COVID-19: Head Office guide

Unprecedented times call for unprecedented measures

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Unprecedented times call for unprecedented measures

As we all begin to understand the impact of the COVID-19 pandemic on our economy, we have been working with our clients and regulators to remove the road blocks to corporates operating in the current 'lock down' environment. In general ASIC, ASX and Treasury have shown a willingness to revisit policy settings in a way that is better suited to the current environment. The law is literally changing on a daily basis.

Significantly, on 23 March, the federal government introduced and passed the *Coronavirus Economic Response Package Omnibus Bill 2020*. We expect that this will see the Treasurer making a range of regulations to address market concerns. Meanwhile, ASIC has demonstrated an unprecedented willingness to grant waivers or relief, where appropriate, to assist organisations resolve liquidity issues and manage competing logistical and legal challenges.

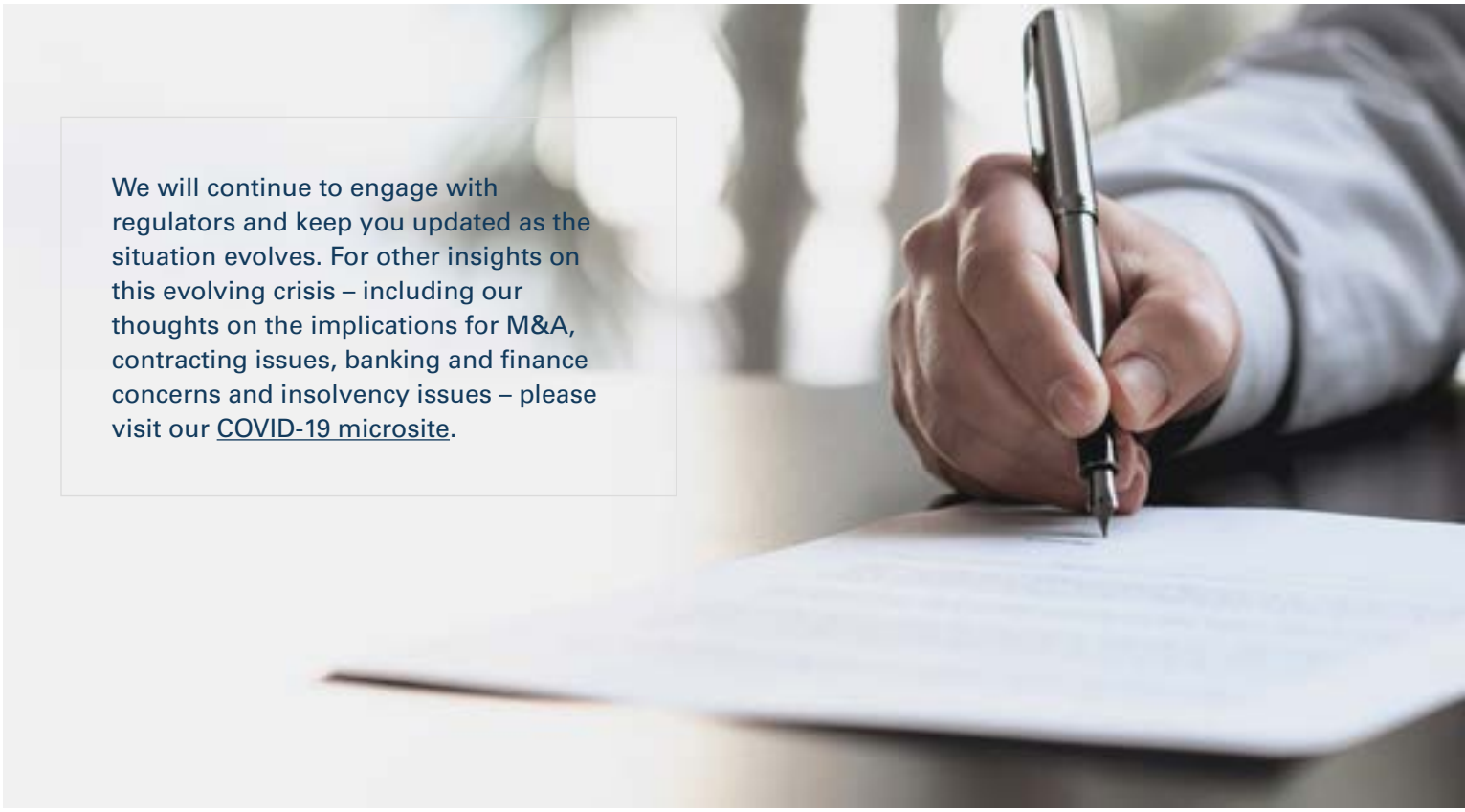
ASX is also taking steps to assist listed entities with the announcement, on 31 March, of reporting relief for ASX / NZX dual listed entities and temporary capital raising relief that will apply until 31 July 2020 unless removed or extended by ASX[1].

