



**ASIC**  
Australian Securities &  
Investments Commission

**Continuous disclosure:  
Review of 2021 amendments  
Submission by the Australian  
Securities and Investments  
Commission**

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## Overview

- 1 Compliance with continuous disclosure is essential for market integrity and investor confidence. ASIC investigates and takes enforcement action on potential contraventions of the continuous disclosure laws for the public benefit. We welcome the opportunity to make a submission to the independent review (**Review**) of amendments to continuous disclosure laws by *Treasury Laws Amendment (2021 Measures No. 1) Act 2021 (2021 Amendments)*.
- 2 The 2021 Amendments introduced an additional fault element in civil penalty proceedings alleging contravention of the continuous disclosure laws. The fault element is not required in relation to the issue of infringement notices.
- 3 This submission comments on developments since the 2021 Amendments commenced. We also respond to questions relating to ASIC in Treasury's [Consultation Paper](#) *Continuous Disclosure: Review of changes made by the Treasury Laws Amendment (2021 Measures No. 1) Act 2021* dated 1 November 2023.
- 4 The relatively short time since the 2021 Amendments commenced means it is difficult to fully evaluate how they have affected ASIC's enforcement actions, none of which have yet concluded. However, the need to prove the fault element makes our investigations and enforcement action for alleged contraventions of the continuous disclosure laws harder to prove, more resource intensive and less certain.
- 5 Given the importance of the continuous disclosure regime to market integrity and investor confidence, we remain of the view that the 2021 Amendments should be reversed for regulatory action instigated by ASIC. In this regard, we note that the current provisions already treat ASIC differently from private litigants in that the fault element is not required for the issue of an infringement notice. We also note that a differential liability regime for ASIC and private litigants is proposed in Treasury's [Consultation Paper](#) *Climate-related financial disclosure* dated June 2023.

## A Observations on 2021 Amendments

### Context of the 2021 Amendments and ASIC

The 2021 Amendments were introduced in response to increased shareholder class actions alleging contraventions of the continuous disclosure laws. This rationale does not apply to regulatory action.

#### Outline of the 2021 Amendments

- 6 *Treasury Laws Amendment (2021 Measures No. 1) Act 2021* inserted s674A and 675A into Ch 6CA of the *Corporations Act 2001* (Corporations Act) so that for all civil penalty proceedings commenced under the continuous disclosure provisions, the plaintiff (whether a private litigant or ASIC) must prove that an entity or officer acted with ‘knowledge, recklessness or negligence’ in respect of an alleged contravention: specifically that the entity ‘knew or was reckless or negligent’ with respect to whether the information would have a material effect on the price or value of the entity’s securities. This is colloquially known as a ‘fault’ element and it was first introduced on a temporary basis in May 2020 by *Corporations (Coronavirus Economic Response) Determination (No. 2) 2020* and extended via the *Corporations (Coronavirus Economic Response) Determination (No. 4) 2020 (2020 Determinations)* to facilitate the release of forward-looking information to the market about the impact of COVID-19.
- 7 *Treasury Laws Amendment (2021 Measures No. 1) Act 2021* also extended the mental element to misleading and deceptive conduct in s1041H of the Corporations Act and s12DA of the *Australian Securities and Investments Commission Act 2001* (ASIC Act). Entities and officers are only liable for misleading and deceptive conduct in the circumstances where the continuous disclosure provisions have been contravened if the fault element has been proved.

#### Rationale for the 2021 Amendments

- 8 The 2021 Amendments were made following a recommendation from the Parliamentary Joint Committee (PJC) on Corporations and Financial Services Inquiry into litigation funding and the regulation of the class action industry: recommendation 29, [PJC Report Litigation funding and the regulation of the class action industry](#).
- 9 The PJC Inquiry received submissions opposed to the 2021 Amendments (cited at paragraph 17.69) and submissions in favour of the amendments (paragraphs 17.78–17.84). A number of submissions were in favour of a

fault element for private actions but in favour of strict liability in civil penalty proceedings brought by a regulator (cited at paragraph 17.87 of the PJC Report).

