



Continuous disclosure: Review of changes made by the *Treasury Laws Amendment (2021 Measures No.1) Act 2021*

Consultation paper

November 2023

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Manager
Media Unit
The Treasury
Langton Crescent
Parkes ACT 2600
Email: media@treasury.gov.au

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About this consultation

The purpose of this consultation

The purpose of this consultation is to inform an independent review (**Review**) of the amendments (**2021 Amendments**) to the continuous disclosure laws made by the *Treasury Laws Amendment (2021 Measures No.1) Act 2021 (2021 Amending Act)*.¹

The Review will consider, among other things, whether the 2021 Amendments are working in support of an efficient, effective, and well-informed market.

Depending on its findings, the Review may make recommendations to the Government that the 2021 Amendments should be repealed or amended.

It should be noted that the terms of reference for the Review are limited to the operation of the 2021 Amendments, and therefore the Review will not be seeking views nor making recommendations on the broader operation of Australia’s continuous disclosure laws.

Request for feedback and comments

Interested stakeholders are invited to make submissions on the issues raised in this consultation paper.

The closing date for submissions on this consultation paper is **1 December 2023**.

Submissions may be lodged electronically or by post to the following addresses:

Email	continuousdisclosurereview@treasury.gov.au
Mail	Director Continuous Disclosure Review Unit Market Conduct and Digital Division The Treasury Langton Crescent Parkes ACT 2600

However, electronic lodgement is preferred.

For accessibility purposes, please provide your submissions in a Word, RTF, or PDF format.

Enquiries should be directed in the first instance to continuousdisclosurereview@treasury.gov.au.

Confidentiality

Submissions may be shared with other Commonwealth agencies for the purposes of the Review. All information (including name and address details) contained in submissions may be made publicly available on the Australian Treasury website unless you indicate that you would like all or part of your

¹ See Schedule 2 of the *Treasury Laws Amendment (2021 Measures No.1) Bill 2021* (Cth). Schedule 1 of the 2021 Amending Act also included reforms to facilitate electronic meetings. Those reforms do not form part of this consultation.

submission to remain in confidence. Automatically generated confidentiality statements in emails are not sufficient for this purpose.

If you would like only part of your submission to remain confidential, please provide this information clearly marked as such in a separate attachment.

Please note that legal requirements, such as those imposed by the *Freedom of Information Act 1982*, may affect the confidentiality of your submission.

For further information, please refer to Treasury's [Submission Guidelines](#).

Background

What are the continuous disclosure laws?

Australia's continuous disclosure laws are found in chapter 6CA of the *Corporations Act 2001* (**Corporations Act**) which, subject to certain exceptions, requires 'disclosing entities'² to disclose market-sensitive information on a continuous basis and in a timely manner. If the disclosing entity is listed on a market whose rules require it (such as the ASX), these disclosures are made to the market operator. Otherwise, they are made to the Australian Securities and Investments Commission (**ASIC**).

A disclosing entity breaches these obligations:

- if the entity has information that is not generally available;
- the information, if it were generally available, is such that a reasonable person would expect it to have a material effect on the price or value of the entity's securities; and
- the entity fails to notify the market operator or ASIC (as required) of the information in accordance with these requirements.

A breach of these obligations attracts significant criminal and civil penalties for both the entity and any officer of the entity who was involved in the breach. A person who suffers loss as a result of the breach can also bring a civil action for damages against the entity and any officer of the entity who was involved in the breach.

Why the continuous disclosure laws are important

The objective of Australia's continuous disclosure regime is:

... to enhance the integrity and efficiency of Australian capital markets by ensuring that the market is fully informed. The timely disclosure of market sensitive information is essential to maintaining and increasing the confidence of investors in Australian markets, and to improving the accountability of company management. It is also integral to minimising incidences of insider trading and other market distortions.³

² 'Disclosing entities' include companies and trusts listed on an Australian securities market such as the ASX and certain other entities that have raised capital or undertaken a takeover or scheme of arrangement in Australia.

³ *James Hardie Industries NV v ASIC* (2010) NSWCA 332, at paragraph 355.

As ASIC has noted:

Maintaining the integrity of Australia's equity markets is essential to ensure a fair, strong, and efficient financial system for all Australians. Confidence in the integrity of Australia's equity markets:

- encourages investor participation
- contributes to liquidity
- stimulates more competitive pricing
- lowers the cost of capital.