Key areas of focus for all regulators include:

- the rules for calling and holding general meetings;
- communications with shareholders;
- cancelling or deferring dividends;
- meeting notice periods;
- execution of documents;
- continuous disclosure;
- auditing of financial accounts; and
- insolvency related issues.

This paper focuses on what we are seeing in the market that might help general counsel and company secretaries.

We will continue to engage with regulators and keep you updated as the situation evolves. For other insights on this evolving crisis – including our thoughts on the implications for M&A, contracting issues, banking and finance concerns and insolvency issues – please visit our COVID-19 microsite.



1 See "*Listed@ASX Compliance Update - March 2020 - 03/20*", dated 31 March 2020.

COVID-19: accessing equity funding

In the current environment we have already seen a number of firms looking to access equity markets to shore up their balance sheet.

Based on our GFC experience, the issues that we expect listed entities to have to consider are:

1. The need to address technical issues where key members support equity raisings.
2. The limits on placement capacity under existing rules.
3. The style of equity raising that may best suit your needs.

Issues with the support of significant members

The Corporations Act regulates related party transactions[2]. Shareholder approval is required unless the directors can form a view that the issue is on terms at least as favourable as arms-length. This can be a difficult call for directors in the current environment, where share prices are heavily depressed and there are few comparators from which to draw a view.

ASX Listing Rules[3] also include significant restrictions on insiders being involved in placements without member approval unless a waiver is obtained. ASX has traditionally been reluctant to grant waivers. At present however, ASX is taking a highly pragmatic approach to waiver requests and reasonable and appropriately sized placements to closely connected parties may be allowed to proceed without shareholder approval.

Where shareholder approval is required, the notice period that must elapse prior to the shareholder meeting could prove prohibitive in the current climate. We believe that the Federal Treasurer should consider exercising his new power to temporarily modify the operation of the Corporations Act to shorten notice periods, particularly in circumstances where the meeting is proposed to be held electronically (which might also be an appropriate subject of the Treasurer's consideration)[4].

Listed entities and members with significant holdings will need to keep an eye on the takeover rules and ensure that the proposed issue does not increase a member's relevant interests in the entity beyond the permitted thresholds. The 3% creep exception may be of some use, but in a depressed market this threshold can be reached quite quickly.

Limits on placement capacity

Current share prices bring into sharp focus the limits of the 15% cap[5]. On 31 March, ASX announced that it would, via a class waiver that will have effect until 31 July 2020, increase the 15% cap on placements to 25%, provided that companies using that additional capacity make a follow-on pro-rata entitlement offer under exceptions 1, 2 and/or 3 of LR 7.2 or a follow-on offer to retail investors under a share purchase plan, in each case at the same or a lower price than the placement price[6]. NZX has also taken steps to increase the placement capacity of companies in that market from 15% to 25%.

Options for raising equity quickly and 'easily'

Placements: these are quick and easy and should generally be able to be able to be conducted in a low doc model. That usually means issuing a cleansing notice.[7] Ordinarily an issuer can only issue a cleansing notice if trading in the

2 Section 208 of the Corporations Act prohibits public companies from granting a 'financial benefit' (such as issuing securities) to a related party, unless shareholder approval is obtained. A shareholder will be a 'related party' if they relevantly 'control' the company.

3 ASX Listing Rule 10.11.2 requires member approval for a placement to either a 30% holder or to a 10% holder, where that holder has appointed a director to the board under a relevant agreement which gives the member the right or expectation to make that appointment (a closely connected party).

4 See new s 1362A, *Corporations Act 2001* (Cth) that was inserted by the *Coronavirus Economic Response Package Omnibus Act 2020* (Cth).

