Hamilton Locke

PART 3 • MAY 2020

CONTENTS

15 Managing Liquidity

16 Valuations and Purchase Price

17 Commercial Tenancies Code

18 Material Adverse Change / Effect

19 Certainty of Funds

20 Regulations

21 Raising Capital 3

About the authors

NAVIGATING VOLATILITY

Hamilton Locke's insights on the impacts of COVID-19 on businesses and markets

HOW SHOULD RESPONSIBLE ENTITIES MANAGE LIQUIDITY IN THE COVID-19 ENVIRONMENT?

First Published:
8 April 2020
Authored by:
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Investor reactions to the COVID-19 pandemic have driven significant downturns in global and domestic markets across many asset classes. ASIC has recently written to responsible entities reminding them of their liquidity requirements in the current market environment.

Internationally, a number of high-profile asset managers, including Aviva Investors, Kames Capital and Janus Henderson, have suspended dealing in their property funds, citing liquidity concerns, the safeguarding of investor assets and difficulty valuing assets.

Domestically, we will potentially see a similar approach taken with fund managers looking to suspend redemptions in some sectors of the unlisted funds market – that was a significant feature of the 2008 global financial crisis.

This article is designed to assist responsible entities in managing their liquidity during this challenging time. We have set out some tools and strategies that responsible entities may consider when faced with these challenges.

MANAGING LIQUIDITY

The effect of the COVID-19 pandemic on the economic environment increases the risk that responsible entities will not have adequate financial resources to meet their financial obligations and needs, including redemptions, distributions and expenses.

Funds that have invested in assets that are not easily traded on a financial market, such as property or mortgage schemes, may experience challenges around liquidity. For some landlords, income streams are under threat as occupiers fail to generate sufficient revenue to make rental payments and, in extreme cases, sustain their businesses.

The management of liquidity should be considered at both the responsible entity level and the scheme level.

RESPONSIBLE ENTITY LEVEL

At the responsible entity level, there should be liquidity risk management processes in place to continually assess compliance with the financial requirements under their Australian financial service licence. The financial requirements that are relevant to liquidity include, but are not limited to:

a. standard solvency and positive net assets;
b. cash needs;
c. audit requirements;
d. net tangible assets, including requirements for holding at least 50% of the NTA requirement in liquid assets; and
e. specific requirements for financial products and services offered. [1]

Responsible entities should forecast their income and continually monitor their ability to meet their financial requirements. If their financial requirements are no longer met, it is likely that a responsible entity will be required to lodge a breach report with ASIC and possibly cease dealing in their funds.

SCHEME LEVEL

At the scheme level, acting in the best interests of members, the responsible entity is required to manage the objectives of both the scheme and members' expectations for redemptions. Responsible entities need to closely monitor the amount of redemptions and the applications that are being made by members.

ASIC has identified a number of tools that can be used to manage liquidity at the scheme level, including but not limited to:

a. redemption fees;
b. suspension of withdrawal requests;
c. placing a limit on the amount of redemptions;
d. in specie transfer;
e. swing pricing;
f. minimum or maximum limits on withdrawals; or
g. satisfying withdrawals on a partial or staggered basis. [2]

Liquidity and illiquidity

Responsible entities should be assessing whether their funds remain liquid or become illiquid. If a fund becomes illiquid, the responsible entity must determine whether there should be a suspension of member related cashflows to protect members.

1) ASIC Regulatory Guide 166 Licensing: Financial requirements.
2) Regulatory Guide 259: Risk management systems of responsible entities

If the responsible entity intends to suspend redemptions, the constitution must give it the power to do so. ASIC has provided guidance on what type of restrictions should be stated in the constitution. Any decision to restrict dealing with withdrawal requests must be exercised in a manner consistent with the responsible entity's duties.[3]

Unit pricing

When faced with significant market volatility, responsible entities may be unable to value the scheme assets or calculate the unit price with any certainty. If the responsible entity cannot accurately value the fund's assets, it may be permitted to suspend unit pricing and therefore a suspension of withdrawal requests.

If the responsible entity intends to suspend unit pricing, the constitution and unit pricing policy must give it the power to do so. This power should also be disclosed in the fund disclosure documents.

Transaction costs

The current environment may require some funds to incur more costs than typically arise, including those from liquidating assets to make redemption payments. In such circumstances, in order to act in member's best interests, the responsible entity may determine that transaction costs (ie. the buy/sell spread) should be increased.

If the responsible entity intends to increase the transaction costs, it should ensure that its terms are consistent with the PDS, the constitution and the unit pricing policy.

3) Regulatory Guide 134: Funds management: Constitutions

Disclosures

It is important that responsible entities ensure that fund product disclosure statements (**PDS**) are up to date. As a result of the market turbulence caused by the COVID-19 pandemic, a number of responsible entities have reviewed fund PDSs and updated their disclosures. Particular focus has been placed on disclosure regarding risk, unit pricing and redemptions.

Responsible entities of simple managed investment schemes that have shorter PDSs need to monitor scheme assets for the strict requirement to have at least 80% of their investments able to be sold within 10 days at market value.[4] If the threshold is breached, then the scheme is no longer a simple managed investment scheme and the responsible entity is required to cease dealing in the fund until a full PDS is issued.

Notifying ASIC

If a responsible entity determines that a scheme is to be suspended or deems it illiquid, then it should notify ASIC immediately.

Hardship relief

Under the *Corporations Act*, a responsible entity must treat all members equally and are unable to make exceptions on suspended withdrawal requests. However, during the 2008 financial crisis ASIC provided relief to allow responsible entities with non-liquid funds to return some capital to certain members experiencing financial hardship. ASIC has indicated to responsible entities that it will consider providing this hardship relief to responsible entities on a case-by-case basis. [5]

ABOUT HAMILTON LOCKE

Hamilton Locke can assist fund managers that are seeking advice on licensing requirements or breaches, liquidity risk management, updating their PDSs, applications for relief, considering trustee duties or other Corporations Act requirements.

Please contact Brendan Ivers, Justin Gross or Samuel Jones for more information.

4) Information Sheet 133: Shorter PDS regime -Superannuation managed investment schemes and margin lending.
5) Regulatory Guide 136: Funds management: Discretionary powers.

THE IMPACT OF COVID-19 ON **VALUATIONS AND PURCHASE PRICE IN M&A TRANSACTIONS**

First Published:
8 April 2020
Authored by:
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The volatility and uncertainty of the COVID-19 crisis is having, and will continue to have, a significant impact on M&A transactions.

What distinguishes this period from previous financial crises, is the level of uncertainty the impact COVID-19 will have on the economy and the extent of that impact. One thing is certain though: the quantum and structure of consideration in M&A transactions will be impacted. This article considers how vendors and purchasers may consider approaching purchase price structure and negotiation.

VALUATIONS

The uncertainty around the short and long-term impact of COVID-19 will undoubtedly make valuing businesses challenging. Valuations based on expected future cash flows and earnings of a business will be hard, given the difficulty in accurately assessing earnings and cash flow generation capability, as well as the timing of recovery for a business from the impact of COVID-19. Valuations based on historical earnings may not be reliable, as it is unlikely that any business will be unaffected by the current crisis.

