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ASX SUBMISSION TO CONTINUOUS DISCLOSURE: REVIEW OF CHANGES MADE BY THE TREASURY LAWS AMENDMENT (2021 MEASURES NO.1) ACT 2021

ASX welcomes the opportunity to make a submission to the review of the changes to the continuous disclosure laws made by the *Treasury Laws Amendment (2021 Measures No.1) Act 2021* (**2021 Amendments**). ASX's principal interest as a licensed market operator is to ensure that its markets are fair, orderly and transparent. A strong and effective continuous disclosure regime is vital to achieving this objective.

Australia has historically been a net importer of capital, attributable to high levels of investment. This investment has been driven in part by the strong market integrity and investor confidence in Australian markets. Australia's continuous disclosure regime sets a high standard for listed entities, which serves the interests of both listed entities and their investors, and enhances the reputation of Australia's capital market by contributing to the regulatory settings that promote market integrity and investor confidence.

Key benefits of Australia's strong continuous disclosure regime include:

- A higher standard of accountability for entities' management and protection for investors.
- Confident and informed participation by investors, which can be expected to enhance the depth, liquidity and efficiency of Australian capital markets.
- A high level of market cleanliness, minimising information asymmetry between those seeking capital and those providing capital in a market.

This contributes to more efficient price discovery and capital allocation within the market, leading to a lower cost of capital for listed entities.

The changes reflected in the 2021 Amendments were initially introduced during the uncertainty of the COVID-19 pandemic as temporary changes to assist listed companies in navigating compliance with their continuous disclosure obligations during the challenging period. However, given the critical role of the continuous disclosure regime in maintaining Australia's high levels of market integrity and attractiveness as an investment destination, ASX welcomes the opportunity to contribute to the consultation on whether the 2021 Amendments should remain.

While ASX considers it too soon to fully observe the impact of the 2021 Amendments, in the interests of ensuring the effectiveness of Australia's continuous disclosure regime and the integrity and attractiveness of Australian markets, ASX submits:

- The 2021 Amendments as they relate to regulator-initiated civil penalty proceedings should be repealed. Regulator action is the primary enforcement mechanism under the continuous disclosure regime and plays a critical role in incentivising robust disclosure practices by listed entities.
- The 2021 Amendments as they relate to private plaintiff-initiated civil penalty proceedings should remain, unless evidence becomes available that demonstrates a detrimental impact on the disclosure practices of entities. Requiring the demonstration of fault on the part of the disclosing entity for a successful private plaintiff-initiated action may reduce incentives for potential plaintiffs to pursue 'opportunistic' actions.

In the interests of ensuring that Australia's continuous disclosure regime remains fit for purpose and adequately enforced, ASX's submission also provides comments on three related issues that should be considered in the context of the efficient and effective operation of Australia's continuous disclosure regime.

ASX's responses to the questions set out in Treasury's consultation paper are included at **Attachment A**.

ASX's role

The primary continuous disclosure obligations for listed entities under ASX's Listing Rules are contained in Listing Rules 3.1, 3.1A and 3.1B. Under Listing Rule 3.1, once an 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. To accompany the high bar established by the rules, ASX has published a substantial guidance note detailing how the rules operate, and the matters that ASX suggests listed entities should think about when considering how their continuous disclosure obligations apply in different circumstances.[1] ASX periodically reviews and updates its rules and guidance to ensure they remain fit for purpose as market practices develop and change.

Listing Rule 3.1 is given statutory force under chapter 6CA of the *Corporations Act 2001* (Cth) (**Corporations Act**). Over time, changes to the Corporations Act have developed the enforcement and other legal options available if a listed entity has not met its continuous disclosure obligations. This includes the prospect of enforcement action by ASIC by way of infringement notices, disqualification orders, civil penalty proceedings and criminal prosecutions. It also includes civil proceedings for damages, commonly in the form of a securities class action brought by shareholders or former shareholders in the listed entity who allege they have suffered loss from purchasing shares while the market was not adequately informed.

Timely and effective enforcement of Australia's continuous disclosure regime rests primarily on ASX's actions in monitoring and enforcing compliance with the Listing Rules, and on ASIC's actions in enforcing the continuous disclosure provisions in the Corporations Act. As a licensed market operator, it is ASX's role to monitor and enforce its Listing Rules, including using its censure, suspension and removal powers where necessary to manage non-compliance. ASX also has an obligation to notify ASIC where there is reason to suspect a significant contravention of the Listing Rules, including the continuous disclosure rules. ASIC assesses these matters and where appropriate may investigate and commence enforcement action under the Corporations Act.