- 10 The PJC Report’s recommendation 29 to enact the 2021 Amendments was based on an increase in shareholder class actions for contravention of continuous disclosure laws, the economic inefficiency of these class actions and their impact on D&O insurance. Parity with international regimes was also mentioned, although the PJC report says at paragraph 17.53 that removing strict liability for regulatory claims by ASIC ‘*appears to be unique among comparable jurisdictions (see Table 17.2)*’.

### **ASIC’s perspective on the 2021 Amendments**

- 11 ASIC’s perspective on the amendments proposed by *Treasury Laws Amendment (2021 Measures No. 1) Bill 2021* is explained in our submission dated June 2021 to the Senate Economics References Committee: [Senate Economics References Committee, Treasury Laws Amendment \(2021 Measures No. 1\) Bill 2021, Submission by the Australian Securities and Investments Commission](#) (PDF 358 KB). Our 2021 submission focused on how the proposed amendments would, in practical terms, impact the way ASIC administers continuous disclosure laws. ASIC also gave evidence at Senate Estimates on the proposed changes: [Hansard](#), 25 March 2021, pp. 12–18 and to the Senate Economics References Committee Inquiry into the Bill; [Hansard](#), 10 June 2021, pp. 44, 47–48, 51–53.
- 12 The reasons cited in favour of the 2021 Amendments at paragraph 10 above do not apply to ASIC’s enforcement of the continuous disclosure obligations, nor do they apply in those civil proceedings where ASIC seeks declarations of contraventions of s1041H of the Corporations Act or s12DA of the ASIC Act to obtain the court’s disapproval of misleading or deceptive conduct.
- 13 The introduction of the fault element for the misleading or deceptive conduct provisions in s1041H(1) of the Corporations Act and s12DA of the ASIC Act where allegations of such misconduct are brought in connection with alleged continuous disclosure contraventions has resulted in an anomalous situation. ASIC is not required to establish the fault element when alleging breaches of these provisions otherwise.
- 14 Paragraph 68 of our 2021 submission notes that when contemplating regulatory action for a potential continuous disclosure breach, ASIC considers factors that differ from those considered by private litigants. The Courts have long recognised that the primary purpose of civil penalty proceedings is deterrence and improving the conduct of disclosing entities. Whereas private litigants are usually seeking compensation, ASIC aims to ensure Australia’s markets support confident and informed investment decisions.

- 15 ASIC’s enforcement activities are undertaken selectively, in the public interest, and in accordance with our published enforcement policy. ASIC does not commence civil penalty proceedings ‘opportunistically’. Since 2004, we have commenced civil penalty proceedings against 19 listed entities alleging breaches of s674.
- 16 ASIC therefore considers it to be in the public interest for strict liability to be reinstated for civil penalty proceedings alleging contravention of the continuous disclosure laws. This may mean the provisions take a differential approach to regulator and private litigant actions. To an extent, the provisions already do this by allowing ASIC to impose infringement notices without proving fault.
- 17 We also note that a differential liability regime is proposed in Treasury’s [Consultation Paper](#) *Climate-related financial disclosure* dated June 2023 for similar reasons. The Consultation Paper on climate-related financial disclosure says that stakeholders expressed concerns about liability, particularly for forward-looking statements. The Government’s proposed climate disclosure reforms therefore restrict the application of misleading or deceptive conduct-type provisions regarding certain categories of forward-looking statements to regulator only actions for a fixed period of three years. This interim modified liability framework is intended to balance the importance of disclosing decision-useful information with appropriate protections for reporting entities and their officers (who also have the protection of s1317S and 1318 of the Corporations Act where they have acted honestly and ought to be fairly excused for the breach).

## Constructive knowledge and attribution rules

Treasury’s Consultation Paper says at footnote 6 that the Review will consider 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.

ASIC recommends attribution rules be introduced for s674A and 675A of the Corporations Act (consistent with s769B(3) of the Corporations Act).