Traditional valuation methodologies will need to be carefully considered in the current environment and appropriate adjustments or discount rates to earnings and cashflow forecasts can be expected.

LOCKED BOX WORKING CAPITAL ADJUSTMENT

Where a business is in decline, a vendor will typically fare better with a locked box structure. The economic and financial benefit and risk of a business passes to a purchaser from the locked box date, with no opportunity for the purchaser to adjust the price post-closing, even where the business declines in performance between the locked-box date and the date of completion. The purchase price is locked in when the sale agreement is signed. Purchasers will need to consider whether locked-box mechanism carries too much risk in this environment.

A post-completion working capital adjustment mechanism ensures that the purchase price paid reflects the state of the target business on completion. Vendors will bear the financial and economic risk of the target business between signing and completion.

In Australia, most private M&A deals have a post-completion working capital adjustment mechanism and we expect that will continue to be the preferred approach. Agreeing the target working capital figure, as well as any adjustments or normalisations that historical working capital are typically areas of significant negotiation in any M&A transaction. In the current environment, we anticipate there will be considerable discussion with respect to adjustments to be made to working capital calculations to reflect the impact of COVID-19. The principles used in determining working capital will require careful consideration as inventory, payables and receivables may be abnormal and lead to dispute between the parties as to the adjustment calculation.

With the recent changes to the FIRB regime (see our article Putting the brakes on foreign investment – zero tolerance from FIRB for further information), more transactions will require FIRB approval which may extend the period between signing and completion. This may also have an impact on the adjustment mechanics, as what a purchaser is willing to pay now, in this rapidly changing landscape, may not be the same in 6 months' time.

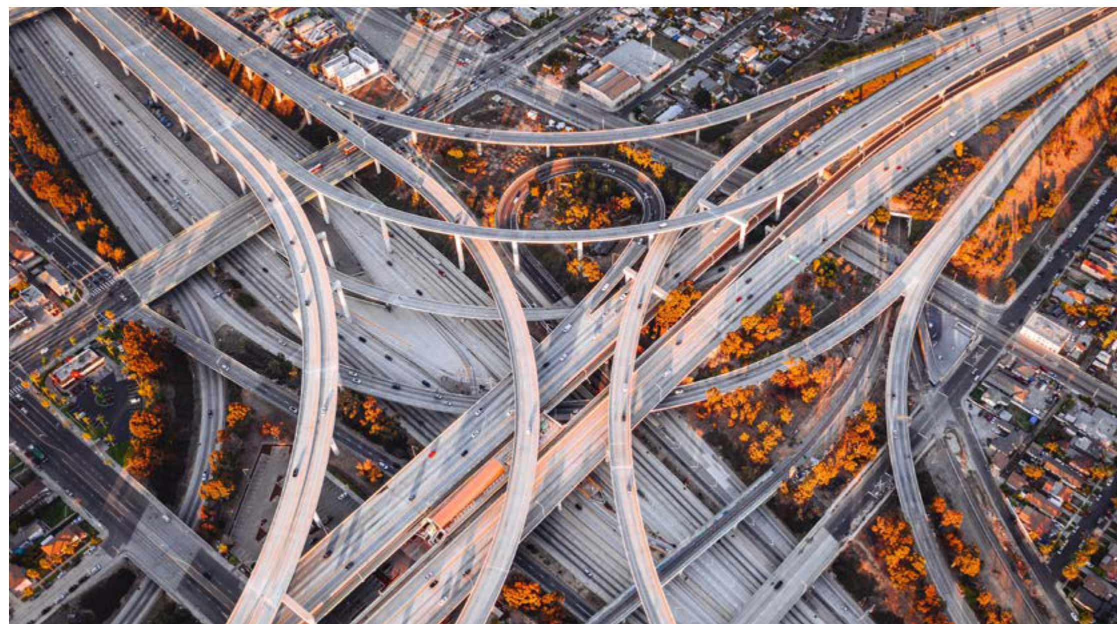
DEFERRED AND CONTINGENT CONSIDERATION

In private M&A, we are likely to see an increase in deferred consideration structures (such as earn outs and holdbacks) to bridge valuation gaps between vendors and purchasers.

Holding back a proportion of the purchase price until the target business' supply chain returns to normal or the target business achieves certain milestones can provide the purchaser with valuable down-side protection.

With an earn out, part of the purchase price is made contingent on the target's future performance, with the vendor and purchaser sharing the economic risk of the business after completion. Earn outs can create tension between vendors and purchasers. While the vendors may simply view the earn out as a deferred consideration, for the purchaser, the earn out will be highly contingent on the performance and continued success of the business post-acquisition.

Agreeing appropriate earn out hurdles may prove difficult in the current environment. Parties may consider including specific arrangements to deal with the consequences of COVID-19. For example, the earn out period could be extended or delayed by 12 months and vendors could have the benefit of a catch-up right so that outperformance in later earn out periods can be appropriately rewarded. Negotiating earn out covenants (being the matters which a purchaser is prohibited from doing or must do during the earn out period) will be particularly important for both parties.



Including appropriate normalisations will require careful drafting. Purchasers may no longer be willing to accept normalisations for abnormal or non-recurring losses (or gains).

Earn outs can sometimes be resisted by vendors due to the lack of certainty of payment and the loss of control of the business after completion. Vendors can consider seeking to mitigate that risk by ensuring they have appropriate information rights, as well as a suitable dispute resolution mechanism.

ABILITY TO FUND THE PURCHASE PRICE

COVID-19 will continue to impact the revenue and solvency of businesses in certain industries. This, in turn, will adversely affect the ability of certain trade purchasers to obtain acquisition financing. Vendors should be aware of the credit risk of their counterparties and consider the use of structures such as deposits, escrow arrangements, parent company guarantees, third party guarantees and break fees to reduce the risk of purchasers defaulting on their payment obligations under acquisition agreements.

The COVID-19 crisis provides a unique set of opportunities and challenges for both purchasers and vendors when it comes to valuing assets. Parties can expect to see unique completion accounting mechanisms that will seek to counter some of the uncertainty provided by the COVID-19 crisis. Parties will also need to consider whether deferred consideration targets can be achieved and the use of appropriate structures to reduce counterparties credit risk.

DISTRESSED M&A

If the M&A transaction involves a formal insolvency process the above adjustment mechanisms will most likely not be available to counterparties. The sale will usually be conducted on an “as is, where is” basis with any potential purchaser having to factor the associated risks into pricing. For more details around distressed M&A please see our previous article Distressed M&A - What you Need To Know.

ABOUT HAMILTON LOCKE

Hamilton Locke is a corporate law firm specialising in complex corporate finance transactions, including mergers and acquisitions, private equity, finance and restructuring, insolvency, litigation, property and fund establishment.

The Finance and Restructuring team has considerable restructuring and turnaround experience across all relevant areas including finance, debt-trading, loan to own transactions, distressed M&A, safe harbour, enforcement and insolvency.

If you would like to discuss the contents of this article, please contact Cristín McCoy, Nicholas Edwards or Zina Edwards.