The 2021 Amendments did not have an impact on the way ASX enforces and monitors its Listing Rules. ASX continues to apply Listing Rule 3.1 and other Listing Rules, and to refer any serious breaches of those rules to ASIC.

Timing of the review

ASX notes that the timing of the review is driven by the requirements in sections 1683B and 1683C of the Corporations Act. These provisions require (among other things) a review to be conducted of the operation of the 2021 Amendments by an independent expert within six months after the second anniversary of the commencement of the changes, or else the 2021 Amendments will automatically sunset.

ASX considers that it is too soon to meaningfully observe or measure the impact of the 2021 Amendments on the nature or quality of disclosures being made, or the ability of investors to make informed investment decisions.

The impacts of legislative change on trends in civil litigation can take a number of years to emerge. There is often a lag between an event giving rise to a potential action and the commencement of proceedings. Once commenced, civil litigation can take a number of years to be finalised. Some of the practical consequences of the 2021 Amendments may not be meaningfully observed until the Courts consider proceedings based on the 2021 Amendments.

In addition, the securities class action landscape in Australia is evolving, with two decisions in 2022 having potential implications for future actions in this space.[2] These decisions provide guidance in relation to the principles concerning corporate attribution of knowledge, and how the application of the continuous disclosure provisions to "information"

[1] ASX Listing Rules Guidance Note 8 – Continuous Disclosure: Listing Rules 3.1 – 3.1B.

[2] *Aucham Super Fund v Iluka Resources Ltd [2022] FCA 71* and *Larry Crowley v Worley Limited [2022] FCAFC 33*

includes opinions which reasonably ought to have been held by relevant officers. These decisions may have ramifications for the interpretation and operation of the 2021 Amendments.

ASX considers that it would be appropriate for the changes as they relate to private plaintiff civil proceedings to remain in place, unless evidence becomes available which demonstrates a detrimental impact on disclosure practices of entities. However, given the critical role of regulator actions in enforcing the continuous disclosure regime, ASX submits that the 2021 Amendments should be repealed in respect of regulator-initiated civil proceedings.

Regulator-initiated civil proceedings

A well-resourced regulator with an appropriate enforcement toolkit is paramount to the effective enforcement of the continuous disclosure regime and related provisions of the Corporations Act, and to achieving their underlying objectives.

ASX submits that the 2021 Amendments as they relate to regulator-initiated civil penalty proceedings should be repealed. Repealing the requirement for ASIC to establish fault would remove potential barriers to ASIC commencing civil penalty proceedings, enhance the deterrent effect of potential regulatory action (against entities as well as individual directors and officers), and is more likely to deliver stronger and more consistent outcomes than private plaintiff-initiated civil proceedings.

One of the Government's original objectives of introducing a fault element was to reduce the potential threat of 'opportunistic' securities class actions. ASX considers that the Government can pursue that objective without restricting ASIC's ability to take effective enforcement action. In particular, ASX notes that ASIC follows a publicly detailed approach to enforcement, which outlines that ASIC typically has regard to several matters before deciding to commence civil penalty proceedings, such as the seriousness of the suspected misconduct, the significance of actual or potential harm and the public interest in enforcement action.

There is benefit in a regulatory structure that allows a regulator to take enforcement action without needing to prove fault on the part of the entity. It ensures that the appropriate incentive structures are in place for entities to make timely and accurate disclosures to the market, and establish and invest in effective systems and processes to ensure those disclosures are made. Recent case law demonstrates there are circumstances in which a serious contravention of the continuous disclosure regime can take place, even when the contravention was not deliberate or reckless, does not arise out of failure to exercise due care and skill, and where no officer or employee knowingly, wilfully, fraudulently or dishonestly contravened any legal obligation, in which the Court nevertheless determined it appropriate to award a penalty. For the purposes of incentivising good disclosure practices, it is important that the regulator can still take action to achieve the objective of deterrence in these cases. The wider and more robust the enforcement options available to ASIC, the stronger the incentives will be on entities to ensure their continuous disclosure practices are of a high standard.