5 ASX Listing Rule 7.1

6 See "*Listed@ASX Compliance Update - March 2020 - 03/20*", dated 31 March 2020. Companies that already have additional placement capacity under ASX LR 7.1A will be able to use their existing LR 7.1A capacity or the temporary additional capacity announced by ASX, but not both. Companies that have already exhausted their ordinary 15% placement capacity are not precluded from placing more securities up to 25%. ASX has also stated that it is willing to grant waivers in relation to Exception 5 to LR 7.2, if necessary, to allow the required share purchase plan to proceed.

7 Under s 708AA(2)(f) of the Corporations Act – usually needed unless there are undertakings against resale etc.

relevant securities has not been suspended for more than five trading days during the 12 months prior to the day on which offers are made. This does not include trading halts. However, on 31 March ASIC announced that the usual five trading day limit will be increased to 10 trading days in the previous 12 month period. Companies will be able to rely on the relief if:

- they have been suspended for up to 10 days in the 12 months before the offer, and
- they were not suspended for more than five days in the period commencing 12 months before the offer and ending 19 March 2020.

Companies that have been suspended for more than five days before 19 March 2020 or companies that have been suspended for more than 10 days in total will need to apply for individual relief to conduct a 'low doc' capital raising or prepare and lodge a prospectus[8].

Rights issues: similar issues to the placement option discussed above but the timetable of approximately 18 days often makes the standard rights issue even for renounceable issues unworkable. Rights issues do not require shareholder approval.

Accelerated rights issues: in an accelerated rights issue, institutional holders are required to deal with their rights before other holders and are generally allotted their securities first. The offer proceeds in two tranches: institutional and retail. The company receives funds from the institutional tranche on an accelerated basis.

The ASX announcement on 31 March flagged the temporary removal of the one-for-one cap on non renounceable entitlement offers[9]. This waiver is due to last through to 31 July 2020. Applying to both standard and accelerated non-renounceable rights issues, to take advantage of the waiver of LR 7.11.3 companies must notify ASX of their intention to rely upon the waiver and the circumstances under which they are doing so.

Underwritten issues: issuers who require certainty will be looking for underwriters. Where the offer is underwritten by members with significant holdings (discussed above), issuers should be mindful of the Takeover Panel rules. Generally issuers should have little trouble establishing that the underwriting is the only viable course available to raise necessary funds in the current environment. One other issue to watch for is whether there might be a need for temporary licensing relief to permit major shareholders to underwrite capital raisings (currently, they must interpose a professional underwriter or hold an AFSL).[10]

Share purchase plans: while we believe that the current cap on share purchase plan participation of $30,000 in the previous twelve months should be raised to a materially higher amount to address any dilution that may be imposed on members, ASIC has not, so far, seemed willing to increase the cap. However, ASIC have announced changes to the five trading day limit on issuer suspensions[11].

ASX is willing to grant waivers in relation to Exception 5 of LR 7.2 where companies make use of the additional placement capacity announced by ASX on 31 March 2020. To further assist listed entities consider, plan and complete a capital raising, ASX will allow entities to request "back-to-back" trading halts allowing those entities a total of up to 4 trading days in halt[12].

While ASX is taking significant steps to help listed entities raise equity capital, we do expect that there will be a close focus on ensuring that entities do not attempt to abuse or 'game' the more permissive posture that has been adopted.

Due diligence

Issuers should also turn their mind to the diligence process required to support their offering. In addition to confirming compliance with their continuous disclosure obligations, that diligence needs to identify whether the company is withholding any information from the market (on the basis of a continuous disclosure exemption) that investors would reasonably require to make an investment decision. Issuers with robust continuous disclosure practices should have little difficulty in identifying whether any such 'excluded information' exists. Given the current working arrangements under which many listed entities are operating however, thought should be given at an early stage as to how that process will be managed and information verified. Many of the issues discussed below will be relevant to the due diligence process.

8 See ASIC Media Release "*20-075MR Facilitating capital raisings during COVID-19 period*" dated 31 March 2020.

9 See "*Listed@ASX Compliance Update - March 2020 - 03/20*", dated 31 March 2020

10 Alternatively – a revision of ASIC policy that suggests that doing something more than once can be 'conducting a financial service business

11 These changes are described under the heading "Placements", above. See ASIC Media Release "*20-075MR Facilitating capital raisings during COVID-19 period*" dated 31 March 2020.

