BCA
Business Council of Australia

BCA submission to Treasury consultation on Continuous Disclosure: Review of liabilities for failure to meet obligations

December 2023

Contents

1. Overview

The Business Council of Australia welcomes the opportunity to make this submission to the review of the operation of the amendments made to the Continuous Disclosure Regime by the Treasury Laws Amendment (2021 Measures No.1) Act 2021 (Amending Act). The amendments introduced a requirement for plaintiffs to prove that companies and their officers acted with 'knowledge, recklessness or negligence' to be successful in a civil penalty proceeding for breaches of continuous disclosure laws. The reforms to the continuous disclosure framework were initially introduced in May 2020 on a temporary basis by executive order before they were made permanent through legislation in 2021.

The BCA is strongly supportive of the existing framework, which has brought Australia more into line with comparable jurisdictions, although Australia is still widely regarded as imposing more onerous disclosure obligations on a relative basis. The 2021 amendments have brought about a better balance between investor protection via private right of action and discouraging opportunistic shareholder class actions, providing a level of comfort that directors that have acted with due care and good faith are not exposed to personal liability.

The BCA submits that the current arrangements have supported and provided greater assurance to an already strong commitment on the part of our members to meeting disclosure obligations, leading to better informed and more efficient and effective securities markets. It is important that disclosure obligations do not put Australia at a relative disadvantage as a venue for the public listing of leading and new companies and the raising of capital via public markets compared to competing jurisdictions or increase the scope for class actions that reduce value for shareholders, including superannuation fund members.

The BCA offers the following responses to the questions posed in the consultation paper.

2. Key recommendations

- The BCA submits that the current arrangements have supported and provided greater assurance to what was already a strong commitment to meeting disclosure obligations.
- The 2021 amendments have encouraged more fulsome, less cautious disclosure, leading to better informed and more efficient and effective securities markets. There is also quantitative evidence for increased guidance on the part of listed entities in recent quarters.
- Current policy has brought about a better balance between investor protection via private right of action and discouraging opportunistic shareholder class actions.
- The BCA is strongly supportive of the existing framework, which has brought Australia more into line with comparable jurisdictions, although Australia is still widely regarded by investors as imposing more onerous disclosure obligations overall.
- Public markets in Australia have underperformed those in the United States as measured by market capitalisation as a share of GDP. The number of publicly listed entities is also little changed in net terms over the last 10 years. In this context, it is important the disclosure regime does not put Australia's public markets and public companies at a further competitive disadvantage.

3. 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?

Overall, the BCA is of the view that the 2021 amendments have resulted in the market for Australian listed securities being materially more efficient, effective, and well-informed by supporting and providing greater assurance to an already strong commitment to effective disclosure.

BCA agrees that maintaining the integrity of equity markets is essential to an efficient, effective and well-informed financial system and that confidence in the integrity of equity markets encourages investor participation, contributes to market liquidity and price discovery, stimulates more competitive pricing and lowers the cost of capital. Fulsome and timely disclosure by listed entities is important to market integrity.

Academic research has found that whereas earnings announcements by US firms convey some new information to the market as evidenced by significant announcement returns, Australian firms' share prices do not experience similar reactions. This is consistent with the view that under Australia's continuous disclosure regime, markets are, on average, almost fully informed of all materially relevant information at the time of the announcement.[1]

The 2021 Amendments did not substantively change the disclosure obligations of listed entities. Rather, they provided that disclosing entities would not be the subject of civil actions for alleged failures to comply with those obligations (and should not face civil penalties) without proof of a fault-based element requiring 'knowledge, negligence or recklessness', a standard that is broadly aligned with that found in comparable offshore jurisdictions.

The pre-2021 regime was adopted by the *Financial Services Reform Act 2001*, a substantial body of largely unrelated legislation. The change was thought to be 'housekeeping,' and was not mentioned in the Explanatory Memorandum to the Bill, the second reading speech, the Joint Parliamentary Committee on Corporations and Securities or during debate on the Bill.

When combined with the later development of a substantial, financially-motivated, class action industry, the pre-2021 regime ultimately reduced the confidence and assurance with which disclosure is made by disclosing entities.

In seeking to provide as much guidance as possible to investors in an inherently uncertain business environment, entities could become subject to an action in circumstances where events unfold differently to the best judgment of the disclosers, despite taking all reasonable steps to ensure there is a reasonable basis for the guidance given or statements made to the market. This led entities to provide more cautious guidance in making disclosures in order to minimise the risk of costly litigation.

The 2021 Amendments have encouraged more fulsome, less cautious disclosure, leading to better informed and more efficient and effective securities markets.

Prior to the 2021 Amendments and the previous determination made under the Corporations (Coronavirus Economic Response) Determination (No. 2) 2020 (the Determination), economically material leakage of value from Australian listed entities to class action funders, insurers and lawyers occurred, making Australia's public markets less efficient than international peers.

It is sometimes asserted that a harsh disclosure regime with greater probability of legal action enhances disclosure because it creates a stronger incentive to disclose to the highest standard possible. BCA rejects that assertion. As outlined above, we consider that it has the opposite effect by encouraging overly cautious disclosure. BCA members maintain that their strongest motivation with respect to disclosure is to win the

[1] Stephen Brown and Chander Shekha, Continuous Disclosure in Australia and the United States: A Comparative Analysis, 12 January 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3098665

confidence of investors, thus reducing the entity's cost of capital. This motivation applies regardless of the form of the disclosure test.