THE FEDERAL GOVERNMENT'S **COMMERCIAL TENANCIES CODE**

First Published:
14 April 2020
Authored by:
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The National Cabinet's mandatory Code of Conduct (Code) was released last week. The Code is a set of principles that apply to eligible commercial tenancies including retail, office and industrial. The principles will act as a guide for parties to negotiate amendments in good faith to existing leasing arrangements.

FOR HOW LONG DOES THE CODE APPLY?

The Code will shortly be formalised by the enactment of legislation or regulations by the States and Territories. The Code comes into effect in all States and Territories from a date following 3 April 2020 (to be defined by each jurisdiction) and will remain in place for the period during which the Commonwealth JobKeeper program remains operational.

WHO DOES THE CODE APPLY TO?

The Code is mandatory and applies to all landlords and tenants if the tenant fulfils both of the following conditions:

a. **it is a small or medium size enterprise with an annual turnover of less than $50 million per year.** It is not clear at what point in time the $50 million assessment of annual turnover occurs. However, given that much of the legislative change and rescue packages are directly linked to Commonwealth Government's JobKeeper program, our view is that the annual turnover assessment made by the ATO as part of an application for the Commonwealth Government's JobKeeper program, will be the test applied to the Code

b. **it is suffering financial distress and hardship.** We note that this phrase is defined so that tenants eligible for the JobKeeper program automatically qualify. Businesses with an annual turnover less than $1 billion are eligible for the JobKeeper program if they have experienced a 30% fall in revenue since 1 March 2020, and are not subject to the major bank levy.

Although not mandatory for other tenants, the National Cabinet have expressed a desire for the Code to nonetheless be applied to all leasing arrangements for businesses affected by COVID-19. The Code is intended to apply during the period of the COVID-19 and a reasonable subsequent recovery period (Code Period).

OVERARCHING PRINCIPLES

The following are the key principles that landlords and tenants must consider in negotiating amendments to existing leasing arrangements:

1. **Good faith:** All negotiations must be in good faith.
2. **Collaboration:** Parties should work together to ensure business continuity and to facilitate resumption of business after COVID-19. This includes reaching mutually appropriate temporary leasing arrangements through open and transparent sharing of relevant information and assisting in dealings with other stakeholders such as banks and governments.
3. **Regard to COVID-19 implications on business:** Agreed arrangements between parties must account for COVID-19's impact on the tenant's business including revenue, expenses and profitability. Consideration must be had to whether the tenant is in administration or receivership.
4. **Unique arrangements:** Arrangements must be dealt with on a case-by-case basis, including determinations around rent and lease terms.

PRINCIPLES SPECIFIC TO LANDLORDS

The following are principles that landlords are obliged to follow as soon as practicable and on a case-by-case basis:

1. **Termination:**
   a. Landlords must not terminate leases due to non-payment of rent during the Code Period.
   b. Whilst the Code does not prevent termination of leases for other breaches, landlords should take into account the overarching principles of the Code before taking such action.

2. **Rent reductions, waivers and deferrals:**
   a. Landlords must offer tenants proportionate reductions in rent in the form of waivers and deferrals of up to 100% of the amount ordinarily payable. Rental waivers must constitute at least 50% of the total reduction in rent payable, although this may be waived by the tenant. A case study of how the rent reductions work is outlined at the end of this article.
   b. Importantly, rental waivers may need to be greater than 50% if that is required to ensure the tenant has the capacity to fulfil its ongoing obligations under the lease. However, any such increase to the rental waiver must take into account the landlord's financial position.
   c. Rental deferrals must be amortised over, whichever is greater between, the balance of the term and the period of no less than 24 months. The repayment period cannot commence until the end of the Code Period and the expiry of the lease.
   d. No fees, interest or other charges may be applied with respect to rent waived but the Code contemplates allowing interest to be charged on deferrals of rent provided the rate is not punitive.
   e. The landlord must provide the tenant with an opportunity to extend the lease for a period equivalent to the rent waiver and/or deferral period. However, the reverse position is not contemplated by the Code, meaning landlords cannot require tenants to extend lease terms in return for the waivers and deferrals of rent.

3. **Passing on benefits:** Landlords must seek to pass on to tenants the benefits received, including:
   a. any reduction in charges such as land tax, council rates and insurance (in the appropriate proportion determined with respect to the lease). This will result in a net position for landlords where leases allow for recovery of outgoings, but it is unclear how it is to be applied to tenants paying a gross rent; and
   b. benefits it receives due to deferral of loan payments, including those provided by a bank or other financial institution.

To this end, the New South Wales and Queensland Governments have announced that their respective legislative enactments will provide for a 25% discount on land tax for the 2020 calendar year which will be passed on to tenants as a form of rent relief. Further details will be provided as the legislative landscape evolves.

4. **Security / bank guarantee:** A landlord cannot call on a tenant's security during the Code Period for non-payment of rent, including any claim on cash bonds, bank guarantees or personal guarantees. The Code does not prevent landlords calling on security in respect of other breaches but it is possible the legislation may extend the prohibition.
5. **No rent increases:** Landlords must agree to a freeze on rent increases for the Code Period (except for retail leases based on turnover rent).
6. **Other key considerations:**
   a. Tenants may reduce opening hours or cease trading without being in breach of their leases. Landlords may not impose any levy or penalty if tenants reduce opening hours or cease to trade due to COVID-19.
   b. Landlords should, where appropriate, seek to waive recovery of any other expense or outgoing during the period which the tenant is unable to trade. Landlords reserve the right to reduce services as required in such circumstances.
   c. If negotiated arrangements pursuant to the Code require repayment, the repayment must occur over an extended period to avoid undue financial burden on the tenant.
7. **Principles specific to tenants:** Tenants must abide by the terms of the lease, subject to any amendments made under to the Code.
8. **Conflict resolution:** Where landlords and tenants cannot reach an agreement, the matter will be referred for binding mediation to the applicable State or Territory retail/commercial leasing dispute resolution process, including Small Business Commissioners and Ombudsmen.

PRACTICAL CONSIDERATIONS PENDING INTRODUCTION OF STATE SPECIFIC LEGISLATION

Whilst it remains to be seen how the Code will be reflected in the jurisdiction specific legislation, it is worthwhile for landlords and tenants to consider a range of matters at this stage, including those outlined below.

Landlords' Considerations

Landlords should consider the following:

1. Reviewing its tenancy portfolio to form an initial view as to which tenancies are likely to be caught by the Code.
2. Considering what information should be requested from those tenants who apply for rent relief in order to assist the landlord in considering the appropriate waivers and deferrals of rent.