- 18 ASIC’s 2021 submission at paragraphs 22–31 explains the complexity with establishing a contravention of s674A and 675A (and, where applicable, s1041H of the Corporations Act and s12DA of the ASIC Act). As detailed at paragraph 26 of our 2021 submission, one of the practical implications is difficulty in ascribing to an entity the knowledge of an individual as to, or an individual’s recklessness or negligence with respect to, the materiality of information. In short, it may be difficult for ASIC to prove that an entity was reckless or negligent with respect to the materiality of information of which

it was not aware but should have been. This is particularly important where ASIC also alleges a breach of s180 (breach of directors' duties) in tandem with an alleged breach of s674(2) where directors ought to have been aware.

- 19 Our 2021 submission observed at paragraph 31 that the insertion of an attribution provision in Ch 6CA, similar to s769B(3) of the Corporations Act, would assist in addressing some of the practical issues with the attribution of knowledge necessary to establish the fault element. We also observed at paragraph 28 that *'Introducing clear attribution rules will provide an incentive for market-sensitive information to be elevated to a board or senior officer in a timely manner'*. It would also be consistent with ASX Listing Rule 19.12's definition of when an entity becomes aware of information (see paragraph 27 of our 2021 submission).

Note: The Australian Law Reform Commission considered the corporate liability attribution model as part of their 2019/2020 inquiry into corporate criminal responsibility. ASIC's [submission](#) dated 7 January 2020 commented on a single attribution model at pp. 47–60. There are complex issues relating to attributing liability to a corporation and ASIC would need to see the detail of any proposed model, but in principle ASIC considers that adopting a similar provision to s769B(3) for Ch 6CA may be the preferable option.

## International comparisons

The Consultation Paper asks at question 9 whether introducing a fault-based framework for ASIC enforcement litigation may have placed Australia out of step with the United States and the United Kingdom.

The PJC Report says at paragraph 17.53 that removing strict liability for regulatory claims by ASIC *'appears to be unique among comparable jurisdictions (see Table 17.2)'*.

- 20 International comparisons are complex and it is beyond the scope of this submission to comment in detail on the position of regulators in other jurisdictions. ASIC understands that international liability regimes for contravention of continuous disclosure provisions are all slightly different. There are differences in how the provisions are applied, the civil liability regimes more broadly and the relevant regulator's powers.
- 21 Subject to these caveats, we are not aware of any international comparisons that would justify requiring ASIC to prove fault in civil penalty proceedings alleging breaches of the continuous disclosure laws. For example, it appears:
- (a) s91(1) of the *Financial Services and Markets Act 2000* (UK) does not require the Financial Conduct Authority to prove a fault element when imposing a penalty on an issuer of listed securities for contravention of listing rules. Under s91(2), the FCA may impose a penalty on a person

who was a director of the issuer at the time of the contravention if the director was knowingly concerned in the contravention; and

- (b) under s13(a) of the *Securities Exchange Act of 1934*, the Securities Exchange Commission can take action on disclosure failures without proving state of mind.

Note: See also Commissioner Cathie Armour's evidence at Senate Estimates on 25 March 2021, Hansard, pp. 12–18.

- 22 We also note that Australia's market and securities regime differs from other jurisdictions in material ways. For example, Australia has a relatively unusual capital raising regime that allows listed entities to raise significant capital without a prospectus based on the theory that the entity has complied with continuous disclosure. This heightens the importance of strong compliance with the continuous disclosure obligations.



## B Impact of the 2021 Amendments on enforcement

### ASIC's approach to enforcement

23 ASIC's [submission](#) to the Parliamentary Joint Committee's *Inquiry into Australian Securities and Investments Commission investigation and enforcement* dated February 2023 explains our broad remit and risk-based approach to regulation (paragraphs 48–59). In short, when responding to misconduct, we consider a range of enforcement options and the most severe sanctions are reserved for the most egregious misconduct.

24 ASIC develops strategic and enforcement priorities on an annual basis, starting with an environmental assessment to identify key threats and harms to consumers, investors and markets.