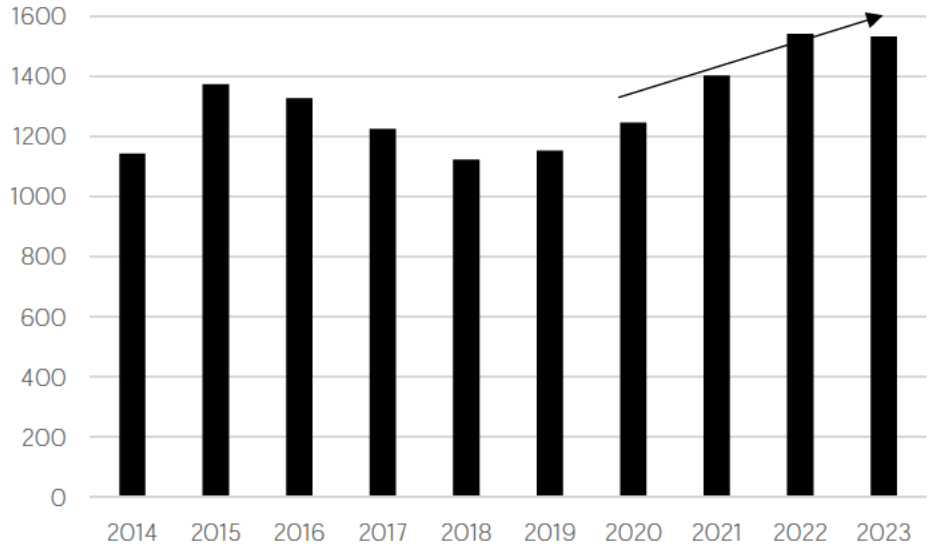
4. Impact on nature and quality of disclosures by disclosing entities

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?

The 2021 Amendments have encouraged more fulsome disclosure by listed entities. Treasury has previously noted an increase in the number of material announcements to the market following the introduction of the amendments.[2] There are no other changes to the regulatory environment that would be expected to have this impact.

Data derived from the AlphaSense database shows a trend to increased guidance since the 2021 amendments. Figure 1 shows the number of times 'company guidance' was mentioned in annual and interim reports, corporate earnings, conference calls, event transcripts and other company publications for Australian listed entities with a market capitalisation over $500 million between Q1 2014 and Q4 2023.

Figure 1 Company guidance mentions, number



Source: AlphaSense, Morgan Stanley Research.

There was a low point through COVID as companies withdrew and/or stopped providing guidance updates. This past reporting season, there is discernible increase in companies either providing or mentioning guidance, with a record number of mentions for the period going back to Q1 2014. The periods that best capture this trend are generally Q1 and Q3, which includes the February and August reporting seasons. The number of guidance mentions in Q3 has increased every year since 2019.

3. Have the 2021 Amendments affected the ability of investors in Australian listed securities to make informed investment decisions? If so, how?

[2] Treasurer, Reforms to Australia's continuous disclosure laws pass parliament, media release, 10 August 2021.

A well-informed securities market is essential to market efficiency and fairness. As outlined in the answer to consultation questions 1 and 2, the 2021 Amendments have encouraged more fulsome disclosure by listed entities. This has assisted investors in listed securities to make more informed investment decisions.

5. 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?

BCA members are of the view that it is too early to determine the effect of the 2021 amendments on class actions, given the significant lags in the preparation and launching of actions. It is also difficult to disentangle the effects of other changes affecting litigation funding on the number of class actions.

As noted by AON, 'it remains uncertain whether the licensing requirements for litigation funders introduced in August 2020, together with the August 2021 changes to Australia's continuous disclosure laws, directly contributed to an overall reduction in securities class action activity.'[3] However, AON also specifically note the sunsetting of the 2021 continuous disclosure reforms as bringing 'renewed uncertainty into the risk landscape for insurers.' Retaining the 2021 amendments will alleviate this uncertainty.

Prior to the 2021 amendments, there had been a significant increase in securities class action activity. Australian Industry Group estimated that claims against businesses in the 2018–19 financial year alone exceeded $10 billion.[4] In December 2019, Marsh found that:[5]

- There had been a four-fold increase in the average number of securities class action claims per year over the previous 10 years.
- The average class action seeks between $50 million and $75 million in compensation, with a number of ASX shareholder claim settlements exceeding $100 million.