12 See "*Listed@ASX Compliance Update - March 2020 - 03/20*", dated 31 March 2020

The impact of COVID-19 on shareholder meetings

The impact of COVID-19 is being felt across Australian businesses, including in the area of corporate governance. If your organisation is due to hold a members' meeting, rules on physical proximity challenge the feasibility of holding in-person meetings. That means that organisations need to explore 'hybrid' or 'virtual' meetings.

Shareholder meetings in a world of regulated physical proximity

The Corporations Act requires meetings of members to be held at a reasonable time and place.[13] However current and anticipated rules about physical proximity are likely to severely limit member attendance at meetings. Even if they do not, compliance with those measures will make holding of physical meetings difficult, if not illegal. Some support for this view can be derived from ASIC's recently announced 'no action' position on AGMs.[14]

How can organisations comply with their obligations to hold shareholder meetings within the time limits prescribed by the Corporations Act when the options for holding those meetings are severely restricted?[15]

Should you hold a shareholder meeting at all?

Organisations should consider whether in the current circumstances it is appropriate or necessary to continue with a meeting as planned.

As a general rule, postponement is only possible if the organisation's constitution expressly authorises a postponement, otherwise it may only be possible with the permission of the courts.

Ordinarily, any right to postpone an AGM would need to be considered in light of the obligations of a public company to hold its AGM within five months of its financial year close. ASIC has confirmed that it will not take action against any organisation with a financial year end of 31 December 2019 that fails to comply with this rule, provided the organisation holds its AGM by (at this stage) 31 July 2020.

In the absence of a constitutional right to postpone a meeting, organisations should consider whether the chair of that meeting has the power to adjourn the meeting. Again, the constitution will generally provide for the adjournment of meetings (although even without that power the chair of the meeting can adjourn in certain circumstances).[16] However, to be able to adjourn a meeting, it would first need to be opened and be quorate. As such, in light of the current shut-down measures, an adjournment could be impracticable.

Can your organisation hold a 'hybrid' meeting?

A 'hybrid' meeting is one where members are given an option to attend at one or more physical locations or to attend electronically,[17] usually via a sophisticated videoconferencing platform that allows members to view proceedings, ask questions and vote.

13 Section 249R, *Corporations Act 2001* (Cth).

14 See ASIC Media Release "*20-068MR Guidelines for meeting upcoming AGM and financial reporting requirements*", dated 20 March 2020. ASX has expressed strong support for ASIC's position – see "*Listed@ASX Compliance Update - March 2020 - 03/20*", dated 31 March 2020.

15 See, for example, s 250N, *Corporations Act 2001* (Cth) in relation to Annual General Meetings and s 249D in relation to meetings requisitioned by shareholders.

16 For companies to which the replaceable rules apply, s 249U(4) provides that the chair must adjourn a meeting if members present with a majority of votes (agree) or direct the chair to do so. This provision clearly places the ultimate power of adjournment with the members at the meeting, rather than the chair. Valid adjournment would require the carriage of a motion for the adjournment, including the time and place for resumption.

17 Under the Corporations Act a company may hold a meeting of shareholders at multiple physical venues linked by technology that gives members as a whole a reasonable opportunity to participate in the meeting. Holding your meeting in multiple venues is a good way to promote social distancing where a physical meeting must be held. You should check whether your constitution has any particular technical or notice requirements in relation to holding meetings at multiple physical venues.

A hybrid meeting may provide a possible option to continue with a shareholder meeting, but there are a number of matters that need to be considered before an organisation proceeds in this way.

ASIC considers that the Corporations Act permits hybrid meetings, but subject to any restrictions imposed by the constitution.[18] Indeed, not all constitutions are permissive when it comes to modern technological approaches, especially older constitutions. You should carefully review your organisation's constitution to determine whether hybrid meetings are an option for you. If your constitution does not allow for hybrid meetings, ASIC does not have the power to remedy this but there is talk of the Commonwealth Government fixing this problem.[19]

If your constitution permits hybrid meetings, you may want to consider moving to a hybrid AGM or EGM if the notice of meeting has not already been dispatched. If the notice of meeting has already been dispatched, it may still be possible to convert to a hybrid meeting format. ASIC supports companies sending supplementary instructions to members electronically, on their website and via a market announcement.

In either case, a hybrid meeting format will require, among other things, engaging a technology provider, adapting the meeting documentation sent to members and incurring additional associated costs. It is also critical that the technology used to support the hybrid meeting affords members as a whole a reasonable opportunity to participate.

