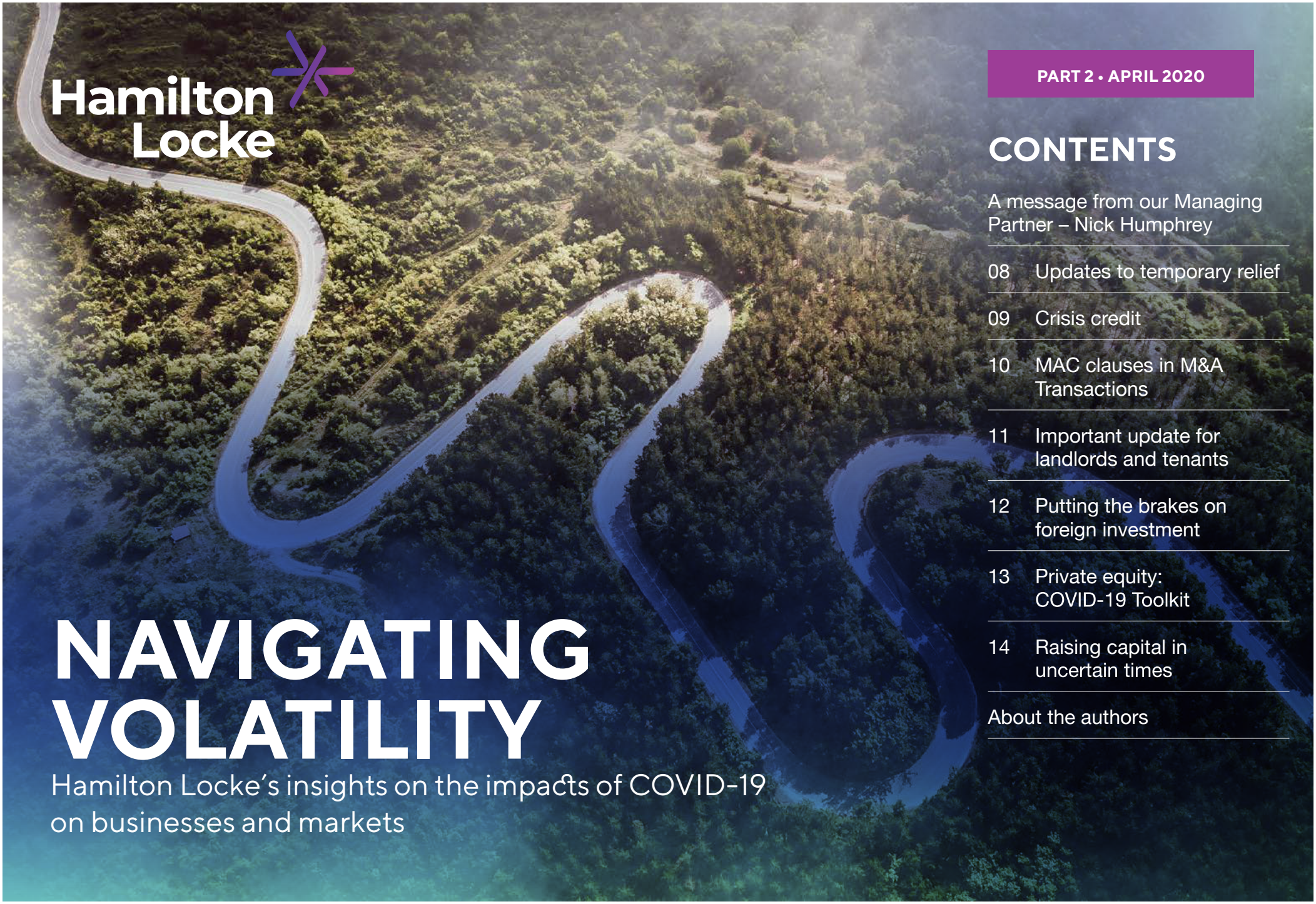


Hamilton Locke

PART 2 • APRIL 2020

NAVIGATING VOLATILITY

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

CONTENTS

STRATEGIES FOR MANAGING STRESS AND UNCERTAINTY IN COVID-19 CRISIS

The current COVID-19 crisis is creating significant uncertainty, anxiety, isolation for many people. This article explores some techniques you can use to stay calm and combat those feelings.

STAY POSITIVE

A key element of managing stress is to remain positive and avoid negativity. Often our minds start worrying about the worst things that can happen. We get more and more pessimistic. If you catch yourself dwelling on negative self-talk, the trick is to gently tell yourself to be positive and focus on the facts and that you can never accurately predict the future.

Identifying and labelling your thoughts as just thoughts (rather than the facts) will help you break the downward spiral of negativity. Another strategy is to spend time journaling and writing down what you are worried about. The process of writing down your thoughts usually helps put them into perspective, so they are rational (rather than emotional) and will hopefully provide clear-thinking.

You have a choice to be negative or positive. To be reactive or proactive. To be the victim or the one in control. Stop blaming everyone else or outside circumstances (poor stock market, you are not strong enough, you have no power). Start using positive language both to yourself and when discussing issues with others:

Negative	Positive
There is nothing I can do	Let's figure out how to solve this
That's not my fault	We can't change the past, but we can make the future better
They won't let me do that	I will figure out a persuasive argument to convince them to let me do that
Nothing works, there is no point	I can fix this
They are so frustrating	I will be patient with them

So instead of focusing on the negatives and playing the blame game, own the problem, be determined to find a solution. If you think and speak using reactive language, you are playing the victim and it becomes a self-fulfilling prophecy: you will convince yourself that you are not in control and there is nothing you can do.

FLOW

When you are present and in the moment and immersed in your task, you forget about your stresses and anxieties. Your focus is so complete that there is no attention left to think about your problems other than completing the task at hand.

A common cause of stress is the feeling that we are not in control. We feel that external factors, outside our direct influence, are threatening (or potentially threatening) you and your family's financial status or personal wellbeing. For example: a client switches to another firm; the newspapers report that the stock market has fallen further.

Flow boosts our sense of control. During flow in work activities like writing articles or solving complex problems or outside work such as martial arts, yoga, cooking, sailing, chess players, participants report a sense of calm and complete control. They feel like everything is in sync and aligned. This sense of control is often lacking in everyday life.

Another source of stress is anxiety that we are not achieving our extrinsic goals (power, money, material possessions). We feel we deserve more money, we crave fame and status, we want a bigger house, nicer car. We trudge along on the treadmill hoping that one day we will achieve these things. Flow helps break this cycle because when performing tasks in this mindset we enjoy performing that task in and of itself, in part because we feel a sense of control and also because we feel like are skills are growing to master the challenges of the task.

The more we intrinsically enjoy a task, the less and less important the extrinsic drivers become to us.

AVOID EXCESSIVE "WHAT IF?"

Most executives and professionals pride themselves on their ability to conduct extensive "what if" scenario analysis. They use it as a tool to mitigate risk and explore potential downside. However, excessive "What if?" analysis may exacerbate your stress and anxiety. Planning before a crisis happens is powerful, but once an event has happened it is far better to just get on with solving the problem rather than worrying about it, re-calibrating the "what ifs" or rehearsing the upcoming arguments.

GRATITUDE

"Happy people aren't always grateful, but grateful people are always happy"

Spend time every day to consider all the things big and small that you are grateful for. Keep a journal and when you sit down at your desk first thing each day, don't log-on and check your emails, instead spend a few minutes journaling. It is a powerful tool to centre you.

It can be as simple as acknowledging the beautiful flowers you noticed the day before when you were walking in the park or how grateful you are that your family are well and safe or how much you enjoyed dinner with your spouse/partner the week before.

Gratitude also improves your mood, because it reduces the stress hormone cortisol by a significant 23%. Research conducted at the University of California found that people who worked to cultivate a mind-set of daily gratitude experienced improved energy, lower stress, better mood, and overall improved physical well-being.