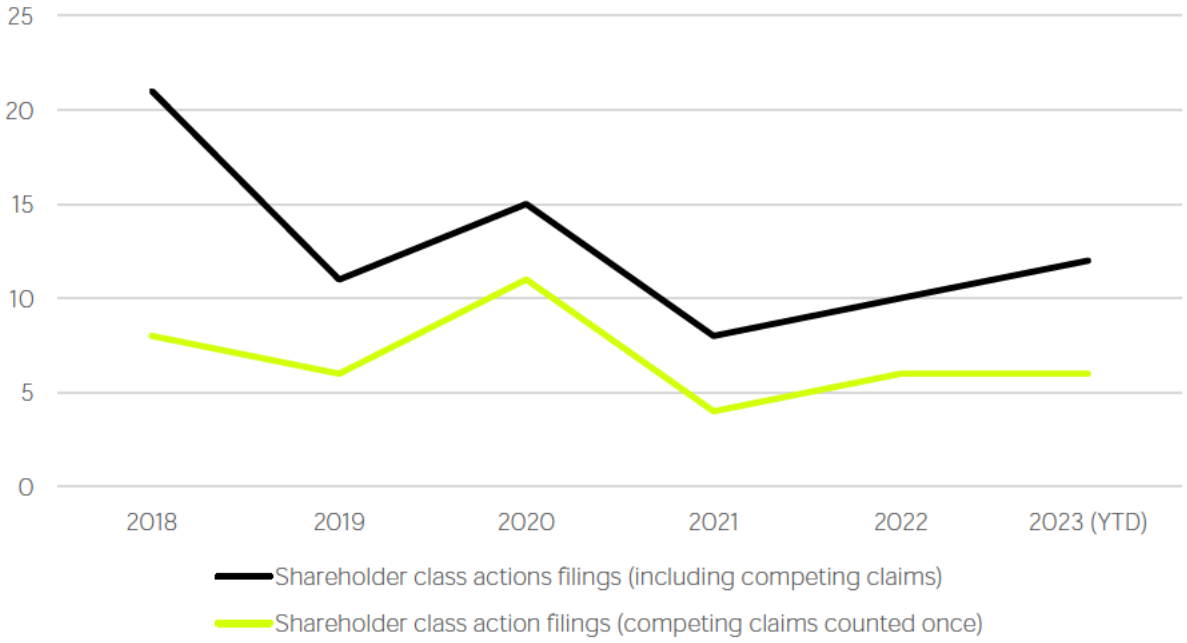
These actions caused a significant transfer of wealth from listed entities and their shareholders, estimated in 2019 at over $1.8 billion in payouts, not counting defence costs.[6] AON estimates that cumulative securities class action settlements are approaching $2.5 billion.[7] Of finalised securities class action settlements/damages, around 34 per cent relate to guidance matters.[8]

The commercial viability of the litigation funder/plaintiff firm model requires class actions to cover a long enough period of time to include enough shareholders in the class so damages can more than cover costs. This leads to plaintiffs pursuing weaker but broader cases than if they focussed on narrower cases with stronger merits. The class action market is not typically focussed on the best interests of the originating shareholders. This reality is contrary to a view held by some that class actions are an important part of shareholder protection and are effective in promoting market integrity.

Available data on shareholder class actions (Figure 2) show some moderation in actions brought after May 2020 and since the 2021 amendments were put in place, particularly relative to 2018.

[3] AON, D&O Insurance Market Insights, H1 2023, p. 3.
[4] AiGroup, Submission to the Parliamentary Joint Committee on Corporations and Financial Services inquiry into litigation funding and the regulation of the class action industry, December 2020, p. 21.
[5] Marsh JLT Speciality, The D&O Insurance Wave: Staying Above Water, December 2019, p. 2.
[6] AXA XL Insurance Reinsurance, Underwriting Directors and Officers Insurance...what's the right price?, D&O White Paper, 2019, p. 17.
[7] AON, D&O Insurance Market Insights, H1 2023, p. 5.
[8] AON, D&O Insurance Market Insights, H1 2023, p. 6.

Figure 2 Shareholder class action filings



Source: Allens, *Class Action Risk 2023: 2022 Year in Review*.

However, there are significant lags involved in preparing and launching these actions and so it is too early to form a conclusive view of the effect of the legislation based on available data. For example, some recent actions relate to disclosures dating back to between 2017 and 2019. Legislative reforms adversely affecting litigation funders would have impacted broader class actions filings. To the extent that shareholder class action activity has moderated, it is difficult to conceive of any reason for this other than the 2020 Determination and the 2021 Amendments.

The number of disclosure-related class actions in Australia is significantly larger than those seen in comparable jurisdictions, highlighting the relative to exposure of Australian entities to such actions. According to data compiled by Herbert Smith Freehills, only 13 matters concerning alleged breaches of continuous disclosure obligations by listed companies have been commenced in England and Wales since 2001, which may not come to trial.[9]

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?

The repeal of the 2021 Amendments would lead to a material increase in the number of class actions brought against listed entities for breach of their continuous disclosure obligations (regardless of whether such breaches arose with knowledge or from recklessness or negligence). The intent of the 2021 reforms was to combat the increasing trajectory of opportunistic shareholder actions enabled by a restrictive disclosure regime that required no element of fault. The reforms ensured that some level of balance was restored, and business and

[9] Data supplied to BCA by Herbert Smith Freehills.

shareholders would be kept accountable where it was clear there was a fault on their part. Unwinding these changes would reintroduce an imbalance and allow for further opportunistic actions that will result in more conservative disclosure on the part of businesses given the significant risks of legal action.

6. 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?

Prior to the 2021 Amendments, there was a serious problem emerging with the price and availability of D&O insurance. In addition, some smaller listed companies have reported that they were unable to obtain any cover prior to the 2021 Amendments. The market for the provision of cover for this type of risk is limited. Australia had become such a "honey pot" for the class action industry globally that insurers were forced to re-price the risk and restrict the coverage available in Australia. Some insurers exited the Australian D&O market.

