

Temporary regulatory relief in the COVID-19 environment

AICD proposal for temporary relief and modifications under the Corporations Act 2001 (Cth) – 27 March 2020

Overview of proposal

We recommend the following relief and modifications in order to:

- Facilitate physical distancing to manage public health risks associated with gatherings (e.g. allowing virtual general meetings of shareholders, facilitating e-signatures);
- Extend reporting and filing deadlines to recognise the difficulty with completing such reports at a time of extreme volatility, and to allow companies more time to deal with urgent issues;
- Ensure charities and not-for-profits benefit from the same relief afforded for-profit entities (e.g. relief from insolvent trading);
- Reduce distractions and additional costs by pausing any regulatory change or open consultations that are not time-critical or necessary to protect significant harm to consumers or the market; and
- Change the operation of some laws to recognise the extreme volatility of the current market.

Details regarding specific policy issues and our recommended solution are set out in the attached table.

Proposed temporary relief from, or modifications to, Corporations Act requirements

Issue	Proposed relief / modification	Comments
Regulatory filing	Provide a blanket 45 – 90 day extension for all regulatory filings.	<p>Would give organisations breathing room to deal with urgent issues in the current environment.</p> <p>This is consistent with extensions made by regulators in New Zealand and the United States.</p>
Continuous disclosure	Introduce a temporary safe harbour for earnings guidance and forward-looking statements to provide that no action may be taken in relation to these disclosures in relation to COVID-19.	See separate briefing note provided to Treasury on 24 March 2020.
Financial Reporting	<p><u>Financial reports:</u></p> <p>Proposed amendment to Corporations Act to push back filing date from four months after the end of the financial year to six months (i.e. an additional two months), and equivalent relief for half year reporting. See sections 315, 316, 319 for reporting to members and 332A for transparency reports.</p>	<p>This allows companies flexibility where they may have problems completing financial reports and audits due to workforce issues, difficulty in physical access and other extraordinary events. Companies who do not have these concerns can file in accordance with their usual timetable.</p> <p>This is consistent with amendments made to reporting deadlines in New Zealand, Hong Kong, United Kingdom, United States.</p>
	<p><u>Solvency declarations:</u></p> <p>At least annually, and half yearly in the case of listed companies, directors are required to make a solvency declaration declaring that they have reasonable grounds to believe the company is solvent (s.347A). The directors report in the annual report must refer to that</p>	Need to align requirements with the policy intent behind the recent insolvent trading reform, and recognise uncertainty created by COVID-19. Policy options might include removing any link to an offence.

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	<p>resolution. An external auditor will need to make an independent assessment of that statement by the directors. Directors may be guilty of an offence if they make a false statement.</p>	<p>This is the subject of further discussion and AICD is consulting with the professional bodies representing accountants and auditors.</p>
	<p><u>Assessment of going concern:</u></p> <p>Under the Accounting Standards, directors are required to make an assessment of going concern and publish this view in their financial statements and the external auditor is required to form an independent view on its reasonableness. The Corporations Act requires compliance with the Accounting Standards.</p>	<p>Need to align requirements with the policy intent behind the recent insolvent trading reform, and recognise uncertainty created by COVID-19.</p> <p>This is the subject of further discussion and AICD is consulting with the professional bodies representing accountants and auditors as well as the AASB and AUASB.</p>
<p>General meetings</p>	<p><u>Virtual general meetings:</u></p> <p>Proposed amendments to Corporations Act to allow companies to hold virtual general meetings that are conducted solely online. This would include amendments to requirements relating to notice of meetings, time and place for meetings, technology, voting, quorum requirements and participation by members. See sections 249L, 249R, 249S, 249T, 250J, 250S. Consider also interaction with the requirement for auditor to attend listed companies' AGMs under section 250RA.</p>	<p>Notwithstanding ASIC's announcement to take a 'no action' position to companies holding online AGMs, there is still uncertainty around the format of an online AGM not meeting Corporations Act requirements and requirements of a company's constitution (see further discussion below – <i>New replaceable rule</i>). It also does not remove the risk of legal action from third parties or resolutions potentially being deemed invalid (e.g. via court order of a procedural irregularity under section 1322).</p> <p>ASIC's 'no action' position for the holding of virtual AGMs is currently applicable for entities with a 31 December financial year end. An amendment to Corporations Act provisions to enable virtual general meetings generally would facilitate broader application to those entities with a 31 March and 30 June financial year end, as well <i>all general</i> meetings of members (including EGMs and shareholder requisitioned meetings).</p>

