in red tape/green tape) are viewed as the most viable areas.

Speaking at the Governance Institute's Virtual Governance and Risk Management forum 2020, NSW Treasury Chief Economist Stephen Walters spoke about the unfolding economic impact of the current health crisis, the path to recovery and the potential positives that may emerge.

## Some Key Points of the discussion

- Global impact: Chief Economist at NSW Treasury Stephen Walters said that COVID-19 is not only a global health crisis but an economic one. For example, we've seen US unemployment approaching 15%, the only time it has reached that level since the Great Depression. Likewise, in Ireland the unemployment rate is 28%.

### Australia

- **The economic impact is unlikely to be as significant as is the case in the US:** Mr Walters said that as yet, in Australia there is not much hard data available, but that will change with the release of employment data later in the week and with the Treasurer's economic statement due on what would have been budget day. The unemployment figures in Australia are unlikely to be as high as in the US. Mr Walters expects that Australia's unemployment rate may be 8% and possibly as high as 10-12%. RBA and Treasury data indicates that the economy has contracted 10% in Q2. It is as yet unclear what the impact of COVID-19 will be in Q3.
- **The recovery is expected to take some time,** given international borders remain closed. For example, the tourism and education will continue to be impacted. Likewise the fact that migration is effectively 0%, will have a significant impact.
- **Mr Walters expressed 'cautious optimism' about the prospects of recovery longer term,** saying that it will be dependent on how many businesses are in a position to re-open (as that becomes possible with the lifting of COVID-19 restrictions).
- **Heading for a potential 'economic cliff' in October?** Mr Walters said that a rapid windback of JobKeeper and JobSeeker packages in September (when funding ends), combined with the ending of COVID-support measures by the lenders eg loan holidays, may deliver a significant shock for business/the economy. There will be significant pressure, especially if unemployment figures are in double digits, to maintain the stimulus programs, though for the moment, the Federal government have indicated they have no plans to extend the programs.

### Positives to emerge from the crisis?

Mr Walters highlighted some positives to emerge from the crisis including: a) rapid acceptance/use of technology; b) advances in health (eg rapid roll-out of telehealth) and c) an appetite for economic reform.

Mr Walters considers that of the long list of potential economic reforms to kick-start the economy post-pandemic, the most viable (from a political and economic point of view) are tax reform (in particular, changes to stamp duty) and changes to the planning system (the reduction of red tape/green tape).

Other reforms, such as increasing the GST or industrial relations reform are unlikely because of the lack of political appetite (given likely opposition from the Federal Labor party and Unions) for change in these areas.

[Source: Governance Institute webcast: State of Play 11/05/2020]

**In Brief | COVID-19: 'Australians know there is no money tree': Treasurer Josh Frydenberg has given a statement on the 'sobering economic impact' that the COVID-19 pandemic has had on the economy in which he emphasised the huge cost, the need to repay the debt in future and the fact that support measures cannot remain in place indefinitely**

[Sources: Treasurer Josh Frydenberg, Ministerial Statement on the Economy 12/05/2020; [registration required] The Australian 13/05/2020;

# Diversity

## Push to widen the director/CEO candidate pool: Update on The NY City Comptroller's campaign to improve diversity on S&P 500 boards

### Key Takeouts

- So far, proposals have been filed at 17 S&P500 companies which had not publicly disclosed board/CEO diversity or their diversity policies and did not appear to have people of colour among their directors and CEOs (based on public disclosures).
- Based on the negotiated settlement/withdrawal rate through mid-February 2020, the Comptroller's Office expects approximately five of the proposals to go to a vote during the 2020 proxy season.

### Context: Boardroom accountability project 3.0

on 11 October 2019, NY City Comptroller Scott Stringer [announced](#) the launch of the Boardroom Accountability Project 3.0, which is aimed at increasing the gender and ethnic diversity of S&P500 company boards.

The initiative calls on companies to adopt a policy (modelled on the 'Rooney Rule') requiring the consideration of both women and people of colour for every open board seat and for CEO appointment.

### Progress update

Writing in Proxy Preview, Michael Garland Assistant to the New York City Comptroller Scott Stringer outlines the Comptroller's campaign to improve diversity on S&P 500 boards and provides a brief progress update.

- **17 'Rooney Rule' proposals filed:** So far, proposals have been filed at 17 S&P500 companies which had not publicly disclosed board/CEO diversity or their diversity policies and did not appear to have people of colour among their directors and CEOs (based on public disclosures).
- **Specifics:**
  - The proposals call on the companies to recruit future directors and/or CEOs from a candidate list that includes qualified female and ethnically diverse candidates (in addition to other candidates) thereby widening the talent pool.
  - The policy would only apply to CEO searches that consider external candidates (ie candidates from outside the company). 'We do not intend for the policy to be a substitute for robust internal succession planning, and we encourage companies to maintain and disclose a process for fostering a diverse talent pipeline for executive management' Mr Garland writes.
  - Mr Garland observes that the proposals bear some similarity to the Rooney Rule in the National Football League – the Rooney Rule requires teams to interview minority candidates for certain positions - which, in the 12 years since its implementation has significantly improved diversity among the NFL leadership. The proposals, like the Rooney-Rule do not seek to mandate who should



eventually be hired, but rather operate to widen the pool of potential candidates early in the recruitment process.

- **Only five are likely to go to a vote this proxy season:** Mr Garland says that the aspect of the policy that has prompted the most pushback has been the call for CEO searches to include diverse candidates. Based on the negotiated settlement/withdrawal rate through mid-February 2020, the Comptroller's Office expects approximately five of the proposals to go to a vote during the 2020 proxy season.

[Source: Proxy Preview 17/03/2020]

# Institutional Investors and Stewardship

## COVID-19 economic recovery plans: International investor groups are calling on governments to work towards a green recovery

International investor groups, including the Investor Group on Climate Change (IGCC), have written to G20 countries and New Zealand (the full text is of the statement is here: [The Investor Agenda: A Sustainable Recovery from the Covid-19 Pandemic](#)) calling for governments to implement five measures to ensure a sustainable COVID-19 recovery.

The group has called on governments to:

- 1. Prioritise human relief and job creation:** The group says that recovery plans should create jobs across society that match with investments in net zero emissions energy, industrial, building and transportation systems, climate resilience measures and other sustainable infrastructure. The plans should be focused on protecting workers (especially the most vulnerable) and communities from the economic impacts of the pandemic.
- 2. Uphold the Paris Agreement:** The group calls on governments, investors and companies to 'maintain and strengthen their commitments in line with the Paris agreement' to reach zero emissions by 2050 or sooner.
- 3. Tie corporate assistance to delivery green targets:** The group calls for corporate assistance, especially assistance provided to carbon intensive companies, to be made conditional on the companies receiving it establishing and enacting climate change transition plans consistent with the goals of the Paris Agreement and net zero emissions by 2050. It's suggested that companies and policy makers should work closely on the implementation of these transition plans.
- 4. Prioritise climate resiliency and net zero emissions solutions:** The group suggests that governments have an opportunity to accelerate the recovery by facilitating new investment and jobs in clean energy, rather than locking in 'carbon-intensive economic activities in pursuit of recovery plans will only exacerbate systemic climate risks and expose economies to escalating shocks'.
- 5. Embed investor participation in recovery planning:** The group argues that given the pressure on government resources after deploying pandemic support packages, unlocking private capital will be critical to economic recovery and that governments can drive better outcomes by ensuring investors assist in the design of sustainable recovery plans.

IGCC CEO Emma Herd commented, 'Investors strongly support new measures to drive a sustainable recovery. We already know that government policy that spurs fresh private investment in clean energy, green industry and other sustainable infrastructure will lead to much needed jobs and economic growth. The Australian government should be looking to integrate recovery plans with its Technology Investment Roadmap, Long-Term Emissions Reduction Strategy, grid modernisation planning and bushfire recovery, to build greater resilience and reduce climate risk. The New Zealand Government should heed the advice of its Climate Change Commission and embrace smart investment decisions in low-emissions planning, technologies and infrastructure.'



[Sources: IGCC media release 04/05/2020; The Investor Agenda: A Sustainable Recovery from the Covid-19 Pandemic]

# Corporate Social Responsibility

## COVID-19: ESG is always core business with or without the pandemic: Insights from the Governance Institute Annual Forum panel discussion

### Key Takeouts

- Support for the SASB standards from investors is strong and growing – eight of the ten largest asset managers in the world are members of the SASB investor adviser group
- ESG has become increasingly integrated into investor decision making and investor engagement activities
- ESG factors remain relevant to investors during the pandemic – the level of investor interest/concern has not diminished and they continue to expect companies to report on ESG issues
- A strong focus on ESG may position companies to be more resilient in the event of future crises

### Scope of the discussion

The Governance Institute's Virtual Governance and Risk Management forum 2020 included a panel discussion on the integration of environmental, social and governance (ESG) into both business decision making and investor decision making and the extent to which it has become integrated into those decision making processes, the role of the Sustainability Accounting Standards Board (SASB) standards and the benefits of strong ESG practices.

The panellists included: Janine Guillot CEO of the Sustainability Accounting Standards Board USA (SASB), Måns Carlsson-Sweeny, Head of ESG at AUSBIL Investment and Darian McBain, Global Director, Corporate Affairs & Sustainability at Thai Union.

### Some Key Points

#### ESG is 'core business' and there is strong and growing support (from institutional investors) for this view

- **Purpose SASB and the SASB standards:** Ms Guillot gave an overview of the purpose of SASB and the SASB standards. She emphasised that the SASB standards are investor-focussed in that they designed to set disclosure parameters for companies to enable them to disclose the financially material information that is most relevant to their investors, using clear, quantitative metrics. In addition, Ms Guillot noted that the standards are industry specific (77 different sectors) to reflect the different priorities in different sectors.
- **Sustainability is broader than climate:** Ms Guillot also spoke about sustainability, explaining that the concept is far broader than climate issues alone. She said that sustainability might be better understood as the sustainability and success of a particular enterprise over the long-term. In order to gauge this, it's necessary to consider such issues as: capital, human capital, business model and innovation, leadership and governance and the environment.
- **Why directors should care:** Ms Guillot gave a number of reasons why directors should be paying attention to ESG issues including the strong and growing support from institutional investors. Eight of the ten largest asset managers globally are members of the SASB Investor Advisory Group. Investors are increasingly using the SASB standards to inform both their engagement activity and their own investment decisions.
- **ESG remains key in the current crisis:** Asked whether ESG issues need to take a 'back seat' in the current crisis, Ms Guillot said that the question comes from a perspective/belief that ESG issues are issues that are not relevant to core business. Ms Guillot's view is that ESG issues are directly relevant to business performance and therefore relevant to risk management and strategy and that this doesn't change regardless of the circumstances including the current crisis). In essence, Ms Guillot said that there is no distinction between 'core business' issues and ESG issues, rather ESG issues are 'core business'.

Having said this, Ms Guillot said that the array of ESG issues that entities might focus on in usual circumstances, might narrow to those that are core business issues (in the present circumstances).

