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INTRODUCTION

COVID-19 is a formula for continued uncertainty, and it is impossible to foresee how the funds management landscape will look in a post-COVID world. But what we do know is the game has changed, the rules are different, and we need to think and act differently.

While Australians have been very compliant and successfully ‘flattened the curve’, our attention now turns to what happens next. How do we begin to return to normal, but at the same time balance the need to limit the spread of COVID-19?

In speaking with our clients and colleagues in the funds management industry, there is a strong desire to return to a sense of normality, but (admittedly from a small sample size) it would seem the consensus is a ‘V-shaped’ recovery is unlikely. We use the phrase ‘V-shaped’ not just in the financial context, but also in the context of how we work and interact with each other. The pandemic has driven several changes in the way we do business. Some of those changes will be temporary; others may well be permanent.

WHAT NOW?

Now is the time to shift focus and for thoughtful action to prepare for the next phase.

With that in mind, we have prepared this Toolkit to consolidate our thinking and commentary on some of the issues which our clients must manage in the coming months.

We hope you find our Toolkit for Fund Managers practical and informative. Our team is available to help guide your business so that you are best placed to manage and mitigate risk and seize new opportunities.

Sean McMahon
Partner, Funds Management

Langton Clarke
Partner, Funds Management
HOT TOPICS FOR FUND MANAGERS:
Are you ready for the next phase?

As we move into the next phase of COVID-19 and attempt to define the ‘new normal’, fund managers will adopt different risk approaches in dealing with the uncertainty. In this article, we pull together some hot topics for fund managers, and ask whether you are ready for the next phase.

VALUATIONS
Most fund managers are expecting uncertainty in valuations in the 30 June financial reporting cycle. Some key steps, duties, and considerations for trustees in these challenging times include the following:

• Review valuations to ensure the valuation is not highly qualified and the assumptions used by the valuer are reasonable. Courts have in the past found against trustees who have relied on independent advice because the advice received was so qualified no reasonable trustee could have relied on it.
• Ensure prices are calculated strictly in accordance with the trustee’s unit pricing policy and any other relevant policies, and that this process and the trustee’s decisions are fully documented.
• Determine whether it is possible to price units at all, though generally, even during market or economic turbulence, it will be.

For more information about unit pricing in volatile times click here for an article by special counsel Matt Moses.

REPORTING AND COMPLIANCE
ASIC has further extended the deadline for both listed and unlisted entities to lodge financial reports under the Corporations Act. This broadens the earlier relief announced and unlisted entities and registered schemes with financial years ending by 7 July 2020 now have five months from the financial year end to lodge their annual reports. A similar extension applies for most AFS licensees, except disclosing entity licensees who will have four months to lodge. Auditors will also have four months (up from three) to lodge compliance plan audits for registered schemes with financial years ending by 7 July 2020.

The timeframes for listed entities to lodge reports will be similar, with annual reports due within five months from the end of the financial year and half year reports within 105 days of the end its half-year. Click here for more details.
EXECUTING AND WITNESSING DOCUMENTS

COVID-19 social distancing and remote working arrangements have thrown into the spotlight the issue of e-signatures and whether documents can be witnessed, or statutory declarations sworn, remotely instead of in person. As we discuss here the position is unclear and can vary from jurisdiction to jurisdiction. But, for the period 6 May 2020 to 5 December 2020, the Federal Government has made the process more convenient by allowing company officers to execute a document on behalf of a company under section 127 Corporations Act by signing two separate counterparts of the document remotely.

MEETINGS

We are coming up to the time of year for meetings – board meetings, investor meetings, shareholder meetings, compliance committee meetings, and AGMs. This year, COVID-19 restrictions on public gatherings and travel will make many traditional, physical meetings impossible. The Federal Government’s COVID-19 response expressly allows virtual meetings for companies and registered managed investment schemes, and workarounds for committee and board meetings include using audio and video connections to hold meetings and using circulating resolutions. See here for more information.

THE NEW FEES AND COSTS DISCLOSURE REGIME

PDSs dated on or after 30 September 2020 must comply with the revised regulations in RG 97 Disclosing fees and costs in PDSs and periodic statements (RG 97) and ASIC policy. While PDSs do not need to be reissued on 30 September 2020 solely to comply with the new RG 97 requirements, it is prudent for fund managers to update their reporting processes and PDS templates to capture and present fees and costs information in the format required by the new RG 97. For more information about RG 97 click here for an article by Jeunesse Meldrum.

