ADDISONS

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Contact us

Jamie Nettleton
Partner
+61 2 8915 1016
jeff.mansfield@addisons.com

Li-Jean Chew
Partner
+61 2 8915 1026
li-jean.chew@addisons.com

Daniel Goldberg
Partner
+61 2 8915 1022
daniel.goldberg@addisons.com

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Latest COVID-19 relief from ASIC and ASX

Authors: Jeff Mansfield and Helen Leung

ASX class order waivers

On 31 March 2020, ASX introduced two class order waivers (**Class Waivers**) to facilitate temporary emergency capital raising measures to help listed entities affected by the COVID-19 pandemic to raise urgently needed capital. On 22 and 23 April 2020, ASX updated the Class Waivers and subsequently extended the emergency capital raising measures until 30 November 2020.

ASX announced in its Compliance Update on 15 September 2020 (September Update) that in light of significant stabilisation in market conditions since the extension of the Class Waivers, ASX considers it prudent and timely to further revise the settings for the availability of the Class Waivers.

Prior to the September Update, ASX's position was that the volatile market environment presented significant challenges for many entities needing to raise capital, whether or not the entity was directly impacted by COVID-19. Accordingly, the Class Waivers facilitated a wider range of capital raisings that were potentially affected by dislocation in the broader market environment, and meant that the relief could be applied whether or not the entity was directly impacted by COVID-19. However, from 16 September 2020, entities seeking to rely on the Class Waivers must satisfy ASX that the entity is raising capital *predominantly* for the purposes of addressing the existing or potential future financial effect on the entity resulting from the COVID-19 health crisis and/or its economic impact.

In its September Update, ASX also warned that, where a capital raising appears to have inequitable features for existing security holders, ASX may withhold the benefit of the Class Waivers.

The changes apply to all relevant capital raisings announced on or after 16 September 2020 and on or before 30 November 2020. The amendments have been implemented by publication of two replacement Class Waivers.

ASIC relief for 'low doc' offers

ASIC previously announced temporary relief for companies to raise capital quickly and more cost effectively in light of the COVID-19 pandemic. The relief allows for certain 'low doc' offers (including rights offers, placements and share purchase plans) to be made without a prospectus, even if all normal requirements are not met.

On 23 September 2020, ASIC announced it was extending the temporary relief under *ASIC Corporations (Share and Interest Purchase Plans) Instrument 2019/547* and *ASIC Corporations (Trading Suspensions Relief) Instrument 2020/289*, which will now be repealed on 1 January 2021, instead of 2 October 2020.

Changes to ASX Guidance Notes 12 and 19

On 28 August 2020, ASX released updates to Guidance Notes 3 (*Co-operatives and Mutuals Listing on ASX*), 4 (Foreign Entities Listing on ASX), 12 (*Significant Changes to Activities*) and 19 (*Performance Shares*), including substantial changes to Guidance Note 12 (**GN 12**) and Guidance Note 19 (**GN 19**).

Changes to Guidance Notes 3 and 4

Guidance Note 3 has been updated to reflect that co-operative companies can now issue co-operative capital units and mutual capital instruments. Guidance Note 4 has been amended to include the Tel Aviv Stock Exchange as an acceptable listing venue for foreign exempt listings and to reflect relief recently granted to US incorporated listed companies to allow them to prepare and file section 601CK accounts using US GAAP, as opposed to Australian IFRS.

Changes to Guidance Note 12

Key amendments to Guidance Note 12 include:

- **New re-compliance process:** Section 2.10 (*Additional steps for transactions requiring re-compliance under listing rule 11.1.3*) has been substantially amended to outline a new process that an entity must follow before and after announcing a transaction that requires re-compliance with ASX's admission and quotation requirements under Listing Rule 11.1.3.

- **Changes to minimum spread rule:** section 8.5 of GN 12 has been amended to reflect standard conditions to be imposed in all re-compliance listings that:

  - spread must come from subscriptions to the capital raising being conducted by the entity in connection with its re-admission (ie pre-existing holdings will not be counted); and

  - in the case of emerging market issuers, 100% (rather than the current 75%) of spread must come from residents of Australia or other jurisdictions acceptable to ASX.