- **Relevance of the standards in the context strategy/risk management:** Asked to comment on the relevance of the standards in the risk management/strategy context, Ms Guillot talked about the ways in which the standards promote thinking through potential risks in a holistic way, identifying the risks most relevant to business performance for each business. For example, the recent bushfires in California bankrupted a utility company operating in the fire zone. A narrow view of climate risk would focus on the need to transition from energy sources, not on the immediate physical environment (ie physical exposure to potential fire risk given the drought).
- **Independent assurance?** Asked whether independent assurance is required (if companies report under the SASB standards), Ms Guillot said that there is no requirement. Rather, at the moment, it's a case by case decision for individual companies. However, she said that in light of increased interest from audit committees, from investors and from some regulators there are moves in that direction. She advised that internal controls (including board oversight) were a necessary first step before external assurance.

#### How ESG is integrated into investment decision making

- **ESG has been integrated into investment decision making:** Mr Carlsson-Sweeney said that attitudes to responsible investing have shifted over time. Where previously, the majority of perceived value came from tangible factors, attitudes have shifted to the point where it's accepted that 'intangible' factors/drivers (eg culture, corporate governance, supply relationship, customer relationships) have a role to play in creating value. Accordingly, it's now the case that investors take ESG issues into account in their decision making because doing so provides a more holistic view of earnings sustainability over the longer term. For example, companies whose profitability is reliant on underpaid workers, low regulation etc may prove a poor investment in the longer term. For this reason, he said that Ausbil uses SASB to help inform better investment decisions.
- **ESG has also been integrated into engagement activities.** In addition, Mr Carlsson-Sweeney said that ESG has also been integrated into/informs engagement activities. In saying this, Mr Sweeney clarified that this is not to say that AusBil will only invest in companies with the strongest ESG profiles. Rather, Ausbil looks to invest in companies that are improving on ESG. Asked to comment on whether engagement activities have changed because of COVID-19, Mr Carlsson Sweeney said that the approach to discussion, and the overall themes being discussed are unchanged though the focus on health and safety is somewhat greater. Referencing recent AGM results, said that support for climate change resolutions is increasing, and this demonstrates that concern around the issues hasn't diminished.
- **Engagement tips?** Asked for advice on engaging with Ausbil, Mr Carlsson Sweeney said that it is important to keep investors updated on the impacts COVID-19 is having (including the impact on culture) and what steps are being taken to manage/address is eg the steps the company is taking when dealing with suppliers, with employees, and customers.
- **Making sense of ESG data – seeing through the marketing:** Where previously there was a shortage of data, 'now there's the opposite' Mr Carson-Sweeney observed. However, he said that company reporting alone (despite the length of some sustainability reports) does not give a full picture. For example, it's unlikely that companies would disclose an issue with underpayment of workers he suggested. Accordingly, AusBil supplements official reporting with a range of other sources including direct engagement with companies, 'field trips' (eg to view factories), engagement with employees, unions (among other sources) to build a fuller picture of actual ESG performance. This approach, he said, enables an appreciation of the challenges being faced, but also a genuine understanding.
- **COVID-19 has not changed the focus on ESG:** Mr Carlsson-Sweeney observed that this focus is not changed by the pandemic. He considers instead that COVID-19 may actually increase the importance of ESG.

#### Case study: Thai Union – why a strong focus on ESG makes good business sense and acts as insurance against future crises

Ms McBain described Thai Union's 'journey' towards ESG following what she described as a 'maelstrom' of ESG issues in 2015 that culminated in a significant drop in the company's share price.

To rebuild value, it was necessary to rebuild the company's reputation and standing. Thai Union decided that the best way to do this was to develop and implement an integrated sustainability strategy underpinned by good governance and transparency.

This has stood Thai Union in good stead in the current crisis Ms McBain said. Having this strong governance focus, has enabled the company to weather the COVID-19 crisis with less disruption/less impact that would otherwise have been the case. To give one example, employees were also wearing personal protective equipment.

Asked whether Thai Union had adopted the SASB standards, Ms McBain said that the company hadn't but may consider doing so in future.

[Source: Governance Institute Annual Forum 2020, Panel session: ESG: Thought leadership — from ethical to social to ESG integration  
Chair: Kerry McGoldrick Partner, ShineWing Australia, Janine Guillot, Chief Executive Officer, Sustainability Accounting Standards Board, USA Måns Carlsson-Sweeny, Head of ESG, AUSBIL Investment Dr Darian McBain, Global Director, Corporate Affairs & Sustainability, Thai Union 11/05/2020

## In Brief | The World Economic Forum has called for continued focus on stakeholders during the pandemic issuing 'Principles for the COVID-19 era'

[Sources: World Economic Forum media release 01/04/2020; Stakeholder Principles in the COVID Era]



# Meetings and Proxy Advisers

## COVID-19: ASIC has released updated temporary guidelines for investor meetings using virtual technology

### Key Takeouts

- **Context:** [Corporations \(Coronavirus Economic Response\) Determination \(No 1\) 2020](#) came into effect on 6 May. Among other things, the determination temporarily modifies the Corporations Act 2001 (Cth) to facilitate the holding of meetings, including AGMs, via electronic means during the COVID-19 pandemic. (For a summary see: [Governance News 06/05/2020](#)). Following this development, ASIC has issued updated temporary guidance for calling and holding hybrid/virtual meetings while COVID-19 restrictions/the determination remain in place.
- **ASIC emphasises the importance of ensuring that virtual participants have reasonable opportunity to participate in the meeting** (eg cast votes and ask questions) and cautions that failure to take steps to ensure this, may risk 'breaching sections 249R or 252P of the Corporations Act (the requirement to hold a meeting at a reasonable time and place), or the terms of the Determination'.
- **Scope of the guidance:** The guidance outlines ASIC's expectations in relation to: participation; voting; the content of the notice of the meeting; and expectations around planning for/managing technical issues.
- **Temporary only:** The guidance remains in place until 5 November 2020.
- **Program of observation:** ASIC has commenced an ongoing program of observation of hybrid and virtual meetings held during the COVID-19 restrictions. ASIC says it may provide further guidance if it considers it necessary based on continuing observations, any requests for additional guidance we receive, or any change in circumstances.

### ASIC's position on virtual/hybrid meetings (while COVID-19 restrictions remain in place)

While COVID-19 restrictions remain in place, ASIC says that it 'strongly encourages' companies and responsible entities to hold their meetings either as 'virtual' meetings (online only) or as hybrid meetings.

#### There must be reasonable opportunity for participation

ASIC emphasises that it is important that the meetings are conducted in a way that enables 'reasonable opportunity' for members to participate.

ASIC cautions that 'given the current restrictions on members' ability to physically attend meetings, ASIC would be concerned if a company or responsible entity were to seek to hold a physical meeting or a hybrid meeting that did not adequately allow questions to be asked, or votes to be cast, at the meeting in a way that provides a reasonable opportunity for members to effectively participate. Companies and responsible entities that hold meetings in such circumstances may risk breaching sections 249R or 252P of the Corporations Act (the requirement to hold a meeting at a reasonable time and place), or the terms of the Determination'.

#### Expectation that supplementary notice is provided where necessary

Some listed entities may have already called a meeting and not included (or need to change) information in the notice of meeting about the virtual technology that will be used to ensure members have a reasonable opportunity to participate. In such cases the entity should issue a fresh notice containing the new details at least seven days before the meeting (see Determination paragraph 5(3)(b)).

### ASIC guidelines for calling and holding hybrid/virtual meetings (including AGMs)

#### Participation

ASIC considers that attendees at virtual/hybrid meetings should have opportunity to participate in the meeting in a way that is 'equivalent to the one they would have had if attending in person'.

ASIC says that this 'generally' means:

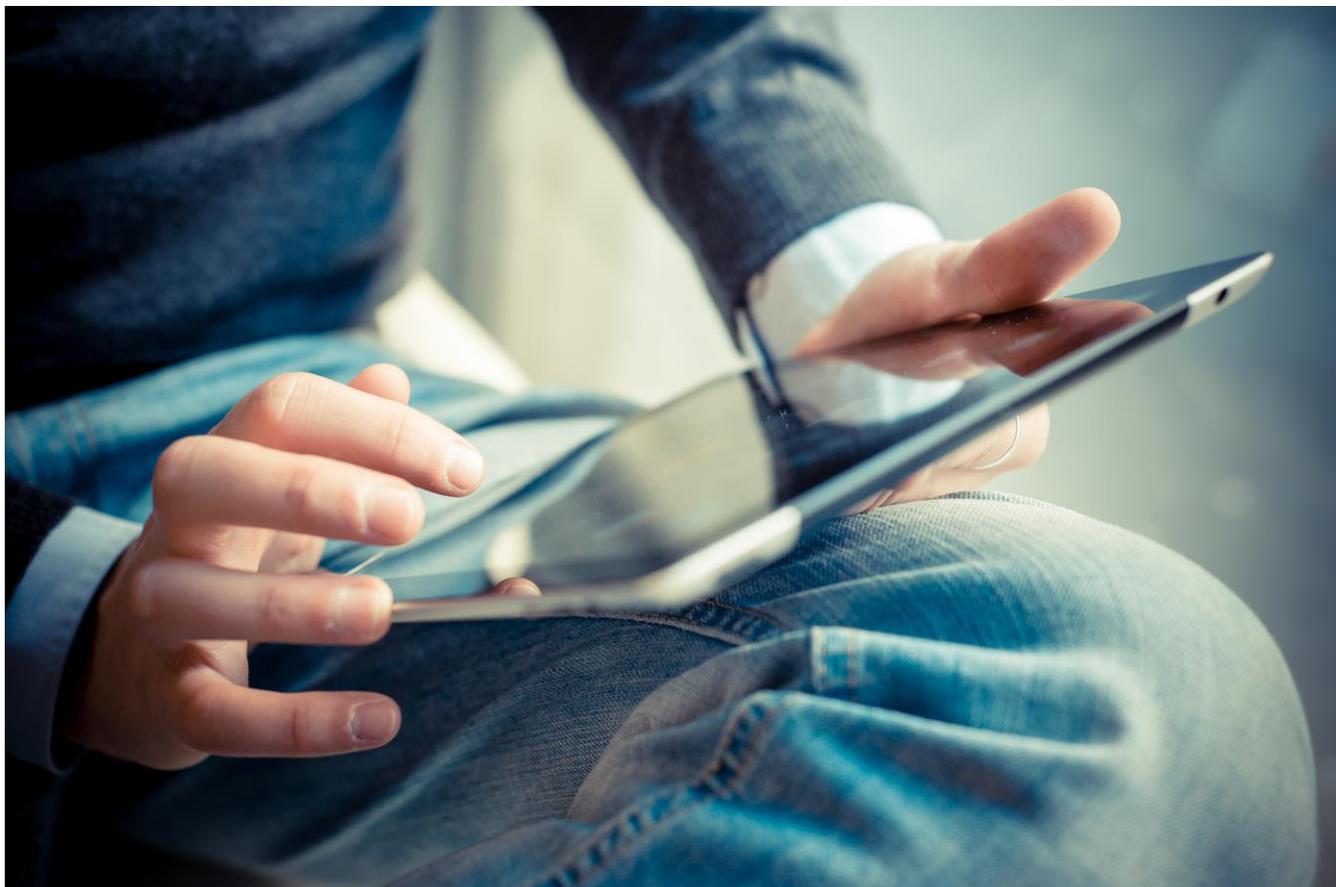
- The technology should enable remote attendees to follow the proceedings of the meeting uninterrupted
- Efforts should be made to 'preserve and promote genuine and effective interaction between members and the board or responsible entity'.
- There should be reasonable opportunity for attendees to ask questions live regardless of whether they are participating in person or virtually. At AGMs, there should be opportunity for questions/comments on the management of the company and (where applicable) the remuneration report, as well as questions to the auditor.
- Where questions are able to be submitted ahead of time, the selection process 'should be balanced and representative'. 'There should also be transparency about the number and nature of the questions asked and not answered – and appropriate records of questions, comments and responses should be kept to enable this'.
- There should be opportunity to consider responses to questions and for debate before voting on resolutions. In light of this, ASIC considers that there should be the option to cast votes live during meetings (even where the option to vote prior to the meeting is also available)

### Voting

- All voting at a virtual or hybrid meeting should be by a poll rather than a show of hands.
- Where practicable, voting via online or other means should also be available prior to the meeting for the convenience of members who do not otherwise intend to participate.