... Reduced confidence in market integrity discourages investors from risking their savings by investing in an unfair market. This can lead to lower turnover, higher cost of trading and inefficient allocation of capital.⁴

The continuous disclosure laws also underpin some of the more important features of Australia's capital markets, including low document capital raisings.

The changes made by the 2021 Amendments

The 2021 Amendments came into effect on 14 August 2021.

Following the 2021 Amendments, for:

- ASIC to succeed in a civil penalty proceeding against;⁵ or
- a plaintiff to succeed in a proceeding for damages from,

a disclosing entity or its officers for alleged breaches of the continuous disclosure laws, they must show that the entity or its officers acted with 'knowledge, recklessness or negligence'.⁶

Before the 2021 Amendments, neither ASIC nor a plaintiff needed to prove state of mind to succeed in such proceedings.⁷

For consistency, the 2021 Amendments included similar changes to the provisions in the Corporations Act and the *Australian Securities and Investments Commission Act 2001* (Cth) prohibiting misleading and deceptive conduct, insofar as the conduct in question involves a breach by a disclosing entity of its continuous disclosure obligations.

⁴ [ASIC Report 623 'Review of Australian equity market cleanliness 1 November 2015 to 31 October 2018', 2019](#), at page 3.

⁵ ASIC does have the ability to issue infringement notices for breaches of the continuous disclosure laws imposing a civil penalty of up to \$100,000 without having to prove state of mind. However, a disclosing entity has a choice as to whether it will abide by an infringement notice. If it chooses not to, ASIC must resort to criminal or civil penalty proceedings to enforce those laws.

⁶ It is noted that the 2021 Amendments did not include any specific provisions governing how the state of mind of a disclosing entity should be established in civil proceedings under or relating to chapter 6CA of the Corporations Act. One of the issues the Review will consider is whether the 2021 Amendments should have included attribution rules providing how the knowledge, recklessness or carelessness of a disclosing entity's officers, employees and agents should be attributed to the entity.

⁷ The provisions in the Corporations Act imposing criminal liability for failure to comply with the continuous disclosure obligations were not amended. They already required the prosecution to show that the entity or its officers acted with intention, knowledge, recklessness or negligence for it to succeed in criminal proceedings.

The background to the 2021 Amendments

On 25 May 2020, the former government temporarily amended the continuous disclosure provisions in the Corporations Act for a period of six months⁸ via the Corporations (Coronavirus Economic Response) Determination (No. 2) 2020. The temporary determination had the effect that disclosing entities and their officers would only be civilly liable for a breach of their continuous disclosure obligations if they acted with knowledge, recklessness or negligence in relation to the breach.

The purpose of the temporary determination was to allow disclosing entities to release forward-looking information to the market – in particular, but not only, about the impact of COVID-19 on their profitability – with greater confidence that they would not be subject to an investor class action for breach of their continuous disclosure obligations if the information proved to be incorrect.⁹

Separately, on 13 May 2020, the House of Representatives referred to the Parliamentary Joint Committee on Corporations and Financial Services (**PJC**) an inquiry into litigation funding and the regulation of the class action industry. The PJC published an extensive report about that enquiry in December 2020 (**PJC Report**).¹⁰ Notably, the PJC Report included a separate minority report by the Labor members of the PJC expressing dissenting views on a number of the findings and recommendations in the PJC Report.¹¹

The PJC Report found that securities class actions were frequently brought in Australia alleging contraventions of the continuous disclosure obligations and that this had a significant financial and compliance impact on the entities and officers subject to these actions. The PJC Report commented:

Evidence to the committee focused on the ease with which shareholder class actions may be triggered by an alleged breach of Australia’s continuous disclosure provisions. It was also argued that shareholder class actions are economically inefficient, overwhelmingly opportunistic, generate windfall profits for class action law firms and litigation funders, and do not contribute to the public good.

Given the apparent detriment caused by the increased prevalence of private litigant shareholder class actions, and the apparent lack of any accompanying public good, the committee considers reforms to the underlying substantive law on continuous disclosure are necessary. The committee adopts this approach rather than recommending further reforms to class action procedure because, in this instance, the problem itself appears relatively discrete and the optimal solution is to target the reform to the underlying source of the problem.¹²

The PJC Report continued:

In the committee's view, shareholder class actions are generally economically inefficient and not in the public interest.