Marsh reported that D&O Insurance premiums rose on average by 75 per cent in the first three quarters of 2019 on top of an 88 per cent average increase in 2018. Over the seven years to the end of 2019, premiums had risen on average by 250 per cent.[10]

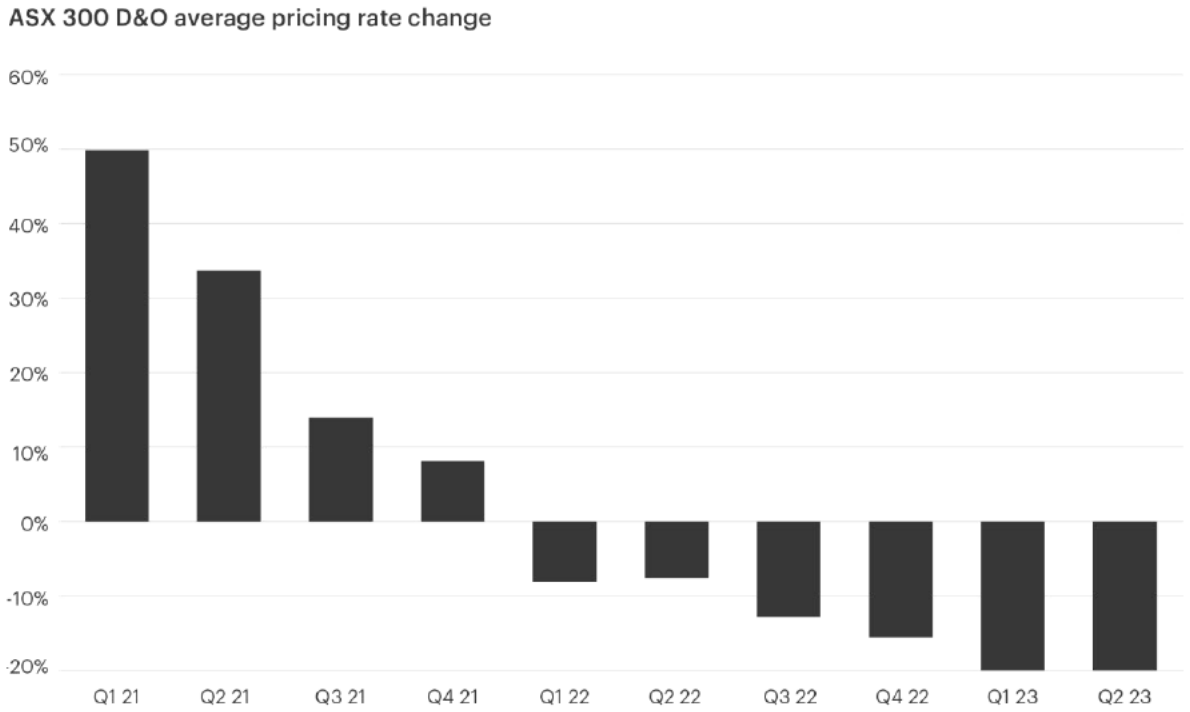
In 2020, premia were between $5 million and $10 million (up from $500,000 - $800,000 in the years prior) for coverage of between $100 million and $200 million. Some industries were paying up to $15 million. Excesses had also grown to upwards of $100 million. Companies facing a class action found it especially hard to get insurance, even where the new policy did not cover historical matters.

More recently, the growth in D&O premiums has moderated, although mainly driven by heightened competition in the market.[11] This is partly attributable to new entrants adding to capacity in the market, as well as changes in legislation affecting litigation funding, but the 2021 amendments are also considered by some BCA members to have been a factor. However, premia paid will vary by company based on market capitalisation, sector and other risk assessments, as well as scope of cover and deductibles.

Data from Marsh indicate that average D&O pricing for ASX 300 companies has declined every quarter since the first quarter of 2022, unwinding some of the strong increases seen in previous quarters. Pricing has been on a moderating trend since Q1 2021.[12]

[10] Marsh JLT Speciality, The D&O Insurance Wave: Staying Above Water, December 2019, p. 1.
[11] AON, D&O Insurance Market Insights, H1 2023. https://aoninsights.com.au/directors-officers-insurance-market-insights-h1-2023/
[12] Marsh, Mid-Year Insurance Market Update 2023, p. 9.

Figure 3 D&O average pricing rate change for ASX 300 companies



Source: Marsh, Mid-Year Insurance Market Update 2023, p. 9.

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?

Repeal of 2021 Amendments could be expected to lead to a material increase in the cost of D&O insurance and the availability of coverage would fall based on market trends observed prior to the amendments.

7. 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?

In the US and UK, a fault threshold of intention or recklessness is required to bring an enforcement action against a company in respect of a breach of disclosure laws. This is a higher test than section 674A of the Corporations Act.

The Australian Law Reform Commission undertook a careful comparison between the Australian laws and corresponding laws of England, Wales and the United States.[13] ALRC's conclusion was that in England and Wales, not only is mere negligence insufficient to ground civil liability, but the claimant must also establish that the conduct of the directing mind of the issuer was reckless or dishonest.

ALRC recites the UK's adoption of the EU's Transparency Directive, which sought an outcome where "if directors do their incompetent but honest best to determine the content of such published information, the s90A claim will fail." The UK government's approach reflected a deliberate policy choice to reduce the burden of opportunistic litigation. In the United States, in order to establish a contravention, a failure to disclose relevant information or the disclosure of false or misleading information must be wilful.

