WOODSFORD

Public Submission to the Treasury – Continuous Disclosure Review

Introduction

1. Woodsford Group Limited ('Woodsford') welcomes the opportunity to make submissions to the Treasury in relation to the review of amendments made by the *Treasury Laws Amendment (2021 Measures No. 1) Act 2021* (Cth) (the '2021 Amendments') concerning the continuous disclosure regime ('the Review'). Woodsford's submissions in relation to the Terms of Reference, together with some background information about Woodsford, are set out below.

Woodsford

2. Founded in 2010, Woodsford is one of the most well-established litigation and arbitration funders in the world.

3. Woodsford has funded class actions in Australia previously and continues to do so. Woodsford also supports the Public Interest Advocacy Centre in Australia as part of its worldwide commitment to promoting access to justice for those that lack the means to achieve it.

4. Woodsford is a founder member of the International Legal Finance Association (ILFA), which is the only global association of commercial legal finance companies and is an independent, non-profit trade association promoting the highest standards of operation and service for the commercial legal finance sector. It also serves as a clearinghouse of relevant information, research and data about the uses and applications of commercial legal finance. Woodsford's Chief Operating Officer, Jonathan Barnes, is a member of the board of ILFA.

5. Woodsford is a founder member of the Association of Litigation Funders of England & Wales ('ALF'), an independent body that has been charged by the UK Ministry of Justice with delivering self-regulation of litigation funding in England and Wales. Woodsford's Chief Operating Officer, Jonathan Barnes, is a member of the board of ALF. Woodsford was actively involved in drafting ALF's Code of Conduct ('the Code'), which sets out the standards by which all Funder Members of ALF must abide, including in relation to their capital adequacy. In particular, the Code:

    a. requires its members to maintain adequate financial resources at all times in order to meet their obligations to fund all of the disputes they have agreed to fund, and to cover aggregate funding liabilities under all of their funding agreements for a minimum period of 36 months.

   b. sets out circumstances in which funders may be permitted to withdraw from a case.

   c. outlines the way in which the roles of funders, litigants and their lawyers should be kept separate.

6. ALF also maintains complaints handling procedures. Since ALF introduced its complaints procedure, Woodsford has never been the subject of an ALF complaint.

7. Woodsford is also a member of the International Corporate Governance Network (ICGN). ICGN's mission is to promote effective standards of corporate governance and investor stewardship to advance efficient markets and sustainable economies worldwide.

8. Woodsford's executive team blends extensive business experience with legal expertise, and includes lawyers admitted to practise in England & Wales, Australia, the United States and Ireland, and accountants admitted into the Chartered Institute of Management Accountants and the Institute of Chartered Accountants of England & Wales. Woodsford has staff in the UK and Australia. Our in-house team of legal specialists reviews many hundreds of cases every year coming from all parts of the globe, including Australia.

9. Woodsford's Chief Executive Officer, Steven Friel, is a solicitor and formerly partner at two major international law firms. Steven has been recognised by every annual edition of the *Legal 500* published in the last eight years. For commercial litigation work, he is praised as having *"the sort of knowledge that one only gets with years of accumulated experience in heavy or complex litigation"* and a *"strong commercial grip on the relevant legal provisions and financial aspects of cases."* For his work in international arbitration, the *Legal 500* ranked Steven as *"outstanding"*. Steven has also been annually recognised as one of the top 100 leaders in legal finance since 2020. Woodsford's Chief Investment Officer, Charlie Morris, is Charlie is an English-qualified senior lawyer and a leading figure in the global litigation finance industry and is regularly ranked by independent directories: "Charlie …has been praised for his expertise on financial services matters, with sources reporting that he is "extremely knowledgeable in those areas, possibly more so than the lawyers who run the cases. If I had a case like that, I would go to him. " Charlie has also been annually recognised as one of the top 100 professionals at the forefront of the litigation funding industry in the Lawdragon Global 100 – Leaders in Legal Finance Guide since 2021 and was named by Business Today as one of the Top 10 Most Influential Litigation Funding Lawyers in the UK in 2023.

10. Woodsford has an Investment Advisory Panel ('IAP') that brings together senior figures from the world of both litigation and international arbitration, with direct experience spanning many areas of law. Current and former members of the IAP include The Hon. Neil McKerracher KC, the Hon. Michael Barker, both former judges of the Federal Court of Australia and Shira A. Scheindlin, a former United States District Court Judge.

