Coronavirus COVID-19 and corporate governance (Australia)

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By: Natalie Caton | Tom Fotheringham | Patrick Baisden

We recently reported on the World Health Organisation (WHO) having declared a “Public Health Emergency of International Concern” following the outbreak and rapid spread of coronavirus COVID-19, and whether this might amount to a force majeure event.

While, as at 18 February 2020, the WHO is yet to escalate the outbreak to the level of a “pandemic”, namely, the worldwide spread of a new disease, the Chinese Government, and several foreign governments, have imposed a number of restrictions including mandatory office closures, full or partial lockdown of cities, and travel bans to prevent spreading coronavirus. Similarly, some businesses are partaking in voluntary closures and have implemented travel bans (not only in and out of China but more generally) for their employees.

The coronavirus COVID-19 outbreak and ensuing government restrictions raise corporate governance concerns and create areas of risk across the ESG spectrum that should be considered by companies and their directors and officers.

It is trite to say that under Australian law, section 180 of the *Corporations Act 2001* (Cth) imposes an obligation on company directors to 'exercise their powers and discharge their duties with the degree of due care and diligence that a reasonable person would exercise' in the relevant circumstances. Directors and officers must, as a minimum, proactively acquire and maintain relevant knowledge, actively monitor the corporation's affairs and partake in an independent and critical evaluation of the matters for which they are responsible.

However, these conventional duties need to be considered in the contemporary context and with reference to the increasingly unconventional issues of the day.

Global health emergencies, like the current COVID-19 outbreak, come with inherent commercial risks such as impacts on business operations due to disruptions to the supply chain and instances of high absenteeism which may impede an organisation’s ability to deliver products and services to its customers. These effects would be exacerbated should the WHO raise its classification of the coronavirus to “pandemic” level.

In addition to recognising the immediate operational risks that emerge from the current coronavirus outbreak, there are potential short, medium and long term corporate governance concerns that the outbreak will give rise to. For example, cast your mind forward to July 2021 and imagine if you will: an ASX listed resource company who finds out that its main supplier cannot make good on a longstanding supply contract. The supplier’s inability to fulfill its obligations under the supply contract is as a result of ongoing effects from the coronavirus (notwithstanding that the outbreak has been under control since April 2020). Amongst other things, the supplier has not been able to deliver a critical manufacturing component due to a backlog in orders which resulted from its two month closure period during the height of the coronavirus outbreak. On announcement to market that its operations have been seriously affected as a result of the supplier's delay, the resource company's share price decreases dramatically.

It is at this juncture that questions will likely be asked of the company's board and senior management. Did they fail to adequately consider and mitigate risks arising from the current coronavirus outbreak? Was there an alternative supply arrangement that they could have secured at the time? If questions like these aren't proactively asked and answered now, companies may open themselves up to claims and legal action, including shareholder class actions, at a later stage. Such legal action may include, by way of example, claims for a failure to mitigate against foreseeable risks (i.e. the effects of coronavirus) resulting in a loss of stock value.

The current environment, extent of the outbreak and its potential impacts is undoubtably fraught with uncertainty. This makes it even more important that directors and officers are proactive in ensuring appropriate strategies are developed to anticipate and to mitigate the potential commercial impacts of a pandemic, and to ensure compliance with their legal obligations and duties. Directors and officers should consider developing a business continuity plan detailing the company's risk management strategy which may include matters such as contingency planning, standby alternative suppliers and emergency communications procedures.

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AUTHORS

Natalie Caton
Partner
Brisbane | T: +61 7 3246 4000
natalie.caton@dlapiper.com

Tom Fotheringham
Partner
Brisbane | T: +61 7 3246 4000
tom.fotheringham@dlapiper.com