In the UK, investors have a cause of action against UK listed companies for: (i) any omissions, or delay in the publication, of information required by the applicable regulatory disclosure rules; and (ii) any untrue or misleading statements made in company announcements (Financial Services and Markets Act 2000 (UK) ('FSMA') s 90A). The thresholds under these s 90A causes of action are high. To establish a limb 1 claim, claimants need to establish that the omission arises from a 'dishonest concealment of a material fact' by a director of the issuer. To establish a limb 2 claim, claimants need to show that the director knew or was reckless as to the untrue or misleading nature of the publication. These thresholds were set deliberately to reduce the risk of a proliferation of shareholder class actions. The UK threshold was a conscious policy choice following a review in 2007[14] and was also informed by the development of shareholder class actions in Australia. The 2021 amendments in Australia did not raise the bar to action as high as that in the UK.[15]

In an analysis for AICD, Herbert Smith Freehills note that 'In the US, a safe harbour exemption may be secured through identifying a statement as forward-looking and using meaningful cautionary statements which identify important factors that could cause the actual results to differ materially from those in the forward-looking statement. The safe harbour applies to private civil suits but not to enforcement actions brought by the SEC or other regulatory agencies.'[16] By contrast, in Australia, companies and their officers cannot avail themselves of any safe harbour exemption for forward looking statements.

The US and UK represent not only comparable jurisdictions to Australia, but also some of the world's large capital markets that are in competition with Australian markets as venues to raise capital. The Australian test for civil claims after the 2021 Amendments is still much tougher (from the perspective of the discloser) than either comparator market, where a claimant must demonstrate actual knowledge and intent (US) and recklessness or dishonesty (UK). A repeal of the 2021 amendments would move Australia further away from these benchmark jurisdictions. As noted above, market reaction to disclosures in Australia is consistent with the Australian market being better informed relative to the US.

> *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?*

The Australian Institute of Company Directors commissioned a comparative analysis of international disclosure and liability regimes that concluded: 'the suggestions that have been made by various interested parties that Australia's disclosure laws (and the exposure of directors to civil liability in relation to corporate disclosure) are

[13] Australian Law Reform Commission, Integrity, Fairness and Efficiency-An Inquiry into Class Action Proceedings and Third-Party Litigation Funders, ALRC Report 134, December 2018. p. 267 and following.
[14] Davies Review of Issuer Liability: Final Report, June 2007.
[15] Christine Tran and Harry Edwards, 'Comparing the new fault standard in Australian and UK shareholder class actions,' LSJ Online, 1 August 2020.
[16] Herbert Smith Freehills, Comparative analysis of international corporate disclosure and liability regimes, November 2023, p. 2.

consistent with the laws and risks in the global capital markets lack merit.'[17] BCA understands this analysis will be made available to Treasury as part of this consultation.

The 2021 Amendments have brought Australia's continuous disclosure regime closer to that of the UK and US, although the Australian regime is still widely considered to be more onerous on disclosers.

ASIC has asserted[18] that US and UK regulators do not need to prove knowledge, recklessness or negligence in order to bring civil penalty proceedings in relation to a disclosure that either wasn't made when required under corresponding laws or turned out not to be correct and that it would be at a disadvantage relative to other regulators in seeking civil penalties for breaches of continuous disclosure laws if the 2021 Amendments were passed.

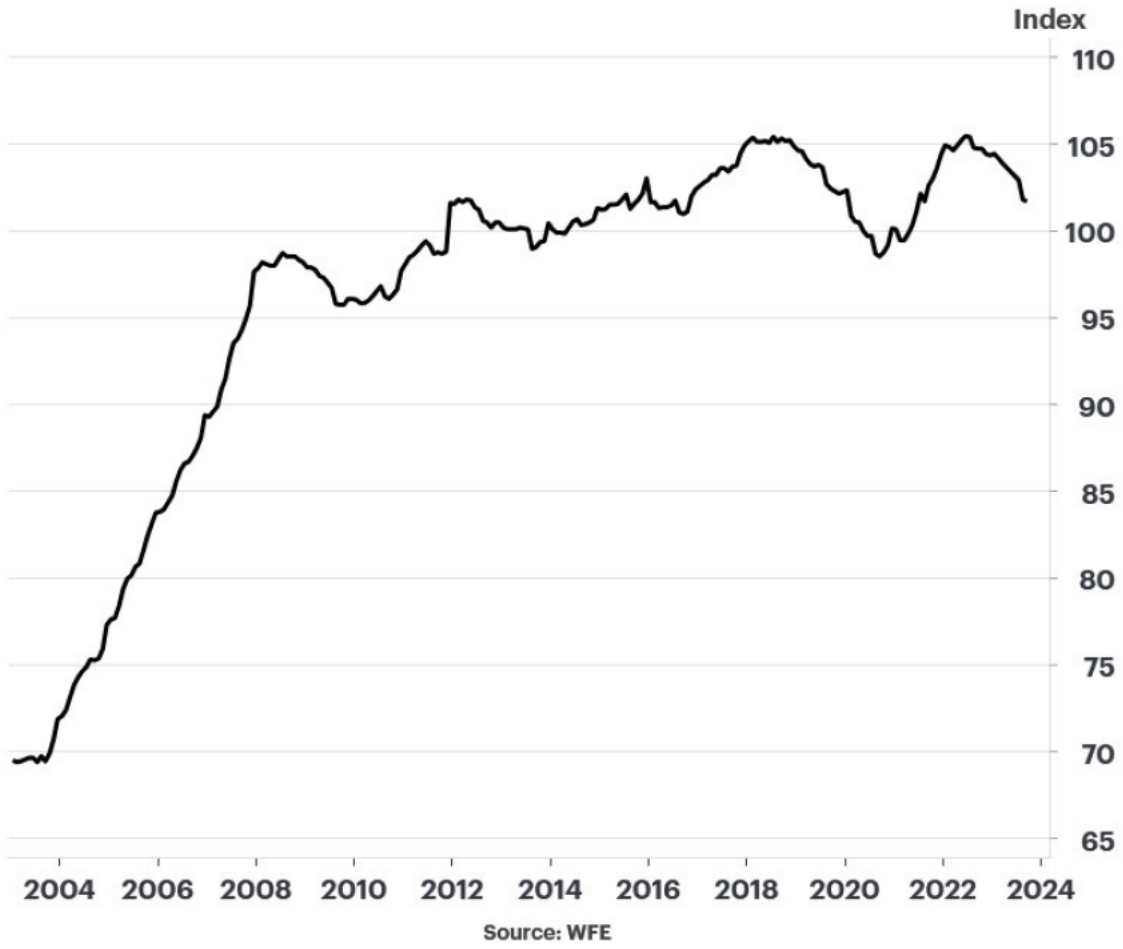
ASIC does not appear to have undertaken any independent analysis in this regard. Instead, it relied on a highly summarised table prepared by the Parliamentary Joint Committee on Corporations and Financial Services in its inquiry into Litigation Funding and the Regulation of the Class Action Industry. This table is a summary of advice received by the Australian Institute of Company Directors in 2018, reflected in a submission to the Australian Law Reform Commission.