### Content of the notice of meeting

- The notice-of-meeting should include clear, concise and effective explanations of: a) how to use the technology to observe, vote, make comments and ask questions; and b) how the reasonable opportunity to vote, comment and ask questions will be provided to those participating virtually. As a minimum ASIC considers that companies/responsible entities should 'specify an email address (or other online submission facility) in the notice of meeting for the service of proxy appointments and proxy appointment authorities'.



## Technical issues

- **Steps to mitigate the risk of disruption as far as possible:** To minimise/mitigate as far as possible, the risk of technical issues disrupting the meeting, ASIC encourages companies and responsible entities to:
  - assess virtual technologies in advance of the meeting eg consider holding a short 'rehearsal' to iron out potential complications ahead of time; and
  - have backup solutions and plans in place to overcome technical issues should they participants should be informed at the outset of the meeting how updates/change in plans/new instructions will be communicated to them in the event of technical issues.
- **Adjourning the meeting:** Where technical issues prevent 'a number' of participants from being able to 'reasonably participate' the meeting should be adjourned until the issues are resolved. This may require an extension to a statutory timeframe. In the case of AGMs required to be held before 31 May 2020, a company or responsible entity may rely on ASIC's 'no action' position.

**The guidance will remain in place until 5 November only:** As our guidance is based in part on the terms of the Determination, it will remain in place until the expiry of the Determination at the end of 5 November 2020, unless it is withdrawn or reissued beforehand.

**Program of observation:** ASIC has commenced an ongoing program of observation of hybrid and virtual meetings held during the COVID-19 restrictions. ASIC says it may provide further guidance if it considers it necessary based on continuing observations, any requests for additional guidance we receive, or any change in circumstances.

[Sources: ASIC media release 7/04/2020]

## COVID-19 has seen governments around the world race to implement emergency changes including allowing virtual meetings: Could these emergency measures act as a blueprint for longer term reform post-pandemic?

### Key Takeouts

- The authors document the global legislative response to the pandemic and identified the five areas in which there has been most legislative activity
- They consider that though some changes will be temporary, the rapid acceptance of the use of technology (eg in the context of AGMs) is likely to remain in place post-pandemic. As such, it's suggested that some crisis measures may become blue prints for longer term change.

In a recent paper, [The COVID-19-Crisis and Company Law - Towards Virtual Shareholder Meetings](#), University of Luxembourg academics Dirk A Zetzsche, Linn Anker-Sørensen, Roberta Consiglio and Miko Yeboah-Smith document emergency legislative measures enacted in 21 countries - Australia, Austria, Belgium, Canada, China, France, Germany, Hong Kong, India, Italy, Luxembourg, the Netherlands, Norway, Portugal, Singapore, South Korea, Spain, Switzerland, Thailand, the United Kingdom, and the United States – in response to COVID-19, to identify common themes in the respective legislative responses.

Overall, the authors identify several areas of concentrated legislative activity. These include:

- extending filing periods for annual and corporate reports
- shareholder meetings:
  - allowing virtual-only meetings, online-only proxy voting and voting-by-mail
  - granting relief from various requirements aimed at protecting shareholders (including fixed meeting and notice periods)
- relaxing provisions requiring physical attendance of board members (including relaxing requirements in relation to signing documents eg allowing electronic execution of documents)
- allowing for 'more flexible and speedy capital measures', including the disbursement of dividends and the recapitalisation of firms
- temporary changes to insolvency law to delay companies' petitioning for insolvency as a result of the sudden impact of the COVID-19 economic downturn

In comparing and contrasting the respective approaches to each of these areas taken by different countries, the authors also consider the extent to which COVID-19 crisis legislation, some of which has been enacted on a temporary basis, might function as a 'blueprint for general corporate governance reform' post-pandemic.

They observe that one impact of COVID-19 has been that 'countries previously hesitant to allow remote participation and the digital exercise of rights have opened their respective company law in response to the crisis' moving more quickly, with less debate and arguably experimenting, in a way that they ordinarily would not be prepared to do.

In the authors' view, though some COVID-19 crisis measures, eg longer filing periods, easing of capital measures and insolvency law relief, will remain temporary, others such as allowing virtual shareholder meetings are 'harbingers of fundamental company law reform'.

They conclude that 'The legislation passed in response to the COVID-19 crisis provides for an interesting case study through which to examine what can be done to modernize the corporate governance framework with a view to furthering digitalization. In this respect, it is safe to assume that some crisis measures will be of model character. While the details of the modus operandi of VSMs [virtual shareholder meetings] will require careful adjustment to ensure that shareholders will be afforded the same rights and opportunities to participate as they would at an in-person meeting (including Q&A), the experimental phase during the crisis will feed into the policy discussion, with some more successful and some less successful examples providing food for thought. Yet, it is safe to say that the COVID-19 pandemic has unveiled the need for virtual-only shareholder meetings, and that some types of VSM will stay for good long after the current crisis has subsided'.

[Sources: Oxford Law School Blog 06/05/2020; [registration required] Zetzsche, Dirk Andreas and Anker-Sørensen, Linn and Consiglio, Roberta and Yeboah-Smith, Miko, The COVID-19-Crisis and Company Law - Towards Virtual Shareholder Meetings (April 15, 2020). University of Luxembourg Faculty of Law, Economics & Finance WPS 2020-007: SSRN: <https://dx.doi.org/10.2139/ssrn.3576707>]

# Regulators

## The regulatory response to COVID-19: Insights from the Governance Institute's Annual Governance and Risk Management Forum 2020

### Key Takeouts

- ASIC is currently considering whether to grant an extension of time for entities with 30 June 2020 balance dates to report (in light of the disruption caused by COVID-19)
- ASIC will be monitoring the market closely for serious consumer harm or sharp practice for example, misleading/deceptive advertising.
- ASIC is also monitoring capital raising activities in reliance on the relief in place to ensure disclosure is accurate and meaningful. Mr Price emphasised the importance of ensuring that fairness obligations continue to be met in this context.
- One area of focus for the ASX is misleading COVID-19 related announcements. So far, ASX has reviewed approximately 70 announcements, of these 50 have been deemed by the ASX to be misleading and have either been substantially amended prior to release or withdrawn.
- The ACNC has effectively paused its compliance activities in light of the pandemic, but cautions charities that they need to ensure any COVID-19 work fits within their charitable purpose, and of the importance of keeping a well-documented audit trail.

The Governance Institute's Virtual Governance and Risk Management forum 2020 featured a panel discussion with representatives of the ASX, the Australian Securities and Investments Commission (ASIC) and the Australian Charities and Not-for-profits Commission (ACNC) about their regulatory priorities with a focus on the changes they have made/their response to COVID-19.

### Some Key Points

#### ASX update

- **Key ASX updates for listed entities:** ASX Chief Compliance Officer, Kevin Lewis highlighted a number of key updates from the ASX that listed entities should be aware of. These included: a) the major changes to the ASX Listing Rules that came into effect 1 December 2019; b) recent changes to guidance note 8 (Continuous Disclosure requirements); and the COVID-19 focussed [Listed@ASX update of 31 March update](#).
- **Capital raising:** Commenting briefly on the issue of capital raising and the relief in place, Mr Lewis said that the ASX considers the relief to have been very effective - \$19bn having been raised.
- **Current ASX focus areas:** Mr Lewis highlighted a number of current focus areas for the ASX these including 'misleading' COVID-19 ASX announcements (among others). Mr Lewis said that the ASX has reviewed approximately 70 announcements, of these 50 have been deemed by the ASX to be misleading and have either been substantially amended prior to release or withdrawn. Those that have 'slipped through' have been formally retracted.
- **Concern about meeting continuous disclosure requirements in the current circumstances:** Mr Lewis acknowledged that there is a level of nervousness about meeting requirements in the current circumstances, but emphasised that there is no expectation that entities 'predict the unpredictable'. Mr Lewis advised companies to concentrate on decisions within their control eg laying off members of the workforce should be disclosed immediately. He added that entities should review any guidance issued prior to COVID-19, to ensure it remains accurate, and if not either amend or consider withdrawing it as appropriate. Mr Lewis referred companies to the [Listed@ASX 31 March update](#) for more detail.

#### ASIC update

- **Temporary recalibration of ASIC's priorities because of COVID-19:** Commissioner of the Australian Securities and Investments Commission (ASIC) John Price said that ASIC has recalibrated its regulatory activities in light of COVID-19 (as per information on the ASIC website) and that ASIC expects the changes will be in place until at least September 2020 (though this is subject to change).
- **Deferral of DDO and broker (best interest reforms) reforms:** Asked about the impact of the six month deferral of design and distribution and broker reforms on customers, and the steps ASIC will take to ensure consumers are protected at a time when they may be vulnerable, Mr Price said that ASIC deferred obligations after the government's broader announcement deferring the implementation of Hayne reforms. He added that ASIC will be monitoring the market closely for serious consumer harm or sharp practice for example, misleading/deceptive advertising. Where an advertisement is misleading/deceptive ASIC will 'show strong interest' from an enforcement point of view Mr Price said.
- **Mr Price said that key ASIC functions remain available** (eg registry operations) and that enforcement activity is also continuing though the timing and process may change.
- **AGMs:** Mr Price referred attendees to the [guidance on the ASIC website](#) around holding virtual investor meetings (including AGMs) which includes guidance on: member participation, managing technical issues, voting and contents of the notice for meetings (this guidance is covered in a separate post in this issue of Governance News.). Asked how electronic voting should be managed in a virtual environment, Mr Price referred the questioner to ASIC's guidance. Separately, Mr Lewis also referred attendees to the guidance issued by the [Governance Institute \(and endorsed by the ASX\)](#) on holding meetings by electronic means.
- **Financial Reporting – possible relief being considered:** Mr Price said that ASIC is currently considering whether to grant an extension of time for entities with 30 June 2020 balance dates to report (in light of the disruption caused by COVID-19) and that an announcement will be issues this week/next week on the issue.
- **Capital raising:** Referencing the relief that has been granted, Mr Price said that ASIC is monitoring capital raising activities in reliance on the relief to ensure disclosure is accurate and meaningful. Mr Price emphasised the importance of ensuring that fairness obligations continue to be met in this context. Directors, Mr Price said, should have a clear understanding of their chosen capital raising structure and its impact on existing retail and institutional investors. Mr Price referred attendees to the guidance on the ASIC [website](#).

