Continuous disclosure reform - not a free pass

COVID-19 Alert

12 August 2021

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The temporary changes to the continuous disclosure and misleading and deceptive conduct laws which were introduced at the beginning of the COVID-19 pandemic have now been made permanent.[1]

The changes were introduced in May 2020 in recognition of the difficulties associated with determining the materiality of information during the COVID-19 pandemic and to mitigate the "threat of opportunistic class actions". [2]

The changes are seen by some, including plaintiff class action law firms and their funders, as a significant lessening of continuous disclosure obligations. Indeed, the changes bring the Australian regulatory position into line with continuous disclosure frameworks in the US and UK. However, the changes do not give listed entities or their officers a free pass in relation to their continuous disclosure obligations. We do not expect the changes will have a material impact on continuous disclosure practices.

Key changes

The effect of the changes is to include a fault element, and all civil proceedings commenced under the continuous disclosure and misleading and deceptive conduct provisions of the Corporations Act will now require proof that a listed entity or officer acted with "*knowledge, recklessness or negligence*" in order to establish an alleged contravention.

In addition, listed entities and officers are no longer automatically liable for misleading and deceptive conduct in circumstances where continuous disclosure obligations have been contravened, unless the requisite fault element (i.e. a knowing, reckless or negligent failure to disclose material information to the market) is proven.

Listed entities and their officers should be aware that there is no change in the requirement to comply with Listing Rule 3.1 and section 674(2) of the Corporations Act, which require the immediate disclosure of information that a reasonable person would expect to have a material effect on the price or value of the entity's securities.

What do these changes mean for listed entities and their officers?

It is hoped that this move will reduce the overall regulatory burden on listed entities by winding back the standard set by the previous reasonable person test, and enabling entities and their officers to more confidently provide information and guidance to the market without fear of speculative or opportunistic securities claims, particularly shareholder class actions.

It is also expected that private litigants will seek to navigate the changes by crafting their claims (usually in the form of a shareholder class action) so as to address the fault elements. It may be possible for a claimant to present an honest error in judgment as to materiality of negligence. Our colleagues have an update on what these changes mean for class-

actions in more detail here.

ASIC opposed the changes and retains wide-ranging investigative and enforcement powers, including the ability to issue infringement notices for certain contraventions of the Corporations Act[3] irrespective of the state of mind of the entity. The existing criminal offences for failing to comply with the existing disclosure obligations continue to apply.[4]

Accordingly, whilst some press reports indicate a significant change in the laws, in reality, best practice dictates that listed entities and their officers should not change their usual approach to their continuous disclosure obligations.

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[1] *The Treasury Laws Amendment (2021 Measures No. 1) Bill 2021* (Cth) (**Bill**) was passed by both Houses on 10 August 2021. The Bill has not yet received Royal Assent.

[2] Parliamentary Joint Committee on Corporations and Financial Services, December 2020, *Litigation funding and the regulation of the class action industry*, pg. 315 at [17.4].

[3] See Note 3 of subsections 674(2) or 675(2), Corporations Act.

[4] See Note 1 of subsections 674(2) and 675(2), Corporations Act.

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