Temporary changes to continuous disclosure – what you need to know

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The COVID-19 pandemic has posed challenges for listed entities subject to continuous disclosure obligations arising under the *Corporations Act 2001* (Cth) (**Corporations Act**) and the ASX Listing Rules. The continued uncertainty and fluid economic environment make it particularly difficult for companies to release forecast future earnings and other forward-looking guidance to the market with confidence.

The Federal Treasurer has recently introduced temporary changes to the continuous disclosure provisions under the Corporations Act, which reduce the risk to companies where there is a failure to disclose material information. The *Corporations (Coronavirus Economic Response) Determination (No. 2) 2020* (**Determination**) commenced on 26 May 2020 and will be in force for six months.

In this alert, Senior Associate **Grace Mullins** outlines these changes and what you need to know.

What are the continuous disclosure obligations?

Continuous disclosure obligations are imposed on companies under Chapter 6CA of the Corporations Act and Chapter 3 of the ASX Listing Rules. For guidance on continuous disclosure obligations arising under the ASX Listing Rules and what is expected in this regard during the COVID-19 pandemic, see our previous alert **here**.

Obligations under the Corporations Act

Section 674 of the Corporations Act obliges listed entities to notify ASX of information that requires disclosure under the Listing Rules, if that information:

1. is not generally available; and
2. is information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of the securities of the entity.

A similar requirement is imposed on unlisted disclosing entities and certain entities listed on other markets under Section 675 of the Corporations Act.

Section 677 of the Corporations Act further provides that a reasonable person would be taken to expect information to have a material effect on the price or value of securities, if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the securities.

As investors rely on the timely disclosure of information to financial markets, the provisions aim to encourage companies to disclose information promptly and to promote market integrity. A listed entity that contravenes section 674 of the Corporations Act, or a person involved in a contravention, commits an offence and may also be subject to a civil penalty.

What are the amendments?

The Treasurer's Determination replaces the objective "reasonable person" tests for disclosure set out above with knowledge, recklessness or negligence with respect to information.

Under modified section 674, a listed entity must disclose information in accordance with the Listing Rules where:

- the information is not generally available; and
- the entity **knows or is reckless or negligent** with respect to whether that information would, if it were generally available, have a material effect on the price or value of the securities of the entity.

Section 675 has been similarly modified, in respect of unlisted disclosing entities and entities listed on other markets.

The meaning of "material effect" in section 677 has also been modified and it will now need to be shown that a company knew or was reckless or negligent with respect to whether the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the securities.

The Explanatory Statement accompanying the Determination noted that:

> *"It is 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. At the same time, it is appropriate that serious breaches committed knowingly, recklessly or negligently during the period the instrument is in force may continue to be litigated."*

The Determination is intended to reduce the scope for liability for companies and officers that make a reasonable attempt to comply with their continuous disclosure obligations in the complex economic environment caused by COVID-19. It is imperative that companies continue to carefully consider the materiality of information and whether disclosure is required by reference to the modified provisions. It should also be noted that there are limitations on the scope of this amendment as listed entities are still required to comply with Listing Rule 3.1 and the amendments do not impact the law on misleading and deceptive conduct nor will they impact allegations regarding information that is actually disclosed to the market. As such, caution should be exercised when seeking to rely on the Determination.

The Determination took effect on 26 May 2020 and will apply for a period of six months before being automatically repealed.

Amendments beyond COVID-19

Disclosing entities and their directors will no doubt welcome the Treasurer's Determination during this time of continued uncertainty surrounding the COVID-19 pandemic. However, critical to the long-term disclosure landscape will be whether these changes ultimately have effect beyond this initial six month period which would require further changes at a federal level.

For advice or assistance on your continuous disclosure obligations, please contact our **Corporate Advisory** team.

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