Shareholder class actions appear to often generate excessive profits for litigation funders and lawyers at the expense of listed companies and their shareholders. The company, rather than the directors and officers, are most often the liable party in shareholder class actions. Due to the circularity problem, the unnecessarily high costs of defending the class action litigation

⁸ The former government’s temporary amendments were extended until 22 March 2021 via the Corporations (Coronavirus Economic Response) Determination (No. 4) 2020.

⁹ Explanatory Statement, Corporations (Coronavirus Economic Response) Determination (No. 2) 2020.

¹⁰ Parliamentary Joint Committee, [Litigation Funding and the Regulation of the Class Action Industry \(Report December 2020\)](#). The non-confidential submissions to the PJC are available at [Litigation Funding And The Regulation Of Class Action Industry](#).

¹¹ See pages 361-371 of the PJC Report.

¹² PJC Report paragraphs 5.36 and 5.37.

and any settlement payments are ultimately borne by shareholders. In essence, money is being taken from one group of shareholders and passed to another to compensate the latter group for wrongdoing by directors and officers. While some individual shareholders may gain, overall shareholders are losing money, particularly long-term or passive investors.

Shareholder class actions do not appear to be limiting agency costs in corporations. Indeed, it appears that shareholder class actions may be costing shareholders more than the problems they seek to resolve. They provide limited deterrence for corporate misconduct, because those responsible for continuous disclosure breaches do not receive timely sanctions or bear the full costs of their actions.

Additionally, the increasing prevalence of shareholder class actions has broader undesirable outcomes on the availability and cost of D&O [Directors and Officers] insurance, with consequential challenges for attracting and retaining experienced and high-quality directors and officers. A culture of risk-averse decision-making across Australian boards is a further adverse outcome of shareholder class actions, with harmful long-term impacts on economic growth, job creation and investors' return on equity.

The committee recognises that continuous disclosure is an important mechanism in the efficient operation of the market. On the one hand, an effective continuous disclosure regime helps ensure transparency, thus enabling investors and shareholders to make informed decisions. On the other hand, several submitters and witnesses argued that, in too many instances, class action lawyers and litigation funders were taking advantage of Australia's continuous disclosure regime to launch opportunistic shareholder class actions.

It is clear to the committee that a balance needs to be struck. Market transparency and integrity is obviously fundamentally important. However, a plethora of economically inefficient shareholder class actions is having a detrimental effect on business.¹³

The PJC Report recommended that the Government legislate to make the changes to continuous disclosure laws in the Corporations (Coronavirus Economic Response) Determination (No. 2) 2020 permanent so that, in determining whether a disclosing entity or its officers contravene their continuous disclosure obligations, their state of mind is required to be taken into account.¹⁴

The PJC Report stated that this change would address an imbalance between the benefits to the market of continuous disclosure obligations and the costs imposed on disclosing entities and their officers by class actions for breaches of those obligations. It would also bring Australia's continuous disclosure regime closer to the regimes in comparable jurisdictions such as the United States and United Kingdom.¹⁵

On 20 October 2021, the former government provided a response to the PJC Report agreeing with the recommendation and stating that the 2021 Amendments, which had already been enacted at the time of the response, 'strike the right balance between ensuring shareholders and the market are appropriately informed while allowing companies to more confidently make forecasts of future earnings or provide guidance updates without facing the undue risk of class actions.'¹⁶

¹³ PJC Report paragraphs 17.117-17.119 and 17.124-17.125.

¹⁴ PJC Report recommendation 29. This recommendation was specifically opposed by the Minority Report of the PJC (see paragraph 1.21 on page 363 of the PJC Report).

¹⁵ PJC Report paragraph 17.128. A useful comparison of the continuous disclosure laws in various jurisdictions can be found in paragraphs 17.48 -17.58 and table 17.2 of the PJC Report.

¹⁶ [Government Response to the Parliamentary Joint Committee Report, 'Litigation Funding and the Regulation of the Class Action Industry December 2020' 20 October 2021](#), at page 45.

The reasons for the Review

The Review is being conducted under, and for the purposes of, section 1683B of the Corporations Act. That section requires the Minister to cause a review to be conducted of the operation of the 2021 Amendments by an independent expert within 6 months after the second anniversary of the commencement of that section (i.e. by 14 February 2024).