- **Modified conditions for eligibility for the 2-cent waiver:** the conditions to receiving a '2-cent waiver' under section 8.8 of GN 12 has been amended to eliminate an emerging area of abuse, where entities were issuing shares at 2 cents to promoters and their associates at or shortly before the time of re-admission but then raising capital from investors at more than 2 cents. ASX will now not grant a '2-cent waiver' unless:

  - the price at which the entity's securities traded on ASX over the last 20 trading days on which the entity's securities have actually traded on ASX preceding the date of the announcement of the proposed transaction (or, if the entity was already suspended at the time of the announcement, the last 20 trading days on which the entity's securities have actually traded on ASX prior to its suspension) was not less than the offer price; or

  - the entity announces at the same time that it announces the proposed transaction that it intends to consolidate its securities at a specified ratio that will be sufficient, based on the lowest price at which the entity's securities traded over the 20 trading days referred to previously, to achieve a market value for its securities of not less than the offer price.

Additionally, an entity will be disqualified for a '2-cent waiver' if it has entered into a deed of company arrangement or a creditor's scheme of arrangement in the two years preceding announcement of the proposed transaction, and been continuously suspended since the deed or scheme was effectuated. The conditions to receiving a waiver from the minimum option exercise price have been modified to include a similar disqualification.

These amendments to GN 12 will limit the ability of certain entities to undertake a 'back door listing' or readmission to the ASX. ASX also noted that receipt of favourable in-principle advice on an entity's suitability for re-admission, by itself, is not to be taken as an indication that the entity will receive any other listing rule waiver or confirmation required or contemplated by the proposed transaction. The entity will need to separately apply to ASX for a specific in-principle advice regarding the waiver or confirmation.

Changes to Guidance Note 19

Key amendments to GN 19, formerly called '*Performance Shares*' but now amended to be called '*Performance Securities*', include:

- **Expanding coverage of GN 19:** GN 19 now covers performance options and performance rights, as well as performance shares. A new section 3 has been added to provide guidance on the different types of performance securities. A new section 7 also makes it clear that for the following types of performance securities, ASX in-principle advice does not need to be sought (i.e. is not covered by sections 8 to 15 of GN 19):
    - cash-settled performance rights;
    - an issue of performance shares, performance options or deliverable performance rights pursuant to a takeover bid or a scheme of arrangement; or
    - an issue of performance shares, performance options or deliverable performance rights under an employee incentive scheme or as part of the remuneration package of a director or employee, where the issue has been made in the ordinary course of business of the entity and not in connection with a new or re-compliance listing, and has been approved by shareholders (where Listing Rule 10.11 or 10.14 applies) or the board or the remuneration committee (where Listing Rule 10.11 or 10.14 does not apply).
- **Further information required for in-principle advice:** the ASX has expanded the information an entity must give to the ASX in an application for in-principle advice on performance securities, by making amendments to section 8 of GN 19.
- **Expanded guidance on appropriate terms:** the ASX has expanded the matters it will have regard to when determining whether performance securities satisfy the requirement in listing rule 6.1 that their terms are 'appropriate and equitable'.
- **Requirement for independent expert's report:** new section 13 has been added to GN 19 which requires an independent expert to opine on whether an issue of performance securities is fair and reasonable to non-participating security holders where:

- if the entity is already listed, it is proposing to issue performance securities covered by sections 8 to 15 of GN 19 and the number of ordinary shares into which those performance securities will convert in aggregate if the applicable milestone is achieved is greater than 10% of the number of ordinary shares the entity proposes to have on issue at the date the performance securities are proposed to be issued (taking into account any ordinary shares that the entity may be issuing in connection with the same transaction); or

- if the entity is applying to be listed, it has or proposes to have performance securities covered by sections 8 to 15 of GN 19 on issue at the date of its admission to quotation and the number of ordinary shares into which those performance securities will convert in aggregate if the applicable milestone is achieved is greater than 10% of the number of ordinary shares the entity proposes to have on issue at the date of its admission to quotation (taking into account any ordinary shares that the entity may be issuing in connection with its listing).