#### ACNC update

- **Change in regulatory approach:** Australian Charities and Not-for-profits Commission (ACNC) Commissioner Gary Johns outlined the temporary changes in ACNC's regulatory approach in light of the impact of COVID-19. Dr Johns said that in effect, the ACNC has temporarily paused its usual compliance activities, because of COVID-19. He reminded charities that they are still required to ensure any COVID-19 activity 'reasonably fits' within their charitable purpose, and to maintain a clear and detailed audit trail of 'reasonable decision making'.
- **Charitable purpose:** Dr Johns said that a number of charities had expressed interest in providing COVID-19 related assistance in various forms. Dr Johns said that charities can not operate outside their charitable purpose, and those wishing to pivot to provide COVID-19 related assistance should: keep members informed, document decisions, and keep within their charitable purpose (which he suggested could be interpreted broadly in the current circumstances),
- **Donations for COVID-19 work:** Dr Johns emphasised the need to charities to account separately for COVID-19 specific donations. Charities need to be able to provide that the money raised for COVID-19 has been used for that purpose.
- **Concern about trading whilst insolvent:** Referencing temporary changes to insolvency law to enable provide relief to corporations during the COVID-19 pandemic, Dr Johns said though the ACNC is unable to amend the law, it will 'apply the same position to registered charities'. Dr Johns cautioned however, that charities should keep informed, seek legal advice as appropriate and keep good records.
- **Charities operating overseas:** Dr Johns said that in the present circumstances charities may not be able/may have difficulty in receiving reports from overseas partners about how they're pursuing their charitable purposes. If this is the case, charities should make every effort to obtain the reports as soon as possible, document those efforts and record the reasons why annual reports cannot be obtained.

- **AGMs:** Dr Johns encouraged charities to hold electronic meetings instead of physical meetings during the pandemic. Charities should keep members informed of any changes to meetings, consult with members and if a decision is taken to postpone the meeting the decision and the reasons behind it should be recorded.
- **Reporting relief:** The ACNC is allowing charities to lodge annual information statements (2019 statements) until 31 August 2020.
- **Jobkeeper queries:** JobKeeper queries should be directed to the ATO rather than to the ACNC>

[Source: Governance Institute Virtual Annual Forum 2020: Panel session: Regulators' panel, Chair: Lyn Nicholson, General Counsel, Holding Redlich, Kevin Lewis FGIA, Chief Compliance Officer, ASX, John Price, Commissioner, Australian Securities and Investments Commission The Hon Dr Gary Johns, Commissioner, Australian Charities and Not-for-profits Commission 11/05/2020]

## ASIC enforcement update 1 July 2019 to 31 December 2019

### Report Overview | ASIC Report 660 ASIC enforcement update July to December 2019 (REP 660)]

The Australian Securities and Investments Commission (ASIC) has released its enforcement update report for the period 1 July 2019 to 31 December 2019 in which it outlines key actions taken over the period. The report also includes discussion of ASIC's enforcement strategy and priorities for 2019-2021.

In his foreword to the report, ASIC Deputy Chair Daniel Crennan said that ASIC's enforcement results over the period demonstrate that 'ASIC has a clear resolve and the Office of Enforcement is delivering on the public's expectation that we hold wrongdoers to account'.

### Some Key Statistics

#### Overall, ASIC's enforcement activity increased

Overall, ASIC's enforcement activity increased on the previous period. For example, in the period July to December 2019 ASIC laid 279 criminal charges. In contrast in the period January to June 2019, only 70 criminal charges were laid.

During the period July to December 2019 \$22.2m in compensation and remediation was paid to consumers and investors (up from \$19.2m in the previous period).



## Enforcement results July to December 2019

| AREA                 | KEY RESULTS JULY TO DECEMBER 2019  |
|----------------------|--|
| Corporate Governance | <ul style="list-style-type: none"> <li>ASIC recorded 25 corporate governance related results during the period (up from 14 in the previous period January to June 2019). The majority (20) were of actions were against auditors, four were actions against directors and there was one action against a liquidator</li> <li>As at 1 January 2020, ASIC had 12 criminal and 16 civil corporate governance related matters still before the courts. The majority of these are actions against directors: 10 criminal actions and 9 civil actions. In contrast, as at 1 July 2019 ASIC had nine criminal and nine civil corporate governance related matters still before the courts.</li> </ul> |
| Financial Services   | <ul style="list-style-type: none"> <li>In the six months between 1 July and 31 December 2019, ASIC recorded 55 financial services related results (up from 51 in the previous period). The majority concerned 'other financial services misconduct'.</li> <li>As at 1 January 2020, ASIC had 14 criminal and 58 civil actions still before the courts. In contrast, as at 1 July 2019, ASIC had 17 criminal and 29 civil financial services-related matters still before the courts.</li> </ul>  |
| Markets              | <ul style="list-style-type: none"> <li>In the six months between 1 July and 31 December 2019, ASIC recorded seven market-related results, a decrease on the previous period when 11 market related outcomes were recorded. .</li> <li>As at 1 January 2020, ASIC had 10 criminal and 12 civil market-related matters still before the courts. In contrast, as at 1 July 2019, ASIC had eight criminal and eighteen civil matters still before the courts.</li> </ul>   |
| Small Business       | <ul style="list-style-type: none"> <li>In the six months between 1 July and 31 December 2019, ASIC recorded 190 small business related results down from 278 in the previous period.</li> <li>As at 1 January 2020, ASIC had 162 small business related criminal matters still before the courts. As at 1 July 2019 ASIC had a similar number (161) criminal matters still before the courts.</li> </ul>   |

### ASIC's enforcement strategy for 2019–21

ASIC's enforcement strategy for the three years to 2021 is as follows.

- For the most serious matters ASIC will act quickly to obtain criminal and civil court based outcomes that discourage and punish misconduct
- ASIC will use its expanded enforcement toolkit including new and increased civil and criminal penalties
- ASIC will use emerging technologies to enhance its enforcement capabilities
- ASIC will 'better communicate' its enforcement priorities, outcomes and performance

### Enforcement priorities for 2019-2021

**Ongoing priorities:** ASIC will always prioritise: a) significant market misconduct; b) misconduct that is serious either by its nature or extent of harm, or that involves a large market participant or licensed entity; c) misconduct that involves a high risk of significant consumer harm, particularly involving vulnerable consumers; and d) misconduct by individuals, particularly criminal conduct or governance failures, at board or executive level.

**Revising priorities in response to COVID-19:** ASIC is revising its enforcement priorities in response to the COVID-19 crisis to ensure it is able to both deal with the most significant and urgent matters, and also respond quickly to serious market misconduct and abuse; instances of immediate consumer harm (eg predatory lending) and other egregious unlawful conduct.

**Priorities for 2019-2021:** The Office of Enforcement will prioritise the following types of matters in 2019–21:

- Financial Services Royal Commission referrals and case studies
- Misconduct related to superannuation and insurance

- New or emerging types of misconduct, including misconduct carried out online or with the use of emerging technologies.
- Cases that engage ASIC's new powers or provisions that carry new or higher penalties
- Illegal phoenix activity
- Auditor misconduct

[Sources: ASIC media release 29/04/2020; ASIC Report 660 ASIC enforcement update July to December 2019 (REP 660); ASIC Report 615: ASIC enforcement update January to June 2019]

## The ACCC and the OAIC have released their joint policy outlining how they will monitor and enforce compliance with the CDR regulatory framework

Text On 8 May, the Australian Competition and Consumer Commission (ACCC) and the Office of the Australian Information Commissioner (OAIC) jointly released the Compliance and Enforcement policy for the Consumer Data Right (CDR).

The full text of the policy is [here](#).

### Scope of the policy

The policy outlines:

- the approach the ACCC and OAIC will take to encourage and to monitor compliance with the CDR Rule, Legislation and Consumer Data Standards and to identify potential breaches
- the approach the two agencies will take to enforcement (how both agencies will respond to breaches of the CDR regulatory framework)

The policy does not discuss how the OAIC will apply its complaint handling powers or the process for making a CDR consumer complaint.

### A 'strategic risk based approach' informed by five principles

The policy states both agencies will 'adopt a strategic risk-based approach to compliance and enforcement'.

This will be informed by the following five principles:

1. Accountability – the actions of the ACCC and the OAIC are reviewable by a range of agencies including the Commonwealth Ombudsman, Parliamentary Committees and the courts.
2. Efficiency – the agencies will 'strive to' execute their roles efficiently and 'in a timely manner' to avoid costly delays and uncertainty for consumers and CDR participants.
3. Fairness – the agencies will 'strive to' to exercise their powers 'in a manner which is procedurally fair and provides natural justice'.
4. Proportionality – regulatory measures and actions will be proportionate to the conduct and the resulting harm or potential harm.
5. Transparency – 'to the extent permitted by law, we will be open and transparent about how we use our regulatory powers, what action we take and why. We will ensure that matters finalised by litigation or other formal resolution are made public'.

### Compliance/monitoring tools – focus on prevention

The policy states that 'ultimately, prevention of a breach of the CDR regulatory obligations through our compliance activities is preferable to taking action after the breach has occurred'. Accordingly, there is a focus on engaging with participants to ensure understanding of their obligations and encouraging 'a compliance culture within the CDR regime'.

The policy outlines the tools/information sources that will be used by the agencies to monitor compliance and to identify potential breaches of the relevant legislation (including Privacy Safeguards, Rules and Data Standards).

These include (among others):

- Receiving intelligence and reports from approved external dispute resolution bodies (eg AFCA)

- Receiving mandatory periodic reports from data holders and accredited data recipients
- Undertaking audits and assessments of data holders and/or accredited data recipients to ensure they are complying with the relevant legislation (including the Privacy Safeguards, Rules and Data Standards)
- Issuing data holders or accredited data recipients information requests, and if necessary using statutory information gathering powers to compel the provision of information

## Approach to enforcement

### Purpose of enforcement

The policy says that the purpose of taking enforcement action is to: a) stop the unlawful conduct; b) deterrence; c) ensure future compliance; d) encourage 'proper use' of CDR data; e) penalise offenders; and f) instil public confidence in the regime and the role of the agencies in ensuring data is protected.

### Risk based approach

The policy states that the agencies will use a risk based approach to monitoring compliance and to taking enforcement action. Importantly, the policy says that issues with potential to harm either the CDR regime or consumers will have priority. 'We cannot pursue all matters that come to our attention. Our role is to focus on those circumstances that will, or have the potential to, cause significant harm to the CDR regime or result in widespread consumer detriment. We prioritise and focus on matters that provide the greatest overall benefit to consumers' the policy states.