If you are considering a hybrid meeting you should contact your share registry to discuss whether they can provide the necessary technical facility and support.

Can your organisation hold a 'virtual' meeting?

A 'virtual' meeting provides another possible option, but again there are a number of matters that need to be considered. A virtual meeting is one where all members attend electronically and no physical venue for the meeting is nominated. This model is not uncommon in the US and is being widely deployed there. However, there is doubt as to whether a virtual meeting constitutes a valid meeting for the purposes of the Corporations Act.[20]

Although ASIC does not have power to vary the Corporations Act, it has recognised the potential value of holding virtual meetings and has announced that it will take 'no action' in relation to non-compliance with provisions of the Corporations Act that may restrict the holding of virtual AGMs, where:

- an organisation elects to do so in order to comply with their statutory deadlines (or the currently extended deadlines);[21] and
- the technology provides shareholders a reasonable opportunity to participate.[22]

While ASIC's 'no action' position should offer some comfort to companies considering a virtual AGM, it does not:

- extend to EGMs, including those requisitioned by shareholders;
- alter the requirements of the Corporations Act or your company's constitution; and
- prevent third party actions against the company.

18 See ASIC Media Release "*20-068MR Guidelines for meeting upcoming AGM and financial reporting requirements*", dated 20 March 2020.

19 See ASIC Media Release "*20-068MR Guidelines for meeting upcoming AGM and financial reporting requirements*", dated 20 March 2020. ASX has expressed support for the use of market announcements as a means of providing supplementary instructions to members – see "*Listed@ASX Compliance Update - March 2020 - 03/20*", dated 31 March 2020.

20 See ASIC Media Release "*20-068MR Guidelines for meeting upcoming AGM and financial reporting requirements*", dated 20 March 2020.

21 See for example s 250N(2)

22 See ASIC Media Release "*20-068MR Guidelines for meeting upcoming AGM and financial reporting requirements*", dated 20 March 2020.

However, as of 25 March[23], the Federal Treasurer has the power to temporarily modify the operation of the Corporations Act and Regulations, and exempt classes of persons, including companies, from the operation of specified provisions where:

- it would not be reasonable to expect the persons in the class to comply with the provisions because of the impact of COVID-19; or
- the exemption or modification is otherwise necessary or appropriate in order to facilitate continuation of business or mitigate the impact of COVID-19.[24]

As at the date of writing, the Treasurer has not exercised his new powers, however, we consider that modifications to the Corporations Act are imminent and expect these will place virtual meetings on a secure legislative footing for the duration of the COVID-19 crisis.

The role of the courts

If the Federal Treasurer does not modify the Corporations Act to expressly permit the holding of virtual and/or hybrid meetings (or does so only in the context of AGMs), it is possible that the courts may offer an alternative basis for the holding of such meetings.

The Corporations Act permits a court to 'cure' some defects in the convening and holding of shareholder meetings. In particular, a court can also make an order declaring any act, matter or thing purportedly done as valid regardless of a contravention of the Corporations Act or of a relevant constituent document where:

- the act is essentially procedural;
- the people involved acted honestly;
- it is just and equitable to make the order; and
- no substantial injustice has been or is likely to be caused to any person.[25]

The court can extend the period for doing an act, such as holding a shareholder meeting.

Steps to take relating to shareholder meetings:

1. Check your company's constitution to see whether hybrid or virtual meetings are an option.
2. Check whether your constitution might allow you to postpone or adjourn shareholder meetings.
3. Stay abreast of announcements from the Commonwealth and State governments that might impact your shareholder meeting.
4. Communicate clearly with your shareholders to keep them informed of any changes to meetings already announced.

23 *Coronavirus Economic Response Package Omnibus Act 2020* (Cth), s 2(1).
24 See new s 1362A, *Corporations Act 2001* (Cth) that was inserted by the *Coronavirus Economic Response Package Omnibus Act 2020* (Cth).
25 Section 1322, *Corporation Act 2001* (Cth).

Accessing the safe harbour and your continuous disclosure obligation

Practical steps for directors of listed entities considering 'safe harbour' protections

Managing your continuous disclosure obligations[26] as you consider the financial implications of the COVID-19 pandemic is particularly difficult. The general financial reporting issues are discussed below but for those with genuine concerns about their financial viability they are particularly difficult.