ASIC reduces red tape for initial public offerings

Authors: Li-Jean Chew and Adrian Palladino

On 27 August 2020, ASIC announced welcomed regulatory relief to reduce red tape and ASIC application fees for companies undertaking an initial public offering (**IPO**). This regulatory relief is provided by ASIC Corporations (Amendment) Instrument 2020/721 (**Instrument 2020/721**) and ASIC Corporations (IPO Communications) Instrument 2020/722 (**Instrument 2020/722**).

Facilitating voluntary escrow arrangements

A person who enters into an escrow arrangement with a security holder has a relevant interest in those securities as they have the power to control the disposal of the securities. There is pre-existing relief under ASIC Class Order [CO 13/520] which provides that a listed company does not have a relevant interest in its own securities merely because of escrow arrangements it is required to enter into with certain security holders under the ASX Listing Rules.

The relief provided by Instrument 2020/721, which amends ASIC Class Order [CO 13/520], extends this relief to voluntary escrow arrangements that the company, underwriter or lead manager requires a security holder to enter into in connection with an IPO.

Voluntary escrows may be required by the company, underwriter or lead manager in an IPO to increase investor confidence in the IPO, and promote an orderly market for the securities following the IPO.

The relief for voluntary escrow arrangements only applies if certain conditions are met, including that:

- the escrow arrangement must not restrict voting of the escrowed securities; and
- the escrow duration must not be longer than:
  - 1 year for an arrangement with an underwriter or lead manager; and
  - 2 years for an arrangement with the company.

ASIC had initially proposed to limit the total percentage of escrowed securities that a listed company can have on issue at the time of its listing as a condition to the relief, however, with the benefit of submissions from stakeholders, ASIC considered the minimum free-float requirements prescribed by the Australian Securities Exchange to be sufficient to mitigate the defensive use of escrow arrangements.

It is important to note that the relief (for both listing rule and voluntary escrows) applies for the purposes of the takeover provisions, but not the substantial holding provisions, of the *Corporations Act 2001* (Cth). In other words, a company's, underwriter's or lead manager's relevant interest in escrowed securities will need to be disclosed if required by the substantial holding provisions.

Pre-prospectus communications

Section 734 of the Corporations Act restricts the advertising or publicising of offers of securities that require a disclosure document under the Corporations Act. ASIC often grants individual relief for companies to communicate with their security holders and employees about an IPO of the company before the company lodges its disclosure documents. Instrument 2020/722 facilitates the disclosure of non-promotional communications to security holders and employees of a company proposing to undertake an IPO prior to lodging its disclosure documents, without the need to apply for individual relief.

The relief is only available where the company does not communicate any advantages, benefits or merits of the IPO.

Instrument 2020/722 outlines the permitted content of the pre-prospectus communications for the relief to apply, and this differs for employees of the company and security holders of the company. Any communications published in reliance on the exemption in Instrument 2020/722 must be updated where necessary to ensure the information is accurate and up to date.

In Consultation Paper 328, ASIC had initially contemplated that pre-prospectus communications would be limited to communications published in writing only. Following public consultation, ASIC has decided not to impose this requirement as it may increase, rather than reduce, red tape.

In response to a submission by a stakeholder to extend the relief to all persons engaged by the company to do work in connection with an IPO (such as underwriters and company advisers), ASIC confirmed its view that it did not consider communications to persons involved in preparatory work for an IPO to be prohibited under s734(2) of the Corporations Act. ASIC has also updated Regulatory Guide 254 to clarify this.

Insolvency relief extended until 2021

Authors: Daniel Goldberg and Adrian Palladino

On 6 September 2020, the Federal Government announced its intention to extend the insolvency relief measures put in place in March 2020 as part of its response to the COVID-19 pandemic. The relief measures were due to expire in September 2020, but will now expire on 31 December 2020.

The Treasurer announced that the regulations, which have not yet been released, will be made to extend the temporary increase in the threshold at which creditors can issue a statutory demand on a company and the time companies have to respond to statutory demands that they receive. These changes will also extend the temporary relief for directors from personal liability for trading whilst insolvent.