Woodsford's Submissions to the Committee in relation to the Inquiry

Executive Summary

11. Woodsford supports the repeal of the 2021 Amendments.

12. The substance of the 2021 Amendments was originally introduced for the purpose of *temporarily* modifying the then existing continuous disclosure regime during the Covid pandemic.[1] The basis for making the 2021 Amendments permanent appears to be based on the Parliamentary Joint Committee on Corporations and Financial Services' Report, Litigation Funding and the Regulation of the Class Action Industry (December 2020) (the "PJC Report"). As referred to in the Continuous disclosure: Review of changes made by the Treasury Laws Amendment (2021 Measures No.1) Act 2021 Consultation paper (the "Consultation Paper"):

    > *"The PJC Report recommended that the Government legislate to make the changes to continuous disclosure laws in the Corporations (Coronavirus Economic Response) Determination (No. 2) 2020 permanent so that, in determining whether a disclosing entity or its officers contravene their continuous disclosure obligations, their state of mind is required to be taken into account.*
    >
    > *The PJC Report stated that this change would address an imbalance between the benefits to the market of continuous disclosure obligations and the costs imposed on disclosing entities and their officers by class actions for breaches of those obligations. It would also bring Australia's continuous disclosure regime closer to the regimes in comparable jurisdictions such as the United States and United Kingdom".*

13. Woodsford submits that there was and continues to be no basis for the changes to be made permanent and the arguments made in favour of a permanent change were and continue to be flawed. In particular, the allegations that there is "an imbalance between the benefits to the market of continuous disclosure obligations and the costs imposed on disclosing entities and their officers by class actions for breaches of those obligations" and that "it would also bring Australia's continuous disclosure regime closer to the regimes in comparable jurisdictions such as the United States and United Kingdom" are incorrect and not supported by the evidence.

14. It is notable that the regulatory enforcer of the continuous disclosure regime, the Australian Securities Investments Commission ("ASIC"), was not in favour of the 2021 Amendments which

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[1] The continuous disclosure regime was originally amended to by the *Corporations (Coronavirus Economic Response) Determination (No. 2) 2020* which was effective for 6 months and extended by *Corporations (Coronavirus Economic Response) Determination (No. 2) 2020* for another 6 months until they lapsed ('the Determinations'). The justification was set out in a media release by the then Treasurer, The Hon Josh Frydenberg titled 'Temporary changes to continuous disclosure provisions for companies and officers', 25 May 2020, available at: <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/temporary-changes-continuous-disclosure-provisions>.

unjustifiably watered down its powers to hold corporates accountable for misconduct and wrongdoing.[2]

Submissions

15. Our submissions to the Review follow the questions posed in the Consultation Paper dated November 2023 with respect to the 2021 Amendments. We answer those questions relevant to our expertise.

Impact on market efficiency and effectiveness

16. It is Woodsford's position that the 2021 Amendments have resulted in the market for Australian listed securities being materially less efficient, effective, and well-informed. In particular, the 2021 Amendments have resulted in:

    a. the legislative provisions straying from their legislated intent to deter "questionable corporate conduct"[3]; and

    b. the market being less informed due to restrained enforcement (both regulatory and private) resulting in a weakening of the deterrence effect.

17. Investor protection is often treated as a "litmus test" for a jurisdiction's quality of corporate governance.[4] An important regulatory mechanism for both investor protection and investor participation is disclosure. Disclosure of information by listed companies is vital to the efficient market hypothesis so that all available information can be rapidly reflected in share prices.[5]

18. As noted in *Australian Securities and Investments Commission v Chemeq Ltd*,[6] the legislative policy behind the continuous disclosure regime was to deter questionable conduct. The relevant minister said:

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[2] Australian Securities and Investments Commission, Submission No 14 to Senate Economics References Committee, *Treasury Laws Amendment (2021 Measures No. 1) Bill 2021* (June 2021) 8.

[3] *Australian Securities and Investments Commission v Chemeq Ltd* (2006) 234 ALR 511, [45] (French J) citing Commonwealth, *Parliamentary Debates*, Senate, 26 November 1992, 3581 (Nick Bolkus, Minister for Administrative Services).

[4] Olivia Dixon and Jennifer G Hill, 'Australia: The Protection of Investors and the Compensation for Their Losses' in Pierre- Henri Conac and Martin Gelter (eds), *Global Securities Litigation and Enforcement* (Cambridge University Press, 2019) 1063, 1064.

[5] Eugene F. Fama, 'Efficient Capital Markets: A Review of Theory and Empirical Work' (1970 25(2)) *The Journal of Finance* 383.

[6] *Chemeq* (n 3) [45].

An effective disclosure system will often be a significant inhibition on questionable corporate conduct. Knowledge that such conduct will be quickly exposed to the glare of publicity, as well as criticism by shareholders and the financial press, makes it less likely to occur in the first place.

In essence, a well informed market leads to greater investor confidence and in turn to a greater willingness to invest in Australian business.[7]

19. One further justification for introducing the original continuous disclosure regime, as referred to in the 1991 Australian Companies and Securities Advisory Committee Report, was to "minimize the opportunities for perpetrating insider trading" thereby providing an explicit link between the purposes of the continuous disclosure regime and the insider trading regime.[8]

20. The objects of the Australian continuous disclosure regime generally are to:

    a. enhance confident and informed participation by investors in secondary securities markets to ensure the price of securities reflects their underlying economic value;[9]

    b. prevent selective disclosure of market sensitive information.[10]

21. The objects of the continuous disclosure regime are intended to enhance the depth, liquidity and efficiency of the secondary securities markets.[11] This is because mandatory disclosure seeks to bridge the information asymmetry between the company and its investors so that securities prices can more closely and quickly reflect underlying economic values. Furthermore, the continuous disclosure regime is "remedial legislation to enhance the public interest and to protect individual investors."[12]

22. Contextually, these objectives are even more important now than when the continuous disclosure regime was first introduced. The ASX Australian Investors Study 2023 showed:

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[7] Commonwealth, *Parliamentary Debates*, Senate, 26 November 1992, 3581 (Nick Bolkus, Minister for Administrative Services).