25 In general, we consider the following four factors, together with our strategic and enforcement priorities, when deciding which conduct to investigate and what enforcement action to take:

- (a) preventing or addressing significant harm to consumers, markets or the financial system;
- (b) the benefits to the public from enforcement, including where there is significant public interest or concern;
- (c) whether there are issues specific to the case that warrant us pursuing action (such as whether the matter is within ASIC's jurisdiction; the nature, impact and age of the misconduct; whether the misconduct is repeated or continuing, and whether reliable evidence is likely to be available to prove the alleged misconduct); and
- (d) whether there are any appropriate alternatives to formal enforcement action or investigation that would, on balance, be more efficient—such as engagement with stakeholders, surveillance, guidance and education.

Note: These factors are set out in Information Sheet 151 *ASIC's approach to enforcement* ([INFO 151](#)).

26 ASIC can only take a fraction of the potential enforcement actions that come to our attention. This is particularly true of court-based enforcement action, which is the most resource intensive form of regulatory action. Our focus is on choosing the enforcement actions that will maximise our regulatory impact in reducing harm to consumers and markets.

27 We pursue litigated outcomes and substantial penalties, where supported by available evidence, to hold to account those who engage in serious misconduct. We address less serious conduct through quicker and more proportionate tools to extend our impact.

## Barriers to enforcement

The Consultation Paper asks at question 11:

- whether the 2021 Amendments have given rise to barriers that may hinder the effective enforcement by ASIC of a disclosing entity's continuous disclosure obligations under the Corporations Act; and
- how those barriers should be addressed.

The 2021 Amendments require ASIC to prove the fault element, making investigations and enforcement matters harder to prove, more resource intensive and less certain.

### Investigations

- 28 The introduction of s674A and 675A require ASIC to obtain admissible evidence to establish a disclosing entity's knowledge, recklessness or negligence in relation to the materiality of the relevant information. Sometimes fault will be self-evident but in our experience this is not always the case, and evidence of knowledge, recklessness and negligence can be difficult to obtain to an admissible standard. The need to obtain evidence on the issue is in our view likely to limit ASIC's ability to commence proceedings where we otherwise consider it is in the public interest to do so.

### Civil penalty proceedings

- 29 To date, ASIC has brought two proceedings alleging contraventions of the amended continuous disclosure laws: *ASIC v McPherson's Limited* ([22-346MR](#)) and *ASIC v Nuix Limited* ([22-262MR](#)). These proceedings have not concluded and it is therefore too early to assess the impact of the fault element requirement.

Note: *ASIC v Holista CollTech Limited* ([21-202MR](#)) involved the continuous disclosure laws as modified by the 2020 Determinations. The company admitted liability and the matter has been listed for hearing on penalty.

- 30 Civil penalty proceedings taken by ASIC will usually involve more serious alleged contraventions of the continuous disclosure provisions, and in many of these matters the fault element will be more readily made out. However, we remain concerned that it will be difficult to take enforcement action where we cannot prove to the requisite standard that directors of the relevant entity were aware of the information requiring disclosure, even if they ought to have been. ASIC is also concerned that even if statutory attribution rules are introduced, there is a high risk that our civil penalty proceedings will be unduly impeded or complicated by defendants' attempts to rely on arguments that we have failed to prove the fault element.
- 31 This issue is important due to the precedent recently established in *Crowley v Worley Limited* (2022) 400 ALR 452 where the Full Federal Court unanimously held that the continuous disclosure laws (as they existed in

2014 prior to the 2021 Amendments) apply to an opinion that an officer of a disclosing entity should have reasonably formed about a forecast based on information that was available to them even if they did not actually form that opinion. This principle established in *Crowley v Worley* supports founding constructive knowledge in continuous disclosure cases concerning forecasts—however, what (if any) impact the fault element will have on the principle remains untested.

### Infringement notices

- 32 ASIC tends to issue infringement notices as an alternative to court-based action for less serious contraventions of s674 or 675 having regard to the relevant facts, the nature and size of the entity, any actual or potential harm arising from the contravention and the need for general and specific deterrence. It is more likely that these matters will not clearly involve knowledge, recklessness or negligence as to the materiality of the relevant information on the part of the entity or its officers.
- 33 Generally, ASIC will only issue infringement notices if we consider we are able to bring civil penalty proceedings for the contravening conduct in the event that the infringement notice penalty is not paid: see paragraphs 33–37 of our 2021 submission. Given this, in addition to the impact on civil penalty proceedings, the need to ultimately prove the fault element is likely to reduce ASIC’s appetite to use infringement notices for contraventions of continuous disclosure.