These temporary relief measures include:

Bankruptcy proceedings

- The minimum amount of debt required for a creditor to seek the issue of a bankruptcy notice against a debtor is increased from $5,000.00 to $20,000.00.
- The time-frame for a debtor to respond to a bankruptcy notice is increased from 21 days to six months.

Statutory demands

- The minimum threshold for creditors to issue a statutory demand on a company is increased from $2,000.00 to $20,000.00.
- The time-frame for a company to respond to a statutory demand is increased from 21 days to six months.

Safe harbour from insolvent trading

- Directors are relieved of their duty to prevent insolvent trading with respect to debts incurred in the ordinary course of the company's business during the period in which the interim relief measures are in effect. Of course, these measures do not relieve the company from the obligation to repay debts incurred during this period.
- Directors are reminded that the temporary safe harbour measures do not apply to breaches of the criminal prohibition in s 588G(3) on dishonest instances of insolvent trading.
- Directors should also note that the relief does not extend to statutory or common law directors' duties, such as the duty to act with due care and skill in good faith in the company's best interest and for a proper purpose.

Federal Treasurer Josh Frydenberg has described the measures as a ‘regulatory shield’, with the extension of the temporary relief measures designed to prevent a further tranche of failures before businesses have had the opportunity to recover from the effects of the pandemic.

While the extension of these measures does provide continuing relief for struggling businesses, and perhaps incentive for investment, we expect to see increased demand for insolvency processes once the relief measures and stimulus cease.

Separately, the Federal Government has also announced significant proposed reforms to corporate insolvency laws for smaller businesses (in this case, businesses with liabilities of less than $1 million). The reforms include a new “formal debt restructuring process” which would enable eligible businesses to restructure and undertake workouts when in financial distress, with the guidance of specialist restructuring practitioners. These measures could take effect as early as 1 January 2021, providing a “softer landing” for eligible businesses who have been relying on the temporary COVID-19 relief measures.

Reminder for ASX listed companies – Does your constitution require updating?

Authors: Li-Jean Chew and Chuanchan (CC) Ma

The AGM season is upon us again. Given recent developments in the law and the ASX Listing Rules (**LR**), some of which have been mentioned in our ECM Bulletins, it might be timely for ASX listed companies to consider whether their constitutions require updating.

The following are some constitutional provisions which may need to be reviewed for updating.

Restricted securities

If a company is looking to issue restricted securities in the near future, the provisions in its constitution relating to restricted securities (as prescribed by LR 15.12) will need to be updated to reflect the amendments to LR 15.12 that were made in December 2019.

Any company that is looking to list on the ASX should also ensure that its proposed constitution as a listed company reflects LR 15.12.

Further details: LR 15.12 requires a listed entity's constitution to include certain provisions dealing with restricted securities. As part of ASX's efforts to streamline the escrow regime in Chapter 9 and Appendices 9A and 9B of the ASX Listing Rules, amendments were made to LR 15.12 which apply to all entities that were admitted to ASX's official list, or issue restricted securities, on or after 1 December 2019. Listed entities that have issued restricted securities before 1 December 2019 must continue to comply with LR 15.12 in force immediately prior to that date.

Fees for registering paper-based transfers

If a company, or its external share registry, currently charges shareholders a fee for registering paper-based transfers, it is important to check the company's constitution to make sure that it actually contains a provision that permits such a fee being charged.

Further details: Older company constitutions often contain an express prohibition on charging fees for the registration of share transfers (which reflect former restrictions in the ASX Listing Rules). While LR 8.14.1 now permits "a reasonable fee" to be charged for registering a paper-based transfer, such a fee can only be charged if it does not infringe the entity's constitution. In a recent Federal Court decision, a listed entity refused to register a share transfer where the fee for doing so was not paid. However, its constitution contained a prohibition on charging such fees. The Federal Court found that by refusing to register the share transfer, the company breached its statutory contract (in the form of the constitution) with the relevant shareholder.