ASX notes that in the absence of a legislative fault element, the degree to which fault is present is still a relevant consideration for the Courts when determining the size of a penalty for a breach of an entity's continuous disclosure obligations. The factors a Court will consider when determining the size of a penalty will include the extent to which the contravention was the result of deliberate, reckless, or negligent conduct by the corporation.[3]

In addition, as noted in Treasury's consultation paper, ASIC has the ability to issue infringement notices for less serious breaches of the continuous disclosure regime, imposing a civil penalty of up to $100,000 without having to prove state of mind. ASX acknowledges that the consequences of an infringement notice are generally less serious than in a civil penalty proceeding. However, a disclosing entity has a choice as to whether it will comply with an infringement notice. ASX considers that it is desirable to have alignment between the infringement notice regime and the civil penalty regime so that ASIC is well positioned to take enforcement action should an entity not comply with an infringement notice. Misalignment between the two levels of enforcement may undermine the operation and effectiveness of the infringement notice regime and regulatory action in support of market integrity.

[3] *Australian Securities and Investments Commission v Chemeq Limited* [2006] FCA 936

Private plaintiff-initiated civil proceedings

Debate about the changes to the continuous disclosure regime has largely focused on the implications for private plaintiff-initiated civil proceedings, and specifically securities class actions.

ASX submits that the 2021 Amendments as they relate to private plaintiff-initiated civil penalty proceedings should remain, unless evidence becomes available which demonstrates a detrimental impact on the disclosure practices of entities. The introduction of a fault element for private plaintiff-initiated civil penalty proceedings can be considered to have the benefit of focusing private plaintiff-initiated actions on more serious cases.

Public commentary has suggested that securities class actions can be economically inefficient and some may be seen as 'opportunistic', giving rise to unnecessary reputational consequences for entities, significant management disruption and implications for listed entities and their directors to cost-effectively insure against that risk. ASX understands that directors and officers' (**D&O**) insurance has become significantly more expensive over the last decade, and Side C cover, which insures a listed entity against securities litigation, has seen particularly significant increases in cost, reductions in cover, and difficulty for entities to obtain. These increased costs may be attributed to the relatively high number of securities class actions in Australia, as well as increased risks around climate and cyber for entities, and could act as a deterrent for entities to list in Australia.[4]

ASX has not observed a negative impact on disclosure practices following the introduction of the fault element for private plaintiff-initiated civil proceedings, noting the above comments about allowing sufficient time to elapse before assessing the impact of the changes. Based on ASX's observations to date, we do not consider that the introduction of the fault element for private plaintiff-initiated civil proceedings is inconsistent with a strong and effective continuous disclosure regime or that it has negatively affected the continued integrity of the Australian market. However, it is critical that the integrity of the market continues to be underpinned by ASIC having an appropriate enforcement toolkit and ASX's own work in monitoring and enforcing the Listing Rules.

Additional issues related to continuous disclosure

In addition to the 2021 Amendments, there are number of policy and regulatory changes underway with implications for the continuous disclosure regime. In the interests of protecting Australia's strong continuous disclosure regime and ensuring that ASX can continue to enforce the rules supporting the regime, the following matters have been included for the Review's consideration.

Cyber security – no fault, no liability ransomware reporting obligation

The Government's recently announced 2023-2030 Australian Cyber Security Strategy includes a commitment to legislate a no-fault, no-liability ransomware reporting obligation for businesses. In designing the new reporting obligation, ASX encourages the Government to consider continuous disclosure obligations for listed entities in this context. ASX will engage with the Department of Home Affairs and Government as more details about the ransomware reporting obligations are made available.

Privacy Act reforms

In ASX's submission to the Attorney-General's consultation on the Privacy Act Review Report, ASX raised concerns that particular proposed changes to the Privacy Act, including the application of the proposed new privacy rights and direct rights of action for individuals could inhibit ASX in the performance of its legal and regulatory obligations, with respect to the operation of the ASX Market Announcement Platform (**MAP**).

Listed entities make disclosures to the market via MAP, a secure online platform. As a licensed market operator, ASX is required to do all things necessary to ensure that the market operates in a fair, orderly and transparent manner. In discharging this obligation, ASX seeks to facilitate the immediate release of company announcements to the market so that investors can make decisions in relation to that information.

[4] A recent report by the Australasian Investor Relations Association (**AIRA**) found that the median cost to be listed for ASX 300-listed entities who participated in the survey is A$7.3 million, with the three highest costs the three highest costs that relate to being listed being people, audit and assurance, and D&O insurance broadly.