[8] *Grant-Taylor v Babcock & Brown Ltd (in liq)* [2016] FCAFC 60; 245 FCR 402, [92] citing Companies and Securities Advisory Committee, *Report on An Enhanced Statutory Disclosure System*, 1991, 7.

[9] Explanatory Memorandum to the Corporate Law Reform Bill (No 2) 1992, [2]; 'Corporate disclosure: strengthening the financial reporting framework' 18 September 2002, 129; *Grant-Taylor v Babcock & Brown Ltd (in liq)* [2016] FCAFC 60; 245 FCR 402, [92]; *Crowley v Worley Ltd* [2022] FCAFC 33; 293 FCR 438, [158] (Jagot and Murphy JJ, with whom Perram J agreed).

[10] *James Hardie Industries NV v Australian Securities and Investments Commission* (2010) NSWCA 332, [354] quoting and approving *Australian Securities and Investments Commission v Macdonald (No 11)* [2009] NSWSC 287, [1080]; (2022) 292 FCR 627, [83]; *Jubilee Mines NL v Riley* (2009) 253 ALR 673, [87] (Martin CJ, with whom Le Miere AJA agreed).

[11] 'Corporate disclosure: strengthening the financial reporting framework' 18 September 2002, 129.

[12] *James Hardie Industries NV v ASIC* (2010) NSWCA 332, [356] (Spigelman CJ, Beazley and Giles JJA).

a. approximately 51% of Australians (10.2 million) hold investments outside their home and super (a rise of 5% from 9 million from the 2020 Study[13]).[14]

b. of those who invest 75% (7.7 million) held on-exchange investments (being an increase of approximately 1.1 million from the 2020 Study[15]).[16]

c. 34% of investors said it was hard to know what sources of information to trust.[17]

23. The ASX Australian Investors Study 2023 highlights that a significant proportion of the Australian population invests in the secondary securities market (one of the highest proportions globally of retail investors). This reinforces the need for adequate and effective shareholder protections to ensure a strong and effective market especially for retail investors, everyday Australians, "mum and dad" investors who, as a rule, do not have their own expert advisers and who rely on the integrity of the market which is reliant on the information disclosed to it by companies. Added to the large proportion of retail investors who invest directly in shares, is the huge number of everyday Australians who invest in shares via their superannuation funds. The importance of superannuation and protecting the Australian public's retirement funds cannot be overstated.

24. As noted by ASIC:

> *"Markets cannot operate with a high degree of integrity unless the information critical to investment decisions is available and accessible to investors on an equal and timely basis. That is why market cleanliness and continuous disclosure are essential to investor confidence. Price discovery in a clean market is efficient. Asset prices react immediately after new information is released through appropriate channels and thereby more closely reflect underlying economic value."*[18]

25. Before 14 August 2021,[19] sections 674(2) (for listed disclosing entities) and 675(2) (for other disclosing entities) of the *Corporations Act* included the following standard regarding the assessment of materiality of the information applied:

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[13] ASX Australian Investors Study 2020, 5.
[14] ASX Australian Investors Study 2023, 6.
[15] ASX Australian Investors Study 2020, 13.
[16] ASX Australian Investors Study 2023, 6.
[17] ASX Australian Investor Survey, 9 and 31.
[18] Australian Securities and Investments Commission, Submission No 14 to Senate Economics References Committee, *Treasury Laws Amendment (2021 Measures No. 1) Bill 2021* (June 2021) 19 [73].
[19] This is the date the 2021 Amendments commenced. From 26 May 2020 the amendments took effect pursuant to *Corporations (Coronavirus Economic Response) Determination (No. 2) 2020* which was effective for 6 months and extended by *Corporations (Coronavirus Economic Response) Determination (No. 2) 2020* for another 6 months until they lapsed and were permanently enacted.

a reasonable person would expect the information, if it were generally available, to have a material effect on the price or value of ED securities of the entity.

26. A similar standard was reflected in the ASX Listing Rules and the insider trading regime.[20] Schedule 2 of the *Treasury Laws Amendment (2021 Measures No 1) Act 2021* (Cth) (**2021 Act**) replaced the objective 'reasonable person' test with a subjective or "fault" element into the continuous disclosure regime so that companies will only be liable for civil penalties "where the entity has acted with 'knowledge, recklessness or negligence' in failing to update the market with price sensitive information."[21] The terms knowledge and recklessness are substantially similar to the terms as defined in the *Criminal Code* (Cth).[22] This has had the inappropriate effect of substantially aligning the civil liability provision with the criminal cause of action by changing the objective and strict test of materiality to a subjective fault test.[23] The 2021 Amendments also altered the misleading and deceptive conduct provisions of the Corporations Act to infuse the fault element into them meaning those provisions have no longer been contravened unless the requisite mental element is proven.[24] This is at odds and contrary to the misleading and deceptive conduct provisions of the Australian Consumer Law.[25] This results in the unsatisfactory position that the protections in place for misleading and deceptive conduct for financial products are weaker and less stringent than the protections for consumers in respect of other products.