EXERCISE

Exercise is one of the first things busy people cut from their routines when they are under pressure and stressed. However, exercise can help reduce stress in a number of ways.

Exercise makes you feel like you are more in control of your time and your life – if you get up half-an-hour earlier and go to the gym or go for walk you are seizing back part of the day. It also releases feel good neurochemicals.

Even mild exercise, for as little as ten to fifteen minutes, releases gamma-Amino butyric acid (or GABA), a neurotransmitter that reduces stress by soothing you and helping you to control your emotions.

The activity will trigger the release of adrenaline and other stimulating hormones, which sharpens your focus and speeds up your metabolism. Have you ever noticed after going for a walk, jog, bike ride or doing a session at the gym, that you feel energised? These hormones tend to have lasting effects and will keep you energised for several hours.

MINIMISE ALCOHOL AND COFFEE / MAXIMISE WHOLEFOODS

Drinking excessive alcohol is not the answer to stress. It is a depressant, so whilst drunk your stress may seem magnified. The next day you will be tired and hung-over, releasing more stressor chemicals.

Drinking caffeine (coffee, tea, energy drinks) triggers the release of adrenaline, one of the neuro-chemical sources of the “fight-or-flight” response, a survival mechanism that forces you to stand your ground and fight or run for safety. Adrenaline forces you to make quick decisions. Fine when you are escaping from a sabre-tooth tiger but not helpful when managing a sensitive political situation. Caffeine has a long half-life and can stay in your body for up to 6 hours. In turn this may cause sleeplessness, another stressor. I am trying to cut back from my normal 5 cups a day!

Eating right is also key. Your mum was right – eat a balanced diet with lots of real foods (especially vegetables, high-quality fish, meat, eggs). Junk food and in most people wheat/gluten/sugar create inflammation which has been linked to depression, anxiety, sleeplessness. Again, keeping a journal will help you track your moods and correlation to inputs like food / alcohol (just be aware it can take days for poor choices to wash through your system, so don’t expect immediate results).

MINDFULNESS

"We can't change the obstacles that life puts in our way, but we can change how we react to them."

Most techniques for managing stress revolve around external factors, such as seeking balance, getting sleep, avoiding coffee, planning regular breaks or playing sport. Mindfulness techniques focus on internal aspects. So rather than trying to change the external stressor, it instead focuses on trying to change how you perceive and experience that stressor.

You can experience the same event in completely different ways. You can react mindlessly and automatically, usually in a way that exacerbates the problem (for example, by reacting with anger you will provoke further conflict). Alternatively, you can respond mindfully, with full attentiveness and boost your consciousness, thereby opening up a range of potential responses and actions to influence the outcome. It is about seeing the turmoil arising from your instinctive reactions for what they are: emotions and feelings. Remember the mantra: you are not your thoughts. So instead of reacting blindly to an event or stressor, focus on the outcome you want to achieve and then the best reaction to achieve that outcome.

Don't confuse meditation (discussed below) with mindfulness. Meditation is just a way of practicing mindfulness – the hack here is to be self-aware and catching yourself when you are reacting mindlessly.

MEDITATE

This is a powerful daily ritual. There are a few different techniques but here are some basics:

Find a quiet spot	Find somewhere without noise, interruptions or distractions.
Timer	Set the timer on your phone for say 10 to 15 minutes. Newbies can try a shorter time, say 5 minutes and work up to a longer session over time.
Sit down comfortably	You can sit on the floor or even in a chair; you don't have to sit cross-legged. You can also try lying down, as long as you are comfortable, and your spine is straight.
Close your eyes	It feels most natural to close your eyes. Alternatively focus your eyes on a spot on the wall or floor.
Focus on your breath	Start to breathe slowly and deeply in and out of your nose. Focus your attention on a particular spot like your chest or belly. Really experience your "in" breath, then "out" breath. Another alternative here is to do a body scan – some people find this a lot easier. Just focus on one part of your body and scan down from your head to the tips of your toes, slowly and one body part at a time (e.g. eyes, mouth, neck, shoulders etc).
Corrections	Every time your mind wanders and you lose focus on your breath, catch yourself and bring your mind back to your breath. It may help you to stay focused on breathing if you make a mental note of "in" and "out". Another option is to count your breaths to 10, then start again.

FOCUS ON WHAT YOU CAN CONTROL

One of the underlying themes here is focusing on the things we can control. Try and stop worrying about all the things you cannot control (global spread of COVID-19, stock market volatility, whether the market will rebound) and put your effort into the things you can. You can implement these changes in routine (start journaling, practice meditation, exercise daily, sleep right). You *can* be pro-active – write an article or work on a task you have been putting off when you were busy. You *can* ring clients or customers and ask them what they are seeing in the market (there is just no point in worrying about whether they will give you work immediately).

SLEEP

Sleep is critical to re-charge your brain and helps boost your memory, focus and also self-control. Sleep deprivation exacerbates stress. A study by University of Rochester found that the brain has no lymphatic system, the way we remove waste from the rest of the body instead it is primarily removed when sleeping, otherwise feel sluggish. So, if you are not sleeping enough your brain connectivity is slowed down by the build-up of waste (like microbes and other cellular debris)! Develop good sleep "rituals" (eg. same time, hot shower, screen free for an hour beforehand). Magnesium and melatonin are good supplements to help sleep.

STAY CONNECTED

Working from home can be very isolating. The usual daily interactions in the office and socially are normally powerful sources of connection, energy. So while you can't physically meet a friend for a coffee or a drink, make sure you do regular social calls or VCs with family, friends, colleagues.

HUMOUR

Laughter and jokes play a key role in keeping your spirits high. So jokes, memes, light-hearted banter are all good stress releases. The emergency response and high-risk workers like paramedics, soldiers, fire-fighters are all well-known to use humour as a way to soften the crisis which envelopes them on an often day to day basis.

THE WOODSMAN'S DAUGHTER

Below is a fable which I really like and gives a good perspective:

There was once a young girl who lived with her mother and father in the woods. It was bitterly cold and food was hard to come by. The girl's clothes were threadbare and torn. Her father was a woodsman and barely made enough money for them to live. She complained to her mother that her life was harsh and unfair. The mother gently took the girl by the hand into the kitchen and put on three pots of water to boil. She then placed a carrot in the first pot, an egg into the second and coffee grounds into the third.

The mother let the pots come to the boil. When they had finished, she ladled the carrot it in a bowl and the egg into a bowl. Then she poured the coffee out into third bowl.

The mother turned towards her daughter and said, "What do you see?"

With a puzzled look her daughter replied, "A carrot, an egg and coffee."

The mother shook her head patiently and asked her to touch the carrot. The daughter did as she was instructed and noted it was

mushy and soft. The mother then asked her to remove the shell from the egg. The egg inside had hardened. Finally, the mother asked her to taste the coffee, which was rich and aromatic.

"I don't understand. What is your point, mother?" asked the daughter impatiently.

"Each of these objects faced the same adversity but each reacted differently," said the mother. "Before the ordeal, the carrot was strong and hard but became mushy and weak. The egg was also changed by the boiling water. Before the ordeal it was protected by its shell. Afterwards it looked the same but inside it had become hardened. The ground coffee beans, however, reacted differently to the ordeal. They had actually changed the water. When the water gets its hottest the beans release their full flavour and aromatic fragrance."

The daughter nodded her head as if she understood. "I see!" exclaimed the daughter.

"When faced with a trial or ordeal I have to choose. Am I like a carrot? Which seems strong but wilts with adversity. Am I like the egg? That starts with a fluid spirit but after ordeal or trial, becomes hardened and stiff? My shell may look unchanged but inside I am tough with a cynical spirit and bitter heart?"

The mother smiled and encouraged her daughter to finish.

"Or am I like the ground coffee beans? The coffee actually changes the boiling water. It actually changes adversity into something which is quite magnificent. If I am like the coffee bean, when things are at toughest, I am at my best better and change the situation around me."

