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AUSTRALIAN FEDERAL GOVERNMENT SEEKS TO PERMANENTLY EASE CONTINUOUS DISCLOSURE RULES

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Legal Briefings – By **Quentin Digby, Christine Tran and Brock Gunthorpe**

On 17 February 2021, the Australian Federal Government proposed new laws which, if enacted, will make permanent the temporary relief from liability for certain breaches of a listed entity's continuous disclosure obligations.

The temporary relief was introduced on 25 May 2020. As discussed here, the relief was intended to provide a degree of protection to companies where they sought to provide guidance to the market despite uncertainties relating to COVID-19 and to mitigate the "threat of opportunistic class actions".

Similarly, in making the temporary measures permanent, the hope is that "[r]*aising the liability standard so that companies only face civil penalty actions where they have acted with knowledge, recklessness or negligence allows companies and their officers to more confidently provide guidance to the market without exposing themselves to the risk of opportunistic class actions.*"[1]

THE PROPOSED AMENDMENTS

In brief, if the new laws are passed in the form proposed in Schedule 2 to the *Treasury Laws Amendment (2021 Measures No. 1) Bill 2021* (**Bill**):

a. listed entities are still required to comply with Listing Rule 3.1 and section 674(2) of the *Corporations Act 2001* (Cth), which requires the timely disclosure of information that a reasonable person would expected to have a material effect on the price or value of the entity's securities;

b. if the listed entity fails to comply with its continuous disclosure obligations:

    1. ASIC may prosecute the entity for criminal offences, issue administrative penalties or issue infringement notices;

    2. ASIC may pursue civil penalties against the entity, if the entity withheld from disclosure with knowledge that it would, or with recklessness or negligence as to whether it would, have a material effect on the price or value of the entity's securities;

    3. private actions (such as shareholder class actions) may be brought against the entity, if the entity withheld from disclosure with knowledge that it would, or with recklessness or negligence as to whether it would, have a material effect on the price or value of the entity's securities;

b. a listed entities and officers are not liable for misleading and deceptive conduct (pursuant to section 1041H of the *Corporations Act 2001* (Cth) or section 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth)) for failing to disclose material information, unless the entity or officer knowingly, recklessly or negligently failed to disclose material information.

In other words, the proposed new laws introduce a fault element (in respect of the judgement as to whether information is materiality price sensitive) for private actions for continuous disclosure breaches and for misleading and deceptive conduct in relation to alleged failures to keep markets fully informed. Similar provisions apply to other disclosing entities.

These new laws are in line with the policy recommendations made by the Parliamentary Joint Committee, following its inquiry into litigation funding and the regulation of class actions. Under Recommendation 29, the Parliamentary Joint Committee recommended that the Australian Government permanently legislate changes to continuous disclosure laws in the *Corporations (Coronavirus Economic Response) Determination (No 2)* 2020.

Importantly, the same fault element is **not** required in respect of the judgement as to whether disclosure of material information can be delayed in reliance on the confidentiality carve-out (for example on the basis that it is insufficiently definite to warrant disclosure).

IMPLICATIONS

The temporary relief expires on 22 March 2021.

If the Bill is passed, the new laws likely provide partial protection for listed and disclosing entities, particularly where the materiality of the information is unclear or difficult to determine. However, the extent to which the amendments will afford substantive relief from class action risk in practice remains to be seen recognising that:

- the judgement as to whether disclosure of material information can be delayed, in reliance on the confidentiality carve out, is often the more difficult judgement call for officers to make in practice; and
- even where negligence is required (as will be the case in relation to the judgement call on materiality), errors of judgement, honestly made, can easily appear negligent in hindsight.

Other key implications to note are:

1. **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. ASIC retains the ability to prosecute criminal offences and issue infringement notices, regardless of the state of mind of the entity.
2. **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. The potential exists 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 allegation, in a practical sense, is already 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.

3. **The amendments close a 'loophole' that exists under the temporary relief**. As discussed previously, the temporary measures do not impact the law on misleading or deceptive conduct (a common cause of action in shareholder class actions). The Bill addresses this by introducing the same standard of liability for misleading or deceptive conduct in respect of non-disclosures. Regardless of whether an action is brought under the continuous disclosure provisions or misleading or deceptive conduct provisions, the listed entity is only liable if it has acted intentionally, recklessly or negligently in failing to disclose price-sensitive information.

For these reasons, companies should continue to exercise caution by understanding the limited scope of the amendments before placing undue reliance upon them when they are passed by Parliament.

OTHER PROPOSED AMENDMENTS

The Bill seeks to extend, for a further six months, the temporary relief allowing companies to use technology to meet regulatory requirements to hold meetings, such as AGMs, distribute meeting related materials and validly execute documents. If passed, the temporary relief will be extended from 21 March 2021 to 15 September 2021.

ENDNOTES

1. Commonwealth, *Parliamentary Debates*, House, 17 February 2021, p 10 (Michael Sukkar) (Second Reading speech).

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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