THE APPLICATION OF FIRB TO LEASING TRANSACTIONS

Treasury recently issued follow up guidance explaining the significant changes to the Foreign Investment Review Board (FIRB) approval process in Australia under the new COVID-19 measures. The general message is you must consider whether FIRB approval is required in relation to a transaction at the earliest opportunity.

The changes have reduced the monetary thresholds to zero, so all leases in excess of five years entered by foreign persons are likely to require FIRB approval.

When considering whether FIRB approval is required for a lease, the ‘look through’ provisions in the legislation must also be considered. In very broad terms, this means even where the lessee is a company incorporated in Australia or a trust established in an Australian jurisdiction, the company or trust may be deemed to be a foreign person because an underlying interest in it (generally, 20 percent or more) is held by foreign interests. You can read more about this at page 8 of this Toolkit.

ARE YOU READY FOR THE NEXT COVID-19 PHASE?

Defining the ‘new normal’ for fund managers is a significant challenge in these uncertain times. Our lawyers will respond to your queries and provide practical advice to help you navigate this next phase of COVID-19.

Langton Clarke
Partner, Funds Management
If you want to join the ‘quarancleaning’ craze, then here are some ideas to start you off:

1. **Review your current compliance systems** and procedures and how they operate. Do they deliver your desired outcomes and features, including automation, reporting requirements, and budget?

2. **Review your compliance policies** (eg breach reporting and recording, related party and conflict of interests, complaints handling). Are your policies up-to-date and consistent with changes to the law? Would your business benefit from additional policies to fully document your compliance arrangements?

3. **Review your arrangements with service providers** (eg distribution agreements). Are the arrangements formalised, up-to-date, and consistent with changes to the law?

4. **Review your fund agreements** (eg investment management agreements, registry, administration, and custody agreements). Are all your agreements up-to-date and consistent with changes to the law?
5. **Assess the roles your staff undertake** in connection with holding your AFS licence, managing compliance, and providing financial services. Are your compliance staffing requirements adequate? Would your staff benefit from additional training or resources?

6. **Prepare for upcoming changes to the law** for registered managed investment schemes. Have you updated your reporting processes and PDS templates to capture and present fees and costs information in the format required by the new Regulatory Guide 97 *Disclosing fees and costs in PDSs and periodic statements*, which will apply post 30 September 2020? For more information about RG 97 click [here](#) for an article by Jeunesse Meldrum. Have you started to prepare your product governance framework and engage with distributors about the new design and distribution obligations, which will be enforced from 5 October 2021? You can read more about these changes [here](#).

**WHAT’S THE NEXT BEST STEP?**

Our funds management lawyers can help you with these tasks to improve your compliance framework and compliance culture.

In addition, from time to time, ASIC undertakes routine checks of the compliance arrangements of AFS licensees. If you want to engage in best practice and truly test the rigour of your existing compliance systems, then our funds management lawyers can undertake a trial surveillance of your business. This process is a mock ASIC investigation to help you identify any deficiencies in your compliance arrangements and determine whether enhanced processes and procedures are required having regard to the nature of your current and proposed business activities. It is time very well spent.

*Jeunesse Meldrum*

*Consultant, Funds Management*
THE LATEST GUIDANCE ON FIRB COVID-19 UPDATES

Treasury’s recent follow up guidance explaining the significant changes to the Foreign Investment Review Board (FIRB) approval process in Australia under the new COVID-19 measures confirms the significant expansion of transactions now requiring FIRB approval. This means you must consider whether FIRB approval is required in relation to a transaction at the earliest opportunity.

Here, partner Mark Lyons highlights some key points arising from the guidance around processing time, fees, pre-existing agreements, exemption certificates, no-objection notifications, plus how the changes impact leasing transactions involving foreign persons.

For more details about the important changes announced by the Treasurer in March this year please click here for an article by partner Nick Stevens.
GENERAL PRINCIPLE
As a general principle, the guidance confirms acquisitions of all interests in all Australian land by all foreign persons are now ‘notifiable’ and ‘significant actions’, regardless of the type or value of the land.

PROCESSING TIME
Administrative measures are being introduced to ensure the great majority of applications are processed much faster than the six-month extended FIRB review timeframe. Priority will be given to applications for investment that protects and supports Australian businesses and jobs. Cover letters submitted with applications should clearly highlight if the application is low risk and the positive impact the transaction is likely to have on job opportunities and the Australian economy generally.

