Federal Treasurer temporarily amends Corporations Act's continuous disclosure requirements and penalties to address COVID-19 uncertainty.

Source: Federal Register of Legislation

Date: 25 May 2020

Abstract:

The Federal Treasurer, Josh Frydenberg has exercised the temporary instrument-making power granted in the Coronavirus Economic Response Package Omnibus Act to issue a ministerial Determination which temporarily modifies the continuous disclosure obligations imposed by the Corporations Act. This follows his earlier exercise of the power to issue a Determination temporarily amending the Act's provisions relation to electronic signatures and company meetings (see our earlier update here)

The Corporations (Coronavirus Economic Response) Determination (No. 2) 2020 amends ss 674, 675 and 677 of the Corporations Act, modifying the continuous disclosure obligations for unlisted entities and the civil penalty provisions relating to market disclosure for both listed and unlisted entities to replace the objective test of whether "a reasonable person would expect" particular information to have a material impact on the price or value of securities if it were generally available with the subjective test of whether the entity or its officers "knows or is reckless or negligent" as to whether such information would have a material impact on the price or value of securities. The effect is to provide a safe harbour of sorts to entities and their directors and officers that diligently consider the materiality of information in deciding whether market disclosures are necessary.

A copy of the Treasurer's media release (available here) and the Explanatory Statement (available here) set out the rationale for these changes. In brief, given the considerable business uncertainty caused by COVID-19 it is significantly more challenging in the current environment for entities to know whether a given piece of information will have a material impact on the price or value of their securities and therefore to release reliable forward-looking guidance to the market. As such, the intent of the Determination is to temporarily limit the available scope for civil proceedings in relation to breaches of disclosure obligations to serious breaches that are committed knowingly, recklessly or negligently and thus protect entities and their officers from "the threat of opportunistic class actions for allegedly falling foul of their continuous disclosure obligations if their forecasts are found to be inaccurate".

Shareholder class actions alleging breach of continuous disclosure obligations routinely rely on ss1317HA and 1325, which provide for compensation orders for damage suffered due to breach of certain civil penalty provisions (amongst them

ss674 and 675), therefore the amendment of the civil penalty provisions themselves will have the consequence of also modifying the basis on which shareholder litigation operates. Civil enforcement provisions enforced by ASIC such as infringement notices under Part 9.4AA are also affected.

The Determination operates for a period of 6 months from its commencement on 26 May 2020 and is automatically repealed on 26 November 2020.

The Australian Institute of Company Directors and Business Council of Australia have both welcomed the relief measure contained in the Determination.

Corporate entities and their advisors should note the following limitations on the effects of the Determination:

- For unlisted entities that are issuers of ED securities and thus subject to continuous disclosure requirements under the Act, the effect of the amendments to ss 674 and 677 is to modify both the disclosure obligation itself and the attendant civil penalty provision. However, for listed entities, the source of the disclosure obligation imported by s 675 is ASX Listing Rule 3.1 which remains unchanged and maintains the "reasonable person would expect" test. A breach of Listing Rule 3.1 may still invite the attention of ASX Compliance. Granted, given the removal of the underlying civil penalty, the breach would no longer be an occasion for referral to ASIC for criminal or regulatory action so the Rule has lost the majority of its teeth, but corrective action may still be required by the ASX.

- While the stated aim of the Determination is to protect entities from shareholder class actions deriving from the COVID-19 environment, it operates only in respect of continuous disclosure requirements and thus protects against actions for information **not** given to the market. It does not affect the bread misleading and deceptive conduct provisions contained in the Australian Consumer Law, the ASIC Act and the Corporations Act. These provisions are a mainstay of shareholder class actions in relation to information that **is** released to the market. Corporate entities and their directors and officers should therefore remain vigilant that any market disclosure that are made are accurate and complete. Other sources of liability relating to market disclosures (such as directors' duties under s 180) also remain unaffected.