27. The alignment of the civil penalty provision and the criminal cause of action is inconsistent with the historical underpinnings of civil penalties. Ford, Austin and Ramsay note that civil penalties were recommended by reformers who thought that directors and those who contravene the Corporations Act should not be branded as criminals unless they acted dishonestly.[26] Consistent with this, an honesty defence is provided under s1317S.

28. It is important to note that a reversion to the 2019 state of the law would maintain the fault element for a criminal proceeding alleging breach of the continuous disclosure regime, and equally would maintain the original intention behind the civil penalty regime.

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[20] *Corporations Act 2001* (Cth) s 1042A, being the definition of 'inside information'.

[21] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 February 2021, 1022 (Michael Sukkar, Assistant Treasurer, Minister for Housing and Minister for Homelessness, Social and Community Housing).

[22] *Criminal Code Act 1995* (Cth) ss 5.3 and 5.4.

[23] Note 1 Sections 674(2), (5), 675(2) make these provisions offences. Section 678 of the *Corporations Act* stipulates that the *Criminal Code* applies to an offence in these subsections. *The Criminal Code 1995* (Cth) outlines the fault elements in the schedule in Division 5.

[24] ASIC Act s 12DA(3)-(4); *Corporations Act* s 1041H(4)-(5); these associated amendments should also be repealed and the position before the amendments ought to be restored.

[25] s18 Australian Consumer Law, Schedule 2, *Competition and Consumer Act 2010* (Cth).

[26] Ian Ramsey and Robert Austin, *Ford, Austin and Ramsay's Principles of Corporations Law* (LexisNexis Butterworths, 17th ed, 2018) [3.390.15], [8.360].

29. By introducing a fault element, a civil action for corporate misconduct is much more difficult to bring but not because the corporate misconduct hasn't taken place or because the claim is unmeritorious (quite the contrary), but rather the relevant state of mind and fault element is too difficult to allege in order to commence the action in the first place. The 2021 Amendments require proof of knowledge, recklessness or negligence but given the information asymmetries between company and shareholder, it is of course the company who is in possession of the relevant proof of a material non disclosure and the relevant state of mind of the company's officers. Shareholders cannot access that proof until at least the discovery stage of a proceeding, if not at the stage of exchange of the lay evidence. Requiring shareholders to be able to establish the state of mind of the relevant officer by way of knowledge, recklessness or negligence before being able to institute proceedings for wrongdoing causes shareholders severe difficulties. This means that without that proof (which it would be very difficult to obtain from the outset), a legitimate action for corporate misconduct is likely not to be brought at all.

30. The introduction of the fault element with requisite knowledge, recklessness or negligence, can be said to have the perverse effect of encouraging less scrupulous company officers to avoid seeking out material information – by remaining ignorant and uninformed, then there is no breach, no criticism can be levied and no action can be brought. This necessarily means the market will be less informed and is a dangerous state of affairs for investors.

Impact upon class actions

31. It is difficult to assess the direct impact of the 2021 Amendments on shareholder class actions without detailed empirical research. The 2021 Amendments have been in force for 2 years which is a relatively short period for any meaningful analysis. However, the better and more meaningful assessment at this stage is of the veracity of the regime prior to the 2021 Amendments, the reasons behind the 2021 Amendments, the basis upon which the previous Government made the 2021 Amendments permanent and the evidence (or lack of it) that was relied upon in making such a drastic change to a regime that wasn't broken and which was functioning perfectly well.

32. Those in support of making the 2021 Amendments permanent (mainly the corporate and insurance lobbies) relied on and referred to the misconception that there has been an "explosion" of class actions and in particular shareholder class actions which needs to be curbed. This misconception has been repeated so many times that it has come to be believed despite the statistics and evidence clearly not supporting these claims.

33. The leading authority on class actions statistics is Professor Vince Morabito of Monash University. Professor Morabito, in his article titled 'Empirical perspectives on twenty-one years of funded

class actions in Australia'', identifies the number of shareholder class actions in the calendar years 2017 to 2022.[27] These were:

Year	**Total Shareholder Class Actions**	**Percentage of all class action in that year**
2017	22	44.8%
2018	26	39.3%
2019	11	20.3%
2020	15	20%
2021	9	15%
2022	8	24.2%
Total	91	

34. These figures show that there has not been any "explosion" in shareholder class actions. In fact, in 2019, the last year before the change in the continuous disclosure regime came into effect, there was a significant decrease in the number of shareholder class actions filed (less than half the prior year). Any argument that shareholder class actions were increasing before the pandemic such that the temporary pandemic amendments should be made permanent is clearly misconceived.

35. In an earlier report detailing data and research dealing specifically with Australian shareholder class actions, Professor Morabito, concluded (based on his review of the hard evidence and data), that:

> *"……no balanced or objective assessment of Australia's class action landscape could possibly lead to the conclusion that there has been an explosion of class actions in recent years.."*[28] and *"….it can be confidently concluded that there has been no explosion of shareholder class actions in Australia either over the last 27 years or so or in recent years…."*[29]

[27] Professor Vince Morabito, 'Empirical perspectives on twenty-one years of funded class actions in Australia', April 2023, 19-20.
[28] Professor Vince Morabito, 'An Evidence-Based Approach to Class Action Reform in Australia: Shareholder class actions in Australia – myths v facts' November 2019 at p. 14..
[29] Ibid at p.16.

