COVID-19 (AUSTRALIA): TEMPORARY RELAXATION OF CONTINUOUS DISCLOSURE REQUIREMENTS – WHAT DOES IT MEAN?

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SNAPSHOT

In response to the uncertainty generated by the COVID-19 crisis, the Australian Federal Government (Government) has modified the Corporations Act 2001 (Corporations Act) tempering the continuous disclosure obligations of listed and disclosing entities.

The *Corporations (Coronavirus Economic Response) Determination (No. 2) 2020* (Determination), came into effect on 26 May 2020 for a period of six months.

The Determination modifies the disclosure standards of sections 674, 675 and 677 of the Corporations Act – disclosure of non-public information is now required where "the entity knows or is reckless or negligent" with respect to whether the information would, if it were generally available, have material effect on the price or value of the securities of the entity.

WHAT IS THE CHANGE?

The unmodified provisions apply a more stringent test with respect to the information that may need to be disclosed - the relevant sections reference information *"which a reasonable person"* would, if it were generally available, expect to have a material effect on the price or value of the securities of the entity.

The modification is a change from an 'objective' to a more 'subjective' reference. The modifications potentially provide companies and their directors with a less stringent disclosure obligation, by allowing companies to take their specific circumstances into account when making a decision with respect to disclosure of non-public information.

THE GOVERNMENT'S RATIONALE

In his media release of 25 May, the Treasurer, the Honourable Josh Frydenberg stated that the Government acknowledges that the uncertainty created by the COVID-19 crisis has made it "considerably more difficult for companies to release reliable forward-looking guidance to the market". The Treasurer's media release further stated that "companies may hold back from making forecasts of future earnings or other forward-looking estimates, limiting the amount of information available to investors during this period".

These changes are in response to the Government's recognition of the potential threat of "opportunistic" class actions stemming from disclosures made under the continuous disclosure regime that are found to be inaccurate. Although the modifications do not address the liability of entities with respect to inaccurate disclosures, they allow,

in certain circumstances, for entities to not make the usual level of disclosure. The limited volume of disclosure in turn arguably reduces the potential cause for claims.

WHAT DOES THIS MEAN IN PRACTICE?

It is important to note that these changes do not provide entities with a 'free pass' to stop making disclosures to the market. Relevant entities will still breach the relevant continuous disclosure provision if they fail to disclose non-public information where "the entity knows or is reckless or negligent" with respect to whether the information would, if it were generally available, have material effect on the price or value of the securities of the entity.

Further, the Determination does not alter the operation of ASX Listing Rule 3. Companies listed on the ASX will still be required to disclose immediately to the ASX any information that a reasonable person would expect to have a material effect on the price or value of that entity's securities. Listed entities should be aware that Listing Rule 3.1A.1 states that no disclosure is required with respect to matters of supposition or information which is insufficiently definite to warrant disclosure. ASX has, in response to the COVID-19 crisis stated that *"a listed entity's continuous disclosure obligations do not extend to predicting the unpredictable"*, and that ASX does not expect *"listed entities to make forward-looking statements to the market unless they have a clear and reasonable basis for doing so"*.

We recommend that listed and disclosing entities continue to diligently consider their disclosure obligations in compliance with their existing continuous disclosure policies. However, disclosing entities can take comfort that ASIC and the ASX (where relevant), do not expect entities to release forecasts or guidance unless the entity has a reasonable basis for that disclosure.

No Effect on Liability for Disclosures Made

The Determination only affects ASIC's ability to bring civil penalty proceeding against an entity in respect of non-disclosures. That is to say, an entity would not be liable for the non-disclosure of information that would, but for the Determination, be required to be disclosed under the "reasonable person" standard of the unmodified provisions.

As previously noted, the Determination provides no relief in relation to disclosures that a company has made and which subsequently turn out to be inaccurate – for example, liability for misleading or deceptive conduct under section 1041H of the Corporations Act.

While some commentators have criticised the Determination for having failed to address the issue of liability, this may ultimately prove to be an appropriately measured response from the Government. Maintaining the existing liability provisions will ensure that entities remain fully accountable for any disclosures they choose to make, this will help facilitate the effective operation of an informed market.

THE UPSHOT

The modifications provide some modicum of comfort for companies in compliance with their continuous disclosure obligations in light of the ever-changing economic environment created by the COVID-19 crisis. However, the Determination does not, in practice, alter a company's obligations to provide timely market updates where the effect of new or other non-public information or circumstances warrants a disclosure.

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