### Priority Conduct

The policy says that the ACCC and OAIC are more likely to take action where the conduct involves:

1. non-cooperation by data holders (data holders that repeatedly refuse to disclose, or frustrate the process of disclosure);
2. misleading or deceptive conduct
3. accredited data recipients collecting CDR data without valid consent
4. misuse or 'improper disclosure' of CDR consumer data
5. insufficient security controls

### Factors relevant to determining the 'appropriate enforcement approach'

The policy includes a non-exhaustive list of factors the agencies will take into account when deciding on the 'appropriate enforcement approach'.

In addition to the 'the specific and general educational, deterrent or precedent value of enforcement action, including whether pursuing court action (where applicable) would test or clarify the law' and whether the conduct requires 'urgent action or intervention' by either agency, the list includes:

- the impact of the conduct (eg consumer harm as well as any realised/potential future gain from the conduct)
- the nature and extent of the conduct constituting the breach, how long it has been occurring and the number of related breaches
- whether the conduct indicates systemic issues that may pose ongoing compliance or enforcement problems
- the size of the business engaging in the conduct
- whether the 'conduct was deliberate, repeated, reckless or inadvertent'
- the extent of senior manager involvement/oversight
- whether action is already being taken to address the issue by another enforcement agency or other organisation (for example, the external dispute resolution body)

### Mitigating factors

The policy also says that the actions of the business in relation to the conduct eg whether the conduct was self-reported and how soon the report was made, as well as the actions of the business to rectify the breach would also be taken into account.

Likewise, whether the business 'displayed a corporate culture of compliance' and the level of cooperation with the ACCC would also be relevant in determining the appropriate enforcement approach.

[Note: The full non-exhaustive list of factors is at Page 6 of the Policy [here.](#)]

## Enforcement options

The policy outlines the available enforcement options. These include: administrative resolutions; infringement notices; court enforceable undertakings; suspension/revocation of CDR accreditation; exercise of the determination or declarations power; and court proceedings.

[Sources: ACCC media release 08/05/2020; CDR compliance and enforcement policy]

# Financial Services

## COVID-19: ASIC has clarified its regulatory approach to lending obligations during the pandemic

### Key Takeout

- ASIC expects lenders to adopt a flexible, case by case approach to responding to hardship notices, cautioning that a standardised approach (in the interests of providing relief quickly) may fall foul of fairness requirements if it fails to take into account consumers' actual circumstances.
- ASIC also makes clear that the COVID-19 pandemic has not altered its view of what is required to comply with responsible lending obligations. Consistent with the approach it took in Australian Securities and Investments Commission v Westpac Banking Corporation (Liability Trial) [2019] FCA 1244 (Wagyu and Shiraz case) and consistent with the approach in RG 209, ASIC's expects lenders to approach lending decisions on a case by case basis, taking into account consumers' individual circumstances.

### Context

In response to a request from the Australian Banking Association (ABA), the Australian Securities and Investments Commission (ASIC) has provided clarification of its regulatory approach to lending obligations during the COVID-19 health crisis.

ASIC's response outlines its expectations of the way in which lenders should deal with issues of hardship, responsible lending and communication with customers during the pandemic.

[Note: The full text of ASIC's response is [here](#). The full text of the request for clarification from the ABA is [here](#).]

In addition, ASIC has published a brief statement outlining retail lenders' obligations when responding to hardship notices.

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

### Lenders' obligations: Lenders should be wary of adopting an inflexible, standardised approach

ASIC observes that:

- Lenders have a legal obligation to consider varying a consumers' credit contract if notified by the consumer that they are unable to meet their credit obligations.
- Lenders are also obliged to do all 'necessary to ensure that the credit activities authorised by their licence are engaged in efficiently, honestly and fairly'.

ASIC acknowledges that adopting a standardised approach will enable lenders to provide relief more quickly, but cautions against lenders doing so at the expense of failing to understand consumers' actual circumstances.

Accordingly, ASIC suggests, that lenders should take into account the following five considerations:

1. Advise consumers of different available options that may assist them.
2. Ensure all communications with consumers are clear and sufficiently detailed (to enable a consumer to make an informed decision). ASIC says that this should include details of how different assistance options will affect the consumer's loan and repayments over the short and long term, including the effect of capitalising interest (where relevant).
3. Be flexible and offer tailored solutions to consumers where a standardised approach may not meet the consumer's needs. For example, if a consumer has had their loan repayments deferred, a lender should ensure that how a consumer will catch up on missed repayments is manageable and offer alternatives.

4. Have ongoing communications with consumers throughout the period of assistance to ensure that any assistance offered remains appropriate and continues to meet their needs.
5. Communicate with consumers as their period of assistance comes to an end to understand their financial circumstances at that time and respond as appropriate and ensure each consumer understands what will happen next.

## Further details: Overview of ASIC's letter clarifying expectations

### Responsible lending obligations

**Limited application:** ASIC observes that responsible lending obligations have limited application in that they only apply to new lending ie to new loans or an increase to a credit limit on an existing loan. ASIC writes, 'the responsible lending obligations only apply before a contract is entered into or a credit limit under an existing contract is increased'.

#### Existing loans

- In light of the fact that responsible lending obligations 'will not be triggered' unless variations to existing contracts result in an increase to a credit limit on an existing loan, ASIC does not consider that they constitute a barrier to varying repayment obligations to accommodate financial hardship.
- Referencing possible hardship measures lenders might implement cited by the ABA in their request for clarification, ASIC says that it considers that the following measures should 'typically' be achievable through variations to an existing contract (rather than by entering into a new contract with different terms):
  - Reducing short-term repayment obligations by changing the repayment terms from principal and interest to interest only for a set period; and/or
  - offering deferrals with capitalisation of interest; and/or
  - extending the term of the loan.
- **Debt consolidation may trigger responsible lending obligations:** One measure that may trigger responsible lending obligations, is debt consolidation. ASIC's view is that where debt consolidation (to reduce the total repayments across a wider credit portfolio) involves an increase to the credit limit under a home loan, the responsible lending obligations will apply.

#### New loans: COVID-19 exemption

ASIC notes that the [National Consumer Credit Protection Amendment \(Coronavirus Economic Response Package\) Regulations 2020](#) temporarily exempts Australian credit licensees from certain responsible lending obligations in order to facilitate the flow of credit to small businesses.

[Note: For an overview of the measure/implications see: [Governance News 03/04/2020](#)]

### Loans to which responsible lending obligations apply

#### Unsuitability assessments – ASIC's expectation is that lenders form a view based on customer's actual circumstances (consistent with RG 209) rather than relying on general assumptions

The ABA sought clarification on whether it is appropriate for lenders making unsuitability assessments to make certain assumptions, including: a) that income of persons adversely impacted by COVID-19 economic conditions are likely to regain previous income within a reasonable period after restrictions are removed; b) any deterioration in asset values is unlikely to be permanent; and c) that the consumer's requirements and objectives relating to their COVID-19 impacted financial position is likely to be a prominent consideration.

ASIC's expectation is that the borrower's **actual** (rather than assumed) circumstances should be taken into account, consistent with the guidance in ASIC Regulatory Guide 209. The approach outlined in the guidance is already, ASIC considers, 'sufficient flexibility for lenders to take a range of actions to reduce the difficulty likely to be experienced by significant numbers of consumers'.

In addition, ASIC expects lenders to 'continue to work closely with their customers to develop options that provide both short-term assistance to customers experiencing difficulty due to COVID19 and also longer-term viability post COVID-19'.

ASIC states, 'The position outlined by the ABA involves making assumptions about a consumer's income (that it will return to pre-COVID-19 levels) without any regard to the consumer's actual circumstances which may indicate that

such a recovery is more likely or less likely. While we agree that ensuring the ongoing flow of affordable credit is important, it is also important that provision of new credit is not based upon assumed changes where these are unlikely to be met, and which will result in unmanageable debt burdens for consumers'.

[Note: In [Australian Securities and Investments Commission v Westpac Banking Corporation \(Liability Trial\) \[2019\] FCA 1244](#) (Wagyu and Shiraz case), Justice Perram found that a lender 'may do what it wants in the assessment process' and is not obliged under the NCCP Act to take into account a prospective borrower's actual/declared expenses when assessing whether a loan will be unsuitable to consumers. On 10 September, the Australian Securities and Investments Commission announced that it has filed an appeal. Our case note on the decision is [here](#). ASIC issued RG 209 with the aim of clarifying its approach at the end of 2019 ([our summary is here](#).) The Full Federal Court held a hearing on 25 February 2020. No orders or judgment have been entered at this time. There are currently no future listings.]

### **'No impediment to high priority being given to meeting a shorter-term funding need'**

Having said this, ASIC makes clear the guidance in RG 209 does not prevent lenders from prioritising the need to provide short term credit, provided that they do not do so to the exclusion of all other considerations.

ASIC writes that there 'is no impediment to high priority being given to meeting a shorter-term funding need. The guidance recognises that in some circumstances consumers may be prepared to make significant short term changes to their lifestyles that they would not ordinarily be willing to make. However, the consumer's longer-term requirements and objectives should also be considered, with regard to the length of the loan to be entered'.

### **Forming a 'justifiable view' of what is likely**

ASIC's expectation is that 'lenders should seek to form a justifiable view of what is likely, based on their understanding of the circumstances affecting the particular consumer'.

The letter outlines a 'range of circumstances' that lenders can consider when assessing a consumer's current and likely future capacity to meet repayment obligations under the terms of the loan. These are:

- availability of immediate repayment deferral periods for managing current obligations;
- eligibility for Government support (e.g. through the JobSeeker or JobKeeper programs);
- whether the consumer's employer has registered for the JobKeeper subsidy – this may, for example, provide an indication of ability and intention to reemploy the consumer (conversely, not accessing the subsidy may be an indication that the consumer will not be reemployed, or the business itself will not continue);
- if the consumer's employer is not accessing JobKeeper subsidies because of its size/nature (e.g. local council, university, larger business or insufficiently affected turnover), whether the employer is able to provide any assurance about prospects of reemployment.

In addition, ASIC says that there may be other individual circumstances that may be relevant eg previous employment history, qualifications and the industry of ordinary employment.

### **Relying on assumed changes to borrowers' financial positions**

ASIC writes that where a lender does rely on assumed changes to the consumer's financial position, 'consideration should be given to how the lender will respond if the assumed recovery does not in fact occur or only over an elongated period. For example, the lender may need to consider whether it would be prepared to provide hardship arrangements for an additional period to give the consumer a further opportunity to recover their financial situation'.

### **Application of the obligation to act efficiently, honestly and fairly**

ASIC acknowledges that in light of the impacts of COVID-19 on lenders eg the very high volume of hardship applications to be processed, meeting the general obligations in s47 of the National Consumer Credit Protection Act 2009 (including the obligation to act in an efficient, honest and fair way) may be more difficult for lenders.

However, ASIC's view is that 'this obligation should not be regarded as a barrier to offering consumers appropriate hardship arrangements'.

For example ASIC considers that in light of the pandemic it 'will not necessarily be unfair for banks to take longer, given the high volume of hardship applications in processing some of the applications for hardship than would otherwise be the case'.

Likewise, hardship arrangements (extending the time allowed to repay the loan) will not necessarily be unfair if they result in a larger amount being paid for the credit over the longer term. 'On its own, this increased cost would not suggest a failure by the lender to act fairly' ASIC states.