Direct voting

Companies should check that its constitution contains a provision that enables shareholders to exercise their voting rights through direct voting, in addition to exercising their existing right to appoint a proxy.

Further details: Direct voting helps to facilitate shareholder engagement by enabling shareholders to directly vote at general or class meetings without having to attend those meetings in person by proxy. It is particularly relevant in the current circumstances where COVID-19 is impacting on companies' ability to hold physical meetings.

A direct voting provision typically allows votes to be delivered by email, electronically or other means approved by the board. The direct voting provision should also give the board the power to prescribe rules for the delivery of direct votes, including the form, method and timing of giving a direct vote in order for the vote to be valid.

Updates to facilitate use of technology

Companies should also check whether its constitution needs to be "modernised" to allow for the use of technology, e.g. in terms of how board and shareholder meetings are held, how resolutions are passed and decisions made, and how notices and shareholder communication are delivered under the constitution.

Further details: Some common "modernisation" provisions include:

- Provisions which allow and facilitate the holding of hybrid or online general meetings.
- In response to the COVID-19 pandemic, temporary modifications have been made to the *Corporations Act 2001* (Cth) (**Corporations Act**) by the *Corporations (Coronavirus Economic Response) Determination (No. 3) 2020* to overcome any legal impediments to holding general meetings by virtual technology. However, companies should nevertheless check that there is nothing in its constitution which would prevent holding of general meetings in this way.
- The relevant provisions should also make it clear that, if holding general meetings using technology, all members so participating in the meeting are taken for all purposes (for example, a quorum requirement) to be present at the meeting while so participating.
- Allowing proxy forms to be delivered by way of email. The company may wish to require some form of authentication to be provided when proxy forms are delivered in this manner.
- Allowing flexibility in how circulating resolutions are "signed" by directors, for example by the director giving their consent to the resolution by email notice or phone message to the chair of the board or the company secretary. Such flexibility is useful in situations where urgent decisions need to be made by the board by way of a circular, and one or more of the directors does not have readily access to a printer and cannot physically "sign" a hardcopy of the resolution.
- Expressly allowing for any signatures on notices or documents that are given by the company to be affixed by mechanical or electronic means.

Renewal of proportional takeover provisions

Checking whether the proportional takeover provisions in the constitution are required to be renewed.

Further details: While this item does not involve a modification to the constitution, it is relevant to ensure that the relevant constitutional provisions are actually enforceable. Under section 648G of the Corporations Act, proportional takeovers provisions only have effect for 3 years after their adoption (or last renewal), and will need to be renewed by approval of shareholders in order for those provisions to continue to apply.

ASIC has restricted certain ‘stub equity’ offers to retail investors in takeovers

Authors: Jeff Mansfield and Adrian Palladino

Background

On 22 September 2020, ASIC executed ASIC Corporations (Stub Equity in Control Transactions) Instrument 2020/734 (**Instrument 2020/734**) to modify the *Corporations Act 2001* (Cth) (**Corporations Act**) to prevent stub equity offers of scrip in a proprietary company being made to large numbers of retail target holders in takeover bids and schemes of arrangement.

In June 2019 ASIC issued a consultation paper seeking feedback on proposals to address concerns with offers of ‘stub-equity’ to retail investors in control transactions (**Consultation Paper 312**). Instrument 2020/734 is the result of this year long consultation process.

Modifications

In Consultation Paper 312, ASIC proposed two legislative instruments to modify:

- (**Modification One**) Chapter 6D so that the disclosure exemptions in sections 708(17) and 708(18) of the Corporations Act do not apply to offers of securities in proprietary companies; and
- (**Modification Two**) Chapter 6 so that the exemptions in items 1–4 (takeover bids) and 17 (schemes of arrangement) of s611 are not available where securities are offered as consideration on terms that require the securities to be held by a custodian and/or subject to a securityholder agreement or similar arrangement, where doing so results in the issuer avoiding the application of:
    - the shareholder limit in s113(1);
    - s606; or
    - the disclosing entity provisions in Pt 1.2A

In *ASIC Report 669: Response to submissions on CP 312 Stub equity in control transactions* (**Report 669**) ASIC addressed submissions from various stakeholders in relation to the proposed modifications. ASIC noted that while Modification One may result in an increase in the use of foreign company vehicles, this risk may have been overstated in the submissions. ASIC went on to state that, on balance, it considered Modification One as an appropriate proactive measure to uphold the intention and function of section 113 rights and protections of retail security holders. However, ASIC has indicated that it will consider, and may provide, individual relief to permit offers of proprietary company securities on a case-by-case basis if it considers it is in the target securityholders’ interests to do so.