[redacted]

ASX has serious concerns that the application of particular proposed changes to the Privacy Act to ASX would impact its ability to discharge these obligations in a timely manner, therefore impacting the efficacy of the continuous disclosure regime. As such, ASX submitted that it would be appropriate for there to be specific exemptions for ASX, similar to the qualified privilege with respect to defamation provided under sections 1100B and 89 of the Corporations Act, as well as other appropriate exceptions.

Climate-related financial reporting modified liability approach

The Government's proposed approach to climate-related financial reporting, set out in its June 2023 consultation paper, includes a time and scope-limited modification of liability settings. As described in the paper, elements of the new reporting regime will be afforded time-limited protection from misleading or deceptive conduct, false or misleading representations, and similar claims, which would only operate in respect of private litigants and would allow ASIC to take action where appropriate, applying for three years from the commencement of the regime.

ASX broadly supports the proposed modified liability regime, and notes that the June 2023 consultation paper indicated that modified liability would not apply in respect of continuous disclosure obligations. There may be merit in considering if this approach is consistent with the policy objective of the modified liability regime for the new climate-related financial reporting regime.

ASX welcomes the opportunity to discuss the matters raised in this submission in more detail. If you have any questions, please do not hesitate to contact me.

Kind regards

DocuSigned by:
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Diane Lewis
General Manager, Regulatory Strategy and Executive Adviser
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ATTACHMENT A – RESPONSES TO CONSULTATION PAPER QUESTIONS

The following table is set out to address the questions in the Consultation Paper. The below responses supplement ASX's submission above.

No.	Consultation Paper Question	ASX submission
Impact on market efficiency and effectiveness		
1.	Do you consider that the 2021 Amendments have: a) resulted in the market for Australian listed securities 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.	ASX considers that insufficient time has passed to meaningfully assess any material impact of the 2021 Amendments on market efficiency and effectiveness. ASX continues to apply Listing Rule 3.1 and other rules, and refer any serious breaches of those rules to ASIC.
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?	*Response to questions 2 and 3* ASX considers that insufficient time has passed to meaningfully assess: > Any trends in changes in the nature and/or quality of disclosures by disclosing entities since the 2021 Amendments came into effect. > Whether the 2021 Amendments have affected the ability of investors in Australian listed securities to make informed investment decisions. ASX has not observed a deterioration in the disclosure practices of listed entities.
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 2021 Amendments or to some other cause? What data or specific examples can you provide to support your observations?	ASX considers that insufficient time has passed to meaningfully observe any trends in changes in the number and/or type of class actions against disclosing entities for breach of their continuous disclosure obligations that could be entirely attributed to the 2021 Amendments. In light of the evolving securities class action landscape, ASX considers that it may be necessary for the Government to assess at a future time whether the 2021 Amendments as they relate to private plaintiff-initiated civil proceedings meet the intended goal of reducing the threat of class actions. Where appropriate, adjustments to the drafting of the 2021 Amendments as they relate to private plaintiff-initiated civil proceedings or changes to the regulation of class actions and litigation funding could also play a role in achieving this aim.

[redacted]

No.	Consultation Paper Question	ASX submission
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.	ASX considers that the 2021 Amendments as they relate to private plaintiff-initiated civil proceedings should remain in place. For the reasons set out below in response to question 13, ASX considers that the 2021 Amendments as they relate to regulator-initiated civil proceedings should be repealed. ASX notes that the coexistence of public and private enforcement in the regulatory framework means that changes to one enforcement process may affect the other. At this stage, it is difficult to reasonably predict the impact of repealing the 2021 Amendments as they relate to regulator-initiated civil proceedings on the number and/or type of class actions against disclosing entities for breach of their continuous disclosure obligations.
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?	*Response to questions 6 and 7* ASX considers that insufficient time has passed to meaningfully observe any trends in the availability and/or cost of D&O insurance for disclosing entities that could be attributed to the 2021 Amendments. ASX notes that it is often anecdotally informed in discussions with current and prospective Australian listed entities that: > The cost of D&O insurance in Australia is increasingly expensive. > The cost of D&O insurance in Australia compared to major overseas equities markets is a key factor in assessing whether to list in Australia. > Securities class actions are a significant driver for increasing costs and restricted availability of D&O insurance in Australia.
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.	*Response to questions 8 and 9* ASX notes: > Both the PJC Report[5] and ASIC's opening statement to the PJC Inquiry[6] suggest that there is generally no requirement for proof of a fault element in regulator-initiated actions for breaches of continuous disclosure requirements in neither the United Kingdom nor the United States. > The PJC Report also suggests that there is generally no requirement for proof of a fault element in regulator-initiated actions for breaches of continuous disclosure requirements in Canada, Hong