36. A further review of class actions undertaken by King & Wood Mallesons ("KWM"), reinforces Professor Morabito's findings[30]:

Year	Total Shareholder class actions	Total non-shareholder class actions	Total class actions
2016/2017	16	20	36
2017/2018	22	32	54
2018/2019	17	41	58
2019/2020	13	43	56
2020/2021	8	57	65
2021/2022	13	43	56
2022/2023	14	39	53

37. If the statistics are plotted graphically, then it can be seen that there is in fact no pattern and that shareholder class actions filings vary year to year – sometimes increasing and sometimes decreasing but we can conclude that there has been a decreasing number of shareholder class actions since 2017/2018 and there has certainly not been any "explosion" in shareholder class actions.

38. There was a notable reduction in filings immediately after the introduction of the 2021 Amendments and then in the couple of years after there has been a slight increase in filings but not returning to 2017/2018 levels (which although higher than other years were not significantly so). However, the increase seen in 2017/2018 correlates with the timing of the serious ramifications of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry and its impact on shareholder class actions. Given the serious misconduct uncovered by that Royal Commission, it could not be said that any subsequent class actions relevant to that misconduct were unmeritorious and opportunistic. That Royal Commission reinforced the need for private enforcement on behalf of shareholders and consumers to address egregious corporate misconduct and seek to recover losses for those harmed as a result.

[30] There is a slight difference between Professor Morabito's numbers and KWM's but this is because they both cover slight different time periods.

39. The PJC Report refers to the need to "stem the flow of opportunistic class actions"[31] but does not refer to any supporting evidence for this misconceived claim. What "flow" of opportunistic class actions? The hard facts as borne out by the statistics show that this is a wild and unsubtantiated claim.

40. It is too simplistic to conclude that given the reduction in shareholder class actions in 2021 and 2022 that this was directly and only due to the 2021 Amendments but the figures are suggestive that the 2021 Amendments have had at least some effect on the private regulation of corporate misconduct. The up and down nature of the data over the years with no particular pattern, is indicative that shareholder class actions are only commenced when there has been corporate misconduct that needs to be addressed on behalf of shareholders and that the allegations of the proponents of the 2021 Amendments that shareholder class actions are "opportunistic"[32] and unmeritorious are false and not borne out by the data.

41. In the table below we have identified the number of shareholder class actions filed since the commencement of the 2021 Amendments (on 14 August 2021)[33]. These statistics include proceedings where they were originally filed and do not reflect where a proceeding has been cross-vested or transferred to another court. As best as we are able to ascertain from publicly available material, the statistics are:

Period	**Federal Court of Australia**	**Supreme Court of Victoria**	**Total**
14 August 2021 to 30 June 2022	4[34]	8[35]	12

[31] Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, Litigation funding and the regulation of the class action industry (Report, December 2020) ("the PJC Report) at [17.130].
[32] Ibid at [17.124] and [17.130].
[33] See n19.
[34] NSD1230/2021 Sanders v Beach Energy Ltd (filed 25 November 2021); VID176/2022 McCullagh v Cudeco Limited (Receivers and Managers appointed) (In Liquidation) (filed on 7 April 2022); VID268/2022 Horsky v Mesoblast Limited (filed 17 May 2022); Oil Surveillance Australia Pty Ltd atf D.A Lynch Superfund v Mesoblast Limited (filed on 3 June 2022). This does not include NSD346/2022 Matheson Property Group Pty Ltd v Virgin Australia Holdings Limited (filed on 11 May 2022) as it does not appear to include a claim of breach of the continuous disclosure regime.
[35] Thomas v The a2 Milk Company Limited (S ECI 2021 03645) filed on 5 October 2021; Lay v Nuix Limited (S ECI 2021 04360) filed on 19 November 2021; Batchelor v Nuix Limited & Ors (S ECI 2021 04391) filed on 23 November 2021; Xiao v The a2 Milk Company Limited (S ECI 2021 04403) filed on 23 November 2021; Nelson & Anor v Beach Energy Limited (S ECI 2021 04440) filed on 25 November 2021; Mumford v EML Payments Ltd (S ECI 2021 04738) filed on 16 December 2021; DA Lynch Pty Limited v The Star Entertainment Group Ltd (S ECI 2022 01039) filed on 29 March 2022; Bahtiyar v Nuix Limited & Ors (S ECI 2022 00735) filed on 13 May 2022.

1 July 2022 to 30 June 2023	5[36]	8[37]	13
1 July 2023 to 1 December 2023	0	0	0
Total since 2021 Amendments	9	16	25

42. The table includes a total of 25 proceedings against 12 different respondent companies. The proceedings against 10 respondents appear to include a claim period including the period from 26 May 2020 and therefore needing to address the subjective "fault" element.[38] Only one class action covers a claim period that is wholly after the 2021 Amendments.[39] None of these class actions have made it to final determination by the Court and so how the 2021 Amendments will affect any judicial assessment of a shareholder class action remains to be determined.