FEES
To align non-foreign government investors with the concessional fee treatment of foreign government investors for non-vacant commercial land acquisitions from $10 million up to $55 million, fee waivers will be considered and processed on a per-application basis. This means non-foreign government investors will ultimately pay the same fee as foreign government investors for acquisitions within this range (ie $2,000 instead of $26,200). To ensure applications are submitted correctly, FIRB recommends the applicant initially pay the full fee (before any waivers are considered and applied) and then wait for a refund where the waiver is approved.

PRE-EXISTING AGREEMENTS
The changes do not apply to any agreement entered before 10.30pm AEDT 29 March 2020 (the cut-off date). If a party is simply exercising an option under an agreement entered before the cut-off date, it will not give rise to a new significant or notifiable action.

EXEMPTION CERTIFICATES
If an exemption certificate was granted to a foreign person prior to the cut-off date, the certificate remains valid, providing all conditions continue to be met.

NO-OBJECTION NOTIFICATIONS
No-objection notifications issued to a foreign person prior to the cut-off date still apply.

SPECIFIC ISSUES FOR LEASES
The guidance also highlights how the changes will impact leasing transactions involving foreign persons. Foreign persons acquiring leasehold interests in Australian land have always potentially required FIRB approval where the term of the lease was likely to be more than five years (including options). However, the requirement was rarely triggered for leases of existing developed commercial property (such as existing office space, industrial facilities or retail outlets) because the consideration paid under the lease (ie rent) rarely exceeded the monetary thresholds for notifiable and significant transactions. Now the monetary thresholds have been reduced to zero, all five-year-plus leases entered by foreign persons are likely to require FIRB approval. Where the rent over the likely term of the lease is less than $10 million, the application fee will be $2,000.

When considering whether FIRB approval is required for a lease, the ‘look through’ provisions in the legislation must also be considered. In very broad terms, this means even where the lessee is a company incorporated in Australia or a trust established in an Australian jurisdiction, the company or trust may be deemed to be a foreign person because an underlying interest in it (generally 20 percent or more) is held by foreign interests.

SUMMARY
To avoid delay, additional expense and potential regulatory non-compliance, it is now more important than ever to consider at the earliest available opportunity whether FIRB approval is required in relation to a transaction. If FIRB approval is required, the right strategy must be developed to navigate the process in the most efficient way possible.

Our Real Estate lawyers understand the changes and can assist with your questions and explain how to develop the best strategy.

Mark Lyons
Partner, Real Estate
DEALING WITH AFCA
COMPLAINTS—BEWARE

The wide jurisdiction of the Australian Financial Complaints Authority
(AFCA), the ‘one stop shop’ for financial disputes, demands financial
firms have strong compliance and complaints handling systems in
place and treat AFCA complaints with caution.

Special counsel Selina Nutley explains how this significantly impacts
the likes of fund managers and sets out some essential tips for
formulating a coordinated strategy.

KEY TAKEOUTS
• An explosion of AFCA complaints has significantly increased the
  prospect of fund managers being scrutinised by AFCA.
• Until 30 June 2020, AFCA can accept complaints about
  investments dating back to 1 January 2008.
• There is limited scope to challenge AFCA determinations.
• Treat AFCA complaints with caution from the outset and
  formulate a co-ordinated strategy.

BEWARE AFCA’S
INCREASED JURISDICTION

AFCA opened for business on
1 November 2018 with a wider jurisdiction
than its predecessors. Australian Financial
Services (AFS) licensees who provide
financial services to retail clients must be
members of AFCA. That obligation does not
extend to licensees who only provide financial
services to wholesale clients.

Importantly for fund managers, AFCA’s
increased jurisdiction means it can now
consider complaints in relation to investments
by wholesale clients up to $1 million. While
licensees who provide only financial services
to wholesale clients are not required to be
members, they expose themselves to AFCA’s
extended jurisdiction where they use the
same licence for both retail and wholesale
activities. For example, where an advisory
group has multiple licences and advises
both wholesale and retail clients, it would
be preferable to advise retail clients using
one licence and wholesale clients from the
other licence to eliminate the potential for
wholesale clients to access AFCA.

Also, following the Hayne Royal Commission
findings, AFCA has been bestowed with
legacy jurisdiction and, until 30 June 2020,
can accept complaints about investments
dating back to 1 January 2008.
The combination of these two factors has seen an explosion of complaints, vastly increasing the prospect of fund managers being scrutinised by AFCA. AFCA does not have jurisdiction to hear complaints about the performance of financial products, but many complaints manifest themselves as complaints about misleading and deceptive conduct, or non-disclosure, which do fall within its jurisdiction. One lesser known aspect of AFCA’s jurisdiction is its ability to investigate ‘systemic issues’ in a licensee’s conduct, and then report that conduct to regulators (such as ASIC, APRA or the ATO). While what are systemic issues will obviously be very circumstance driven, an example might be where AFCA finds a PDS or IM issued to a complainant was misleading and may have misled other investors who have not complained. In addition to notifying regulators, AFCA can require a licensee to send a letter to all affected investors (even those who have not complained to AFCA), publish advertisements in newsletters to promote contact with affected investors, and agree a compensation regime.