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		This is consistent with reform recently taken in the United States and Canada, and is similarly being considered in the United Kingdom at this time.
	<p><u>Delay and postponement:</u></p> <p>Proposed amendment to Corporations Act to allow extension to the deadline by which companies must hold an AGM from five months after the end of the financial year to seven months (i.e. an additional two months)- see section 250N.</p> <p>Proposed amendment to Corporations Act to enable ASIC to grant extensions of AGM deadlines for all or a category of companies, without needing the companies to submit an application for extension - see section 250P and RG 44: Annual General Meeting – Extension of Time.</p> <p>Proposed amendment to Corporations Act to enable companies to postpone or cancel an already convened meeting.</p>	<p>ASIC's 'no action' position currently provides relief for entities with a 31 December financial year end. It also does not remove the risk of legal action from third parties.</p> <p>As above, an amendment to section 250N would allow broader application to entities with a 31 March and 30 June financial year end.</p> <p>There is currently no mechanism in the Act by which ASIC can allow a company to postpone or cancel a meeting that has already been convened. As such, a company would not be immune to third party claims.</p>
	<p><u>General meeting notice period</u></p> <p>Proposed amendment to Corporations Act to reduce to general meeting notice period (for both listed and unlisted companies) from 28 days and 21 days respectively to 14 days without company having to apply for an extension or seek member consent – see section 249H and 249HA.</p> <p>Proposed amendment to Corporations Act to reduce notice period by which companies are to lodge notice of meeting with ASIC before dispatch to members from 14 days to 7 days.</p>	As noted in regards to the time-sensitivity for financial reporting, a reduction of these notice periods would provide board and companies greater flexibility where they may have difficulties completing financial reports and audits in time for these deadlines.
	<p><u>Poll voting</u></p> <p>Although not mandated under the Corporations Act, consideration should be given as to how shareholders attending meetings virtually</p>	Recommendation 6.4 of the ASX Corporate Governance Principles and Recommendations (fourth edition) and ASX Guidance Note 35 suggest that all voting at shareholder meetings has to

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	may vote via direct voting (e.g. updating company constitution to enable direct voting).	<p>occur by way of a poll unless relief is obtained from ASX.</p> <p>Company constitutions could however be amended to enable direct voting by members (see further discussion below – <i>New replaceable rule</i>).</p>
Dividends	<p><u>Declaration of a dividend</u></p> <p>Provide that companies are not required to pay declared dividends (i.e. do not incur a debt when dividends are declared) - see section 254V.</p>	<p>Would assist companies' financial management at a time of significant COVID-19 uncertainty. It may no longer be appropriate to pay a dividend given changed financial and broader economic circumstances.</p>
Contract formation	<p>Electronic signatures:</p> <p>Clarify that (at least during current crisis) an electronically executed document is valid under section 127.</p>	<p>Clarification that electronic signatures are also valid under section 127 during this time would alleviate difficulties for signatories when working remotely and may not be able to print documents.</p>
	<p>Split execution:</p> <p>Clarify that split execution (where officers of a company wet-ink sign different copies of the document is valid under section 127.</p>	<p>Modified split execution where officers of a company wet-ink sign the same document (e.g. via fax or email of the same PDF copy) is currently understood to satisfy the requirements of section 127.</p> <p>As above, clarification that split execution is also valid under section 127 during this time would alleviate difficulties for signatories when working remotely and may not be able to print documents.</p>
New replaceable rule	<p>Create a new replaceable rule (via sunset clause with 6-month expiry) in the Corporations Act to provide boards the power to provide temporary arrangements, without the need to amend the company's constitution.</p> <p>This new replaceable rule could enable the board to adjourn/delay/postpone an AGM; use technology to facilitate a</p>	<p>The replaceable rule will allow directors flexibility to navigate the social distancing challenges presented during this time.</p>