3. An assessment of the likely impact of waivers and deferrals of rent on the landlord's revenue and the resulting impact on the landlord's business, including the landlord's ability to meet its own financial commitments.
4. Assessing the landlord's obligations under the Code against its other legal duties and obligations (including director's duties, duties to shareholders/unitholders).
5. Considering the implications of the insolvency laws and the interplay with the requirements of the Code.
6. Considering the implications of any rent reduction arrangements on the landlord's financing (including potential need for financier consent to any lease variations).
7. Preparing revised cash flow budgets, based on rent reductions to be granted to tenants, and approaching the landlord's financier to discuss variations to the finance arrangements to minimise the financial impact on the landlord (such as reduced interest rates and deferred mortgage instalment repayments).
8. Considering if it has the resources needed to:
    a. properly analyse the information received from tenants requesting rent relief.
    b. model the form and financial impact of any rent relief and to negotiate numerous individual lease arrangements across its portfolio; and
    c. document agreed lease variations in a timely manner (and to register those documents in jurisdictions where that is required).
9. Considering whether potential extensions of lease terms are likely to impact on the landlord's intended use of the property (eg. proposed redevelopment).
10. Ensuring the timely integration of agreed rent reductions and rent freezes into the landlord's or its property manager's accounts systems.
11. Considering the landlord's rights to enforce lease provisions pending the implementation of the legislation in the relevant jurisdiction (including in relation to any existing breaches).
12. Undertaking an audit of all security deposits and bank guarantees held by the landlord to ascertain the expiry dates, if any, of the bank guarantees and to ensure the landlord's interest in any security deposits have been registered.
13. Considering if tenants should be required to replace any bank guarantee containing an expiry date (to ensure expiry does not occur until the later of the end of the Code Period and the date all rent deferrals are required to be repaid).
14. Considering cost savings (such as reduced security costs, services and cleaning) but taking into account landlords' obligations under legislation to provide or maintain these services.

TENANTS' CONSIDERATIONS

Tenants should consider the following:

1. Assessing whether the Code applies to the tenant.
2. Ensuring all turnover information is up to date and gathering information necessary to demonstrate to landlords that the Code applies to the tenant, including information to evidence the reduction in the tenant's turnover.
3. Considering the nature and form of the rent reduction required to sustain the tenant's business during the Code Period and into the future.

4. Ensuring that any requests for rent reductions are proportionate to the reduction in the tenant's turnover.
5. Unless otherwise permitted under the Code (or agreed with the landlord), ensuring continued compliance with the provisions of the lease (failure to do can result in the loss of the protection provided under the Code).
6. Where the Code does not apply to a tenant, but the tenant's business has been affected by COVID-19, opening discussions with landlords seeking co-operation within the spirit of the Code.
7. Ensuring it has the resources and expertise needed to gather the information needed to apply for Commonwealth Government's JobKeeper program and to negotiate lease variations with landlords.

CASE STUDY: RENT REDUCTIONS

If a tenant can establish it is experiencing an 80% decrease in turnover as a result of measures taken to deal with the COVID-19 pandemic (determined based on reduction of trade during the Code Period and subsequent reasonable recovery period) it would be entitled (in principle) to a reduction in the corresponding rent by 80%, with at least half of this reduction being a permanent waiver. So, if the tenant's monthly rent was $100,000, rent would be reduced by $80,000 to $20,000 each month during the Code Period.

In relation to the $80,000 reduction:

- $40,000 is permanently waived each month of the Code Period by the landlord; and
- $40,000 is deferred each month (repayable over the greater of the balance of the term and 24 months after the Code Period (except as otherwise agreed).

ABOUT HAMILTON LOCKE

Hamilton Locke is a corporate law firm specialising in complex corporate finance transactions, including mergers and acquisitions, private equity, finance and restructuring, litigation, property and fund establishment.

If you would like to discuss the contents of this article or have any questions about the impact of current events on your business, please contact Partner John Frangi, Partner Marcus Cutchey, or Partner Brendan Ivers.

IS COVID-19 A **MATERIAL ADVERSE CHANGE OR MATERIAL ADVERSE EFFECT?**

First Published:
15 April 2020
Authored by:
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Alex McCullagh

The global economy faces a period of significant uncertainty. Governments around the world have intensified restrictions on both business and consumers to halt the spread of COVID-19. This has led to deteriorating economic conditions and changes in consumer behaviour, which may adversely impact the capacity of borrowers to comply with their obligations under their existing facility agreements.

WHAT IS A "MAC/MAE"?

Material Adverse Change (MAC) or Material Adverse Effect (MAE) are contractual provisions designed to protect financiers from unforeseen changes to a borrower's financial situation and also unexpected market fluctuations. They are customarily included in financial contracts such as loans, leases and other financing arrangements.

MAE definitions, and their application, are usually negotiated on a transaction by transaction basis and, as such, their interpretation can vary.

The definition of MAE in the Asia Pacific Loan Markets Association facility agreement includes suggested optionality and can extend beyond the ability of an obligor group to comply with its obligations under its finance documents to an event or circumstances which has a material effect on:

- the business, operations, property, condition (financial or otherwise) or prospects of the counterparty corporate group taken as a whole; or
- the ability of an obligor or obligor group to perform its obligations under the finance documents; or
- the validity or enforceability of, or the rights or remedies of a finance party under, the finance documents including security documents.

The question of whether a MAE has been triggered by an event, series of events or circumstances will generally hinge on the drafting of the clause and how this applies to the facts on a case by case basis.

MAE/MAC provisions are typically relevant in facility agreements in two principal ways:

- as a stand-alone event of default; and
- as a qualification or materiality threshold before certain other events (representations or positive undertakings) constitute events of default.

Inevitably, some financiers will have a higher exposure to industries affected by COVID-19 than others (including hospitality, retail and travel). Financiers may consider invoking MAC/MAE clauses to demand early repayment of its loans or, at the least, to stop further monies being advanced. Alternatively, these clauses may act as a lever to renegotiate the terms of the financing arrangements (including as to pricing or general structuring) between the financier and borrower to address concerns around a borrower's ability to weather the economic impact of COVID-19 and, in particular, service their loans and other financial obligations.

HOW DO THEY WORK?

Event of Default

Facility agreements almost always include the occurrence of MAE as a standalone event of default. In other words, a financier may be entitled to declare an event of default if they consider that a MAE has occurred. The decision as to whether or not a MAE has occurred may often be made by a financier alone rather than needing the occurrence to be objectively determined.

Condition precedent

A MAE may be invoked by a financier as the basis to 'draw stop' initial or further funding as it can act as a condition precedent to funds being dispersed. For example, a facility agreement may expressly state that a financier has no obligation to lend if a borrower suffers a 'material adverse effect' in respect of the borrower's business, operations, property, condition (financial or otherwise), prospects or its ability to perform certain of its obligations under the agreement or that a financier has no obligation to fund if a potential event of default or event of default is continuing.

Loans made to businesses based on projected cashflows are particularly vulnerable to adverse economic shocks. A financier may have inbuilt commercial triggers or 'flags' based on the financier's risk appetite. For example, the MAE/MAC provisions may be linked to certain financial covenants used by financiers as a measure of the performance of a borrower.

One distinction between the current COVID-19 economic climate and other global economic downturns (including the GFC) is that lenders (including credit funds and other alternative lenders) and other players in the market remain active and ready to deploy capital such that there is currently no shortage of liquidity in the market. Whilst financiers may take a view that they are happy to keep funding drawdowns in the current circumstances, this might change suddenly if liquidity begins to tighten.

Representations and Warranties

Financiers typically require a representation and warranty from the borrower that no 'material adverse effect' or 'material adverse change' has occurred at various stages throughout the life of a loan.

