

EXPLANATORY STATEMENT

Issued by authority of the Treasurer

Corporations Act 2001

Corporations (Coronavirus Economic Response) Determination (No. 2) 2020

Section 1362A of the *Corporations Act 2001* (the Act) provides that the Minister may, by legislative instrument, exempt specified classes of persons from the operation of specified provisions of the Act or *Corporations Regulations 2001* (the Regulations). Section 1362A of the Act also provides that the Minister may, by legislative instrument, modify provisions of the Act or Regulations in relation to specified classes of persons.

The purpose of the *Corporations (Coronavirus Economic Response) Determination (No. 2) 2020* (the Determination) is to temporarily modify the continuous disclosure provisions in the Act to facilitate the continuation of business in circumstances relating to COVID-19.

The Determination modifies the operation of the civil penalty provisions in subsections 674(2), 674(2A), 675(2) and 675(2A) of the Act to establish a temporary test based on a disclosing entity or its officers' knowledge, recklessness or negligence with respect to whether certain information would have a material effect on the price or value of its enhanced disclosure (ED) securities and therefore should be disclosed under section 674 or 675 of the Act.

Under s111AC of the Act, if any securities of a body are ED securities, the body is a disclosing entity for the purposes of the Act. Generally, ED securities are issued by a listed company that is subject to the listing rules of a prescribed financial market (see RG 254.60 and s111AD of the Act).

The Determination has effect for six months from its commencement. It is automatically repealed at the end of six months beginning on the day after it was made.

COVID-19 has caused a considerable degree of uncertainty for business. In 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 ED securities and therefore forecast the entity's future earnings or prospects. In this environment, the continuation of many businesses may depend on investment, and investors rely on timely disclosure of information to financial markets. 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. On this basis the Minister is satisfied that the modifications in the Determination is appropriate to facilitate the continuation of business in circumstances relating to COVID-19.

An exemption from Regulation Impact Statement requirements was granted by the Prime Minister as there were urgent and unforeseen events.

Details of the Determination are set out in [Attachment A](#)

The Determination is a legislative instrument for the purposes of the *Legislation Act 2003*.

The Determination commenced on the day after it was registered.

A statement of Compatibility with Human Rights is at [Attachment B](#).

Details of the Corporations (Coronavirus Economic Response) Determination (No. 2) 2020

Part 1 - Preliminary

Section 1 – Name of the Determination

This section provides that the name of the Determination is the *Corporations (Coronavirus Economic Response) Determination (No. 2) 2020* (the Determination).

Section 2 – Commencement

The Determination commenced on the day after the instrument was registered on the Federal Register of Legislation.

Section 3 – Authority

The Determination is made under section 1362A the *Corporations Act 2001* (the Act).

Section 4 – Definitions

This section provides that the expressions “listed disclosing entity” and “unlisted disclosing entity” are defined in the Act and that “the Act” means the *Corporations Act 2001*.

Part 2 – Modification of the continuous disclosure obligations

The operation of the civil penalty provisions in subsections 674(2) and 674(2A) of the Act is modified in relation to listed disclosing entities mentioned in subsection 674(1) of the Act and persons mentioned in subsections 674(2A) of the Act. *[Subsection 5(1) of the Corporations (Coronavirus Economic Response) Determination (No. 2) 2020]*

The operation of the civil penalty provisions in subsections 675(2) and 675(2A) is modified in relation to: listed disclosing entities mentioned in paragraph 675(1)(a) of the Act; unlisted disclosing entities; and persons mentioned in subsection 675(2A) of the Act. *[Subsection 6(1) of the Corporations (Coronavirus Economic Response) Determination (No. 2) 2020]*

The modifications temporarily replace the objective tests in paragraphs 674(2)(b) and 675(2)(b) of the Act with respect to whether the information would have a material effect on the price or value of the entity’s ED securities. The new temporary test is whether the entity knows, or was 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 entity’s ED securities. *[Subsections 5(2) and 6(2) of the Corporations (Coronavirus Economic Response) Determination (No. 2) 2020]*

The operation of section 677 of the Act is modified as it applies to the civil penalty provisions in subsections 674(2), 674(2A), 675(2) and 675(2A). Section 677 as modified explains how the new temporary test may be satisfied. Under the new temporary test, a person knows or is reckless or negligent as to whether the

information will have a material effect on the price or value of the entity's ED securities if it knows or is reckless or negligent as to whether the information would or would be likely to influence persons who commonly invest in securities to acquire or dispose of the ED securities. *[Subsections 7(1) and 7(2) of the Corporations (Coronavirus Economic Response) Determination (No. 2) 2020]*

The definitions of "knowledge" and "recklessness" are imported from the *Criminal Code Act 1995* (the Criminal Code). Under the Criminal Code, the fault elements of knowledge and recklessness apply with respect to circumstances. The expression "circumstances" encompasses the legal construct of "circumstances" as a physical element in a criminal offence, but may also bear its ordinary meaning in other contexts. The continuous disclosure obligations as modified by the Determination require information to be disclosed in particular circumstances (within the ordinary sense of the word). On this basis the concepts of "knowledge" and "recklessness" may be imported from the Criminal Code to apply to the civil penalty provisions in subsections 674(2), 674(2A), 675(2) and 675(2A) of the Act. *[Section 8 of the Corporations (Coronavirus Economic Response) Determination (No. 2) 2020]*

"Negligence" is not defined. As a civil tort, it is a common law concept and appropriate for courts to decide what constitutes negligence in a given case.

The Determination does not affect the operation of the criminal offences based on subsection 674(2) or subsection 675(2). *[Section 9 of the Corporations (Coronavirus Economic Response) Determination (No. 2) 2020]*

All civil consequences of breaching the continuous disclosure provisions are affected by this Determination. This includes all civil consequences enforced by the Australian Securities and Investments Commission, including infringement notices for breaches of the continuous disclosure provisions under Part 9.4AA of the Act.

As the Determination is a legislative instrument, the legal position it creates in respect of the time it is in force may be preserved after it is repealed (see section 8 of the *Acts Interpretation Act 1901* as in force in 2005). A likely consequence of this is that the modified provisions will apply in future civil actions (including after the Determination is repealed) brought in respect of an alleged contravention committed while the Determination is in force.

The Determination is repealed at the end of the period of six months beginning on the day after it is made. Due to the operation of subsection 1362A(4) of the Act, no provision can be made in the Determination for transitional arrangements after the repeal date. Affected parties should be aware that on the repeal date, the continuous disclosure obligations will immediately cease to be modified by the Determination. In some cases, this may require certain information to be disclosed immediately after the Determination is repealed. *[Section 10 of the Corporations (Coronavirus Economic Response) Determination (No. 2) 2020]*

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Corporations (Coronavirus Economic Response) Determination (No. 2) 2020

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The Determination modifies the operation of the civil penalty provisions in subsections 674(2), 674(2A), 675(2) and 675(2A) of the Act to establish a temporary test based on an entity's knowledge, recklessness or negligence with respect to whether certain information would have a material effect on the price or value of its ED securities and therefore should be disclosed under section 674 or 675 of the Act.

The Determination does not modify the operation of the criminal offences based on subsections 674(2) or 675(2).

COVID-19 has caused a considerable degree of uncertainty for business. In 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 ED securities and therefore forecast the entity's future earnings or prospects. In this environment, the continuation of many businesses may depend on investment, and investors rely on timely disclosure of information to financial markets. 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 based on inadvertent breaches of the continuous disclosure obligations due to the uncertainty created by 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. On this basis the Minister is satisfied that the modifications in the Determination is appropriate to facilitate the continuation of business in circumstances relating to COVID-19.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

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