The person who conducts the Review must give the Minister a written report and the Minister must cause a copy of the report to be tabled in each House of the Parliament within 15 sitting days of that House after the report is given to the Minister. The report may set out recommendations to the Government. If it does, the report must set out the reasons for those recommendations and the Minister must cause a statement setting out the Government's response to each of the recommendations to be prepared and published on the Department's website within 3 months after the report is first tabled in a House of the Parliament.

If these requirements are not met, under section 1683C of the Corporations Act, the 2021 Amendments automatically sunset and the continuous disclosure provisions in the Corporations Act revert to the form they were in immediately prior to the 2021 Amendments.

Parliament's decision to require the operation of the 2021 Amendments to be reviewed after 2 years reflected the diversity of views expressed by stakeholders at the time about the possible impact of those amendments. By way of example, the Labor party expressed concerns that the 2021 Amendments 'would strip shareholders of their rights to be adequately informed, damage Australia's corporate governance regime, and allow company directors to get away with failing to disclose important information' and that this 'could damage Australian investment and hurt Australian investors and retirees'.¹⁷ ASIC also expressed concerns about the impact the 2021 Amendments would have on its ability to enforce continuous disclosure laws.¹⁸

The terms of reference for the Review

On 19 September 2023, the Hon Stephen Jones MP announced¹⁹ that Dr Kevin Lewis (**Reviewer**) had been appointed to conduct the Review.²⁰

Under the terms of reference establishing the Review, the Reviewer is required to have regard to:

- whether the 2021 Amendments are working in support of an efficient, effective, and well-informed market;
- the effect of the 2021 Amendments on the quality and nature of disclosures made by disclosing entities;
- continuous disclosure regimes that operate overseas and the extent to which the Australian regime is consistent with those regimes; and

¹⁷ The Hon Senator Katy Gallagher, 'Bills - Treasury Laws Amendment (2021 Measures No. 1) Bill 2021 - Second Reading' (Speech, Commonwealth Senate 9 August 2021).

¹⁸ See paragraphs 20-31 of ASIC Submission to the Senate Economics Reference Committee on Treasury Laws Amendment (2021 Measures No.1) Bill Dates June 2021, available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/REFSTLABMeasuresNo1/Submissions (submission number 14).

¹⁹ The Hon Stephen Jones MP Assistant Treasurer and Minister for Financial Services, [Government appoints independent reviewer of continuous disclosure regime amendments](#), Commonwealth Government, 19 September 2023, accessed 27 October 2023.

²⁰ In conducting the Review, the Reviewer is being supported by the Continuous Disclosure Review Unit in Treasury's Market Conduct and Digital Division.

- whether the 2021 Amendments have given rise to barriers that may prevent compliance with or enforcement of the continuous disclosure obligations.

In undertaking the Review, the Reviewer is required to consult with the public and invite submissions.

The Reviewer may set out recommendations to the Government, providing a rationale for any recommendations that are made.

The Reviewer is required to provide a report to the Government by 14 February 2024.

Issues being consulted upon

The Review is seeking stakeholders' views on the 2021 Amendments, whether they have delivered the outcomes projected in the PJC Report and whether they have had a positive or negative impact on issues such as:

- the efficiency or effectiveness of the market for Australian securities;
- the nature or quality of disclosures by disclosing entities;
- the number or type of class actions against disclosing entities for breach of their continuous disclosure obligations;
- the comparability of the Australian continuous disclosure regime with similar regimes in major overseas markets;
- the availability and cost of D&O insurance; and
- the capacity of ASIC to enforce the continuous disclosure laws.

Feedback is therefore sought from interested stakeholders on the following questions:

Impact on market efficiency and effectiveness

1. Do you consider that the 2021 Amendments have:
 - (a) resulted in the market for Australian listed securities²¹ being materially more efficient, effective, or well-informed;
 - (b) resulted in the market for Australian listed securities being materially less efficient, effective, or well-informed; or
 - (c) had no material impact on the efficiency or effectiveness of, or the level of information in, the market for Australian listed securities?

Please explain the reason(s) for your answer.

