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Make sure your business is covered from COVID-19

The recent spread of COVID-19 has had a huge impact on individuals' daily lives and the operation of businesses worldwide. This article will address how financial services businesses can address the concerns following the spread of the virus by relying on guidance provided by regulatory government bodies and non-government schemes which aim to alleviate the harm consequent of the pandemic.

APRA

APRA released their Prudential Practice Guide CPG 233 – Pandemic Planning (**CPG 233**) in May 2013 which provides guidance for APRA regulated entities on how they could operate their business and handle any risks posed by any widespread pandemic.

During these tumultuous times resultant of COVID-19 in 2020, the CPG 233 provides timely guidance on how entities can prepare for the financial, governance and business management risks posed by the pandemic.

CPG 233 supports other APRA issued regulations such as Prudential Standards CPS 232 Business Continuity Management and SPS 232 Business Continuity Management, which outlines APRA's requirements for managing ADI's, RSE licensees, life companies and general insurers.

APRA through CPG 233 recommends entities closely monitor the development of the pandemic and appropriately consider the best course of action for how their businesses should continue. APRA identifies the importance of outlining what the businesses' critical functions are and forming a pandemic plan. The most critical business functions of regulated financial institutions which would be consistent with APRA and governmental priorities would generally be:

- core risk management functions such as market, operational, credit and liquidity risk monitoring;
- general ledger and finance capabilities to allow monitoring of the overall financial position of the entity;
- call centres handling customer transactions and enquiries not including outbound or sales calls; and
- data centres, recovery sites and critical third party suppliers supporting critical functions.

In forming the pandemic plan, APRA also suggests considering:

- staff health and welfare measures;
- alternative work arrangements;
- alternative processing arrangements;
- controls and compliance;
- technology options;
- communications plans;
- resource priorities;
- succession and decision planning; and
- testing.

COVID-19 and *force majeure*

The pandemic is causing unprecedented interruptions to work flow and business operations. As these continue to occur, its impact will be felt on contracts, supply chain and the effective provision of services.

The concept of *force majeure* in a contract is able to exclude a party from fulfilling their contractual obligations in the event of a supervening pandemic such as COVID-19 which suspends the parties for an uncertain length of time. Such a principle can safeguard the involved parties from hardship if the contract can not be acted upon.

In Australia, there is no doctrine of *force majeure* contained in our legislation that suspends or excuses performance of contractual obligations which responds to an unforeseen event and beyond the control of either party.

Contract frustration

Currently, there have been no laws imposing a moratorium on loans repayments whether it be on consumers, businesses or otherwise in response to the COVID-19 pandemic. Any such suggestions for the laws are unlikely to be foreseeable in the future.

The related doctrine of "frustration" is when a contract is terminated by frustration if either party, without fault, becomes incapable of performing the terms of the contract as it is radically different from when it was contemplated at the time the contract was formed. Therefore, the performance that results would not be what the parties had objectively bargained at the time when the contract was initially formed. As frustration is 'all-or-nothing', the contract will be terminated automatically by operation of law and the parties will be released from future obligations and the monies paid by a party could be recoverable if consideration has failed.

Australian courts have applied strict standards for frustration, requiring a fundamentally different situation that would make the performance of the contract substantially different from that which the parties originally bargained for, or failure of consideration that deprives a party of substantially the whole of the benefit that they were intended to receive under the contract. One party facing mere hardship in performing their obligations has not been accepted as resulting in frustration of a contract. It is for the parties to allocate such risks when forming the contract.

Economic measures

In response to the pandemic's harmful impact on Australia's economy, the Government has introduced several economic measures aimed at supporting individuals and businesses.

There are targeted business investments measures which include:

- increasing the instant asset write-off threshold from $30,000 to $150,000 and expanding access to include businesses with aggregated annual turnovers of less than $500 million until 30 June 2020; and
- introducing a 15 month limited investment incentive which will continue to 30 June 2021 in order to support business investment and economic growth in a short term period by increasing depreciation deductions. For businesses with a turnover of less than $500 million, there will be a 50 per cent deduction of the cost of an eligible asset on installation. Existing depreciation rules will apply to the balance of the asset's cost.

There have also been cash flow assistance packages which include:

- "Boosting Cash Flow for Employers" introduced on 12 March 2020, the Australian Government announced a $17.6 billion economic stimulus package containing measures designed to minimise the economic impacts of the COVID-19 pandemic. The cash flow boosts are expected to be made available from the Government's announced date of 28 April 2020.
- the Government is also supporting small businesses to retain their apprentices and trainees. Under this scheme, eligible employers will be able to apply for a wage subsidy of 50 per cent of the apprentice's or trainee's wages for up to 9 months (1 January 2020 to 30 September 2020). If a small business is unable to retain an apprentice, a subsidy will be available to the new employer that employs the apprentice;
- implementing a stimulus payment to households to support growth which will assist around 6.5 million lower income Australians. Among those measures were one-off $750 payments to recipients of certain cash benefits. Half of these people who will receive this benefit are pensioners; and
- a $1 billion measure is intended to be implemented for support regions most significantly affected by the COVID-19 pandemic.

On 23 March 2020, the Government passed a series of Bills encompassing the above proposals which will give effect to a $189 billion stimulus package into the economy.

The Government is also offering JobKeeper and JobSeeker payments. The JobKeeper scheme compromises of the Government, through the ATO paying $1,500 to businesses per fortnight for every employee up to 6 months to assist in paying their wages. The JobKeeper payments are available for those:

- currently employed, including those stood down or re-hired;
- employed at 1 March 2020 on a full-time, part-time or long-term casual basis;
- at least 16 years of age;
- an Australian citizen; and
- do not receive JobKeeper payment from another employer.

JobSeeker payments are for those who are without work or sick and injured and unable to do usual work or study due to COVID-19. Those who already receive income support payments from the Government will be provided with an additional $550 per fortnight in addition to their regular benefit payments from 27 April 2020.

The JobSeeker payments are for those who are:

- between 22 and pension age;
- earning an income under test limits; and
- an Australian citizen.

Furthermore, on 2 April 2020 the Government introduced a Early Childhood Education and Care Relief package. From 6 April 2020, weekly payments will be made to early childhood education and care services to financially assist them until the end of the 2019/2020 financial year.

Economic Impact

Any adverse economic impact of the COVID-19 pandemic is likely to increase the number of customers facing difficulty making repayments. This will likely increase the quantity of hardship requests received by financial firms under section 72 of the National Credit Code.

However, in light of the law, the COVID-19 pandemic does not make a difference to how financial firms should deal with hardship requests. External Dispute Resolution scheme, AFCA could expect credit providers to show more flexibility and offer changes to credit contracts to extend payment timeframes or reduce periodic payments, particularly where a customer's pandemic-induced hardship appears to be temporary.

AFCA has advised that if individuals are finding it difficult to repay loans due to the impact of the COVID-19 pandemic, they should contact their bank or financial service provider to seek hardship assistance. If the credit provider refuses to grant hardship relief, the customer can complain to AFCA who, as noted above, is likely to expect more.

Insurance

On 11 March 2020, the Insurance Council of Australia declared COVID-19 an insurance catastrophe. Due to this declaration, AFCA has also activated its "significant event response plan" which identifies and 'fast-tracks' COVID-19 related complaints.

During these testing times, it is important for entities to keep up to date with government developments and monitor any announcements from APRA which may provide further guidance. Piper Alderman can assist with queries regarding APRA updates and the impact COVID-19 may have on the operation of your business.