In many ways these powers mirror those already available to ASIC, and it remains to be seen whether AFCA will ultimately seek to exercise those powers or leave it to ASIC. In either case, it reinforces the need to have strong compliance systems throughout the entire lifecycle of an investment, but particularly in the product development phase when offer documents are being prepared.

CHALLENGING DECISIONS MADE BY AFCA

Another commonly misunderstood issue is the ability for licensees to challenge decisions made by AFCA. A licensee must accept a final determination of the dispute based on AFCA’s opinion of what is fair in the circumstances. Recent challenges to AFCA’s decisions in the Supreme Court of Queensland and the Federal Court of Australia have both failed. The Supreme Court of Queensland concluded a determination by AFCA can only be set aside where—

- no reasonable tribunal could have properly come to it on the evidence
- it is inconsistent with AFCA’s rules
- it is the result of bad faith, bias, fraud or dishonestly, or is the product of the breach of the rules of natural justice, or

- the AFCA decision maker misconceived the task required.

ESSENTIAL TIPS FOR DEALING WITH AFCA COMPLAINTS

It is clear AFCA has a very broad discretion in making determinations, and those determinations are subject to limited challenge. Its powers now extend far beyond the reach of just one isolated complaint into a broader oversight role. For these reasons, it is very important AFCA complaints are treated with the appropriate degree of seriousness from the outset, and a coordinated strategy formulated.

Here are some practical tips to assist you to deal with AFCA complaints:

1. Ensure the dates a party acts as an authorised representative under an AFSL are correctly recorded in ASIC’s register.
2. Thoroughly examine the complaint immediately on receipt to ensure it falls within AFCA’s subject matter and monetary jurisdiction.
3. Obtain all relevant records from authorised representatives as soon as the complaint is received.
4. Consider whether the complaint may reveal any systemic issues. If so, develop a coordinated strategy for dealing with those issues at an early stage.
5. Wherever possible, provide services to wholesale and retail clients via separate licences.

HOW CAN WE HELP?

We encourage you to contact us about how you can best meet AFCA’s expectations and requirements and to deal with any complaints. Our experience in developing compliance and risk solutions for fund managers ensures we are well-placed to help you address and mitigate any potential issues.

Selina Nutley
Special Counsel, Funds Management and Commercial Disputes
HERE’S A ROUND-UP OF SOME OF OUR OTHER THINKING IN CASE YOU MISSED IT...

COVID-19 CHALLENGES FOR AFS LICENSEES—TIPS AND TRAPS

New Government-imposed restrictions to contain the spread of COVID-19 and the significant implications for the economy mean Australian financial services (AFS) licensees are grappling with how to comply with their many obligations.

Click here for an article where senior associate Elliott Stumm highlights some of the specific challenges you need to think about and what you should do next.

QUESTIONS EVERY FUND MANAGER MUST ASK IN THE FACE OF THE COVID-19 CRISIS

To help you navigate and respond to the fallout from the COVID-19 crisis, our Funds Management team has put together practical answers to the critical questions every fund manager, responsible entity and trustee should ask now. We have also included links to more detailed information about some topics to assist you. Click here for more information about—

- liquidity and asset valuations
- applications, redemptions and distributions
- asset management and fund structure
- disclosure and reporting
- compliance and administration
- trustee, responsible entity and director duties.

FUND AND COMPANY MEETINGS—DECISION MAKING IN A PANDEMIC

The current social distancing measures have created a range of challenges for the corporate world. Companies and funds still need to be operated, decisions need to be made by boards, and sometimes shareholders and investors need to be called upon to make decisions as a group.

However, meetings usually involve people getting together, and formal decisions normally involve some sort of vote. It is particularly likely in this turbulent and quickly changing environment that some important decisions need to be made, and they might need to be made quickly. How can this be achieved when it is impossible for stakeholders to meet?

Here, special counsel Matt Moses outlines the types of meetings that may be needed and explains the Federal Government’s latest COVID-19 driven response which expressly allows virtual meetings for companies and registered managed investment schemes.
OUR FUNDS MANAGEMENT TEAM CAN HELP YOU

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