[36] NSD665/2022 R&B Investments Pty Ltd v Blue Sky Alternative Investments Limited (Administrators Appointed) (Receivers and Managers Appointed) (In Liquidation) & Ors filed on 19 August 2022; NSD948/2022 Furniss v Blue Sky Alternative Investments Limited (Administrators Appointed) (Receivers and Managers Appointed) (In Liquidation) & Ors filed on 6 November 2022; NSD293/2023 Jowene Pty Ltd v Downer EDI Limited filed on 30 March 2023; NSD427/2023 Teoh & Anor v Downer EDI Limited filed on 15 May 2023; Kajula Pty Ltd v Downer EDI Limited filed on 6 June 2023.

[37] Norris v Insurance Australia Group Limited (S ECI 2022 02887) filed on 29 July 2022; Drake v The Star Entertainment Group Ltd (S ECI 2022 04492) filed on 4 November 2022; Jowene Pty Ltd v The Star Entertainment Group Ltd (S ECI 2023 00413) 3 February 2023; Huang v The Star Entertainment Group Ltd (S ECI 2023 00428) 6 February 2023; Kilah v Medibank Private Ltd (S ECI 2023 01227) filed on 29 March 2023; Lidgett v Downer EDI Limited (S ECI 2023 01835) filed on 4 May 2023; Raeken Pty Ltd v James Hardie Industries PLC (S ECI 2023 01899) filed on 8 May 2023; Sinnamon v Medibank Private Limited (S ECI 2023 02833) filed on 29 June 2023. Fuller v Fletcher Building Limited (S ECI 2022 03433) is excluded from the table because it does not contain an explicit claim of breach of the continuous disclosure regime.

[38] Nelson & Anor v Beach Energy Limited (S ECI 2021 04440) with a claim period of 17 August 2020 to 29 April 2021 (inclusive); VID268/2022 Horsky & Anor v Mesoblast Limited with a claim period of 22 February 2018 to 17 December 2020 (inclusive); Thomas & Anor v The a2 Milk Company Limited (S ECI 2021 03645) with a claim period of 19 August 2020 to 9 May 2021 (inclusive); Lay & Anor v Nuix Limited & Ors (S ECI 2021 04360) with a claim period of 18 November 2020 to 29 June 2021 inclusive; Mumford v EML Payments Ltd (S ECI 2021 04738) with a claim period of 19 December 2020 to 25 July 2022; DA Lynch Pty Limited v The Star Entertainment Group Ltd (S ECI 2022 01039) with a claim period of 29 March 2016 to 13 June 2022 (inclusive); Lidgett v Downer EDI Limited (S ECI 2023 01835) with a claim period of 23 July 2019 to 24 February 2023 (inclusive); Norris v Insurance Australia Group Limited (S ECI 2022 02887) with a claim period of 11 March 2020 to 20 November 2020; Sinnamon v Medibank Private Limited (S ECI 2023 02833) with a claim period of 10 September 2020 to 25 October 2022; Raeken Pty Ltd v James Hardie Industries PLC (S ECI 2023 01899) with a claim period of 7 February 2022 and 7 November 2022.

[39] Raeken Pty Ltd v James Hardie Industries PLC (S ECI 2023 01899) with a claim period of 7 February 2022 and 7 November 2022.

Consistency with other markets

43. The continuous disclosure regime in the Corporations Act following the 2021 Amendments is now materially more lenient on corporate Australia than the disclosure regimes that operate in major overseas markets.

44. As noted in the Consultation Paper, 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. This isn't correct. Whilst the United Kingdom and United States do not have strict liability for private litigation for continuous disclosure breaches, the United States and United Kingdom regulatory regimes remain strict liability. By introducing a fault-based framework for ASIC enforcement litigation, Australia is now out of step with the United States and the United Kingdom, where regulators can take civil enforcement action without any need to establish fault. Other comparable jurisdictions such as Canada, Hong Kong, and South Africa, are strict liability and do not require either regulators or private litigators to prove knowledge, recklessness or negligence as noted in the PJC Report itself [40]. This means that Australia is now out of sync with all comparable jurisdictions. This means that ASIC's powers in relation to civil penalty enforcement are comparably significantly impeded ultimately to the detriment of investors.[41] If the 2021 Amendments were to be repealed, that repeal would have a materially positive impact on the policing of corporate wrongdoing in Australia and maintaining the integrity of Australia's financial markets in the interests of investors.

Compliance and enforcement

45. The 2021 Amendments have severely impacted ASIC's powers. Prior to the 2021 Amendments, in order to bring a civil penalty action, neither ASIC (or any private litigation) needed to establish a fault element. ASIC was only required to establish a fault element for any criminal prosecutions. According to ASIC, as at June 2021, there had been no criminal prosecutions (ever) against a company for breaching its continuous disclosure obligations[42]. This means that ASIC generally has been policing the continuous disclosure regime via civil penalties and infringement notices without the need for harsher criminal sanctions. Infusing the civil penalty provisions with the requirement to prove knowledge, recklessness or negligence has aligned civil enforcement by ASIC with the criminal offence, which severely limits ASIC's powers and abilities to deter and impose sanctions for corporate misconduct and the misleading of investors that falls below this new higher standard. It is notable that ASIC has not brought any proceedings for breaches of

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[40] The PJC Report, Table 17.2 at p.333.