Stay safe. Stay connected. We will get through this together.

ABOUT THE AUTHOR

Nick Humphrey is the managing partner of Hamilton Locke. He is the Chairman of the Australian Growth Company Awards and author of a number of best-selling books on business and leadership. His latest book is *Summit Leadership: strategies for building high performing teams*, published by Wolters Kluwer. He is also the author of Maverick Executive: strategies for Driving Clarity, Effectiveness and Focus, published by Wolters Kluwer.

UPDATES TO TEMPORARY RELIEF FOR DISTRESSED BUSINESSES AND INDIVIDUALS

First Published:
24 March 2020
Authored by:
Nicholas Edwards, Zina Edwards, Brit Ibanez

The Australian Federal Parliament have fast-tracked a Bill through both Houses of Parliament for an Act to provide economic and in-kind relief for businesses and individuals affected by COVID-19.

The Act, when given the final Royal Assent, will be the *Coronavirus Economic Response Package Omnibus Act 2020*.

The Bill covers a range of topics, including stimulus payments, childcare, superannuation and Medicare levies. We have outlined below three key changes to the *Corporations Act 2001* (the Corporations Act), expanding on our article published on Sunday.

Each amendment discussed below takes effect from the day after the Bill receives Royal Assent, which, while yet to be confirmed, will likely be in the coming days (the Commencement Date).

These provisions are only temporary and will, at this stage, apply for 6 months. None of the proposed amendments discussed below are retrospective. This means, for example, that a statutory demand issued today will still need to be complied with within 21 days to avoid the presumption of insolvency.

1. TEMPORARY RELIEF FOR FINANCIALLY DISTRESSED INDIVIDUALS AND BUSINESSES

The Corporations Act is amended to provide temporary relief for financially distressed individuals and businesses.

For businesses, the minimum threshold of debt for a statutory demand to be issued to a debtor company has been increased from $2,000 to $20,000 and the time for compliance has extended from 21 days to six months. These amendments apply to statutory demands served on or after the Commencement Date only. The period of time to comply with a bankruptcy notice has also been extended from 21 days to six months .

2. INSOLVENT TRADING RELIEF

The relief from insolvent trading will apply for six months from the Commencement Date (the **relevant six month period**). It affords directors temporary relief from personal liability for insolvent trading in the following circumstances:

- the relevant debt is incurred by the company in the ordinary course of the company's business;
- the debt is incurred during the relevant six month period, or a longer period if prescribed; and
- the debt is incurred before any appointment of an administrator or liquidator of the company during the relevant six month period.

The phrase *'ordinary course of business'* requires the debt to be necessarily incurred to facilitate the continuation of the business during the relevant six month period. An example is taking out a loan to shift business operations online. Further circumstances may be outlined in the regulations. Directors will bear the burden of proving the debt was incurred in the ordinary course of the company's business.

A holding company may also rely on the temporary relief from insolvent trading by its subsidiary. To do so, the holding company must take reasonable steps to ensure the that the relevant debt incurred by the subsidiary was done so on in the ordinary course of business.

3. TREASURER GIVEN WIDE POWERS

Under the heading 'Providing flexibility in the Corporations Act', the Treasurer has been given wide powers to exempt classes of persons from the operation of any part of the Corporations Act or modify the operation of the Act in any way.

This power will only be available to the Minister during the 6 months from the Commencement Date.

In order to use this power, the Minister must be satisfied:

- that it would not be 'reasonable' to expect those people to comply with the provisions because of the impact of COVID-19; or
- the exemption or modification is necessary or appropriate to:
  - facilitate continuation of business; or
  - mitigate the economic impact of the coronavirus.

These are extraordinarily wide powers given to the executive during these extraordinary times.

If you have any questions about current events and how they may impact your business, please contact Nicholas Edwards, Zina Edwards or Brit Ibanez.

Our 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.

CRISIS CREDIT: THE ROLE OF PRIVATE DEBT CAPITAL IN VOLATILE MARKETS

First Published:
25 March 2020
Authored by:
Zina Edwards, Nicholas Edwards, Abigail Cowled, Amelia Schubach

As the world faces an unprecedented global health crisis, the escalating global economic crisis is in itself novel and completely unprecedented.

While it may be tempting to draw comparisons to the economic shock experienced by global markets during the 2007 GFC, the current crisis is in many ways vastly different. Importantly, unlike the lack of lender liquidity experienced throughout the GFC, credit funds and other alternative lenders have raised vast amounts of capital over the past few years and remain a viable source of funds for businesses seeking flexible liquidity to see them through the uncertainty ahead.

While domestic and overseas banks focus on mitigating the fall out for current customers from the economic downturn, we are hearing from many private debt providers that have committed capital available to be deployed and are actively looking for good opportunities.

This article will discuss private debt capital as an alternative to traditional bank debt and equity raisings (for equity raising in the current markets see our earlier article Raising capital in uncertain times)

WHAT IS PRIVATE DEBT CAPITAL AND WHY CONSIDER IT?

There are currently over 100 non-bank lenders operating in the Australian market, who have outlayed loans in aggregate of approximately $150 billion. Providers of private debt capital can come in varying shapes and sizes but increasingly private credit funds and other non-bank lenders are cementing their place in the market as alternative sources of more flexible debt. A debt capital provider will have an investment mandate and a preferred asset class (or choice of asset classes) in which they invest, often driven by a particular in-depth knowledge, experience or understanding of the industry to which the preferred underlying assets relate. Because of this specialised and in depth knowledge, we often find private debt capital providers are able to effectively and efficiently understand and cater for the unique lending needs of a business in rapidly changing market conditions.

THE ADVANTAGES OF PRIVATE DEBT CAPITAL

There are a number of advantages to pursuing private debt capital over traditional bank loans or other financing options. These include:

a) greater availability and often risk appetite, particularly when markets are volatile;

b) less reliance on non-negotiable "standard terms";

c) greater covenant flexibility, often driven by a more in-depth understanding of the borrower's business;

d) willingness to consider, and flexibility to provide, more variety in lending structure, including whether the funds are provided as senior, mezzanine or junior debt or as a hybrid structure;

e) frequent willingness to structure financing options that include capitalised interest, deferral of amortisation or balloon repayments, thereby deferring the need to pay interest and make repayments during the current crisis period;

f) ability to take equity upside if necessary for risk sharing in the current environment;

g) more involvement at borrower level with some private capital providers taking board or board observer roles in order to guide businesses; and

h) less regulatory constraints, such as those that typically apply to bank lenders (e.g. prudential capital limits imposed by APRA).

In general, many private debt capital providers are able to assess the borrower's business from more than one angle and can often take a commercial view on short to mid-term risks if they have a clear turnaround or growth strategy.

LIMITATIONS OF PRIVATE DEBT CAPITAL

Despite the many advantages of private debt capital, there are elements of private debt capital which may limit how attractive such debt may be to borrowers:

a) costs;

b) covenants; and sometimes

c) control.

Cost

Private debt is often more expensive to obtain than traditional bank debt. This is not just because interest rates and other lending fees can be higher, but costs will also increase when bespoke finance documents are required, or complicated lending structures require specialised advice. Private lenders may also require returns in excess of interest and fees, such as options, warrants or other profit sharing style arrangements. However, when weighed against the risks to the company of not obtaining cashflow reprieve in an already stressed economy, any such disadvantages tend to pale in comparison to the consequences of not obtaining sufficient funding to survive the crisis period.

Onerous covenants

At the same time, private debt documentation generally includes covenants which provide an early warning sign in the event of any deterioration in creditworthiness of the borrower. The covenants empower the debt provider to engage with the company to remedy issues where necessary. Debt providers in the Australian market, particularly during uncertain times such as the present, tend to also require a more intensive range of covenants than alternate lenders or bond investors in overseas markets.