## Enforcement trends and 2021 Amendments

Treasury’s Consultation Paper asks at question 12 whether there are 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.

It is not currently possible to identify any meaningful changes in ASIC’s enforcement activity relating to continuous disclosure in the short period since the 2021 Amendments came into effect (or since the similar changes made by the 2020 Determinations) because:

- investigations commenced for suspected breaches of the continuous disclosure obligations either relate to periods outside of the amendments and/or involved other suspected contraventions of the Corporations Legislation;
- where ASIC decided to take no further action in relation to the aspect of the investigation that related to the suspected contraventions of the continuous disclosure obligations, the reasons were often consistent with the evidentiary difficulties already faced by ASIC prior to the amendments;

- enforcement action requires admissible evidence and is often complex and resource intensive. Several investigations are ongoing; and
- only a small number of civil penalty actions alleging breaches of continuous disclosure under s674A have been commenced since the amendments and none have been determined.

## Investigations

34 Since May 2020, ASIC has commenced 21 investigations into suspected breaches of the continuous disclosure obligations. Not all of these investigations relate to conduct that occurred within the period where either the 2020 Determinations or 2021 Amendments applied. Of these 21 investigations:

- (a) four are ongoing;
- (b) two resulted in infringement notices for an alleged breach of continuous disclosure;
- (c) three resulted in other enforcement outcomes by ASIC;
- (d) ASIC decided to take no further action in seven matters; and
- (e) five matters are currently in litigation.

## Civil penalty proceedings

35 The number of ASIC's civil penalty proceedings for alleged contravention of the continuous disclosure provisions since the 2020 Determinations/2021 Amendments commenced remains consistent with prior periods. However, we suggest this is not the most meaningful indicator of whether the 2021 Amendments are likely to cause challenges for ASIC's enforcement activity in the long term, given both the short period since the amendments took effect and the small number of proceedings for alleged continuous disclosure breaches that ASIC brings each year. Caution is required when extrapolating from small numbers.

36 To be clear, we are not concerned that the volume of our civil penalty proceedings for alleged contraventions of the continuous disclosure provisions will reduce. We are concerned that in the longer term we are likely to be unable to bring cases that we consider warrant civil penalty proceedings due to the fault element being required (as outlined at paragraph 3018).

## Infringement notices

37 ASIC has issued one infringement notice on the belief that the entity contravened s674(2) of the Corporations Act in the period in which the 2020 Determinations were in force. We have not identified any matters where we would have issued an infringement notice but did not do so due to the need to prove the fault element in any subsequent civil penalty

proceedings. However, as noted above, a number of our investigations are continuing and we consider that the need to prove fault in subsequent civil penalty proceedings is likely to constrain ASIC's use of infringement notices in the long term.

## Key terms

Term	Meaning in this document
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
Continuous disclosure laws	The provisions in Ch 6CA of the Corporations Act
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Consultation Paper	Consultation Paper <i>Continuous Disclosure: Review of changes made by the Treasury Laws Amendment (2021 Measures No. 1) Act 2021</i> published by Treasury on 1 November 2023
PJC	Parliamentary Joint Committee
PJC Inquiry	Parliamentary Joint Committee on Corporations and Financial Services' Inquiry into litigation funding and the regulation of the class action industry
Review	The independent review of the 2021 Amendments to the continuous disclosure laws made by <i>Treasury Laws Amendment (2021 Measures No.1) Act 2021</i>
2020 Determinations	<i>Corporations (Coronavirus Economic Response) Determination (No. 2) 2020</i>  <i>Corporations (Coronavirus Economic Response) Determination (No. 4) 2020</i>
2021 Amendments	<i>Treasury Laws Amendment (2021 Measures No. 1) Act 2021</i>