For example, construction and or infrastructure loans generally require multiple drawdowns for various stages of a project and a financier will typically require a borrower to repeat such a representation at predefined phases of the project. Importantly, this could lead to an event of default if a borrower represents to a financier that there has been no MAC/MAE since the date of the latest financial information provided to the financier.

Separately, in an M&A context, a MAC clause might permit a buyer to 'mothball' or even terminate a transaction if, as a result of an event or series of events, a significant or material deterioration in the financial

health of the seller or target has occurred between the signing of the agreement and the closure of the deal. In addition, financiers may include material adverse effect (business or market related) conditionality to their commitments to fund the acquisition. For more information on MAC clauses in the M&A context, please see our earlier article, MAC Clauses in M&A Transactions – Implications of Coronavirus.

NEXT STEPS

There is no standard or set definition of 'Material Adverse Effect' or 'Material Adverse Change' in facility agreements. These are generally negotiated on a transaction by transaction basis and intentionally left vague and ambiguous and largely come down to contractual interpretation.

Whilst financiers might not typically rely on the stand-alone MAC/MAE trigger to default facilities and accelerate loans, we are experiencing unprecedented market uncertainty and the question that arises is whether the impacts of COVID-19 will warrant financiers taking this step (as was seen during the global financial crisis). If an event of default was called, this could have a far greater effect than the borrower just having to repay the loans on demand as it may trigger cross default provisions in customer or supplier contracts.

Financiers and borrowers should carefully review the MAC/MAE clauses in their financing agreements to determine whether this could lead to a draw stop or an event of default or other undesired consequences and seek appropriate waivers from their financiers.

ABOUT HAMILTON LOCKE

The Hamilton Locke finance, restructuring and insolvency team have a broad range of top-tier experience acting for a variety of stakeholders in distressed scenarios. For more information on debt trading, distressed investing and finance, or advice on insolvency, distressed debt and restructuring generally please contact Zina Edwards and Nicholas Edwards.

CERTAINTY OF FUNDS IN THE COVID-19 WORLD

First Published:
20 April 2020
Authored by:
Lauren Cloete

WHY ARE CERTAIN FUNDS PROVISIONS NEEDED?

Generally, in acquisition loan agreements (and loan agreements more generally for that matter), there are a number of conditions precedent that need to be fulfilled before lenders are obliged to disburse funds. These conditions precedent will include the requirement that no event of default or potential event of default subsists. The events of default under a loan agreement often include circumstances or events that are outside the borrower's control. An example (which is almost always included as an event of default) is the occurrence of an event or circumstance that will have a material adverse effect on the borrower's (or other group member's) or target's assets, business, operations, property or condition (financial or otherwise). This event of default is commonly described as a 'business MAC'. An event that triggers a 'business MAC' could be as general as a change in law or the introduction of a new government requirement, or as specific as the termination of a material contract. Any of these triggers could be applicable in the current COVID-19 world we are living in.

It is therefore clear that borrowers actually have very little certainty that lenders will advance the requested loans on the requested drawdown date (including, where the loans are required to fund an acquisition, on the closing date for that acquisition). In a number of jurisdictions, given the public scrutiny of transactions involving listed entities, this uncertainty has resulted in codified requirements that a purchaser has

'certain funds' available to it before it is able to enter into an acquisition of a listed entity. In the UK, this requirement is regulated by the City Code on Takeover and Mergers.

In Australia, the two principal methods of acquiring listed entities are by way of a takeover bid (regulated by Chapter 6 of the *Corporations Act*) and a scheme of arrangement (a court approved arrangement). Unlike in the UK, neither of these methods has a strict legal requirement for certain funds but The Takeovers Panel has stated that a takeover offer will not be acceptable if the acquirer does not have reasonable grounds to believe that it will have sufficient funding to complete the takeover and, in the case of schemes of arrangement, the offeror will be required to satisfy the court that it has sufficient funds to pay the scheme consideration and complete the transaction. As such, and from a practical perspective, purchasers in these public to private transactions will generally require that their acquisition financing be provided on a certain funds basis.

Certain funds provisions are not limited to public M&A transactions and are also generally seen in the private space (including private equity backed transactions) especially in competitive bid processes. In these competitive bid processes, financing arrangements with certain funds provisions can be seen as a competitive advantage given that they mitigate the risk that the purchaser will rely on a "financing out" (being that, because the purchaser's proposed financing arrangements did not reach financial close, the purchaser has no obligation to complete the transaction).

WHAT ARE CERTAIN FUNDS PROVISIONS?

In short, certain funds provisions are provisions that set out that a lender is required to fund, and is not entitled to cancel or terminate a loan facility or exercise any other rights typically conferred on the occurrence of an event of default, provided a limited number of conditions are met. These provisions therefore limit the conditions precedent that would otherwise need to be satisfied before a lender is obliged to fund and they have become largely standardised across the Australian market such they generally involve little negotiation between the parties. In addition, the Loan Market Association does provide suggested certain funds language.

The conditions that typically remain, and are required to be fulfilled before funding, are those that are either completely within the purchaser's control or are outside of the purchaser's control but generally considered to be too remote to be triggered on or before the anticipated drawdown date. Certain funds provisions in the Australian market typically include the following conditions:

1. Satisfaction of mechanical conditions precedent (including signing finance documents, causing standard legal opinions to be delivered and issuing a utilisation request);
2. Absence of illegality in respect of funding by the lender;
3. Absence of a 'major default' being:
   - failure to pay an amount under the loan documentation;
   - insolvency of the purchaser or any other day-one obligor;
   - the loan documentation being unlawful, void, repudiated or rescinded;
   - breach of any negative covenants relating to the incurrence of finance debt, granting guarantees or loans, giving security, making acquisitions, disposing of assets or entering into mergers; and
   - any representations becoming false or misleading and which relate to status, power and authority, binding obligations, transactions under the loan documentation being permitted and requisite authorisations to enter into the loan documentation;

4. Absence of a breach or non-compliance of the acquisition document by the purchaser or any other circumstance pursuant to which the purchaser is no longer obliged to complete the transaction; and
5. Absence of a change of control in a purchaser.

It is standard for the major defaults and major representations to be limited to the purchaser (often an acquisition SPV) or the purchaser group prior to the acquisition so that their occurrence in relation to the target or its subsidiaries is not a certain funds default and therefore does not cause a drawstop. This is because the purchaser group does not control the target until the acquisition is completed, and so could not, for example, prevent a target group member from incurring finance debt or granting security or taking some other action that could operate as a drawstop.

Fulfillment of lender due diligence and lender satisfaction in respect of the acquisition or scheme documents is not typically a certain funds condition as it is generally accepted that lenders should be signed off on any relevant diligence and documentation (based on a sign-off from their lawyers) prior to committing funds (either by way of a commitment letter or the loan document itself).

Given the influx of foreign lenders (banks and non-banks) into the Australian acquisition financing market, compliance with sanctions and anti-corruption laws have also, from time to time, been negotiated as conditions to the certain funds.

Certain funds provisions do not typically apply for the life of a loan document but will typically apply from the date of signing the debt commitment letter or loan documentation until the sunset date in the acquisition agreement or the latest date on which a purchaser is required to pay the cash consideration to shareholders in a public to private transaction.