[5] The comparative analysis in the PJC Report is informed by research undertaken by Herbert Smith Freehills for the Australian Institute of Company Directors.
[6] ASIC, Opening Statement to the Parliamentary Joint Committee on Corporations and Financial Services, 'Inquiry into litigation funding and the regulation of the class action industry' (29 July 2020) (Daniel Crennan, Deputy Chair, ASIC).

No.	Consultation Paper Question	ASX submission
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. 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. Do you agree with the PJC Report or with ASIC in this regard? Please explain the reason(s) for your answer.	Kong or South Africa. > ASIC and the Australian Institute of Company Directors made further submissions regarding comparative research during the Senate Standing Committees on Economics inquiry into the *Treasury Laws Amendment (2021 Measures No.1) Bill 2021*.[7] > Herbert Smith Freehills recently published a book on Australian corporate and securities law that includes comparative research.[8] > Comparisons of international continuous disclosure regimes involve complex analysis. Where appropriate and to the extent possible, comparative findings should be assessed in the context of relevant market and jurisdictional differences. There may be circumstances in which deviation with international disclosure regimes is desirable.
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, 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.	There a range of factors that drive the Australian market's competitiveness and ability to attract new listings, including the overall cost of being listed. ASX considers that repealing the 2021 Amendments as they relate to private plaintiff-initiated civil penalty proceedings would likely have a materially negative impact on the competitiveness of Australian equity markets to attract new listings compared to major overseas equities markets based on considerations relating to the risk of securities class actions and the associated costs. ASX considers that repealing the 2021 Amendments as they relate to regulator-initiated civil penalty would likely have a material positive impact on the competitiveness of Australian equity markets to attract new listings compared to major overseas equities markets. The ability for Australian equity markets to attract new listings compared to major overseas equities markets is underpinned by Australia's strong regulatory regime (including the continuous disclosure regime) and resulting high levels of market integrity and investor confidence.
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?	ASX considers that the 2021 Amendments as they relate to regulator-initiated civil proceedings may give rise to barriers that may hinder the effective enforcement by ASIC of a disclosing entity's continuous disclosure obligations under the Corporations Act. For the reasons set out below in response to question 13, ASX considers that the 2021 Amendments as they relate to regulator-initiated civil proceedings should be repealed.

[7] ASIC, Submission No. 14 to Senate Economics References Committee, 'Inquiry into Treasury Laws Amendment (2021 Measures No.1) Bill 2021' (June 2021) [17] – [19]; Australian Institute of Company Directors, Submission No. 11 to Senate Economics References Committee, 'Inquiry into Treasury Laws Amendment (2021 Measures No.1) Bill 2021' (May 2021).

[8] Tony Damian, Cameron Hanson and Jennifer Xue, 'The Challenge of Continuous Disclosure' in Tony Damian and Amelia Morgan (eds), *Bootmakers, Boards and Rogues: Issues in Australian Corporate and Securities Law* (Ross Parsons Centre, 2023) 243 – 257.

[redacted]

No.	Consultation Paper Question	ASX submission
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?	ASIC is best placed to provide data or observations on the number and/or effectiveness of enforcement actions.
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.	ASX considers that repealing the 2021 Amendments as they relate to regulator-initiated civil proceedings would have a materially positive impact on the capacity of ASIC to take effective enforcement action against disclosing entities for breach of their continuous disclosure obligations for the following reasons. **Comprehensive regulator enforcement is of paramount importance** ASX considers that a regulator with comprehensive enforcement powers is of paramount importance to the integrity of Australia's continuous disclosure regime. ASIC's status as an independent statutory body means that its enforcement action carries unique reputational harm with significant deterrence effects. ASX notes that IOSCO's Principles are particularly instructive on this matter in the following respects:[9] > IOSCO has determined three core objectives of securities regulation: (i) protecting investors; (ii) ensuring that markets are fair, efficient and transparent; and (iii) reducing systemic risk. > IOSCO considers that "An independent and accountable regulator with appropriate powers and resources is essential to ensure the achievement of the three core objectives of securities regulation." > IOSCO recommends regulatory frameworks "should ensure full, timely and accurate disclosure of risks, financial results and other information that is material to investors making informed investment decisions on an ongoing basis." > IOSCO recommends that the regulator "should have comprehensive enforcement powers."