ASIC's view is that 'fairness to the consumer may involve advising the consumer of different available options that may assist and the longer-term implications for the consumer, to enable an informed decision to be made. Lenders should determine the best way to achieve this kind of fair treatment having regard to the circumstances.

### **Debt consolidation**

ASIC observes that 'it may be unfair to encourage the consumer to undertake a particular contract change that reduces risk exposure for the lender (such as through debt consolidation) but ignores longer term priorities for the consumer'.

### **Disrupted property settlements**

#### **Open to lenders to proceed with 'in flight' transactions: offering hardship arrangements is 'not an indication of a failure to act efficiently, honestly and fairly'**

ASIC observes that 'responsible lending obligations do not apply to require a further unsuitability assessment to be completed after entry into a credit contract, even if there are significant changes to the financial situation that was considered before entry into the contract.'

In light of this, ASIC's view is that the responsible lending obligations 'do not raise a barrier for proceeding with "in-flight" property transactions where there is a change of circumstances between entry into the loan and drawdown of funds on settlement of the property transaction'.

ASIC observes that 'some lenders may be concerned that they would be at risk of breaching the obligation to act efficiently, honestly and fairly if they proceed to fund a home loan in these circumstances, and immediately offer hardship arrangements such as repayment deferrals.' ASIC confirms that 'in the current circumstances we would not consider that proceeding to fund the loan and offer immediate hardship arrangements would be an indication of a failure to act efficiently, honestly and fairly'.

#### **Open to lenders to terminate the contract (though lenders should consider whether 'it is fair in all the circumstances before doing so)**

Alternately, ASIC writes that it is open to lenders to make a commercial decision to terminate the contract before providing any credit (subject to the contract allowing it).

Having said this, ASIC suggests that lenders should consider 'whether it is appropriate to discuss the changed circumstances with the consumer, determine what flow on effects the decision will have in relation to the property transaction (eg loss of deposit, loss of home, potential contractual liability for the consumer) and whether it is fair in all the circumstances to terminate the contract'.

### **Approach to procedural requirements under the National Credit Code for making contract changes**

#### **Guarantor notice and acceptance requirements**

The ABA requested that ASIC give class relief under s203A of the National Credit Code that gives exemptions from the guarantor notice and acceptance requirements in s61 of the Code, where liabilities are increased due to repayment deferral of up to 182 days.

ASIC's view is that the relief is not warranted because 'an exemption from this requirement would involve a transfer of additional credit risk from the lender to the guarantor without the guarantor's knowledge or consent', and that 'removal of their right to refuse to accept an extension to their guarantee to provide further security to the lender, would involve a risk of significant consumer harm'.

Having said this, ASIC says that it considers 'it is appropriate to take a facilitative approach to use of electronic communications if the lender chooses to seek an extension to the guarantee'.

#### **Written notice documenting contract changes – ASIC to take a 'facilitative approach' to the timeframes for complying and the use of electronic communications**

The ABA sought an extension of existing relief (in s71(2) of the Code and ASIC class order [CO 14-41]) to cover 182-day repayment deferrals.

ASIC's view is that this is also not appropriate. 'As these deferrals are proposed as a response to hardship situations, it is not clear why such changes would be made by agreement under s71 of the Code, rather than the prescribed framework for hardship notices' ASIC states.

Further, ASIC considers that 'the provision of a written description of the changes made is important to enable consumers to understand the effect of the change on their obligations. For example, so they are aware of what their changed repayment obligations are, when those obligations commence, frequency of repayments, changes that will be made to their credit balance through capitalisation of interest, and changes that will be made to the term of their

loan. Relief would involve a real risk of consumers not being properly informed about the obligations with which they must comply, once the deferral period ends'.

However, ASIC does 'consider that it is appropriate to take a facilitative approach to the timeframes for complying with these requirements and use of electronic communications'.

### **Electronic transactions: ASIC will not take action in relation to strict failure to comply where lenders have made 'reasonable efforts to comply in the circumstances'**

The ABA sought an exemption from requirements under s187 of the National Credit Code, to enable a 'publish and notify' approach.

ASIC writes that it does not consider that it is able to 'provide relief' but acknowledges that 'strict compliance may be difficult due to the number of hardship requests to be managed and the widespread social distancing measures. ASIC will take a facilitative approach to support lenders to make their best endeavours to comply with the procedural requirements (ie form of documents and timeframe for giving documents) and will not take action in relation to strict failures to comply where lenders have made reasonable efforts to comply in the circumstances. We note that this position does not affect the legal rights of debtors and guarantors under provision of the Code, or the legal validity of documents executed in a way that is contrary to the ET Act and Regulations'.

[Sources: ASIC media releases 29/04/2020; Australian Banking Association letter to ASIC; ASIC response to Australian Banking Association]

## **COVID-19: Funds are processing early release of super applications on average within 3.1 business days according to APRA data**

### **Key Takeouts**

- The first set of industry level data on the early release of superannuation scheme was released on 4 May. APRA found that in the first week of the scheme funds:
  - paid members \$1.3bn
  - processed almost a quarter of applications received (162,879 of 665,310 applications were processed)
- Going forward, APRA said it would release weekly data (including fund level data) every Monday
- The second set of data, including fund level data, was released on 11 May. The data shows that funds are processing 96% of payments within five business days. The average processing time taken is 3.1 business days
- APRA Deputy Chair Helen Rowell has welcomed the findings but also commented that it may be reasonable/appropriate in some cases for funds to take longer to process applications eg risk of fraud (among other reasons)

### **First week of the scheme: Industry level data released 4 May**

The Australian Prudential Regulation Authority (APRA) published its first industry-level data on benefits paid to members through the Government's COVID-19 temporary early release of superannuation scheme.

**Reporting period:** APRA requested data from 167 superannuation funds for the week ending on 26 April (the first week of the scheme). All funds responded to APRA's request (though only 107 funds had made an early release payment to date).

### **Key Points**

The data shows that in the first week of the scheme:

- funds received 665,310 applications for early release and processed 162,879 applications.
- the average time taken to process an application was 1.6 business days (after receipt from the ATO)
- funds have paid members \$1.3 billion.
- the average benefit paid was \$8002.

Trustees took an average of 1.6 days to make payments to eligible members after receipt of their applications from the ATO. APRA observes that given this was the first week of the scheme, trustees had no applications that were more than five business days old.

APRA Deputy Chair Helen Rowell said that 'although this publication only covers the first week of a scheme that will run for several months, the initial data indicates trustees are moving quickly to make payments after receiving determinations from the ATO...We expect trustees should generally be able to achieve this within five business days, however we recognise this may not be practicable in all cases, as trustees conduct fraud checks, and fulfil their legal obligation to look out for the best interests of all fund member'.

Ms Rowell said that 'APRA is closely monitoring trustee performance in this area and will consider taking appropriate action if evidence emerges of funds not releasing benefits to eligible members as soon as practicable'.

**Weekly reports and fund level data:** APRA said that going forward it will release weekly data every Monday, and that the next report will include fund level data.

[Sources: APRA media release 04/04/2020; COVID-19 Early Release of Superannuation Data 04/04/2020]

## **Fund level data released 11 May**

The Australian Prudential Regulation Authority's has now released the first fund level data on the early release of superannuation scheme. The data identifies the number and value of the payments processed by each fund, as well as the time taken to make payments.

### **Industry level data**

- Funds are processing 96% of payments within five business days with the average time taken to process payments at 3.1 days
- As at 3 May, superannuation funds had issued early release payments to 830,000 members worth a total of \$6.3 billion.
- The average payment was \$7,629

### **Fund level data**

- Of the 142 funds to make payments, 82% (117) have made more than 90% of payments within the five business days guideline indicated by APRA.
- Of this group, 57 funds that made all payments within five business days, 24 paid 99% within that timeframe, and another 18 funds that paid 98% within five business days.
- APRA found that all payments have been made within 10 business days of receipt of the an application from the ATO 'with very few exceptions'

Commenting on the figures, APRA Deputy Chair Helen Rowell welcomed the news that the average processing time is 3.1 days, saying that the data show that 'superannuation trustees understand the importance of getting payments as quickly as possible to members who may be enduring financial hardship'.

## **It may be both necessary and appropriate for funds to take longer processing payments in some cases?**

Ms Rowell went on to say that APRA recognises that 'it may be both necessary and appropriate for trustees to take longer in some cases. This is no doubt frustrating to those awaiting payments, but the recent attempted fraud being investigated by the Australian Federal Police emphasises that care is needed to ensure payments go to the right people'.

In addition Ms Rowell said processing could also be delayed where there is: incomplete information provided by the ATO; application errors by members that require clarification; verification of mismatches between member information provided by the ATO and that held by the fund; and defined benefits members whose applications require additional processing.

[Sources: APRA media release 11/05/2020; ERI data 11/05/2020]

## COVID-19: Early release of superannuation scheme – funds report implementation is proceeding smoothly

### The AIST confirms funds are reporting a smooth transition

- The Australian Institute of Superannuation Trustees (AIST) has released a statement confirming that profit to member superannuation funds that are estimated to hold approximately 51% of the total of \$397 billion in cash and \$549 billion in liquid bonds held by superannuation funds across the sector are reporting a 'smooth implementation' of the government's early release of superannuation scheme.
- Profit to member funds are reporting to the AIST that:
  - they are 'readily meeting early release requests'
  - their approach to managing liquidity has 'successfully ensured they could meet the anticipated increase in early release requests'.

The AIST comments that 'Profit-to-member funds are united in supporting their eligible members to access their super quickly and efficiently in these difficult times. The funds have worked together with the ATO to implement the process as quickly and smoothly as possible'.

[Sources: AIST media release 30/04/2020]

### Update from ASFA

Separately, The Association of Superannuation Funds of Australia (ASFA) issued an update on superannuation funds' response to the early release scheme. ASFA said that:

- it estimates that the number of early release financial hardship payments processed by funds is running at 200 times the typical weekly average
- 95% of applications have been processed with 'only minimal amounts of exception handling'
- An estimated 98% of applications have been paid within five working days
- Only a 'relatively small' number of claims being rejected by funds due to anomalies or concerns regarding evidence of fraud or potential fraud or because an account had been closed or an invalid bank account number was supplied

ASFA CEO Dr Martin Fahy commented that 'Despite having only 18 working days to prepare for one of the biggest system changes in 30 years, superannuation funds and administrators have been working hard to support members at this difficult time, through the early release of superannuation scheme. Funds have worked cooperatively with government and regulators to change systems to process this unprecedented volume of transactions and ensure early release financial hardship payments have been made quickly and safely'.

[Sources: ASFA media release 01/04/2020]

## COVID-19: ATO's opening statement to the select committee provides an update on the ATO's work in delivering the government's COVID-19 support measures

In his opening statement to the Select Committee on COVID-19, Commissioner Chris Jordan provided an update on the ATO's work in delivering the government's COVID-19 support measures.

### Some Key Points:

- **Small scale early super release scheme fraud detected:** Commissioner Jordan confirmed that 'some limited fraudulent activity' in connection with the government's early superannuation release scheme had been identified by the ATO and referred to the Australian Federal Police for investigation. Commissioner Jordan reminded 'all Australians to be vigilant in keeping their personal information secure and private.'