MATERIAL ADVERSE CHANGE AND THE CURRENT COVID-19 CLIMATE

The standard business MAC event of default that is normally found in loan documentation is not typically included as a 'major default' for the purposes of the certain funds provisions on the basis that it is entirely outside of the control of the purchaser and this would not be compatible with having certainty of funding. Likewise, a 'market MAC' or an event in the financial, banking, or capital markets that could impair the syndication of any financing provided by the lenders is rarely, if ever, accepted as a condition precedent let alone a condition for certain funds provisions. The one exception to this was during the global financial crisis where lenders were simply unable to syndicate loans that they had underwritten such that, after the GFC there was a brief period where the market MAC was included.

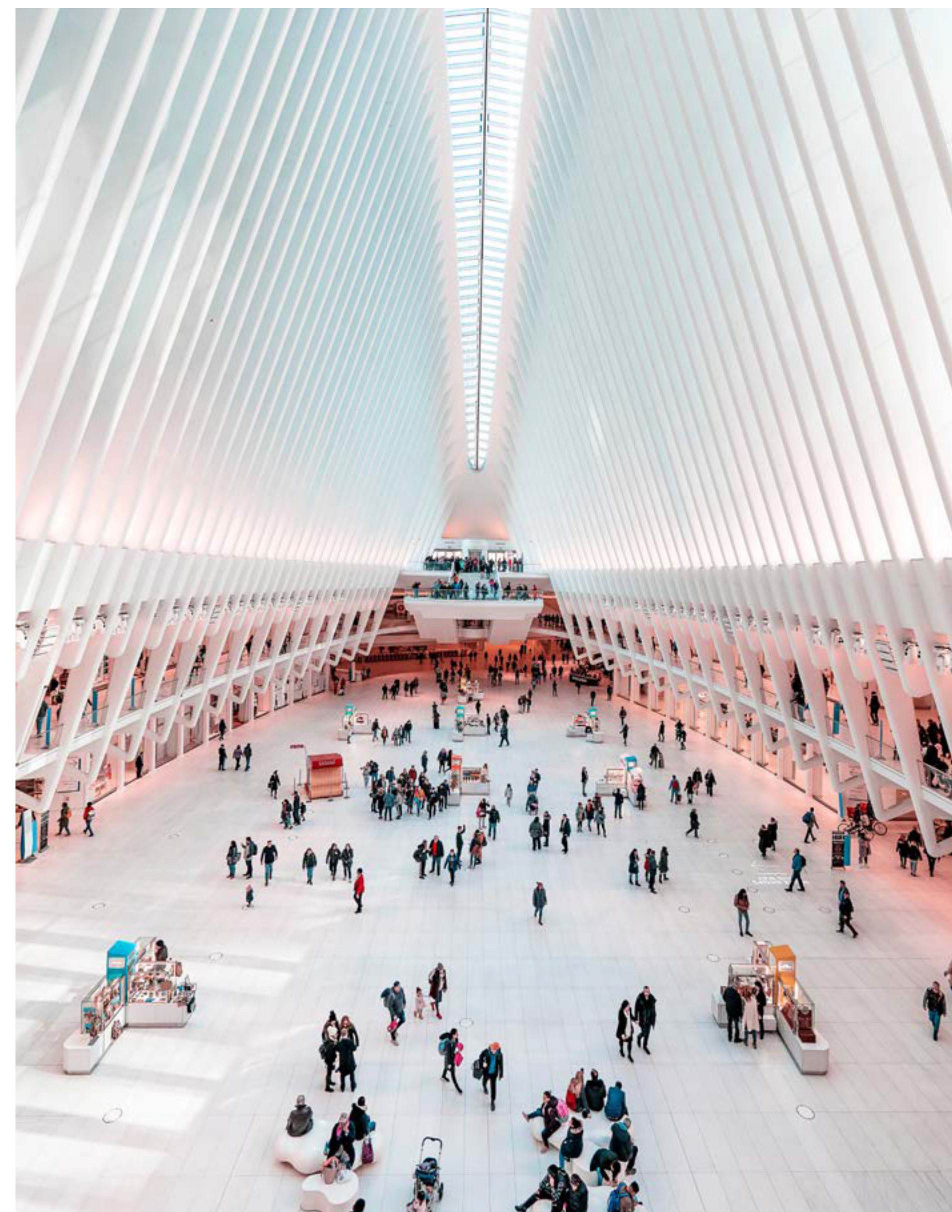
In the UK, MAC conditions are not accepted for the purposes of the certain funds requirements of the City Code on Takeover and Mergers. In the Australian context, the guidance note issued by The Takeovers Panel provides that, if the debt facility used to fund the transaction contains material conditions precedent (including MAC clauses), these should be set out in the takeover offer documentation so that the market is aware of them.

In these times of uncertainty both as to the business or viability of purchasers or targets in certain sectors and the market conditions generally, lenders might try to introduce business or market MAC conditionality as they may be concerned with ensuring that they will not be required to make funding available in circumstances where the credit profile of the purchaser or the target group, or the lending markets generally, are no longer that on which they have based their investment thesis and risk assessment.

Going forward, sponsors and purchasers more generally will need to pay careful attention to the conditions imposed in their certain funds provisions, and also their financing arrangements more generally, so as to ensure that funds will be advanced as and when required.

ABOUT HAMILTON LOCKE

The Hamilton Locke finance, restructuring and insolvency team have a broad range of top-tier experience acting for a variety of stakeholders in distressed scenarios. For more information on debt trading, distressed investing and finance, or advice on insolvency, distressed debt and restructuring generally please contact Zina Edwards and Nicholas Edwards.



THE REGULATIONS ARE OUT

First Published:
20 April 2020
Authored by:
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A snapshot of the Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020.

Several weeks ago, the Treasurer announced important changes to Australia's foreign investment framework which stated that the monetary screening thresholds would be reduced to zero for all actions. We discussed those changes and their implications here, while we waited for the detail of the changes to be revealed in the updated regulations.

Those updated regulations are out now. The *Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020* are short, sharp and do not add much detail beyond what the Treasurer announced and FIRB indicated on their FAQ page.

The key headlines to note are:

THRESHOLDS ARE ZERO

All monetary thresholds are now zero for all actions. This means that many transactions which previously would not have required foreign investment notification will now either require approval before the transaction can proceed (if it is a notifiable action) or be subject to later review by FIRB if it is a significant action).

However, this change does not impact on the tests that need to be applied to determine if an action is a notifiable or significant action – the only difference is that the monetary screening thresholds for all actions is now $0 (instead of changing based on the nature of the investor, the type of transaction or whether the transaction is in a prescribed sector).

This change means that it is now best practice to assume that any foreign investment in Australia is a notifiable or significant action and then to apply the analysis and determine if any exemptions apply.

EXEMPTIONS UNCHANGED

There is no impact to any exemptions that are currently available in the legislation or regulations, which include the exemption around money lending agreements for taking security and foreign shareholders taking up pro rata entitlements in a rights issue.

ANNOUNCEMENT TIME EXEMPTION

These changes commence from the announcement time, being 10.30pm (AEST) on 29 March 2020. The updated regulations state that any agreements entered into before the announcement time, whether conditional or not, are exempt from the changes. This is an important exemption which was flagged by FIRB and discussed in our previous article.