[9] IOSCO, 'Objectives and Principles of Securities Regulation' (2017); IOSCO, 'Methodology For Assessing Implementation of the IOSCO Objectives and Principles of Securities Regulation' (2017).

[redacted]

A fault element creates barriers to effective enforcement

Regulator-initiated civil proceedings are integral to deterrence. As the Financial Services Royal Commission found, "adequate deterrence of misconduct depends upon visible public denunciation and punishment."[10]

ASX considers that the requirement to prove a fault element may create barriers that hinder ASIC's ability to efficiently conduct civil penalty proceedings and promote trust and confidence in financial markets. For example:

- The fault element may increase the cost and time associated with actions, as well as place a greater strain on ASIC's limited resources.
- The fault element may give rise to circumstances that may undermine the integrity and operation of the infringement notice regime. As there is no obligation on entities to comply with infringement notices, ASIC effectively needs to be ready to bring civil penalty proceedings and establish the requisite fault element when it issues an infringement notice to ensure that infringement notices are not viewed as voluntary. As stated by ASIC, "The requirement to meet a fault element for any civil penalty action is likely to necessitate ASIC conducting a more extensive investigation (and committing additional investigative resources and time) for less serious continuous disclosure breaches to ensure that, if an infringement notice is issued, it will be enforceable."[11]

ASX notes:

- In cases heard prior to the introduction of the 2021 Amendments, the Courts have considered a range of factors when imposing a penalty in a non-disclosure case,[12] including "the extent to which (if at all) the contravention was the result of deliberate or reckless conduct by the corporation."[13]
- There is recent case law in which ASIC was successful in securing significant penalties in circumstances where ASIC accepted that the continuous disclosure contravention "was not deliberate or reckless; that the contravention did not arise out of a failure to exercise due care and skill; and that no officer or employee... knowingly, wilfully, fraudulently, or dishonestly contravened any legal obligation under statute or the general law." [14]

Distinct benefits of regulator action can be maintained without compromising the Government's objectives

ASX notes that one of the foundational objectives behind the 2021 Amendments is to reduce listed entities' exposure to threat of 'opportunistic' class actions. ASX considers that the Government can pursue this aim without restricting ASIC's ability to take effective enforcement action and should do so given the paramount importance of ASIC enforcement.

Distinct comparative benefits of ASIC enforcement, include:

- ASIC's motives for taking action are driven by statutory objectives aimed at facilitating markets and promoting trust and confidence in the financial system, and giving effect to the laws it administers.

No.	Consultation Paper Question	ASX submission
		> ASIC follows a publicly detailed and considered approach to enforcement.[15] > ASIC is accountable to Parliament and the public for its regulatory activities, including regulatory actions.
Other matters		
14.	Are there any other matters concerning the 2021 Amendments that you would like to see addressed in the Review?	In addition to the points raised above and in ASX's submission, ASX notes that the practical interaction of continuous disclosure and misleading and deceptive conduct provisions should be carefully considered if any changes are made to the 2021 Amendments. ASX also refers to the three issues raised in the body of ASX's submission for the Review's consideration concerning: > The Government's commitment to legislate a no-fault, no-liability ransomware reporting obligation for businesses. > The Government's proposed reforms to the Privacy Act. > The Government's proposed climate-related financial disclosure regime.

[10] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, 'Final Report – Volume 1' (2019) 433.
[11] ASIC, Submission No 14 to Senate Economics References Committee, 'Inquiry into Treasury Laws Amendment (2021 Measures No.1) Bill 2021' (June 2021), [36].
[12] *Australian Securities and Investments Commission v Rio Tinto Limited (No 2)* [2022] FCA 184, [42] – [44].
[13] *Australian Securities and Investments Commission v Chemeq Ltd* [2006] FCA 936, [95] – [99].
[14] *Australian Securities and Investments Commission v Rio Tinto Limited (No 2)* [2022] FCA 184, [47].
[15] ASIC Information Sheet 151.