> *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?*

There is a global trend away from listed markets towards private markets dominated by managed funds, especially private equity funds. AON note a material reduction in M&A activity both in Australia and globally between 2021 and 2022.[19] Australia has participated in this global trend. The number of listed entities on the ASX has increased since May 2020, but is little changed from 10 years ago (Figure 4).

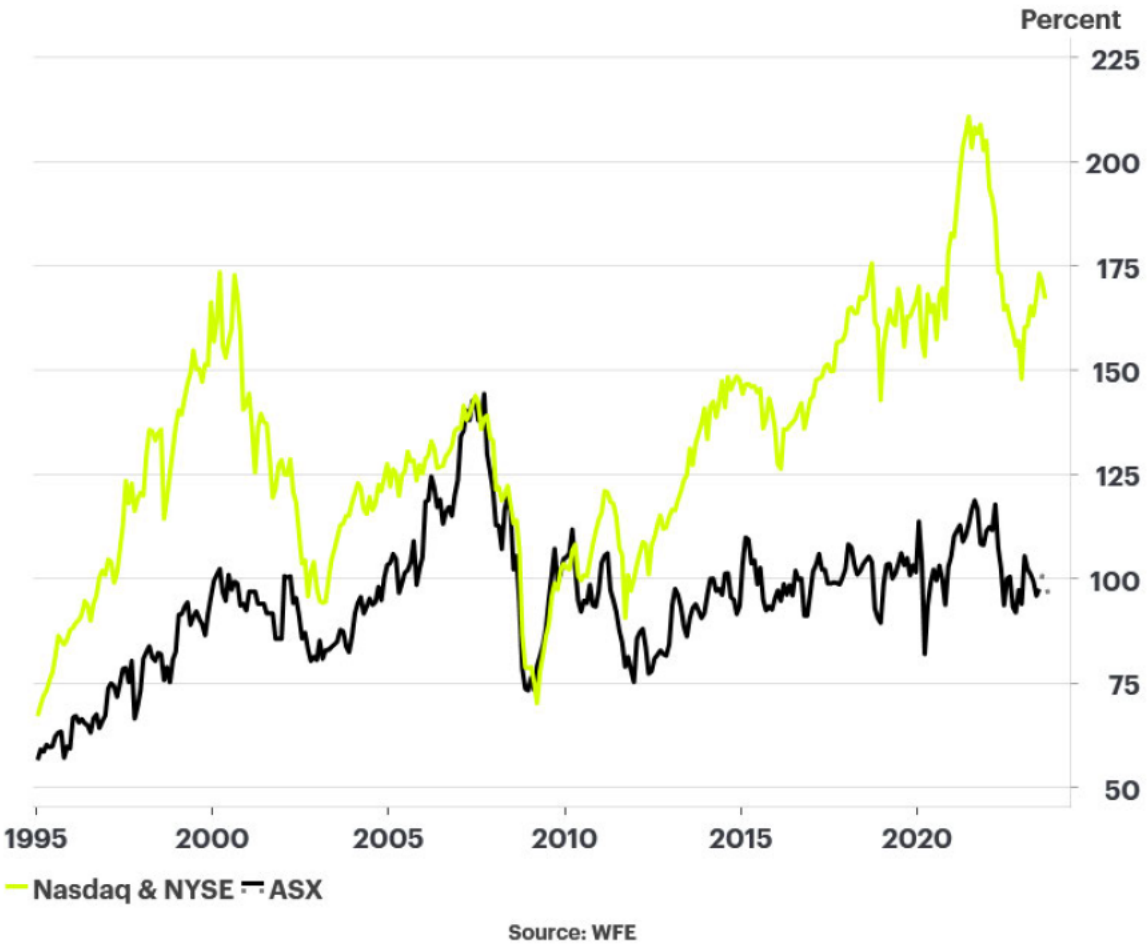
[17] Herbert Smith Freehills, Comparative analysis of international corporate disclosure and liability regimes, November 2023.
[18] Submission to the Senate Committee examining Treasury Laws Amendments (2021 Measures No. 1) Bill 2021 (**TLAB1**) (para 19).
[19] AON, D&O Insurance Market Insights, H1 2023, p. 9, https://aoninsights.com.au/directors-officers-insurance-market-insights-h1-2023/

Figure 4 ASX listed entities, May 2020 = 100



The market capitalisation of Australia's public markets was in line with the United States as a share of GDP both before and in the years immediately following the 2008 financial crisis. But since 2010, the capitalisation of Australia's public markets has been broadly steady at around 100 per cent of GDP, while US market capitalisation has increased to around 167 per cent of GDP (Figure 5).