[41] Australian Institute of Company Directors, Submission No 40 to Parliamentary Joint Committee on Corporations and Financial Services, *Litigation Funding and the Regulation of the Class Action Industry* (11 June 2020) Appendix 1.

[42] Australian Securities and Investments Commission, Submission No 14 to Senate Economics References Committee, *Treasury Laws Amendment (2021 Measures No. 1) Bill 2021* (June 2021) [56].

continuous disclosure obligations since the 2021 Amendments that specifically involve the 2021 Amendments.[43] This is indicative of the negative impact the 2021 Amendments have had on ASIC's powers and abilities to appropriately police corporate Australia.

46. The law should be returned to the position it was prior to the 2021 Amendments to enable ASIC to effectively police corporate wrongdoing via the civil regime. A repeal of the 2021 Amendments would therefore 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. We refer to ASIC's submissions made when the 2021 Amendments were first proposed[44]. ASIC did not support the 2021 Amendments on the basis they anticipated they would hinder and severely impact their ability to effectively enforce the important continuous disclosure regime and which is proving to be correct.

47. The effectiveness of disclosure laws generally depends heavily on enforcement.[45] If enforcement is effective, then the deterrence effect is highly likely to incentivise compliance by listed entities. The availability of private enforcement mechanisms to seek remedies as well as regulatory mechanisms is an important feature of an effective disclosure regime to police and punish corporate misconduct.[46] This includes shareholder class actions.[47] The 2021 Amendments have also raised the bar for private litigation and reduces the important deterrence effect of private litigation to ensure corporates are appropriately held to account for corporate misconduct. ASIC has acknowledged how private litigation plays an important role alongside its regulatory powers in holding corporate wrongdoing to account:

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[43] NSD827/2022 ASIC v Nuix Limited & Ors was commenced on 28 September 2022 and includes a period where one of the Determinations were in effect; NSD1063/2022 ASIC v McPherson's Limited was commenced on 8 December 2022 and includes a period where one of the Determinations were in effect; NSD163/2023 ASIC v Noumi Limited was commenced on 7 March 2023 and includes a period where one of the Determinations were in effect.

[44] Australian Securities and Investments Commission, Submission No 14 to Senate Economics References Committee, *Treasury Laws Amendment (2021 Measures No. 1) Bill 2021* (June 2021).

[45] See 'Corporate disclosure: strengthening the financial reporting framework' 18 September 2002, 132; John C. Coffee Jr, ' Law and the Market: The Impact of Enforcement' (2007) 156(2) University of Pennsylvania Law Review 229; Howell E Jackson, ' Variations in the Intensity of Financial Regulation: Preliminary Evidence and Potential Implications' (2007) 24(2) Yale Journal on Regulation 253 as quoted in Olivia Dixon and Jennifer G Hill, 'Australia: The Protection of Investors and the Compensation for Their Losses' in Pierre-Henri Conac and Martin Gelter (eds), Global Securities Litigation and Enforcement (Cambridge University Press, 2019) 1063, 1064.

[46] Commonwealth of Australia, 'Fundraising: Capital Raising Initiatives to Build Enterprise and Employment', Corporate Law Economic Reform Program, Proposals for Reform: Paper No 2 (1997) 10 as cited in Benjamin B Saunders, 'Causation in Securities and Financial Product Disclosure Cases: An Analysis and Critique' (2019) 47(3) *Federal Law Review* 494.

[47] Benjamin B Saunders, 'Causation in Securities and Financial Product Disclosure Cases: An Analysis and Critique' (2019) 47(3*) Federal Law Review* 494.

"The Corporations Act provides clear avenues for shareholders and consumers to take legal action to enforce their rights. It was clearly not intended that the regulator should have a monopoly on legal action. Where private action can achieve a similar outcome to that which action by ASIC could achieve, it allows ASIC to allocate its regulatory resources to other priorities. ASIC encourages investors to consider private legal action where appropriate to obtain compensation for losses investors may have suffered……" [48]

48. Woodsford agrees with the view expressed by ASIC that "the economic significance of fair and efficient capital markets dwarfs any exposure to class action damages"[49] and with former ASIC chairman, Greg Medcraft, that class actions are a "good market driven solution" of private enforcement.[50] Furthermore, "class actions and the prospect of them support ASIC's enforcement regime and help ensure that corporate Australia does the right thing."[51]

Other matters

Court resources

49. Practically, the 2021 Amendments are likely to have a negative effect on the resources of the court. This is because the applicants (either by way of private litigation or ASIC as regulator) will be required to prove the subjective fault element requiring many witnesses to be called to establish the subjective intent of the company through its officers. Austin and Black opine this amendment will occupy a significant portion of any hearing. They note:

    It is likely that a substantial part of the hearing of a continuous disclosure case will be directed to taking evidence about whether the entity (through its officers) knew or was reckless or negligent with respect to the materiality of information.[52]

50. This will likely mean oral lay evidence will be required at any trial many years after the events in question. Judges have remarked on the difficulty in commercial cases of assessing oral evidence based on recollection, usually many years after the events the subject of a proceeding occurred.