ASIC noted in Report 669 that many respondents to Consultation Paper 312 argued that there is no underlying policy that Chapter 6 and the disclosing entity provisions must be made to apply to offers of stub equity. Further, respondents to Consultation Paper 312 argued that Modification 2 would reduce competition in the market for control of entities and would deprive target security holders of a reasonable and equal opportunity to participate in benefits which might accrue through stub equity, contrary to section 602 of the Corporations Act.

In respect of Modification Two, ASIC acknowledged that the application of Chapter 6 and the disclosing entity provisions may give rise to nuanced considerations in the context of stub equity. ASIC stated that it would not be pursuing Modification Two at this time, but expressed concern that bidders may circumvent Modification One by, for example, making offers through a public company with mandatory custodial arrangements and converting to a proprietary company after the control transaction. To address these concerns, Instrument 2020/734 inserts a new section 615A so that where consideration includes securities in a public company held under mandatory custodial arrangements, items 1–4 and 17 in s611 only apply if the custodial arrangements contain 'conversion and termination provisions'.

Stub equity offers going forward

As might be expected, ASIC has expressed that it will be monitoring stub equity offers and will raise questions where it has concerns in relation to an offer. Bidders should be aware of this increased scrutiny.

While ASIC reiterated the limitations of disclosure in relation to stub equity offers, it provides the following best practice guidance for disclosure:

- the expert opinion on the offer should include a valuation and opinion on the scrip; and
- the directors should include a recommendation on the scrip consideration,

and these should be clearly and prominently disclosed in the scheme booklet.

Update on Continuous Disclosure – COVID-19 temporary changes – How do they change a director's liability?

Authors: Jeff Mansfield and Li-Jean Chew

The Federal Government has extended the temporary changes (**Temporary Changes**) to the continuous disclosure provisions in the Corporations Act (**Act**) to 22 March 2021[1]. They were due to expire in November 2020[2].

The Temporary Changes modify the test of whether there has been a breach of the continuous disclosure provisions in the Act from an objective to a subjective test.

This means that an ASX listed entity will be in breach of the continuous disclosure provisions of the Act if it does not disclose information which is not generally available (which does not come within one of the exceptions to disclosure) and:

- without the modification – objective test:
  - is information that **a reasonable person** would expect, if it were generally available, to have a material effect on the price or value of the entity's securities.
- with the modification – subjective test:
  - the **entity knows or is 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 securities.

In addition, the entity's directors (or other persons, e.g. the entity's other officers) who are involved in a breach by the entity will, under the Temporary Changes, only be liable if the entity knows the information, or is reckless or negligent with respect to whether the information, would, if it were generally available, have a material effect on the price or value of the entity's securities.

At the time of the introduction of the Temporary Changes, the Federal Treasurer, Josh Frydenberg, said that these measures mean that "companies and officers will only be liable if there has been knowledge, recklessness or negligence with respect to updates on price sensitive information to the market".

This is good news for listed companies and their directors and officers, but it is not the whole story in an action for breach of an entity's continuous disclosure obligations.

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[1] Corporations (Coronavirus Economic Response) Determination (No.4) 2020 which commenced on 24 September 2020 and is due to expire on 22 March 2021.
[2] Corporations (Coronavirus Economic Response) Determination (No.2) 2020 which commenced on 26 May 2020 and expired with the introduction of Corporations (Coronavirus Economic Response) Determination (No.4) 2020 on 24 September 2020.