Since the regulations do not offer detail around what constitutes an ‘agreement entered into’ before the announcement, we expect that a key question will be whether email agreements or heads of agreement will qualify for the exemption. Currently, the legislation casts a broad net over what can constitute an ‘agreement to acquire an interest’, so it will be interesting to see if FIRB clarifies this point in their Guidance Note. Certainly, the fact that FIRB have not taken this opportunity to address various seemingly unintended consequences from the changes suggests that their view is that an application should be made if there is any doubt.

TIMING IMPLICATIONS

The Treasurer warned that applications could now take up to six months to be assessed and priority will be given to applications which protect Australian jobs and businesses.

These updated regulations do not address the extended application process because the statutory deadline is set out in the legislation rather than the regulations (which means it would require Parliament to amend the legislation). However, FIRB already has levers at its disposal to extend timetables, both at a statutory and practical level.

The key takeaway is that parties entering into transactions or arrangements should:

- prepare for a six month delay to the transaction timetable because applications will not be assessed on a “first in first served” basis, but rather applications which persuasively show how they secure Australian jobs will jump to the front of the queue; and
- be mindful of the extended timeframe when considering timing implications to your deal (such as sunset dates, working capital targets and earn out metrics, protections to deal with the extended time between signing and completion).

A practical point to keep in mind is that FIRB have hired (and are hiring) new staff to deal with the expected wave of new applications. As in any industry, inexperienced case managers are likely to rigorously follow checklists when assessing applications. For applicants, it will now be more important than ever to take the time to put together a thorough and detailed application which addresses all relevant factors to avoid even further delays.

COST IMPLICATIONS

Transactions that are captured by these changes will need to make an application to FIRB. This can have a significant impact on the deal economics because application fees can range from $2,000 to $100,000+. Here is a fee estimator.

Note that FIRB have indicated that they may consider refunding application fees for applications made before the announcement date where parties decide not to proceed due to the extended timetable.

It is expected that FIRB will release a Guidance Note on these changes soon, so keep an eye out for that on their website.

ABOUT HAMILTON LOCKE

Hamilton Locke is a corporate law firm specialising in complex corporate finance transactions, including mergers and acquisitions, private equity, finance and restructuring, litigation, property and fund establishment.

If you would like any guidance on these changes and how they affect your transaction, please contact Brent Delaney, Partner or Joshua Bell, Senior Associate.

RAISING CAPITAL IN UNCERTAIN TIMES – UPDATES TO THE ASX REFORMS TO FACILITATE CAPITAL RAISINGS

First Published:
27 April 2020
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With market volatility continuing to be driven by the economic and social upheaval caused by COVID-19, the number of entities that are finding themselves with a need to raise capital is ever increasing. All entities that rely on revenue/earnings for cash flow over the next 6 to 9 months will need to consider raising debt or equity capital.

In our recent article Raising Capital in uncertain times we considered at a high level the options that were previously available to listed entities that may find themselves particularly impacted by these difficult times. We queried whether the investor market would be supportive of capital raisings in the same way they were during the GFC, and discussed some of the legislative and regulatory reforms that were introduced shortly before and during the GFC that assisted entities to replace debt financing and shore up balance sheets swiftly and efficiently at a time of volatility and uncertainty.

Despite this, on 31 March 2020, ASIC and ASX introduced temporary measures intended to facilitate rapid capital raisings during COVID-19. We first described these temporary measures in our article Raising Capital in uncertain times – ASIC and ASX reforms to facilitate capital raisings. However, following a chorus of objections from certain market participants, and consultation with ASIC, ASX has now updated the temporary measures with the intention to improve the overall operation.

ASX DEVELOPMENTS – 22 APRIL 2020 & 1 MAY 2020 UPDATES

In its ASX Compliance Updates released on 22 April 2020 and 1 May 2020, ASX updated and clarified the measures introduced on 31 March 2020. The updated temporary measures are as follows:

Back-to-back trading halts

ASX is continuing to permit an entity to request two consecutive trading halts, totaling 4 trading days, to assist entities to execute any form of capital raising (not just an accelerated pro-rata offer as was provided for in its 31 March reforms).

However, ASX has now made it clear that in its request for such a trading halt, the entity must state that the 4-day halt is for the purpose of considering, planning and executing a capital raising to raise urgently needed capital. Consecutive trading halts are not permitted for any other purpose.

If an entity simply requests a regular trading halt, ASX will only grant it a single trading halt for a maximum of up to two trading days and will not consider a subsequent application from the entity for a second consecutive trading halt.

If the capital raising cannot be executed within the extended 4-day timeframe, an entity can request voluntary suspension which can now be for a period of 10 days without limiting the ability of an entity to raise capital through a 'low doc' offer.

Temporary Extra Placement Capacity waiver

ASX is continuing the temporary increased placement size in any 12 month period of 25% (Temporary Extra Placement Capacity), subject to the entity undertaking the placement in conjunction with a pro-rata entitlement offer (standard or accelerated) or a SPP – in each case at the same or lower price than the placement price. The normal 'supersize' waiver is also included in the class order waiver.

Under the amended terms of the Temporary Extra Placement Capacity waiver, ASX requires the entity to do the following within 5 business days of completing the relevant placement:

- announce to the market: (a) the results of the placement; (b) reasonable details of the approach that the entity took in identifying investors to participate in the placement and the key objectives and criteria it followed in determining their respective allocations (including whether one of the objectives was a best effort to allocate pro-rata to existing holders, and any significant exceptions/deviations from those); and (c) that, as far as the entity is aware, no securities were issued or agreed to be issued in the placement to any person referred to in ASX Listing Rule 10.11 without complying with one of the exceptions set out in ASX Listing Rule 10.12 (e.g. the placement being conditional on shareholder approval).

- supply ASIC and ASX (in the case of ASX, not for release to the market) a detailed allocation spreadsheet that shows full details of the persons to whom securities were allocated in the placement including existing holding, number of securities the investor applied for or was offered in the placement and the final allocations (including any zero allocations).

A 25% placement capacity is already available to entities that fall outside the ASX 300 and have a market cap equal to or less than $300 million, and sought shareholder approval to increase their placement capacity at their AGM under ASX Listing Rule 7.1A. Entities that are already eligible to use this additional placement capacity will be able to use their additional placement capacity or the Temporary Extra Placement Capacity (but not both).

ASX has noted that this is a one-off measure that can only be used for one placement and entities cannot obtain shareholder approval to replenish this temporary placement capacity under the listing rules.

Temporary reforms relating to SPPs

In relation to SPPs, ASX is continuing to waive the usual SPP restrictions around SPP price and number of securities that may be issued under the SPP, and instead will simply require that the follow on SPP occurs at a price equal to or lower than the placement price. Further, if an SPP is undertaken without a placement, ASX is waiving the pricing restrictions usually set out in the ASX Listing Rules and allowing the SPP to be undertaken at any price determined by the board.