Control and oversight

A final consideration for a borrower in relation to the private debt market is around control and the level of oversight. Private lenders typically take a more hands-on approach to their debt portfolio investments than traditional banks. In addition to bespoke reporting, forecasting and business plan oversight, some lenders may also require board observer rights, director appointments or even veto decision making rights in respect of certain matters to be decided by the business. The implementation of these measures is going to be particularly likely in the current crisis environment. However, these additional layers of oversight and control should not necessarily be seen as a negative by a board of a company. Private lenders will often bring with them a wealth of business transformation, growth and turnaround experience which can provide useful guidance for the board and business during the volatile months to come.

ABOUT HAMILTON LOCKE

The Hamilton Locke finance, restructuring and insolvency team have deep experience acting for a variety of stakeholders in both debt and other lending structures, and across a wide range of industries. For more information on banking and finance, debt structuring and restructuring or advice on insolvency and distressed debt, please contact Zina Edwards or Nicholas Edwards.

MAC CLAUSES IN M&A TRANSACTIONS – IMPLICATIONS OF CORONAVIRUS

First Published:
26 March 2020
Authored by:
Cristin McCoy and
Morgan Sheargold

As we face increasingly uncertain market conditions, parties involved in an M&A transaction process will need to consider the impact of coronavirus (COVID-19) on the transaction.

The impact may be demonstrated in purchase price negotiations and/or additional protections or risk mitigation provisions in the sale agreement required to address COVID-19. In this article, we consider the operation of MAC clauses and suggest some issues to be considered in drafting for future deals.

Purchasers should carefully consider their options before seeking to rely on MAC clauses as a result of COVID-19 due to its continually evolving nature. If a purchaser wrongfully relies on a MAC clause, this could result in reputational damage or a potential damages claim.

WHAT IS A MAC CLAUSE?

A MAC clause permits a purchaser to claim for damages or pull out of the deal if, in the time between signing and completion, the target business deteriorates or there are adverse economic developments that will affect the value of the business.

MAC clauses typically take the form of:

- a warranty that no MAC has occurred since a particular date (typically since the date of the last set of accounts); or
- a condition precedent to completion that no MAC has occurred between signing and completion.

IS COVID-19 A MAC EVENT?

The operation or invocation of a MAC clause is subject to a number of different triggers including:

- the extent or 'materiality' of the change required to trigger the MAC clause
- whether the term 'materiality' is defined to assess the effect on the target company alone or the proportionate effect on the target company relative to others in the market
- whether the definition of MAC excludes more broad events such as general economic or market conditions
- whether the change has a long-term impact on the target

As such, COVID-19 has the potential to trigger the MAC clause. However, globally significant events are rare, and examples of MAC provisions being called upon in such a circumstance are even rarer. Epidemic or pandemic events such as the SARS epidemic in 2003 or the swine flu pandemic in 2009 and major global political and economic

events, including the 9/11 terrorist attacks, have not contributed significantly to the limited body of case law in this area. There is no one size fits all answer to whether COVID-19 will constitute a MAC. Ultimately, the specific phrasing of the MAC clause and the specific facts and circumstances impacting the target will determine the outcome.

In the last few days, there has been speculation that the sale of Funlab to Archer Capital will grind to a halt, Quadrant has ceased its discussions relating to the acquisition of Total Tools and the Abano Group has given formal notice under the proposed scheme of arrangement that there are circumstances which may give rise to a MAC.

MAC AND COVID-19: DRAFTING CONSIDERATIONS AND IMPLICATIONS

The economic impact of the COVID-19 outbreak is likely to be significant and unpredictable and any future MAC clauses will need to be carefully drafted to ensure they extend to cover this issue. Below are some key drafting considerations for MAC clauses in sale agreements:

- **Carve outs and exclusions:** Economy wide or industry wide events are often excluded from MAC clauses. COVID-19 may encourage target companies to push for MAC clauses that exclude consequences flowing from COVID-19. Whether excluding it completely or specifying a quantitative or qualitative level of financial or operation impact from COVID-19, the MAC clause will need to be drafted with precision and specificity so as to guard against unexpected results. Sellers may try to limit the scope of the MAC so there can be no aggregation of a number of consequential effects of COVID-19 where only a single event can trigger the MAC.
- **Long lasting consequences:** There is conflicting information surrounding the proliferation of COVID-19. Some experts predict

months to years, while others predict a shorter period. Sellers may want to ensure that, in order for a MAC to be triggered, it must have an adverse impact on the maintainable earnings of the business and is not due to a one-off event.

- **MAC metrics:** Consider what the appropriate trigger should be in addition to a reduction in earnings or net assets, such as unavailability of key personnel (or a certain proportion of the workforce), suppliers or manufacturers or a standstill arrangement being entered into with financiers or landlords.

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.

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.

COVID-19 LEGISLATION AMENDMENT (EMERGENCY MEASURES) ACT 2020: **IMPORTANT UPDATE FOR LANDLORDS AND TENANTS**

First Published:
28 March 2020
Authored by:
John Frangi, Marcus Cutchey, Bobby Nader

In response to the COVID-19 pandemic, Parliament on 24 March 2020 passed the COVID-19 Legislation Amendment (Emergency Measures) Act 2020 (NSW) ('**the New Act**').

The New Act was assented to on 25 March 2020. The object of the New Act is to implement emergency measures as a result of the COVID-19 pandemic.

The New Act will have a significant impact on the operation of the *Retail Leases Act 1994* (NSW) and the *Residential Tenancies Act 2010* (NSW) (collectively '**the Acts**'). The New Act grants powers to the Minister to recommend to the Governor that regulations be made under the Acts which may regulate or prevent the exercise or enforcement and/or impose restrictions on landlords in exercising certain statutory and contractual rights.

IMPLICATIONS FOR LANDLORDS AND TENANTS

The New Act permits the creation of regulations under the Acts for the purposes of responding to the public health emergency caused by the COVID-19 pandemic which may preclude landlords from:

1. **Terminating a lease in particular circumstances.** Landlords may not be entitled to terminate a lease for particular breaches identified by the regulations, which may include non-payment of rent for a specified time period;
2. **Recovering possession of premises.** Landlords may not be entitled to enter and repossess leased premises for certain breaches, notwithstanding any express lease provision to the contrary; and
3. **Exercising or enforcing other rights.** The regulations may stipulate that a landlord may not exercise certain rights it may have under a lease or the Acts, including the right to call on bank guarantees or security bonds for non-payment of rent.

The New Act also permits creation of regulations which purport to exempt tenants (or classes of tenants) from the operation of a provision of the Acts or lease agreement. This could mean that a regulation may exempt tenants from their obligation under a lease to pay rent and outgoings for a period of time.

HOW LONG WILL THE REGULATIONS OPERATE FOR?