Impact on nature and quality of disclosures by disclosing entities

2. Have you observed any changes in the nature and/or quality of disclosures by disclosing entities since the 2021 Amendments came into effect? If so, what changes have you observed and do you attribute those changes to the 2021 Amendments or to some other cause? What data or specific examples can you provide to support your observations?
3. Have the 2021 Amendments affected the ability of investors in Australian listed securities to make informed investment decisions? If so, how?

Impact on class actions

4. Have you observed any changes in the number and/or type of class actions against disclosing entities for breach of their continuous disclosure obligations since the 2021 Amendments came into effect? If so, what changes have you observed and do you attribute those changes to the

²¹ That is, securities issued by an entity listed on an Australian financial market.

2021 Amendments or to some other cause? What data or specific examples can you provide to support your observations?

5. If the 2021 Amendments were to be repealed, would that have:
 - (a) a materially positive impact;
 - (b) a materially negative impact; or
 - (c) no material impact at all,on the number and/or type of class actions against disclosing entities for breach of their continuous disclosure obligations? Please explain the reason(s) for your answer.

Impact on D&O insurance

6. Have you observed any changes in the availability and/or cost of D&O insurance for disclosing entities since the 2021 Amendments came into effect? If so, what changes have you observed and do you attribute those changes to the 2021 Amendments or to some other cause? What data or specific examples can you provide to support your observations?
7. If the 2021 Amendments were to be repealed, would that have:
 - (a) a materially positive impact;
 - (b) a materially negative impact; or
 - (c) no material impact at all,on the availability and/or cost of D&O insurance for disclosing entities? Please explain the reason(s) for your answer.

Consistency with other markets

8. Would you say that the continuous disclosure regime in the Corporations Act following the 2021 Amendments is:
 - (a) materially tougher than;
 - (b) materially more lenient than; or
 - (c) in broad alignment with,the disclosure regimes that operate in major overseas markets? Please explain the reason(s) for your answer.
9. The PJC Report stated that the 2021 Amendments would bring Australia's continuous disclosure regime closer to the regimes in comparable jurisdictions such as the United States and United Kingdom.²² ASIC, however, has stated that introducing a fault-based framework for ASIC enforcement litigation may have placed Australia out of step with the United States and the United Kingdom, where it appears regulators can take enforcement action without establishing fault.²³ Do you agree with the PJC Report or with ASIC in this regard? Please explain the reason(s) for your answer.
10. If the 2021 Amendments were to be repealed, would that have:
 - (a) a materially positive impact;
 - (b) a materially negative impact; or
 - (c) no material impact at all,

²² PJC Report paragraph 17.128. A useful comparison of the continuous disclosure laws in various jurisdictions can be found in paragraphs 17.48 -17.58 and table 17.2 of the PJC Report.

²³ See paragraphs 17-19 of ASIC Submission to the Senate Economics Reference Committee on Treasury Laws Amendment (2021 Measures No.1) Bill Dates June 2021, available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/REFSTLABMeasuresNo1/Submissions (submission number 14).

on the competitiveness of Australian equity markets to attract new listings compared to major overseas equities markets? Please explain the reason(s) for your answer.

Compliance and enforcement

11. Have the 2021 Amendments given rise to barriers that may hinder the effective enforcement by ASIC of a disclosing entity's continuous disclosure obligations under the Corporations Act. If so, what are those barriers and how do you think they should be addressed?
12. Have you observed any changes in the number and/or effectiveness of enforcement actions by ASIC against disclosing entities for breach of their continuous disclosure obligations since the 2021 Amendments came into effect? If so, what changes have you observed and do you attribute those changes to the 2021 Amendments or to some other cause? What data or specific examples can you provide to support your observations?
13. If the 2021 Amendments were to be repealed, would that have:
 - (a) a materially positive impact;
 - (b) a materially negative impact; or
 - (c) no material impact at all,on the capacity of ASIC to take effective enforcement action against disclosing entities for breach of their continuous disclosure obligations? Please explain the reason(s) for your answer.

Other matters

14. Are there any other matters concerning the 2021 Amendments that you would like to see addressed in the Review?

Next steps

The Reviewer will consider all submissions received on this consultation paper and prepare a report for the Minister summarising the submissions and his findings. The report may or may not make recommendations for changes to the continuous disclosure laws. Whether or not any recommendations by the Reviewer are acted upon will be a matter for Government consideration.