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AUSTRALIAN FEDERAL GOVERNMENT EASES CONTINUOUS DISCLOSURE RULES

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Legal Briefings – By **Jason Betts, Christine Tran and Mark Smyth**

Yesterday, the Australian Federal Government modified the continuous disclosure provisions of the *Corporations Act 2001* (Cth) (**Corporations Act**) in an effort to provide temporary relief to companies and officers for a six month period from today.

In brief, pursuant to the amendments in *Corporations (Coronavirus Economic Response) Determination (No. 2) 2020*, a breach of the civil penalty provisions under sections 674 and 675 occurs only where information is withheld from disclosure with **knowledge** that it would, or **recklessness** or **negligence** as to whether it would have a material effect on the price or value of the entity's securities. This modifies the previous objective "reasonable person" expectations of materiality.

These amendments are intended to facilitate the continuation of business in circumstances relating to COVID-19 and to enable companies to more confidently provide guidance to the market during the crisis.[1]

It is also aimed squarely at addressing "the threat of opportunistic class actions" and "to make it harder to bring such actions against companies and officers' during the Coronavirus crisis and while allowing the market to continue to stay informed and function effectively."[2]

The amendments likely provide partial protection for listed and disclosing entities. However, the extent to which the amendments afford substantive relief from class action risk in practice remains to be seen. For example, the amendments do not modify the provisions of the Corporations Act dealing with misleading or deceptive conduct, which is commonly pleaded in disclosure-related shareholder class actions. Companies should exercise caution in considering the limited scope of the amendments before placing undue reliance upon them.

THE AMENDMENTS

The amendments have been made under the instrument-making power inserted into the Corporations Act as part of the government's response to COVID-19. These are in effect until 26 November 2020 (ie six months from commencement and are automatically repealed at the end of that period).

The effect of these amendments is to temporarily modify the test for whether information would have a material effect on the price or value of its securities and therefore should be disclosed under sections 674 or 675 of the Corporations Act.

The amendments replace the objective reasonable person test (ie what a "reasonable person would be taken to expect, if information was generally made available"), with a subjective test of what the company actually "knows or is reckless or negligent" with respect to whether information will have a material effect on the price or value of securities.

It is expected to provide a degree of protection where companies are still attempting to understand the likely impact of COVID-19 on their business and, for that reason, had not yet updated the market; or where companies are unsure whether particular information has already been factored into the price or value of their securities.

IMPLICATIONS

The amendments are a welcomed development for companies subject to the continuous disclosure regime in times of considerable uncertainty, following on from the previous guidance issued by the ASX.

The amendments likely provide partial protection for listed and disclosing entities, however the extent to which the amendments afford substantive relief from class action risk in practice remains to be seen.

In practical terms, the impact of the temporary relief on class actions may be more confined than anticipated:

1. **The amendments modify the circumstances in which non-disclosure can give rise to liability**, by limiting this to among other things where a company is negligent in assessing whether the information is material. There is the potential for plaintiffs to seek to sidestep the relief by reformulating their cases to assert a negligent failure to keep the market informed. The primary allegation in most shareholder class actions is that a company failed to recognise that it held material information and therefore breached its disclosure obligations. That is, in a practical sense, very close to an assertion of negligence. A conventional continuous disclosure breach based on the reasonable person standard could easily be reformulated by a plaintiff as a negligent failure to keep the

market informed. Whether or not that would be successful remains to be seen. Any allegation of negligence will be heavily context and fact-dependent.

2. **The changes provide relief in respect of non-disclosure**, rather than disclosures which are actually made to the market. The relief measures do not impact the law on misleading or deceptive conduct, and will not impact on allegations concerning information which is in fact released to the market. Allegations of misleading or deceptive conduct, which are the hallmark of shareholder class actions, may well continue unimpeded.

3. **Listed entities are still required to comply with Listing Rule 3.1**, which requires them to "immediately tell ASX" information that a reasonable person would expect to have a material effect on the price or value of the entity's securities.

For these reasons, companies should exercise caution in understanding the limited scope of the amendments before placing undue reliance upon them.

OTHER GOVERNMENT ENDEAVOURS TO ADDRESS UNCERTAINTY IN THE CONTEXT OF COVID-19 FOR BUSINESSES

The government's stated objective is to address uncertainty with respect to company disclosures in the context of COVID-19, acknowledging that "[i]n the current environment it is significantly more challenging for disclosing entities to know whether a given piece of information will have a material effect on the price or value of its securities". It is therefore appropriate to encourage disclosing entities to continue to disclose information to markets or to ASIC by temporarily modifying the scope to commence civil proceedings for breaches of the continuous disclosure obligations in circumstances relating to COVID-19.

The amendments follow on from ASX Guidance released on 31 March 2020, which acknowledged the particular disclosure challenges for listed entities arising from the rapidly evolving and highly uncertain situation surrounding COVID-19. That guidance emphasised that a listed entity's continuous disclosure obligations "do not extend to predicting the unpredictable", nor is disclosure required of matters of supposition or which are insufficiently definite to warrant disclosure.[3]

The government's announcement also follows on from recent measures aimed at litigation funders, including reversing the current exemptions for litigation funders from holding an AFSL (announced on Friday 22 May 2020), and the Federal Parliament's current inquiry into litigation funders and the regulation of the class action industry (with the Parliamentary Joint Committee on Corporations and Financial Services due to report by 7 December 2020).

ENDNOTES

1. https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/temporary-changes-continuous-disclosure-provisions

2. https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/temporary-changes-continuous-disclosure-provisions

3. https://www2.asx.com.au/about/media-centre/asx-action-on-covid-19

KEY CONTACTS

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