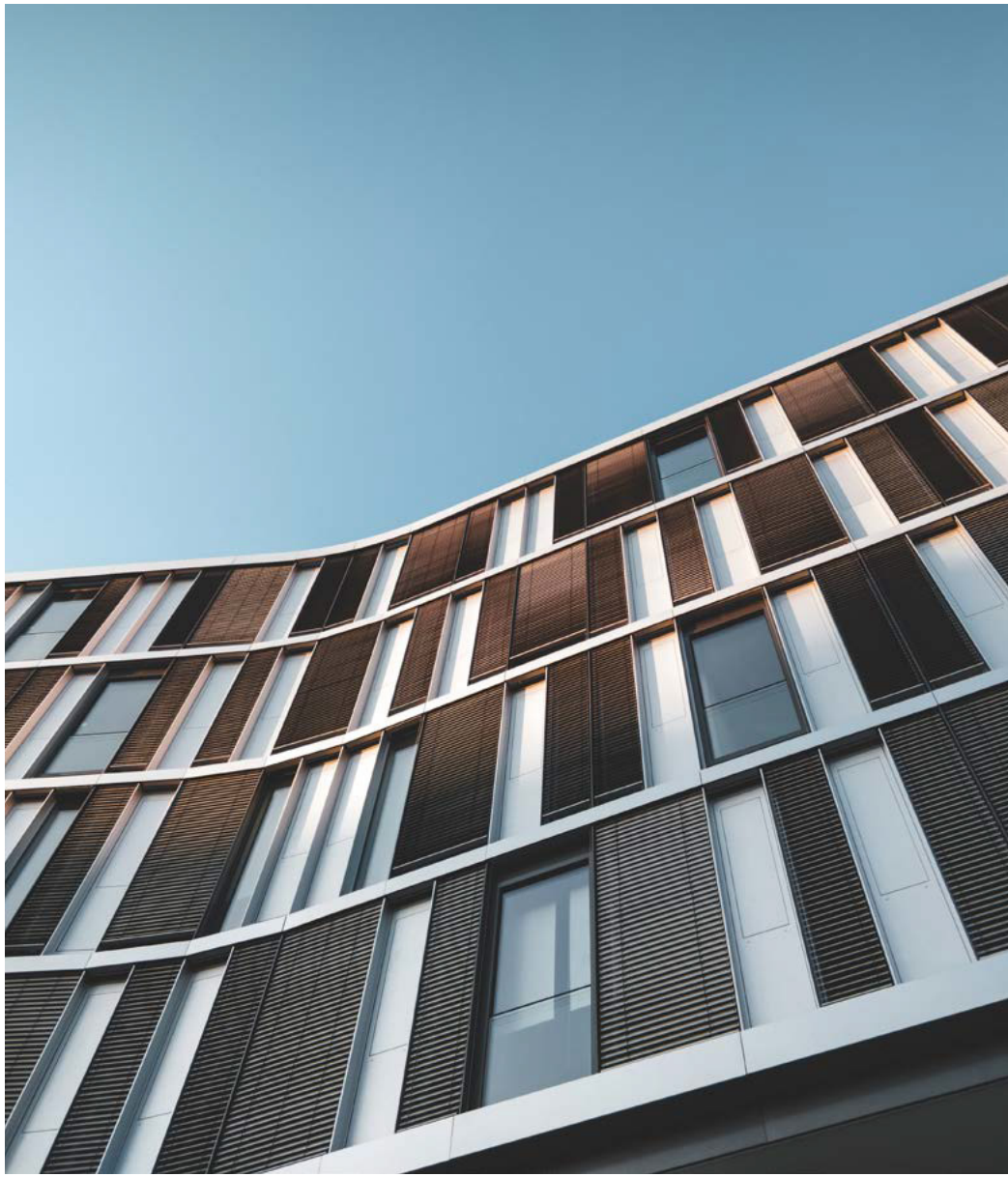
Any regulations created under the Acts will cease to operate on the day which is 6 months after the day on which the regulation commenced, or such earlier day decided by Parliament. Effectively, any regulation exempting tenants from the requirement to pay rent would operate as a 6-month rent abatement, providing these tenants with the ability to manage their expenses and for businesses to continue employing people.

DO THE CHANGES APPLY TO COMMERCIAL LEASES?

The changes are also said to apply to 'any other Act relating to the leasing of premises or land for commercial purposes'. It is unclear whether the changes will apply to non-retail commercial leases. In this regard, we suggest that much will depend on the extent to which businesses operating under commercial leases are able to continue operating from their premises.

We will keep you updated in relation to any further government announcements or changes concerning the New Act.

If you require any assistance relating to retail and commercial leasing transactions, commercial acquisitions and disposals and other real estate transactions, contact partner John Frangi or partner Marcus Cutchey



PUTTING THE BRAKES ON FOREIGN INVESTMENT – ZERO TOLERANCE FROM FIRB

First Published:
31 March 2020
Authored by:
Brent Delaney, Joshua Bell

Important but unexpected changes to Australia's foreign investment framework came into effect from 10.30 pm (AEDT) on Sunday, 29 March 2020 (**Effective Time**) following an announcement by the Federal Treasurer.

The changes reduce the monetary screening threshold to zero for all transactions and flag that the Foreign Investment Review Board (**FIRB**) will work with existing and new applicants to extend the statutory timeframe for applications from 30 days to six months.

These are temporary measures designed to deal with the economic impact of the COVID-19 outbreak by putting the brakes on undervalued Australian assets being picked up at fire-sale prices by foreign buyers without appropriate oversight.

The exact wording of the changes will need to be reviewed when it is available, but they are likely to have serious and immediate implications for inbound transactions involving foreign investors (although there appears to be relief for agreements entered into before the Effective Time).

This article offers some insights into the practical implications arising from these measures.

WHAT IS AUSTRALIA'S FOREIGN INVESTMENT FRAMEWORK?

Australia's foreign investment framework regulates foreign investment in Australia to ensure that investments are in the national interest. This is a multifaceted test that considers issues such as the impact of an investment on national security, competition, tax revenue, the economy and the community more broadly. Under this framework, which is governed by the *Foreign Acquisitions and Takeovers Act 1975* (**Act**) and associated regulations, the Treasurer and FIRB can prohibit or impose conditions on certain foreign investments where they are contrary to the national interest.

Importantly, this framework only captures investments that fall into one of the following categories:

- **notifiable actions**, which require the investor to notify FIRB and obtain approval before undertaking the transaction; and
- **significant actions**, which do not need approval to proceed but may be subject to later review by FIRB (which could lead to the transaction being unwound on national interest grounds).

There are tests that need to be applied to assess if a transaction is a notifiable or significant action. These, include (in brief) that a foreign person (which is broadly defined) must be acquiring the interest, that a specified action must be taken (such as acquiring an interest of 20% or more in an Australian entity or business) and that the relevant monetary screening threshold must be satisfied. For significant actions, there also needs to be a change in control of the relevant entity.

WHAT ARE THE CHANGES?

Thresholds to zero

Until now, the specified monetary thresholds for both notifiable and significant actions depended on factors such as the nature of the investor (for example whether the investor was a foreign government investor), whether the transaction involves land, whether the investor is from a country that has a free trade agreement with Australia or the type of the transaction or asset being acquired (i.e. whether it involves land or is in a sensitive sector).

For example, the threshold is zero for foreign government investors and acquisitions of vacant commercial land, whereas private investors from countries that have a free trade agreement with Australia could buy non-sensitive businesses valued up to A$1.192 billion without requiring approval.

A transaction that otherwise satisfied the other criteria might not be a notifiable or significant action because the threshold was not satisfied. However, that has now changed – the threshold is zero for all transactions, regardless of the nature of the investor or the type of transaction.

Statutory timeframes

FIRB must review an application within 30 days after payment of the application fee (which could be extended by FIRB for a maximum of 90 days). In practice, if FIRB needs more time, they ask the applicant to agree to an extension (which is usually agreed because it is usually in the applicant's best interest to work with FIRB).

However, the Treasurer has announced that FIRB will work with existing and new applicants to extend timeframes for up to six months. Unlike the monetary thresholds which can be changed by updating the regulations, FIRB cannot unilaterally extend timeframes beyond that set out in the Act. It appears that FIRB's approach will be to rely on applicants agreeing to an extension or else use its legislative powers to achieve the same ends.

WHAT THESE CHANGES ARE NOT

It is important to be clear about what these measures do not change, namely:

- **Unchanged process:** There is no change to the tests that need to be applied to determine if a transaction is a notifiable or significant action and no change to the definition of 'foreign person'. In other words, the same analysis for working out whether an action is a notifiable or significant action should still be applied – the only difference is that the thresholds are now zero.
- **Significant actions:** The distinction between significant actions and notifiable actions is unaffected. This means that it is still not mandatory to seek approval for significant actions before completing the investment (unlike notifiable actions). However, there is of course significant deal uncertainty to complete a significant action without prior FIRB approval because the transaction could be unwound in the future.
- **Exemptions:** There is no change to the various exemptions that are available in certain transactions, such as the rights issue exemption for an equity raising and the 'money lending agreement' exemption that offshore financiers typically rely on to obtain security in Australian assets (although note that, as before, this exemption is not available to foreign government investors in certain circumstances).