The statutory safe harbour regime provides directors with protection from liability for insolvent trading provided they have begun developing a course of action that is reasonably likely to lead to a better outcome for the organisation and its creditors than the appointment of a voluntary administrator or liquidator[27].

The safe harbour is intended to give directors breathing space to consider innovative solutions and to take reasonable, considered risks to restructure viable businesses without necessarily exposing the organisation to a formal insolvency process. Directors seeking to rely on the safe harbour must demonstrate that they took the action necessary to lead to a better outcome for the organisation, such as seeking advice from an 'appropriately qualified' entity and properly informing him or herself of the organisation's financial position.

Continuous disclosure obligations

In these circumstances a practical issue for directors is how to manage your disclosure obligations, with ASX guidance[28] noting that a listed entity is not necessarily required to disclose that its directors are relying on the safe harbour regime. Even so, the organisation remains subject to its continuous disclosure obligations, including the fact that it is in financial distress[29].

The issue is less about whether the safe harbour regime is being relied upon, but rather whether there have been materially adverse developments in respect of the financial condition of the listed entity of which the market is unaware[30].

If you are in financial distress you should continuously consider whether an adverse development has occurred that would otherwise need to be disclosed. Accordingly, you should include statements that emphasise that the current situation is in flux and subject to change (discussed in more detail below).

This will remain the right approach even if you are relying on the recently announced temporary relief from the duty to revent insolvent trading for debts incurred in the ordinary course of business (other than in the case of dishonesty or fraud).

Given the changing circumstances caused by the COVID-19 pandemic, listed companies need to continuously assess whether each piece of new information is still a matter of 'supposition' or 'insufficiently definite' and therefore exempt from disclosure. In certain cases, the adoption of a turnaround plan may cease to be an 'incomplete proposal' and is therefore required to be disclosed.

Even if you are not in a position to disclose the specific extent of financial impact, it should still announce based on its current information and with a signal it will make a further announcement when it has determined the financial impact.

ASX encourages listed entities to approach the ASX and seek a voluntary suspension to manage disclosure obligations while implementing a financial restructure, reorganisation or definitive course of action that aims to avoid insolvent administration[31].

26 ASX Listing Rule 3.1 provides that a listed entity must immediately inform the ASX of any 'material' information concerning the organisation – that is, any information that a reasonable person would expect to have a material effect on the price or value of its securities.

27 Section 588GA of the Corporations Act 2001 (Cth).

28 ASX Guidance Note 8

29 See "L*isted@ASX Compliance Update - March 2020 - 03/20*", dated 31 March 2020, for a timely reminder in relation to these issues.

30 ASX GN 8 (Para 5.10) provides that "*… if there is an adverse development affecting the financial condition or prospects of an entity that falls outside the carve-outs to immediate disclosure in Listing Rule 3.1A and a reasonable person would expect information about that development to have a material effect on the price or value of its securities, the entity must immediately disclose that information under Listing Rule 3.1.*"

31 A voluntary suspension is more appropriate in this situation than a trading halt as it is likely to persist for longer than the maximum two trading days for which a trading halt may be granted.

COVID-19 and earnings guidance

In the last few weeks there has been a rush of listed companies withdrawing earnings guidance.

Given the focus by regulators and class action groups on this topic it is not surprising that listed companies from a range of industries are announcing the withdrawal, retraction or suspension of earnings guidance and related forward-looking statements. ASX has stated that this is acceptable and understandable in the circumstances[32]. However, organisations should carefully consider the implications of withdrawal and ensure they don't get 'hoisted by their own petard'. Follow the basic rules: tell the market what you do know, share with them what you don't know and explain what you are doing.

For listed entities it is not surprising that in light of the COVID-19 pandemic it is simply no longer possible to accurately predict the financial impact of the constantly changing business environment. As such, a number of organisations are withdrawing guidance yet many are also leaving themselves open by saying "we withdraw but…". This approach means that organisations risk having to go back to the market and adjust for the "but …" statements.

In considering earnings guidance and financial announcements, you should:

1. Consider your forward looking projections.
2. Ensure the market understands your financial results.
3. Manage the risk in guidance statements.