[Note: The ATO has issued a brief statement providing further detail. This is covered in a separate post of this issue of Governance News below.]

- **Focused on delivery of five key measures:** Mr Jordan said that the ATO has been focussed on delivery of five key measures: 1) jobkeeper payments; 2) early release of superannuation scheme; 3) cash flow boost program; 4) increasing the instant asset write off; and 5) accelerated depreciation.

- **Support is now flowing:** Mr Jordan said that 'support is now flowing' through three measures:
  - JobKeeper Payments: As of midnight on 4 May, the ATO had received almost 750,000 enrolments for the JobKeeper program.
  - Cash flow boost program: As at midnight 4 May, more than \$7 billion in credits have been applied to eligible business under the cash flow boost program.
  - Early release of superannuation: The early release of superannuation program has had over 1 million applications approved, totalling more than \$9 billion.
- **Delivery of the programs has necessitated rapid organisational change:** Commissioner Jordan said that meeting the increased demand for services and delivering the programs within such tight timeframes, with the added pressure of COVID-19 restrictions had necessitated a 'rapid transformation' of the ATO workforce. For example, call centre capacity has been increased to meet the 'record number' of calls received. Commissioner Jordan said that towards the end of April the ATO was receiving an average 90,000 calls a day (up from the previous average of 71,000 calls a day).
- **ATO will remain on guard against risk:** Commissioner Jordan observed that the short implementation timeframe 'does not come without risk' and though 'thankfully there have been no serious problems to date, we won't be dropping our guard. The demand for information and assistance from us has been unprecedented'.
- **Governance:** In addition, Commissioner Jordan said that the ATO is 'proactively engaged with our external scrutineers' to ensure governance and risk frameworks are 'potent'.
- **Collaborating with other agencies (AFR and Treasury) to plan for future challenges.** 'While we know most Australians want to do the right thing, our robust compliance systems and partnerships with other agencies will allow us to quickly identify those intending to fraud the system.'

[Sources: Opening statement from Commissioner Chris Jordan to Select Committee on COVID-19, 07/05/2020]

## COVID-19: Fraudulent activity associated with the government's early release of superannuation scheme is under investigation by the Australian Federal Police

### Key Takeouts

- The ATO has confirmed that it has detected a 'small amount' of fraudulent activity associated with the government's early release of superannuation scheme.
- The matter has been referred to the Federal Police for investigation
- No ATO systems/processes were compromised
- Assistant Treasurer Michael Sukkar told Sky News on Friday that the ATO has been directed to temporarily pause sending requests for early release to superannuation funds to allow it to investigate whether existing systems can be further hardened to protect against possible compromise
- Mr Sukkar advised on 11 May, that the ATO had resumed processing applications, with 'additional risk filters' in place. Mr Sukkar said that Australians can have confidence in the security measures the ATO has in place to protect the integrity of the early release of superannuation scheme.

The ATO has issued a statement confirming that it has detected 'a small amount of fraudulent activity' associated with the government's early release of superannuation scheme.

According to the ATO:

- personal details of a small number of people have been used to attempt to defraud the program
- the issue has been 'stopped' and those individuals impacted are being contacted
- ATO systems have not been hacked/compromised
- The ATO has referred the matter to the Australian Federal Police for investigation.

[Source: ATO media release 06/04/2020]

## Temporary pause on processing applications

In an interview with Sky News, Assistant Treasurer Michael Sukkar said that 'out of an abundance of caution' the ATO has been directed pass on requests for early release of superannuation to superannuation funds, until Monday 11 May.

Mr Sukkar said, 'we want the ATO today, out of an abundance of caution, to make sure that there's nothing more we can do to help people protecting their data, to ensure that people are not the victims of identity theft, as is being investigated by the AFP. So today we will undertake that process just to make sure there is nothing more that the ATO can do'.

### Processing of applications by the ATO resumed on 11 May.

In a statement, Mr Sukkar said that

'The ATO has identified a small number of third parties who could be susceptible to criminal activity. The ATO is working with these third parties to help them make security enhancements.

Additional risk filters will also be applied by the ATO on all files before they are delivered to funds, and additional information will be provided to funds to assist them in discharging their own obligations to apply fraud prevention processes.'

Mr Sukkar said that the ATO is taking the opportunity to remind people not to share their myGov password with third parties and to be 'vigilant' when sharing/storing their personal data. Mr Sukkar said that 'Australians can have confidence in the security measures the ATO has in place to protect the integrity of the early release of superannuation scheme'.

[Sources: Assistant Treasurer Michael Sukkar, Transcript of Interview with Laura Jayes, First Edition, Sky News 08/05/2020; Assistant Treasurer Michael Sukkar media release 11/05/2020]

### Related News: The Federal Labor Party have called for a review

In a statement, Federal Labor Leader Anthony Albanese and Shadow Assistant Treasurer Stephen Jones welcomed the news that the scheme had been temporarily frozen and called on the government to order a 'full review of the early access to superannuation scheme' and to explain how the (alleged) fraud was possible.

[Source: Joint media release Federal Labor Leader Anthony Albanese and Shadow Assistant Treasurer Stephen Jones 08/05/2020]

## COVID-19: The ICA has called on insurers to fast track measures to support vulnerable customers/customers experiencing financial hardship

### Key Takeouts

- The deadline for full compliance with the 2020 General Insurance Code of Practice has been extended by six months to July 2021 (with the exception of compliance with parts 9 and 10).
- The deadline for technical compliance with parts 9 (supporting customers experiencing vulnerability) and 10 (financial hardship) of the Code remains January 2021.
- Insurers have committed however, to fast tracking measures to support vulnerable customers/customers experiencing financial hardship and to working with customers to provide flexible options. They will meet 'key provisions' in parts 9 and 10 of the Code by 1 July 2020.
- The announcement follows [ASIC's 27 April letter to general insurers](#) in which the regulator said that it expects that in light of COVID-19, insurers commit to meeting the additional consumer protections contained in the 2020 Code, particularly those related to vulnerability and financial hardship, ahead of the 1 January 2021 deadline. And, that directors 'will seek affirmation through board reporting that the Code commitments are being met'. For a summary of ASIC's letter see: [Governance News 29/04/2020 at p23](#).

## Deadline for full compliance with the 2020 General Insurance Code extended

The Insurance Council of Australia (ICA) has announced, that due to the combined impact of COVID-19 and natural disasters on insurers, The ICA Board has extended the deadline for full compliance with the new 2020 General Insurance Code of Practice.

- The deadline for 'full technical compliance' with parts 9 (supporting customers experiencing vulnerability) and 10 (financial hardship) of the Code remains January 2021.
- The deadline for compliance with the remaining parts of the Code has been extended by six months to 1 July 2021.

## Insurers to 'fast track' implementation of key consumer provisions by 1 July 2020

However, to support vulnerable customers/those experiencing financial hardship because of COVID-19, insurers have committed to meeting key consumer provisions in parts 9 (supporting customers experiencing vulnerability) and 10 (financial hardship) by 1 July 2020.

The ICA says that insurers will 'fast-track' these parts by putting in place 'temporary or short-term measures to achieve the consumer outcomes intended by these parts, if necessary. In delivering this, members will look to the principles that preface the Code including transparency, fairness, support and integrity.'

This includes working with vulnerable customers/those experiencing financial hardship to arrange 'flexible options'.

The ICA comments the extended timeline for implementation does not prevent insurers from adoption the Code sooner.

## Insurers will publish their family violence policy on their websites

The ICA says that insurers remain committed to publishing their family violence policy on their websites by July 1, 2020, to enhance awareness and understanding of how insurers will support customers experiencing family violence.

## Important to ensure the Code is implemented 'correctly'

Commenting on the decision to extend the timeline for full compliance, ICA CEO Rob Whelan said, that the 'new Code of Practice is not a quick fix. It is an important step forward for the Australian insurance industry and we want to implement it correctly'.

[Sources: Insurance Council of Australia media release 07/05/2020]

## The Federal Court has approved a settlement between the ACCC and Bupa in connection with the provision of 'extra services'

### Snapshot

- The Federal Court has [approved a settlement](#) between the ACCC and Bupa in connection with the provision of 'extra services' (non-clinical services eg fully equipped physiotherapy rooms, talking book libraries, individually controlled heating/cooling) for which some customers at 20 Bupa Aged Care facilities were charged, but which were either not provided/not provided in full.
- The Court has directed that Bupa: a) pay a penalty of \$6m; b) continue with its customer remediation program; and c) undertake other actions including an Australian Consumer Law Compliance Program.
- Bupa self-reported the issue to the ACCC (and other regulators) and commenced compensating those impacted in July 2018 and so far 85% have been reimbursed with interest or are in the process of receiving final payment). The ACCC says that the compensation program, which is estimated to amount to a total \$18.3m, is expected to be completed within 12 months.
- In a statement, ACCC Chair Rod Sims said that the regulator had taken court action against Bupa, despite the fact that the conduct was self-reported because 'Bupa's conduct impacted substantial numbers of elderly and vulnerable consumers for a significant period of time'. 'The ACCC prioritises conduct that impacts vulnerable and disadvantaged consumers, who can be disproportionately affected by breaches of the Australian Consumer Law' Mr Sims said.

[Sources: Australian Competition and Consumer Commission v Bupa Aged Care Australia Pty Ltd [2020] FCA 602; ACCC media release 12/05/2020; Bupa media release 12/05/2020; [registration required] The AFR 12/05/2020]

## In Brief | COVID-19: The case for allowing superannuation funds to borrow from the RBA during the pandemic

[Source: The Conversation 01/04/2020]

In Brief | COVID-19: ASIC has cautioned consumers not to make investment decisions based on advertising that suggests riskier fixed-term investment products as alternatives or substitutes for bank term deposits, warning that not all products are 'true to label'. ASIC says it is also 'considering legal action where appropriate ' against entities making these claims

[Source: ASIC media release 07/05/2020]

In Brief | The House of Representatives Standing Committee on Economics will hold an 'urgent hearing' via videoconference on 14 May as part of its ongoing review of the four major banks and other financial institutions at which ME Bank and Industry Super Australia will appear

[Source: Economics Committee media release 11/05/2020]

In Brief | The Australian reports that former ASIC Chair Greg Medcraft has said that banks have a long way to go to rebuild their reputation/win back community trust in the wake of Hayne Commission

[Source: [registration required] The Australian 12/05/2020]



# Accounting and Audit

## United Kingdom | The FRC has provided a brief update on its progress towards becoming the Audit Reporting and Governance Authority (ARGA)

### Key Takeouts

- **Context:** Three recent reviews, The Independent Review of the FRC (The Kingman Review), The Competition and Markets Authority (CMA) review and Sir Donald Brydon's review into the quality and effectiveness of audit have all made recommendations to strengthen regulatory oversight of the UK audit sector. One of the key recommendations of the Kingman Review was that the UK audit regulator be replaced by a new: Audit, Reporting and Governance Authority.
- **FRC update on progress towards becoming the ARGA ahead of legislative change.** The FRC states that 'despite the fact that primary legislation is required to create the ARGA and to give it formal powers, the FRC continues to work closely with the Secretary of State and BEIS to find ways to take forwards many of the recommendations without legislative changes'.