WHAT ARE THE PRACTICAL IMPLICATIONS ARISING FROM THESE CHANGES?

These measures are likely to affect capital raisings, M&A transactions, land transactions (including long term lease arrangements) and distressed sales where foreign investors or buyers are involved. Some practical implications include:

- **Difficulty raising emergency capital:** These changes will make it more difficult and costly to raise emergency capital from foreign investors to keep a company solvent and with sufficient working capital to survive this turbulent period. To get a FIRB application processed urgently, applicants will need to show how the investment protects and supports Australian businesses and jobs (otherwise, the application may not be considered for up to six months). This is likely to mean that companies needing emergency capital may need to turn to local investors or consider debt funding options (although listed companies may be able to rely on the rights issue exemption in carrying out a discounted rights issue).
- **Restructures:** Foreign-owned multinational groups that have Australian subsidiaries and assets and are undertaking internal restructures to deal with the crisis may now find that the restructure requires FIRB approval. This is likely to delay the restructure which could have adverse implications on their ability to effectively weather the economic storm.
- **Distressed sales:** Administrators, liquidators and receivers will need to reconsider whether it makes sense to pursue a sale process with any foreign bidders in distressed sales because of the timing risk around obtaining FIRB approval.
- **Signed deals:** For transactions involving a foreign investor where the transaction documents have been signed but completion has not yet

occurred, the parties will need to stop and think about whether the transaction is now a notifiable or significant action. If FIRB approval is required, then there are a range of issues that arise. However, the good news is that FIRB have released guidance that the changes will not apply to agreements that were entered into before the Effective Time (regardless of whether they have completed). The question then becomes whether formal agreements need to have been signed or whether heads of agreements or even verbal arrangements will qualify as 'agreements' for these purposes. Under the Act, the concept of 'entering into an agreement' is very broad but FIRB may narrow the scope of 'agreement' (otherwise this is an easy way to circumvent the changes). As always, the devil will be in the detail once the updated Regulations are released.

- **Pre-signed deals:** For agreements that have not been entered into before the Effective Time and which will now require FIRB approval, parties will need to consider the cost implications (application fees can range between $5,000 to $100,000), potential timing delays (which can be up to 6 months unless parties can convince FIRB that the public interest is best served by the application being processed quickly) and deal risk (if FIRB decide not to grant approval or impose onerous tax or information or other conditions as part of their approval).

From a drafting perspective, parties should consider issues such as sunset dates (for example, ensuring that it is long enough not to be inadvertently triggered before FIRB approval is granted), cost-sharing provisions and refundability of deposits if approval is not granted (noting, for example, the opportunity cost for the seller in being locked into a transaction that may not complete in 6 months) and turn their minds to what protections are needed to cater for a longer period between signing and completion (such as more robust pre-completion covenants). There are, of course, other issues that will come to fore in negotiations now, such as setting suitable working capital targets where there is a working capital adjustment to ensure that an appropriate target is set given the uncertainty around the completion date.

There is no denying that these measures will impact on sale processes and capital raisings involving foreign investors that, in some cases, may jeopardise access to financial support for Australian businesses. However, the good news is that the Treasurer made it clear that these measures are temporary and are not an investment freeze.

We expect to see further clarity released by FIRB in the coming days as they respond to feedback from the market and address unintended consequences and hopefully the regulations will adequately address those concerns (such as the exclusion for agreements entered into before the Effective Time). In the meantime, foreign investors and Australian companies seeking investment or doing a deal with a foreign buyer should get on the front foot to understand how these changes affect their transaction and keep an eye out for further guidance from FIRB.

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.

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PRIVATE EQUITY: COVID-19 TOOLKIT

First Published:
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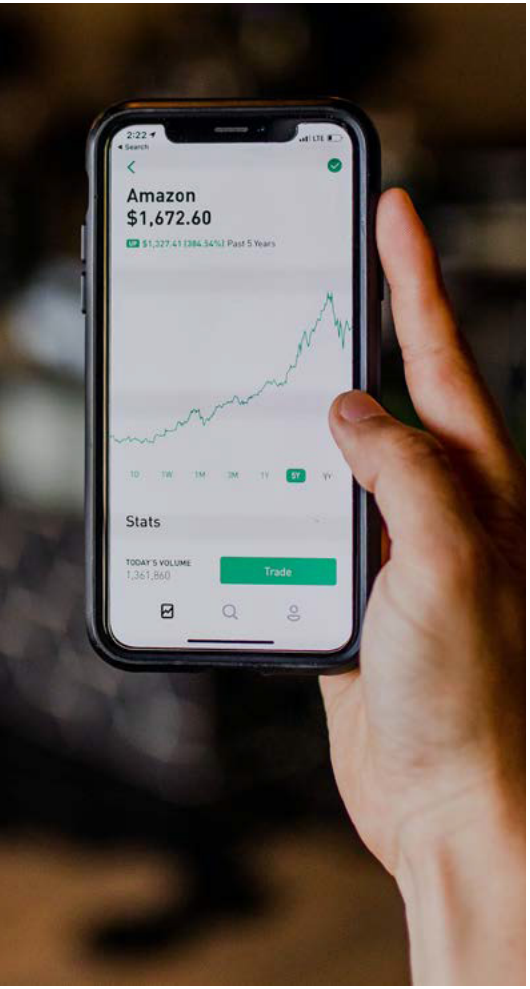


All signs are pointing towards the global economic fallout from the COVID-19 pandemic being far greater than the economic impact of the GFC, particularly after the unprecedented shutdown of non-essential services and the anticipated further lock down in the coming weeks.

In an effort to find some positivity in the increasingly sombre newsreel, in this article we look at 5 factors that may help those private equity funds most impacted by the crisis bounce back (which may not have been available during the GFC).

- **Dry Powder** – private equity firms have more capital available to deploy than during the GFC.
- **Alternative sources of capital** – there is a much larger alternative debt market available, typically offering more flexible solutions than traditional banks.
- **Safe Harbour** – safe harbour provisions coupled with legislation introduced in the past weeks give directors more time to formulate and implement contingency plans.
- **Stand Down** – the response by Government to the COVID-19 pandemic has, for some sectors, enabled activation of the stand down provisions under the *Fair Work Act 2009* (Cth).
- **Team Australia** – the Government, the RBA, regulators and industry have moved together in the past weeks to take unprecedented steps to offer solutions to businesses.

With the sand shifting daily, this article represents the position at the time of posting, noting that further stimulus measures are likely to be introduced over the coming weeks.

DRY POWDER

Private equity funds have a record amount of capital to invest. The Australian Investment Council Annual Report 2019 notes that at the end of 2018 there was US$14.8 billion committed for investments in Australia, compared to US$9.7 billion at the end of 2008. With the aggregate capital raised by domestic funds also tripling between 2011 to 2018, there is no doubt that funds now have access to more capital. While some of our private equity clients are sitting tight for the time being in terms of new investments or exits (while they assess the impact of the current crisis on their portfolio), this additional capital should enable them to take advantage of future opportunities which will no doubt arise.

ALTERNATIVE SOURCES OF CAPITAL & 'COV-LITE' STRUCTURES

In recent years many domestic leveraged buyouts have utilised unitranche debt (a hybrid loan structure that combines senior and subordinate/mezzanine debt into one loan facility at a blended interest rate) or other 'cov-lite' structures such as Term Loan B. A private equity fund that has used one of these structures to finance a portfolio company may now benefit from their less restrictive requirements in the current uncertain climate - particularly as such debt structures usually allow for greater flexibility on companies incurring additional debt or disposing of non-core assets, and the nature of the 'springing' financial covenants which only apply once a certain drawing threshold has been met means if companies can manage their liquidity, testing of financial covenants can be avoided.

For private equity funds with portfolio companies struggling for liquidity, they may look to tap into alternative sources of capital. Credit funds and other alternative lenders have raised large amounts of capital over the past few years and, once the appropriate risks are quantified, we expect these lenders will be willing to deploy this capital for businesses seeking flexible liquidity to see them through the uncertainty ahead.