However, one risk that you need to keep in mind will be the growing pressure from the market and analysts to provide answers about the financial impact of the COVID-19 pandemic on the business. In these situations the basic rules apply: tell the market what you do know, share with them what you don't know and explain what you are doing. If you keep doing this as a consistent theme of your communication the market will start to listen for that. They will get used to the fact that this is the way that you are providing the market with information.

Consider forward looking projections

Listed entities that have not yet qualified their existing earnings guidance should immediately consider their forward looking projections about revenue, earnings or distributions[33]. If any of these future earnings projections are likely to be subject to material adverse change, you should consider whether there is a need to update the market. ASX's recent update to Guidance Note 8 now supports our general advice to clients that ASX 300 entities should be applying a materiality benchmark of 5% or thereabouts.

But these announcements were also consistent in their undertaking that "once market conditions stabilise, the Company will seek to reinstate earnings guidance" or provide more detail of the expected impact. When to deliver on that promise in the face of volatility will be a difficult judgement call.

Ensure the market understands the financial results

With the end of the financial year fast approaching listed entities are going to need to keep a close eye out for any 'earnings surprises'. As board's start the process of closing off for the financial year there will be pressure on listed entities to ensure the market understands their financial results. Organisations will be under pressure to use financial year end to paint the picture of the new normal, at least in the medium term. Listed entities may need to consider a different style of final result announcement to describe how the organisation's COVID-19 response plan has worked. Again, in preparing these statements remember the basic rules.

Manage the risk in guidance statements

Our expectation is that boards will need to consider a new style of post financial year announcement to give the market guidance about the impact of the pandemic on the finances of the organisation. Boards will need to carefully consider how to manage the risk in such statements. As with any forward looking statements they will need to be able to show that they are based on reasonable grounds and are the subject of stringent testing by executives and advisers alike, and are also based on the best available information in an environment where even the most basic facts are in flux.

If developments continue as rapidly as they are today, providing guidance and any forward looking statement will be a difficult issue to confront, however if you follow the basic rules discussed above you will find that the process is much easier.

32 See "*Listed@ASX Compliance Update - March 2020 - 03/20*", dated 31 March 2020.

33 See "*Listed@ASX Compliance Update - March 2020 - 03/20*", dated 31 March 2020, for ASX's latest (at the time of writing) comments on this issue.

Deferral or cancellation of dividends

There has also been a recent rush of ASX announcements either deferring or cancelling previously announced dividends. But not all dividends are created equal, and not all boards will be free to change their mind.

The outcome may depend on:

- whether the dividend was 'determined' or 'declared';
- what powers your constitution gives the board; and
- the drafting of the resolutions approving a dividend.

Declared or determined dividends

Historically, dividends that had been 'declared' by a company created a debt payable by the company at the time of the declaration. This meant that they could not be cancelled. This led to a widespread practice of announcing an 'interim' dividend, which was purposively not declared and could be revoked.

Companies who wish to defer or cancel a dividend should start by checking their constitution to confirm that the board has power to determine and not just to declare a dividend. Most modern constitutions will adopt the language of 'determining' a dividend[34].

Unfortunately there is complexity here. There is High Court authority[35] that the phrase 'determine' in the particular context was a synonym for 'decide' and did not displace the director's right to declare a dividend. Accordingly, they concluded that directors had power to either declare or determine a dividend. In that case, the directors had used the language of declaration and the dividend was treated accordingly.

The practical outcome is that the language used by directors when resolving to pay a dividend can be important in deciding whether the dividend is determined or declared. If it is declared then it will be difficult to defer or cancel an announced dividend.

34 Section 254V(1) of the Corporations Act, provides that a company does not incur a debt when it 'determines' a dividend, and makes clear that the "debt arises only when the time fixed for payment arrives and the decision to pay the dividend may be revoked at any time before then". Confusingly however, s 254V(2) notes that if the company constitution provides for a dividend to be 'declared' then the company has incurred a debt at the point that it is in fact declared. This apparently simple distinction between dividends that are 'determined' and those which are 'declared' comes into strict focus where a company wishes to defer or cancel payment.

35 *Bluebottles UK Ltd v Deputy Commissioner of Taxation* [2007] HCA 54) the Court found that a provision in the constitution that empowered directors to 'determine' a dividend did not mean that directors could not also 'declare' a dividend. In that case, the company argued that directors could not have declared the impugned dividend because the constitutional provision, only authorised directors to 'determine' dividends. The issue was relevant to when a debt was created for tax purposes.

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