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	<p>hybrid/virtual AGM; offer direct voting for members; amend the reporting date of the entity; amend certain notice requirements; postpone shareholder-requisitioned meetings.</p>	<p>Spain has implemented similar changes to override / insert provisions into constitutions where necessary to facilitate these measures.</p>
<p>Not-for-profit and charities sector</p>	<p>Insolvent trading:</p> <p>The Coronavirus Bill which sets out relief for directors from personal liability for trading while insolvent does not turn off the ACNC Governance Standard obligation in 5(2)(g), which requires charities to take reasonable steps to ensure that the charity does not operate while insolvent. Therefore technically, this duty could still be enforced by the ACNC against a registered charity.</p> <p>Consistent with the Coronavirus Relief Bill, suggest turning off the insolvent trading aspect of the ACNC Governance Standard.</p> <p>Ensure committee members of incorporated associations are provided with similar relief for trading while insolvent (falls within remit of State and Territory governments).</p>	<p>All charities and not-for-profits should be afforded the same relief as for-profit entities. Many NFPs likely to face severe cash-flow difficulties due to COVID-19 situation and associated government restrictions.</p> <p>Many charities and NFP are incorporated associations and registered with the ACNC. It is not appropriate that only directors of charities/NFPs that have a corporate form regulated by the Corporations Act (e.g. companies limited by guarantee) benefit from insolvency relief.</p> <p>Encourage the Commonwealth to take up the issue with States and Territories to ensure national consistency.</p>
	<p>Charitable purpose</p> <p>Allow charities to re-purpose resources (e.g. medical equipment) for COVID-19 related research, education or treatment if directed by the government or for the public benefit, even if outside the charities "charitable purpose". This should not impact the charities charitable status.</p>	<p>Charities should not be penalised for repurposing resources if required by government or for the public benefit, and should receive appropriate assurances from government.</p>

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	Replaceable rule The replaceable rule outlined above should apply to charities and NFPs.	The replaceable rule will allow directors flexibility to navigate the social distancing challenges presented during this time.
	Fundraising regulation To assist charities and NFPs during this challenging time we suggest Government prioritise reforms to Australia's charitable fundraising laws, including: <ul style="list-style-type: none"> • implementing the recommendation from the Strengthening for Purpose Australian Charities and Not-for-profits Commission Legislative Review 2018 Report to amend the Australian Consumer Law to clarify its application to charitable and not-for-profit fundraising; and • convening a special meeting of all Ministers with responsibility for the Australian Consumer Law to discuss amendments supporting better regulation of fundraising activities. 	There has already been a downturn in fundraising and philanthropy as a consequence of the COVID-19 crisis. Commonwealth and State governments should work together to ensure that fundraising laws are simplified to ensure that red tape is not an obstacle to fundraising and, ultimately, the continued existence of many charities. As a first step, the Commonwealth should seek an urgent legislative amendment so that the Australian Consumer Law clearly applies to charitable and NFP fundraising.

Postpone regulatory changes and all open consultations

Financial Accountability Regime	Treasury has consulted on a proposals paper and originally signalled that they would consult on draft legislation mid-2020.	Defer consultation as this requires detailed consideration by companies to meaningfully respond.
Financial Services RC-related legislation	Raft of RC-related regulatory changes will affect many APRA-regulated entities from 1 July 2020 (such as changes to breach reporting, unfair contract terms, duty of disclosure, anti-hawking, enforceable codes).	Defer implementation date. Implementing the required system and process changes by this date will not be possible in the current environment. Significant burden for financial institutions that will distract from core issues.

Postpone Bills currently before Parliament

Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019	Introduce DINs	Defer any additional compliance burden.
Treasury Laws Amendment (Your Superannuation, Your Choice) Bill 2019	Change the way superannuation funds are chosen in enterprise agreements.	Superannuation funds are dealing with significant dislocation now around their portfolios and early member access in accordance with the government's reform measures. This would be a significant change to the sector and would divert resources to funds marketing and chasing clients.
Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Bill 2019	Imposes new obligations on banks and creates new criminal offences	It should proceed but defer commencement date by 12 months of requirements on banks to allow longer time to get compliance systems operating effectively.
Australian Business Growth Fund Bill 2019	Provide a source of patient capital for small and medium business	FastTrack. This could be a vehicle used for funding businesses in economic downturn.
Currency (Restrictions on the Use of Cash) Bill 2019	Restrictions on businesses accepting cash of \$10,000 or more	Cash may be more widely used if liquidity an issue so businesses should not be restricted at this time. Will impose unnecessary red tape and compliance burden.

Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019	Amends the foreign bribery offence.	We support this reform and believe Government should proceed with creating this offence but maybe defer start date so that compliance burden is deferred.
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