Additional updates to the Temporary Extra Placement Capacity waiver as it applies to SPPs include:

- if there is a limit on the amount to be raised under the SPP, the entity must use all reasonable endeavours to ensure the SPP participants have a reasonable opportunity to participate equitably in the overall capital raising and must disclose why a limit is in place and how the limit was determined in relation to the total proposed fundraising;
- expanding the existing provisions requiring the scale-back arrangements for SPP offers to be applied on a pro-rata basis to all participants to allow that to be based either on the size of their existing security holdings or the number of securities they have applied for; and
- allowing parties covered by listing rule 10.11 (including directors and related parties) to participate in an SPP on the same terms as other security holders.

Non-renounceable Offer Ratios waiver

ASX is continuing to waive the one-for-one cap on non-renounceable entitlement offers and instead listed entities are expected to choose a ratio for their non-renounceable entitlement offer that meets their capital raising needs and that is fair and reasonable in the circumstances.

New process requirements

A listed entity wishing to take advantage of the Temporary Extra Placement Capacity waiver or the Non-renounceable Offer Ratio waiver must, before the entity undertakes the relevant capital raising, provide a confidential notice to ASX that clearly sets out the circumstances of the capital raising, including whether the capital raising is proposed to be made to raise urgently needed capital to address issues arising in relation to the COVID-19 crisis and/or its economic impact, or if the capital is needed for some other purpose. In an ASX Compliance Update dated 1 May 2020, ASX advised that these discussions are best held as early as possible and not left to the evening before the proposed capital raising, especially where a capital raising is not COVID-19 related or urgently needed.

Further, ASX has reconfirmed that the class waivers are not specifically limited to capital raisings relating to the COVID-19 crisis and/or its economic impact, however, where a capital raising is not COVID-19 related and not urgently needed (e.g. to raise capital predominantly for “growth opportunities” or unidentified potential future acquisitions), ASX may query whether (a) it is appropriate for the entity to have the benefit of the class waivers or (b) the capital raising should be made in accordance with the existing limitations in ASX Listing Rule 7.1 or else be submitted to security holders for approval under that rule.

As noted in the ASX Compliance Updates dated 22 April 2020 and 1 May 2020, ASX has now specified its ability to withdraw the new class waivers from an individual listed entity at any time and for any reason by giving the entity written notice to that effect. It may also withdraw the class waivers prior to their scheduled expiry date of 31 July 2020 for all listed entities with notice to the market to that effect. Further, in addressing whether ASX should exercise these powers, ASX will need

to understand the structure of the capital raising and the allocation policy for any placement, particularly where the capital raising is neither COVID-19 related nor urgently needed.

Application of the reforms

Many entities are already taking advantage of the measures introduced on 31 March 2020 and we expect many more entities are likely under funding pressure coupled with the need to raise capital rapidly to survive. However, as we previously noted, in structuring their capital raisings, entities must remember their obligations to consider fairness between shareholders – both institutional and retail – and structure offers where possible to help achieve fairness. This requires directors to balance a range of considerations, such as the need for quick and certain capital, and the cost to, and possible dilution of, existing securityholders – an important reminder highlighted by both ASIC and ASX in their earlier market releases and further evident by the updates to the temporary measures released on 22 April 2020. As noted in the market release on 1 May 2020, ASX has advised that where a capital raising appears to be structured equitably from a security holder perspective it is unlikely to withdraw the benefit of the class waiver even where the capital raising is not specifically COVID-19 related or urgently needed.

By including a condition that placements utilising the Temporary Extra Placement Capacity waiver must be undertaken in conjunction with a capital raising that is made available to retail investors, ASX is ensuring retail securityholders have an opportunity to participate in the offer at the same or a lower price to institutional investors. However, this only assists to an extent, and even where retail investors have the appetite to participate in the retail component of such an offer, which at this point in time may be low, the practical effect is still likely to be significant dilution for retail investors. Boards will need to take care to consider properly and document properly the process by which it is decided to take advantage of the increase in placement capacity, given the potential for adverse effect on minority shareholders.

The updated temporary measures that require entities utilising the Temporary Extra Placement Capacity waiver to disclose: (a) to the market reasonable details of the approach the entity took in identifying investors to participate in the placement and the key objectives and criteria it followed in determining their respective allocations including whether one of the objectives was a best effort to allocate pro-rata to existing holders, and any significant exceptions/deviations from those; and (b) to ASIC and ASX (not for release to the market) a detailed allocation spreadsheet showing full details of persons to whom securities were allocated and the number of securities allocated, including existing holdings, number of securities applied for and any zero allocations), are a response to complaints and concerns regarding the dilutive capital raisings that have been undertaken since the temporary reforms were first introduced. The additional best endeavours obligation on an entity undertaking an SPP in conjunction with a placement relying on the Temporary Extra Placement Capacity waiver to use all reasonable endeavours to ensure SPP participants have a reasonable opportunity to participate equitably in the overall capital raising is another means by which ASX is encouraging directors to treat their shareholders fairly.

The changes made by ASX to the class waivers reflect ASIC's expectation that directors must provide transparent disclosure to the market about the capital raising decisions they are making which are required to be in the best interests of the company. In its media release 20-097MR dated 23 April 2020, ASIC has stated that it will be reviewing

the allocation spreadsheets provided by issuers and monitoring the disclosures made by companies about placements, rights offers and SPPs to ensure they are accurate, sufficiently detailed and provide meaningful, rather than 'boiler plate' disclosure. ASIC has stated that, for example, the following disclosures would require additional information to be provided:

- 'largely on a pro-rata basis to existing shareholders' should also include reasons why some existing investors were treated differently; and
- '80% to existing holders', does not explain the basis for that allocation or whether it was done on a pro-rata basis.

Interestingly ASIC has stated that it considers the enhanced disclosure required under ASX's Temporary Extra Placement Capacity waiver is also appropriate for other capital raisings that do not need to rely on the waiver and therefore encourages entities to make these types of disclosures for all placements and SPP's.

However, despite these efforts, the question remains as to whether the updated temporary measures to facilitate capital raisings, in particular the Temporary Extra Placement Capacity waiver, treat retail investors fairly. We expect the inevitable result of dilutive capital raisings in this market, as in all downturns, will continue to be a transfer of value away from the small, typically retail investors, to the large.

Nevertheless, as we have seen to date, we expect the updated temporary measures will continue to have the desired effect – to help facilitate capital raisings.

ABOUT HAMILTON LOCKE

If you are a business that may need to raise funds, it is important to start thinking about this now, as we expect there to be many more entities in need of capital in the coming weeks and months. If you are considering a capital raising or would like to discuss the contents of this article, please contact Patricia Paton.

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PART 3, 15 Managing Liquidity

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Samuel is a financial services regulatory lawyer that has considerable experience on funds management, wealth management, consumer credit and protection, payment services and open banking, fintech and regtech, anti-money laundering and culture. Samuel also advises financial services organisations on corporate governance and risk management matters. He has a particular interest in sustainable finance, responsible investment and culture within financial services.

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ABOUT

Bobby is a paralegal working in the property team. Working under the supervision of John Frangi, Bobby has gained experience in various real estate transactions, including retail and commercial leasing matters (including large format supermarket leases), telecommunications licences, acquisitions, disposals and undertaking due diligence.

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