Figure 5 Australian and US stock market capitalisation, per cent of GDP



The underperformance of Australia's public markets relative to the US likely reflects a wide range of factors. However, it does highlight the importance of not placing Australia at a further competitive disadvantage as a venue for raising capital by materially increasing the exposure of listed entities to costly disclosure litigation and enforcement.

One of the factors driving these trends is the compliance burden associated with a listing, of which the disclosure regime is part, and vulnerability to litigation which takes management effort and resources away from generating economic value for shareholders.

Prior to the 2021 Amendments (and the earlier Determination), Australia had an international reputation as a venue for securities class actions (see answer to question 8 above). This may have been a factor in more entities being taken private in Australia relative to other economies, depriving Australians of the opportunity to invest in a wider range of Australian companies.

The government should strive to make ASX and other local listing venues a more attractive place for entities to raise capital and for the ASX to play a larger role in the world's capital markets, supporting domestic investment, employment and economic growth.

Another impact of the growing compliance burden on listed entities is that leadership roles in these organisations, especially directors, are less attractive, making it more difficult to attract and retain talent.

Company directors are currently subject to over 700 pieces of legislation that impose various obligations on directors and which create exposure to personal liability.[20]

Our members report that their boards are required to devote more time to compliance matters, of which continuous disclosure is part, than was the case in the past and are less able to devote time seeking to generate economic value for investors.

The AICD's Director Sentiment Index for the second half of 2023 showed that compliance and regulation was a top issue for 45 per cent of directors, a level significantly higher than any other issue.[21] Whilst minimum standards must, of course, be set in areas like continuous disclosure, they must be kept in proportion and be consistent with international markets. Prior to the 2021 Amendments (and the Determination) and the class actions that it fostered, there was material leakage of economic value from listed entities, taken as a whole, to insurers, litigation funders and lawyers (both those representing the entities and the classes represented in litigation).

Whilst some investors may receive proceeds from a class action based around disclosure, the costs are ultimately born by the listed entities (and therefore their shareholders), both directly and through insurance premia. The insurance costs, legal costs and payments to funders represent material loss of value from the entities and their investors, taken as a whole. Investors in listed entities were collectively worse off before the 2021 Amendments and the Determination than they were after those amendments. These investors embrace the majority of Australians given the breadth of coverage of Australia's superannuation system.

Analysis by Dr Peter Cashman and Ms Amelia Simpson of empirical data provided by the Law Council of Australia[22] found that, across the period 2001 to 2020, the portion of the gross settlement of funded class actions going to lawyers and litigation funders was 41.4 per cent. Excluding insurance costs, and using the 2019 estimate of total payouts excluding legal costs of $1.8 billion, the leakage of value from shareholders (taken as a whole) to lawyers and funders was at least $745 million and likely considerably more.

The 2021 Amendments brought Australian law more into line with other securities markets and made the Australian market more efficient and able to deliver greater value to investors.

8. 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?

BCA does not consider that ASIC faces any unreasonable barriers in bringing enforcement proceedings. The disclosure test has not changed, only the standards required to bring a civil action. It is appropriate that ASIC must meet the same standards as any private litigant.

The test for ASIC to bring criminal prosecutions has not altered as a result of the 2021 Amendments. ASIC also argue[23] that if they are required to prove fault or negligence, there ought be a deeming provision like s769B(3) so that if anyone in the entity (or any advisor) knew of something or thought something that should have been disclosed, the company is deemed to have that knowledge. The consultation paper notes that this is something which will be considered by the Review.

[20] King & Wood Mallesons, Analysis of Australian Corporate Governance for the Business Council of Australia, 30 January 2019, p.32.
[21] AICD, Director Sentiment Index, Insights Report, 2nd Half 2023, https://www.aicd.com.au/content/dam/aicd/pdf/news-media/research/2023/roy-morgan-aicd-dsi-wave-2-2023-insights-report.pdf
[22] Dr Peter Cashman and Ms Amelia Simpson, Submission to the Parliamentary Joint Committee on Corporations and Financial Services inquiry into Litigation funding and the regulation of the class action industry, December 2020, pp. 35–36.

[23] ASIC Submission to the Senate Economics Reference Committee on Treasury Laws Amendment (2021 Measures No.1) Bill, June 2021 section B.

ASIC has noted that under the 2021 reforms it would need to establish facts and ensure the disclosure obligations have been breached before issuing an infringement notice or seeking a civil penalty. BCA considers this to be the appropriate course of action and a restatement of the requirements under a balanced disclosure framework.

