

10 July 2020

The Hon Josh Frydenberg MP
Treasurer
House of Representatives
Parliament House
Canberra, ACT

Via email: Josh.Frydenberg.MP@aph.gov.au

Dear Treasurer

Re: COVID-19: Extension of regulatory relief to support economic recovery

I am writing further to my letter of 1 April 2020 regarding regulatory relief in response to the COVID-19 pandemic, which we propose should be extended until the end of 2020.

Firstly, let me again commend the Government for the swift and effective suite of policy measures it has introduced, particularly in relation to regulatory relief and employment. The AICD has been publicly supportive of these measures, which helped Australia to weather the storm far better than most nations. We have particularly valued our engagement with Treasury and your office over this period.

Throughout this crisis the AICD has sought to play a constructive role in policy debate on the issues facing Australian organisations while also providing practical guidance for directors. Our guidance includes freely available support such as the AICD's online COVID-19 director resource hub with over 240,000 views since March, and our COVID-19 webinar program with more than 20,000 participants to date.

It is in this light that I write to support the Government's consideration of extending COVID-19 relief already provided in key areas until the end of the calendar year.

We believe that the case for extending relief is compelling. Current events in Victoria highlight the ongoing risks and volatility posed by the pandemic. While the Australian economy is showing some signs of recovery, the cessation of policy relief, particularly JobKeeper and insolvency relief, carries with it risks of economic shock.

This sentiment is reflected across the Australian director community. As you know, the AICD has a membership of more than 45,000 including directors and senior leaders from across the business, government, and not-for-profit (NFP) sectors. In a recent AICD survey of over 2,300 directors from across the economy, 81 per cent of respondents indicated they support a cautious phasing out of government policies to assist the economy and organisations to recover from the crisis¹.

¹ AICD's COVID-19 survey results have been shared with your office and Treasury, available at: www.aicd.com.au.

Specifically, the AICD encourages an extension of relief in the following areas:

- Temporary relief for directors from personal liability for trading while insolvent;
- The re-introduction of a fault element into continuous disclosure laws;
- Relief to facilitate virtual AGMs and electronic communications; and
- Targeted wage subsidy and social security support.

In our view, extending these measures until the end of this calendar year would be a prudent step to mitigate the continuing risks and uncertainty of the pandemic. We would also strongly encourage the Government and National Cabinet to consider funding support for the NFP sector.

1. Insolvent trading relief

The AICD strongly supported the Government's decision to provide insolvent trading relief early in the crisis. The results of our recent member survey suggest that the measure has successfully achieved its objective of encouraging organisations to trade through the pandemic rather than opt for voluntary administration.

In total, 12% of all AICD member respondents indicated that the insolvency relief had impacted their decision to trade through the crisis, with that number lifting to 16% amongst directors in the small and medium enterprise sectors.

It is important that directors continue to focus on leading their organisations through COVID-19, rather than personal liability risks, during this continued period of exceptional disruption. We recommend that the relief already provided be extended until the end of calendar 2020 to support this focus. This extension should equally apply to charities and other NFPs.

The AICD has emphasised in our publications and commentary that, notwithstanding the relief, general directors' duties continue to apply. Directors must take reasonable steps to inform themselves about their company's current and ongoing financial viability and assess the impact of incurring further debts. We have stressed that directors must think carefully about their duty to act in the best interests of the corporation (including the interests of creditors when approaching insolvency), and whether incurring additional liabilities is prudent and consistent with their duty of care and diligence.

2. Need for fault element in disclosure laws

The AICD welcomed your decision to temporarily amend continuous disclosure laws by re-inserting a fault element into continuous disclosure laws. This was a prudent step to directly address the material risk of opportunistic securities class actions created by our strict liability disclosure framework.

These measures have been welcomed as restoring some balance to policy settings. However, the general view amongst legal experts is that significant risks remain given most securities class actions plead a breach of misleading and deceptive conduct provisions in addition to alleged continuous disclosure contraventions.

We have yet to see a material increase in forward-looking market disclosures, an outcome that may be attributable to the ongoing legal risks. Disclosure is crucial to market integrity and the regulatory environment must support, rather than discourage, the provision of meaningful information to allow informed decision-making. Accordingly, we encourage extension of the existing relief as well as equivalent modifications to misleading and deceptive conduct provisions which operate on a no-fault basis.

3. Virtual AGMs and other electronic communications

The decision to temporarily enable virtual AGMs until 5 November provided much-needed certainty to companies from all sectors dealing with the challenges of holding valid meetings during the pandemic. However, we note that the temporary relief will expire part-way through the 2020 AGM season for listed entities.

Given that physical distancing will likely be in place for the foreseeable future we would encourage extension of virtual AGMs and other electronic communications relief until the year's end. This support would allow certainty for forward planning and allow the flow of commerce to continue as smoothly as possible.

4. Wage subsidy support

The Government's JobKeeper program has offered timely and material financial support for many organisations throughout this period. In our recent survey, the JobKeeper Scheme was rated as the policy measure that has provided the greatest assistance to organisations (44% of all respondents, with higher responses from directors in the small and medium enterprise and NFP sectors).

We note your recent comments that the Government is giving consideration to further phases of income or wage support post JobKeeper's planned expiration. The AICD supports this approach.

In our view a phased adjustment of the scheme would best support economic recovery. A phased adjustment of JobKeeper, with concurrent consideration of JobSeeker and security net measures, would allow refinement of the scope of the program while minimising the risk of sudden economic shock from September. Extra consideration could be given to sectors facing specific disruption risks.

5. Support for the NFP sector

As your office may be aware, the AICD has previously written to the Assistant Treasurer, Senator the Hon Zed Seselja, highlighting the acute financial challenges facing the NFP sector at this time. As one example, our recent member survey found that around 43 per cent of all NFP directors were concerned with making going concern or solvency assessments as a result of COVID-19.

A consistent message from NFP directors is that bringing forward government grants and rolling-over funding would be of great assistance. Given that government

funding of the sector comes from both the Commonwealth and States, this may be an appropriate topic for National Cabinet consideration.

Finally, we would encourage fresh consideration of banking sector support for the NFP sector. While some NFPs may be eligible for the relief currently offered, for many organisations credit criteria will preclude them. A tailored and coordinated approach by relevant regulators and the banking sector should be encouraged to help NFPs continue to provide valuable services to the Australian community.

6. Next steps

I hope that the above will assist your deliberations on the next phase of the Government's response to the pandemic. If you would like to discuss any aspect further, please contact me directly at aarmour@aicd.com.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Angus Armour', with a long horizontal line extending to the right.

Angus Armour FAICD
Managing Director and CEO