Article Information

Authors: Sina Kassra, Sam Blight
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Frydenberg gives listed companies a shield against continuous disclosure breaches

In a win for businesses and their directors, Federal Treasurer Josh Frydenberg is proposing to make permanent the temporary modifications to Australia's continuous disclosure regime. The modifications were originally put in place to assist listed entities, and their directors, maintain timely disclosure of information to financial markets during the Covid-19 pandemic.

The amendments weaken protection for investors and create new hurdles for shareholder class actions (and the litigation funders involved) to overcome when trying to recover losses for aggrieved shareholders.

The proposed amendments to the *Corporations Act 2001* (Cth) (**Corporations Act**) will, if enacted, mean that a listed entity's state of mind is taken into account when determining whether the entity is liable for breaches of its continuous disclosure obligations. Prior to the modification an entity would be held liable for a breach of its continuous disclosure obligations if a plaintiff was able to prove that:

1. the entity had information that was not generally available;
2. a reasonable person would expect such information to have a material effect on the price or value of the entity's securities; and
3. the entity failed to notify the market operator or ASIC of that information.

Following implementation of the proposed changes, plaintiffs will also need to prove that the entity (read, the board) *also* had knowledge that, or was reckless or negligent as to whether, the information would have the material effect on the price or value of the entity's securities (**Fault Element**). This requirement to establish the Fault Element also extends to actions for misleading and deceptive conduct stemming from a breach of the continuous disclosure laws, however, it will not prevent ASIC from issuing infringement notices to entities where the Fault Element cannot be established.

Persons who are "involved" in a breach of the new continuous disclosure laws will also be held liable as an accessory to the breach, however, there will also be a defence available. The term "involved" is defined very broadly in section 79 of the Corporations Act and could attribute liability to a wide range of people (such as senior managers and advisors), however the entity's directors are most at risk of liability as a result of this inclusion.

The defence to accessorial liability requires that a person involved in the contravention:

1. has taken all steps that were reasonable in the circumstances to ensure that the entity complied with its continuous disclosure obligations; and
2. after doing so, believed on reasonable grounds that the entity was complying with its continuous disclosure obligations.

This defence is almost identical to the due diligence defence available to persons who would otherwise be liable for

misstatements or omissions from disclosure documents. Accordingly, if the proposed amendments to the Corporations Act are passed, it will become all the more important for listed entities to have detailed, well documented, and legally sound diligence practices in place for determining whether new information is price sensitive and making appropriate disclosure.

Our team at Piper Alderman will be able to assist you in putting in place the appropriate disclosure frameworks for effective disclosure, allowing Corporations, their officers and their advisors to avail themselves of the available defence.