These lenders typically have a greater appetite for risk than traditional banks and have flexibility in structuring options that include capitalised interest, deferral of amortisation or balloon repayments, all of which can assist in relieving current pressures on cash flow by deferring the need to pay interest and make repayments during the current crisis (for further analysis, please see our earlier article Crisis credit: the role of private debt capital in volatile markets.

SAFE HARBOUR

Directors can and should avail themselves of the safe harbour provisions to avoid the risk of insolvent trading. These provisions were introduced in 2017 and the coming period of widespread economic uncertainty will provide the first real test of the provisions. The safe harbour is designed to encourage boards to formulate a plan of action, in conjunction with advisors, that is designed to deliver a better outcome to the company than an immediate administration or liquidation (for further analysis on the safe harbour and the criteria for entry, please see our earlier article Safe Harbour – Common Questions and Misconceptions).

Additionally, in the past couple of weeks the Government has introduced emergency legislative changes which:

- provide temporary relief for directors from personal liability for insolvent trading for a 6 month period;
- increase thresholds for compliance for statutory demands; and
- provide discretion for the Federal Treasurer to amend the *Corporations Act 2001* (Cth) to relieve companies from certain obligations contained in the Act (although it is not yet clear what other obligations this will apply to).

For further analysis on the emergency legislation please see our earlier article, Updates to temporary relief for distressed businesses and individuals.

For impacted private equity funds, safe harbour plus the recent legislative changes referred to above may provide crucial breathing space for investor directors to assess their portfolio companies and develop and implement contingency plans in conjunction with suitably qualified advisors.

STAND DOWN

Section 524(1) of the *Fair Work Act 2009* (Cth) allows an employer to stand down without pay an employee during a period in which the employee "cannot usefully be employed" because of a stoppage of work for any cause for which the employer cannot reasonably be held to be responsible. In the current context these provisions have been relied upon where there are health concerns as a result of COVID-19 which impact business operations or where governments have ordered mandatory shut-down of workplaces entirely. As painful as this is for those who lose their job, businesses (whether private equity owned or not) are utilising these provisions to create immediate cost savings – e.g. we have already seen Myer, Qantas, Virgin Australia, Flight Centre, APG&Co, Premier, and pubs and hotels group ALH standing down huge proportions of their workforce.

Questions still remain about what the appropriate measures for the Government are to put in place to help 'revive' the companies that enter hibernation during this period, including ensuring a return to full employment for those stood down as far as possible.

The Government announced yesterday that it will be introducing a $130 billion wage stimulus package to cover employees' wages, in the form of a fortnightly wage subsidy (of up to $1,500 per employee) payable to eligible businesses, which must then be passed on to impacted employees.

TEAM AUSTRALIA

Unlike the GFC, where Australia did not go into recession and was not as badly impacted commensurate to other countries (e.g. in 2009 unemployment was 5.5% and Australia's debt to GDP ratio was 16.7% – whereas in the UK it was 7.6% and 63.7% respectively), the COVID-19 pandemic will hit hard. The ASX has fallen over 35% from its February high (although those percentages are changing daily given the market's unpredictable reaction to the current period of volatility) and many economists are forecasting unemployment to rise above 10% (potentially as high as 15%) and the economy to contract by 5% (some saying as high as 10%).

These are startling numbers and coupled with the fear that COVID-19 may directly impact our own physical health or that of people we know, it is difficult to find positives in all of this.

One silver lining might be the speed in which Government (with rare bipartisan support), the RBA and industry have moved in the past weeks to take unprecedented steps to try and find solutions, as set out below:

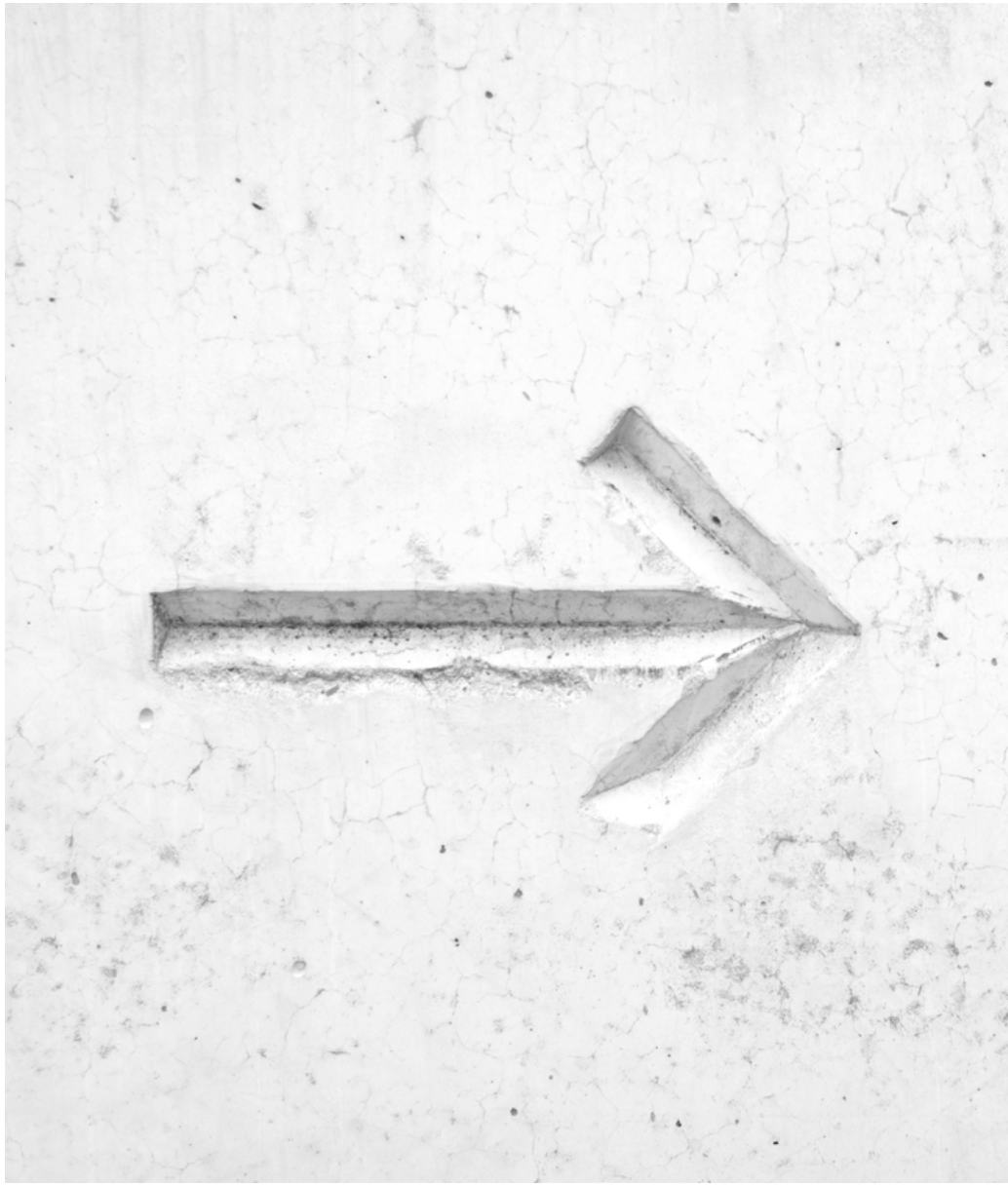
- **Federal Government** – Fast tracking the Coronavirus Economic Response Package Omnibus Act 2020 (Cth) through both Houses of Parliament, which amongst other things, looks to give temporary relief to businesses and directors during these uncertain times (e.g. 6 month temporary relief from personal liability for directors from insolvent trading provisions in the Corporations Act) (for further analysis, please see our earlier article Updates to temporary relief for distressed businesses and individuals).