Private litigants facing a low hurdle to bringing an action might be thought to make the regulator's job easier and to discipline listed entities, but it is not the role of private litigants to achieve regulatory outcomes. ASIC has typically not sought compensation on behalf of investors, suggesting it views shareholder class actions as performing a compensation function so that ASIC can focus more effectively on other types of enforcement actions.

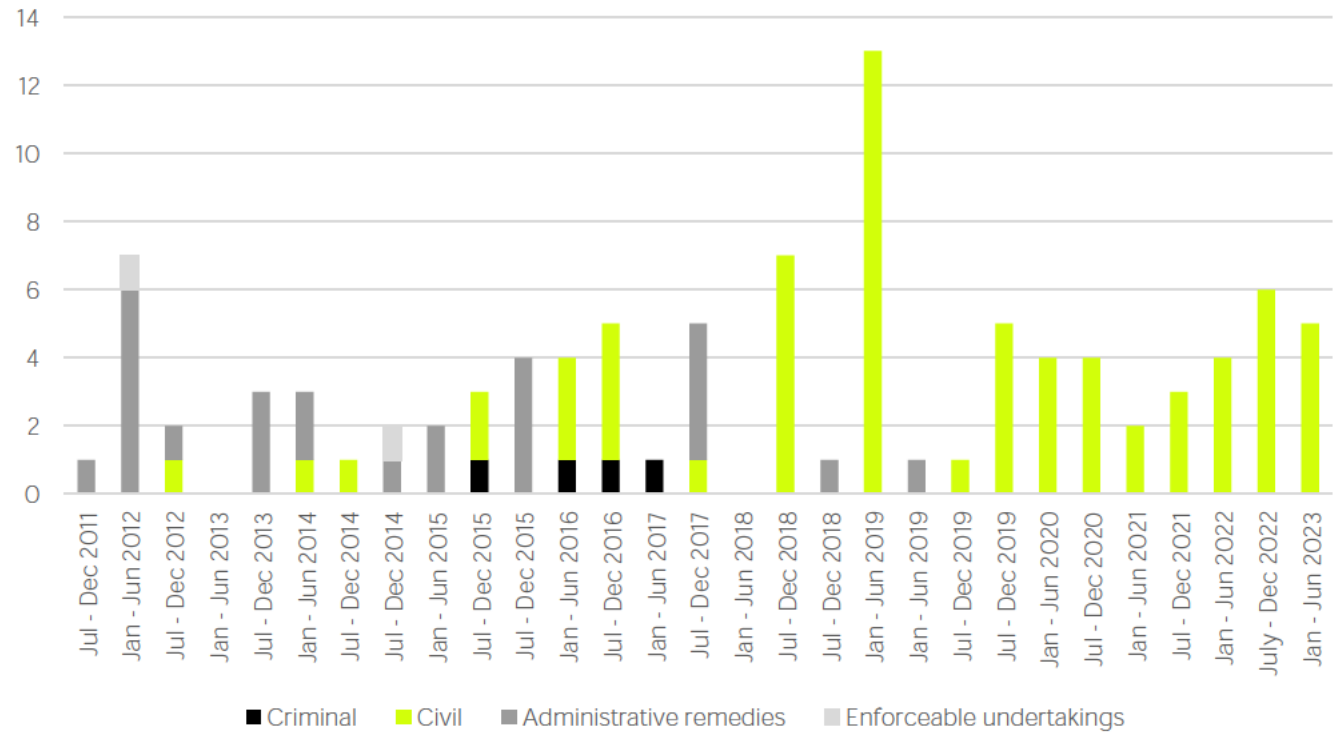
> *12. Have you observed any changes in the number and/or effectiveness of enforcement actions by ASIC against disclosing entities for breach of their continuous disclosure obligations since the 2021 Amendments came into effect? If so, what changes have you observed and do you attribute those changes to the 2021 Amendments or to some other cause? What data or specific examples can you provide to support your observations?*

In June 2021, ASIC reported[24] that in the last 15 years it had commenced 149 investigations which included a suspected contravention of s674 of the Corporations Act and, as a result, commenced civil penalty provisions against 10 listed entities, issued 37 infringement notices and accepted a number of undertakings from entities. No criminal proceedings were commenced.

ASIC publishes data on enforcement outcomes on a six-monthly basis, including enforcement actions with respect to continuous disclosure breaches of all types. Figure 6 compiles the number of continuous disclosures enforcement outcomes by type of penalty or remedy.

[24] ASIC, Submission to the Senate Economics Reference Committee on Treasury Laws Amendment (2021 Measures No.1) Bill,June 2021, para 69.

Figure 6 ASIC continuous disclosure enforcement outcomes by type of penalty or remedy, number



Source: ASIC, Enforcement Outcomes, Periodic Reports, https://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-enforcement-outcomes/

The average number of enforcement outcomes reported in relation to continuous disclosure matters is identical on average in the period before May 2020 and the period following. While it is not possible to determine the precise role of the 2021 amendments in these outcomes, they do not suggest either an increase or decrease in enforceable breaches or enforcement activity by the regulator that would give rise to concern about the operation of the 2021 amendments.

The number of ASIC enforcement actions is notably at odds with the number of class actions over time, which strongly suggests that many class actions concern matters that are not otherwise actionable breaches under the Corporations Act.

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?

The BCA does not see any basis for concluding that ASIC faces any unreasonable burdens in bringing enforcement action in relation to listed entity disclosure obligations as a result of the 2021 Amendments.

BUSINESS COUNCIL OF AUSTRALIA

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