The UK Financial Reporting Council (FRC) has provided a brief update on its progress towards becoming the Audit Reporting and Governance Authority (ARGA) and outlined (planned) next steps.

### Responding to all three reviews through one work program

The FRC proposes to respond to the recommendations of the Independent Review of the FRC (Kingman Review), The Competition and Markets Authority (CMA) review and Sir Donald Brydon's review into the quality and effectiveness of audit in one 'holistic' program.

The program includes six workstreams: 1) setting up the new regulator; 2) audit scope and regulation; 3) corporate regulation; 4) corporate reporting; 5) corporate governance; and 6) market reform.

### Progress to date

The statement also highlights some of the changes that have been made to date. These include:

- **Plans to implement a new internal governance structure within the FRC:** A formal plan to streamline governance is in place and a new governance structure is due to be implemented in January 2021. This entails consolidating the existing three tiers of committees and councils with a two tiered system and reducing the number of board members. It also entails the Executive leading and taking on more of the decision making.
- **Enhancing audit quality:** In light of the 'clarion call to improve audit quality' following the CMA and Brydon Reviews, the FRC (in advance of legislation) has/is:
  - **'developed thinking on mandatory managed shared audits'**, which will enable 'challenger' firms to participate in the audits of larger companies
  - **developing principles for the operational separation of their Big four firms' audit practices**, to raise quality standards and developing 'thinking' on the legislation that may be necessary to support this measure
  - **planning to publish individual Audit Quality Review reports to increase transparency:** The FRC says that it is reviewing the format of individual Audit Quality Review reports with a view to publishing them from the 2020/21 inspection cycle (with the consent of the audit firm and the entity) in line with the Kingman Review recommendation. In the event that companies refuse to give consent to publication of the report, the FRC plans to publish an anonymised summary
- **Enforcement:** The FRC says that a number of recommendations specific to enforcement have already been implemented including greater transparency through the publication of the FRC's Annual Enforcement Review. The FRC states that it 'continues to work with BEIS to implement the recommendations for ARGA's new enforcement powers, in particular greater powers to hold non-accountant directors to account for their duties in relation to financial reporting'.
- **Revised Stewardship Code:** The FRC's revised UK Stewardship Code, (which addresses the Kingman Review recommendation) took effect at the start of 2020 with reporting to begin in 2021. The FRC will engage with prospective signatories this year to communicate expectations.



- **Implementing various operational changes at the FRC have been implemented** eg 'enhanced' complaint handling processes; an 'enhanced' the economics and analytics team (which develops market intelligence); and the publication of an updated budget and strategy for the 2020 financial year. The FRC has also adopted The Regulators' Code and Managing Public Money.

#### Next steps

The FRC plans to continue to work with the government on plans for future consultation and legislation and to identify/act on reforms that can be progressed without further legislation/consultation.

In addition, the FRC says it will enhance its audit quality review and corporate reporting review processes and increase the scope and number of reviews in 2020 and progress plans to take on decision-making responsibilities for Public Interest Entity (PIE) auditor registration.

[Source: FRC media release 01/05/2020]

### In Brief | COVID-19: The Financial Reporting Council (FRC) has updated its guidance for companies in relation to interim results in light of the uncertainty/impact of COVID-19

[Source: FRC media release 12/05/2020; Company Guidance (Updated May 2020) (COVID-19)]

# Risk Management

## COVID-19: Never waste a good crisis: Insights into best practice crisis management from business leader Julia Banks

### Key Takeouts

- The focus of the keynote address at the Governance Institute Annual Forum 2020 was on best practice in crisis management
- The majority of session focussed on the PACCSA model which is underpinned by trust, love and compassion
- This model is aimed not only at assiting in preparing for, managing through and learning from a crisis, but at building resilience and ensuring leaders and organisations emerge stronger from the expeience and better prepared to meet the next one

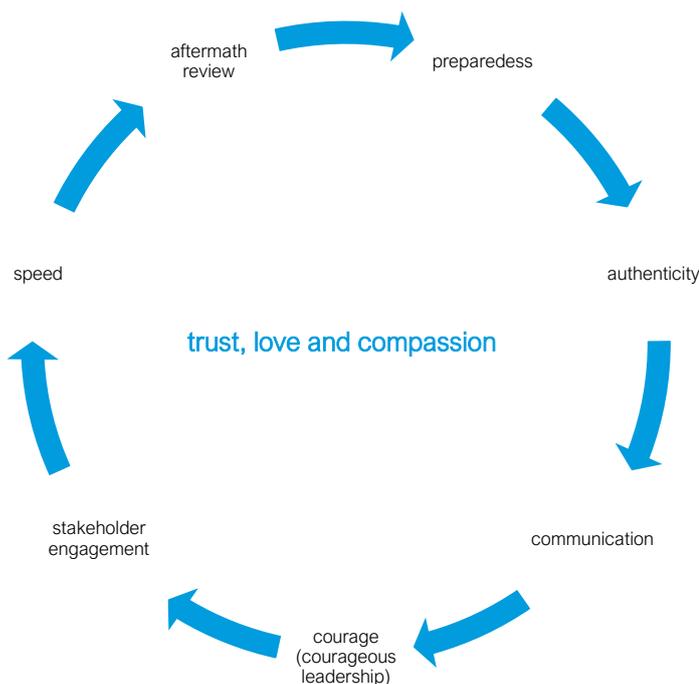
The keynote address at the Governance Institute's Virtual Governance and Risk Management forum 2020, entitled, Delivering effective crisis and issues management, was delivered by business leader and former member of Parliament Julia Banks. The focus of the session was on the PACCSAA crisis management model.

### What is the PACCSA crisis management circle?

Ms Banks described what she considers to be the best practice crisis management model, the PACCSA model and explained each of the seven elements/actions and how they work together, and reinforce each other, to build organisational resilience and allow organisations and their leaders to emerge stronger (rather than weaker) from a crisis.

#### Seven elements

- **Preparedness:** Ms Banks explained that preparedness is about ensuring good governance and effective business continuity plans are in place before a crisis hits. This includes for example, identifying a crisis management team and clarifying their roles/responsibilities, clarifying roles/responsibilities in the leadership chain and ensuring they are understood and ensuring that there are back-ups for key people within the organisation. Ms Banks emphasised the need to be thorough in preparing plans saying that the 'devil is in the detail'. For example, stakeholder contact information (employees, suppliers, clients etc) should be up to date and centrally accessible to leaders working remotely, workers should be prepared for remote working ahead of any crisis.
- **Authenticity (authentic leadership):** Ms Banks emphasised the importance of leaders being visible in a crisis, regardless of whether this personally convenient to them/what else may be occurring. Leaders, she said, cannot stay silent as doing so has potential to damage both the individual reputation of the leader, and the organisation. In addition, she said that leaders should 'be themselves'



and communicate directly (and as far as possible in person) with key stakeholders, including employees, regularly, clearly and truthfully. They should be honest about uncertainty/not having the answers if this is the case. There is no justification Ms Banks said for 'vagueing it up' in a media release Ms Banks said.

- **Communication:** Ms Banks emphasised the importance of timely, authentic, regular and consistent communication and the need to ensure that communication is informed by expert advice/trusted sources. Ms Banks said that communication should not be delegated to others but delivered directly by leaders. Asked to nominate the one key recommendation for best practice crisis management, Ms Banks nominated clear, consistent communication. To illustrate her point she gave the example of Dr Norman Swan, saying that Dr Swan's clear communication had made him a trusted source of information (and more trusted than the plethora of other available sources) and an admired leader.
- **Courageous leadership:** During a crisis, courageous leadership – making decisions where there is no consensus, underpinned by expert advice and acting on good instincts (overlaid by genuine compassion and concern) – is key to successful leadership Ms Banks said. Ms Banks gave a number of examples of leaders who have successfully modelled courageous leadership including Jacinda Ardern. Courageous leadership and authenticity, Ms Banks added are also important in the context of maintaining continuity in the face of disruption eg where there has been a high rate of staff turnover.
- **Stakeholder engagement (stakeholder collaboration):** Ms Banks emphasised the importance of umbrella consistency in communications with different stakeholders. Messaging to different groups needs to be clear, and consistent to minimise confusion and needs to occur in a timely manner. This requires a clear communication plan. Crisis team members should be the receivers of information, and be careful that they are communicating consistently across the organisation to ensure consistent messaging.
- **Speed:** Ms Banks emphasised that in an environment where speed is of the essence in what is often a rapidly changing landscape 'perfection is the enemy of good'. The 'world isn't going to wait for you to catch up' she said. Though many leaders are perfectionists, this isn't the best way forward when it comes to crisis communication she said – even if leaders do not yet have all the answers, it's more important that they communicate what they do know, as soon as possible and to keep communicating as things evolve/become clearer.
- **Aftermath review:** Following a crisis, leaders should resist the urge to hurry back to business as usual, and instead insist on a review of what happened, evaluate their response and document the learnings of what was done well and what could be improved. This should feed back into being prepared (the preparedness phase of the cycle). There is no point, Ms Banks said, in believing a crisis will never happen again. Asked whether aftermath review and preparedness are more important elements of the approach in the current crisis, Ms Banks agreed, saying that they are often undeservedly 'at the bottom of the list'.

### **The PACSSA approach is underpinned by trust, love and compassion**

Ms Banks said that this approach to crisis management should be underpinned by trust love and compassion (TLC). In addition to following the steps/model above, it is imperative that leaders demonstrate genuine concern for those impacted eg for employees (leaders should take the time to check in, be aware of what else may be happening in others' lives and demonstrate compassion).

### **A Good crisis is a gift for emerging leaders/leaders?**

Ms Banks concluded by suggested that managing the crisis properly and professionally has potential to deliver benefits (reputational benefits) to emerging leaders – 'you will become the leader everyone wants to be' she said. Ms Banks closed her remarks by quoting Winston Churchill 'never waste a good crisis'.

### **The role of the company secretary in the current circumstances**

Asked to nominate the most important role a company secretary can play in the current circumstances, Ms Banks said keeping things on track and organised (eg structuring information clearly, keeping track/having a checklist of the actions that need to be done etc) and keeping across the rapidly changing regulatory landscape are key.

[Source: Governance Institute's Virtual Governance and Risk Management forum 2020, entitled, Delivering effective crisis and issues management 11/05/2020]

## In Brief | COVID-19: ASIC has issued a 'reminder' about director trading: The guidance outlines considerations for directors regarding their ability to buy and sell that ASIC considers to be 'particularly relevant in the current market environment created by COVID-19'

[Sources: ASIC media release 07/05/2020]

## Contacts



**Mark Standen**  
**Partner**

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mark.standen@minterellison.com  
T +61 2 9921 4902 | M +61 412 104 902



**Siobhan Doherty**  
**Partner**

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siobhan.doherty@minterellison.com  
T +61 2 9921 4339 | M +61 413 187 544



**Kate Hilder**  
**Consultant**

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kate.hilder@minterellison.com  
T +61 2 9921 8785