- **State Government** – The introduction of the *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (NSW) which amongst other things will have a significant impact on landlord tenant relationships as it grants powers to the Minister to recommend the introduction of regulations that may regulate or prevent the exercise or enforcement and/or impose restrictions on landlords in exercising certain statutory and contractual rights (e.g. the ability to evict a tenant for non-payment of rent where the tenant has been financially impacted by COVID-19). See our earlier article for further details of the predicted changes: COVID-19 Legislation Amendment (Emergency Measures) Act 2020: Important update.
- **RBA** –The introduction in Australia for the first time of quantitative easing.
- **Treasury** – The introduction of a range of tax support measures designed to provide key opportunities for managing cash flow. Provisions allowing, among other things, companies to vary company tax instalment rates which can generate refunds of previous FY20 instalments, immediately write off capital assets and accelerated depreciation on new assets, defer payments of tax and adjusting their GST filings to bring forward input tax credit refunds are just some of the new measures open to companies.
- **ABA** – The recent decision by the banks (endorsed by the Australian Banking Association) to defer small business loan repayments for 6 months (freeing up $8 billion to support borrowers through the crisis) and the introduction of a scheme where the Government will guarantee 50% of loans to certain SMES, are hopefully the first of several positive steps the banking industry will take during this crisis.
- **ASX** – The ASX has been more receptive to voluntary suspensions than any time previously to allow companies to suspend trading until they have raised funds, or assessed the impact of COVID-19 on their business, with media companies Southern Cross Austereo, Pacific Star Network and Ooh Media all electing to suspend their securities last week. It has also been reported that ASIC and ASX are intending to increase placement capacities from the current cap of 15% of shares on issue, to 25% of shares on issue.
- **ACCC** – The ACCC has already shown some leniency in granting interim authorisation for the banking sector to co-ordinate small business loan relief and to the 4 major supermarkets to co-ordinate their response to panic buying, without falling foul of the cartel prohibitions. The hope is that this leniency is further extended to allow quicker execution of transactions and to encourage businesses to work together to find solutions.
- **FIRB** – On Sunday evening the Federal Treasurer announced that it is temporarily reducing the foreign investment thresholds for foreign asset purchases and investments, which essentially means that most foreign investments are likely to require approval from the Foreign Investment Review Board (irrespective of the size of the transaction or the nature of the investor). It is likely the statutory timeframe for applications will also be extended from 30 days to 6 months. Whilst it is encouraging to see all regulatory authorities assessing how they can assist with the current economic crisis, we would question if this is the best approach given that now, more than ever, we need to support the flow of capital in the Australian market. See our article Putting the brakes on foreign investment – zero tolerance from FIRB for further discussion of these changes and practical implications for live deals.

Where the wheel stops spinning in terms of the scale of damage COVID-19 is to leave in its wake is yet to be seen and extremely hard to predict. For the time being, as a nation, our focus should be on adhering to Government guidance and encouraging others to do the same to help Australia pull through this period in the safest and quickest way possible.

If you have any questions about current events and how they may impact your business, please contact Gordon McCann, Zina Edwards or Nick Edwards.

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. Hamilton Locke 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.



RAISING CAPITAL IN UNCERTAIN TIMES
– ASIC AND ASX REFORMS TO FACILITATE CAPITAL RAISINGS

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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, with effect from today, ASIC and ASX have seen it necessary to supplement the existing regulatory regime with new temporary measures which are intended to further facilitate rapid capital raisings during COVID-19. These new measures are outlined below.

ASIC DEVELOPMENTS

ASIC has given temporary relief to enable 'low doc' offers (i.e. non-prospectus offers) including rights issues, placements and share purchase plans (**SPP's**) to be made to investors, even where the entity does not meet all the normal requirements for issuing a cleansing notice. This temporary relief allows a listed entity to undertake a 'low doc' offer where it has been suspended from the ASX for a total of up to 10 days in the last 12 month period. The previous requirement was that an entity intending to undertake such an offer could not have been suspended for more than 5 days in the last 12 months.

With the benefit of the new relief, entities that otherwise satisfy the cleansing notice requirements will be able to undertake a 'low doc' offer:

1. even if they have been suspended for up to 10 days in the 12 months before the offer; and
2. provided they were not suspended for more than 5 days in the period commencing 12 months before the offer and ending 19 March 2020 (nb. 19 March was when the Federal Government changed its travel advice to the most severe Level 4 warning: 'do not travel' overseas).

Over the last couple of weeks, we have observed an increasing number of entities going into voluntary suspension as they endeavor to understand the impact of COVID-19 on their business operations. Other entities in the process of undertaking capital raisings during these

uncertain times have needed to move from trading halt into voluntary suspension to allow them more time to execute the relevant capital raising, and even then have had difficulties executing the capital raising without remaining in suspension for more than 5 days. The effect of a longer suspension being that they can no longer undertake a 'low doc' offer but would instead be required to prepare a prospectus. We therefore expect a number of market participants will welcome the additional time afforded by this measure.

ASX DEVELOPMENTS

In its ASX Compliance Update released on 31 March 2020, ASX provided some helpful reminders and practical guidance for listed entities grappling with their continuous disclosure obligations in the current environment.

In addition, like ASIC, ASX has introduced temporary emergency capital raising relief to help facilitate capital raisings in the short term. The relief has been implemented by way of class order waivers which will expire on 31 July 2020, unless ASX otherwise decides to remove or extend them. The new temporary measures are as follows:

- **Back-to-back trading halts** – ASX is now permitting an entity to request two consecutive trading halts, totaling 4 trading days, to assist entities execute a capital raising. If the capital raising cannot be executed within that 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 (see ASIC's new measures noted above).
- **An increase in the 15% placement capacity to 25%** – ASX will lift the size of a potential placement in any 12 month period from 15% to 25% (Temporary Extra Placement Capacity) subject to the entity undertaking the placement in conjunction with a pro rata entitlement offer 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.

  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 replenish or ratify the placement under the listing rules.

  In addition, ASX is waiving 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.
- **Non-renounceable entitlement offer ratios** – ASX is waiving 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.

Many entities that will consider taking advantage of these measures are likely under funding pressure coupled with the need to raise capital rapidly to survive. However, 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 market releases.

The Temporary Extra Placement Capacity may also facilitate private equity or other private capital investment in listed company shares by way of structured PIPES transactions. PIPES transactions are often structured as convertible notes and raising the placement capacity will permit private capital to take a larger strategic stake in the listed company. Investing by way of convertible notes for a significant minority position, because of the downside protection offered by the note, may be a more popular investment instrument in times of such marked volatility.

By including a condition that placements utilising the Temporary Extra Placement Capacity must be undertaken in conjunction with a capital raising that is made available to retail investors, ASX is ensuring retail security holders have an opportunity to participate in the offer at the same or a lower price to institutional investors. However, we expect retail investor appetite to participate in offers at this point in time may be low, and will likely be low for an extended period of time, so the practical effect is likely to be an even more dilutionary impact for retail investors, raising questions as to whether these temporary measures to facilitate capital raisings, in particular the increase to the placement capacity, treat retail investors fairly. 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.

Nevertheless, we expect the temporary measures will have the desired effect – to help facilitate capital raisings - however this may be tempered by the tightening of the FIRB restrictions which we explain in Putting the brakes on foreign investment – zero tolerance from FIRB.

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.

We also note that our capital market team works seamlessly with our restructuring team to ensure that directors are well advised and protected at all times (including during a capital raise).

If you would like to discuss the contents of this article, please contact Patricia Paton.

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PART 2, 08 Updates to Temporary Relief
PART 2, 09 Crisis Credit

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Her research on statutory unconscionability, misleading and deceptive product design and corporate liability, specifically with respect to the gaming and entertainment sectors, has been published in both domestic and international commercial law journals.

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Bobby is currently undergoing a combined Bachelor of Laws and Bachelor of Commerce (Finance) degree at Macquarie University.

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