Certainly, the Temporary Changes limit the Australian Securities and Investments Commission (**ASIC**) to taking action only where an ASX entity knew, or was reckless or negligent as to whether the information would, if it were generally available, have a material effect on the price or value of the entity's securities.

So the action that ASIC took against *Vocation Limited*[3] and its directors including the Chairman, John Dawkins, under section 674 (continuous disclosure) of the Act may not have succeeded if the Temporary Changes were in place, although give the Court's finding of fact as to the actual knowledge of Vocation and certain of its directors at a particular point in time, this cannot be stated categorically.

However, in the *Vocation* case, in addition to an action under section 674, ASIC also took action against Vocation under the misleading and deceptive conduct provisions of the Act[4] and against certain of its directors for breach of their duty as directors for failing to act with reasonable care and diligence[5]. These causes of action have not been modified by the Temporary Changes.

Also in the *Myer case*[6], which was a class action on behalf of a group of Myer shareholders, the allegation was that Myer and certain of its officers breached:

- s769C – making representations about future matters that are taken to be misleading if made without reasonable grounds;
- s1041H – misleading and deceptive conduct; and
- s674(2A) – involvement in a breach by an entity of its continuous disclosure obligations.

Damages were sought for breaches of these provisions by the class action plaintiffs under sections 1041I, 1317HA and 1325.

Also ASX has not changed the requirement in ASX Listing Rule 3.1 that once an ASX listed entity "is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately tell ASX that information."

The ultimate sanction that ASX has for a failure by an ASX listed entity to comply with this rule is to suspend trading in its securities or, in an extreme case, to terminate its listing. This power is not exercised lightly by ASX and usually the threat of suspension or termination is sufficient to have the entity comply with their obligations.

Nevertheless, a director may find themselves in threat of a breach of their duties as a director to act with a reasonable degree of care and diligence if the entity that they are a director of fails to comply with ASX Listing Rule 3.1, notwithstanding the introduction of the Temporary Changes. The argument being that a

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[3] *ASIC v Vocation Ltd (in liq) and Others* [2019] FCA 807.
[4] s1041H.
[5] s180. See also the recent case of *ASIC v Big Star Energy Ltd (No. 3)* [2020] FCA 1442. The action against the director in this case was that he failed to discharge his duties to his company with the requisite degree of care and diligence by causing the company to fail to comply with its continuous disclosure obligations.
[6] *TPT Patrol Pty Ltd ATF Amies Superannuation Fund v Myer Holdings Limited* [2019] FCA 1747. The class action plaintiffs did not win this case.

director acting in accordance with the standard expected of them would foresee a risk of harm to their entity if they failed to comply with the ASX Listing Rules[7].

So what should directors do?

Directors should continue to comply with their entity's Continuous Disclosure Policy and disclose relevant matters to ASX.

However, in this COVID-19 environment ASX advises that a listed entity's continuous disclosure obligations do not extend to "predicting the unpredictable". In its Compliance Update of 31 March 2020, ASX said that:

> *"ASX does not expect listed entities to announce information under listing rule 3.1 that comprises matters of supposition or that is insufficiently definite to warrant disclosure1 and that otherwise meets the requirements of all three limbs of listing rule 3.1A, mentioned above.2 Nor does ASX expect listed entities to make forward-looking statements to the market unless they have a clear and reasonable basis for doing so.*
>
> *Clearly forecasting future circumstances will continue to be difficult exercise in the current environment so should be avoided, if possible, within the scope of what the ASX has said in its Guidance Note 8 about forecasting."*

ASX's Compliance Update of 31 March 2020 gives some practical guidance to listed entities on their disclosure obligations in relation to earnings guidance, decisions to pay dividends and other matters. ASX's Compliance Update of 31 March 2020 can be accessed here.

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[7] The foreseeable harm being suspension or termination of their listing or some other action, like the possibility of a class action. See *Cassimatis v ASIC* [2020] FCAFC 52.

ADDISONS

Level 12, 60 Carrington Street
Sydney NSW 2000 Australia

ABN 55 365 334 124
Telephone +61 2 8915 1000

mail@addisons.com
www.addisons.com