51. Additionally, as noted above, the whole purpose behind the continuous disclosure regime is to attempt to address the information asymmetry that exists between the listed company and the

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[48] ASIC, Submission No 72 to Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (September 2018) at [47].
[49] Ibid at [20]
[50] Quoted in Paul Miller 'Shareholder class actions: Are they good for shareholders?' (2012) 86(9) *Australian Law Journal* 633, 634 citing Quoted in Boxsell A, "Regulators praise private court actions" *Australian Financial Review*, 5-9 April 2012, 59.
[51] Senate Economic Legislation Committee, Parliament of Australia, *Treasury Laws Amendment (2021 Measures No.1) Bill 2021* (Report, March 2021) 65 [1.14].
[52] R P Austin and The Hon Justice A J Black, Austin & Black's Annotations to the Corporations Act, November 2022, [6CA.674A].

markets. The company is in possession of relevant and market sensitive information, the disclosure of which investors rely upon. Shareholders are not (and cannot) be aware of the subjective intention of the company until the costly exercise of discovery or lay evidence has been completed. The state of the law prior to the 2021 Amendments did not require this more onerous standard of proof but which provides no market benefit. In order to ensure the appropriate allocation of public resources and the administration of justice, an objective element is logically sound for both public and private enforcement.

Disconnect with ASX Listing Rules

52. The ASX publishes and maintains the Listing Rules.[53] Importantly, the ASX Listing Rules have not been amended to be consistent with the 2021 Amendments. This is important because the *Corporations Act 2001* (Cth) effectively provides that the ASX Listing Rules are the starting point for the statutory continuous disclosure regime.[54] This is because under both sections 674 (both the section before the amendment and after) and 674A, a listed disclosing entity is required to disclose information if it must disclose it under the relevant Listing Rules. This approach has been described as 'co-regulatory' in that the ASX relies on the statutory application of the ASX Listing Rules.[55] The Listing Rules require information to be disclosed if it is not generally available and a reasonable person would expect the information, if it were generally available, to have a material effect on the price or value of the subject securities - effectively the same as the continuous disclosure regime requirements before the 2021 Amendments. The 2021 Amendments now require the entity must have known, be reckless or negligence as to the information's materiality. As a result, there are now two standards - the one under the ASX Listing Rules and the now inconsistent one under the Corporations Act. However, the Corporations Act provision is the only one that is actionable by ASIC or private enforcement mechanism to ensure compliance. Previously the provisions were uniform so by enforcing the Corporations Act, there was, by extension, an enforcement of the Listing Rules. There is now a disconnect between the requirements under the Listing Rules and those under the Corporations Act.

53. The continuous disclosure regime and the insider trading regime were intended to work in tandem. The 2021 Amendments removes the synergy between the definition of materiality for continuous disclosure from the previously identical definition of 'inside information' or materiality for insider trading in section 1042A. This provides another disconnect in the regulation of listed entities by the continuous disclosure regime.

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[53] *Cruickshank v Australian Securities and Investments Commission* (2022) 292 FCR 627, [84] (Allsop CJ, Jackson and Anderson JJ).

[54] *Jubilee Mines NL v Riley* (2009) WAR 299, [55] (Martin CJ).

[55] *Australian Securities and Investments Commission v Chemeq Ltd* (2006) 234 ALR 511, [44] (French J).

Lack of evidence to support permanent changes

54. In its submission to the Australian Law Reform Commission ("ALRC") with respect to the ALRC's inquiry in 2018 into class actions and third party litigation funding (the "ALRC Inquiry"), ASIC stated (with respect to the existing continuous disclosure regime at that time in 2018 and prior to the 2021 Amendments)that:

    "In ASIC's experience the provisions are working well and operate to increase the attractiveness of Australian markets for investors".[56]

55. The 2021 Amendments followed the recommendations of the PJC Report. However, the PJC Report post-dated the ALRC Inquiry and the ALRC's report following that inquiry delivered in December 2018 (the "ALRC Report")[57]. The ALRC Report recommended as Recommendation 24 that:

    > *"The Australian Government should commission a review of the legal and economic impact of the operation, enforcement, and effects of continuous disclosure obligations and those relating to misleading and deceptive conduct contained in the Corporations Act 2001 (Cth) and the Australian Securities and Investments Commission Act 2001 (Cth)."*[58]

    In making this recommendation, the ALRC noted that:

    > *"The purpose of the continuous disclosure obligations is well understood – no submission suggested that the fundamental obligations should in any way be lessened; quite the contrary. It was forcefully submitted that a review would:*
    >
    > > *Threaten the integrity of the market and counteract the significant progress the regime has made over the course of the past 26 years. It is essential to protect and maintain the laws currently in place surrounding proper disclosures from large companies in order to continue to effectively deal with corporate misconduct in Australia, minimise the potential for insiders to profit and hold wrongdoers to account*
    >
    > *Neverthelss, there was broad support for a balanced, unbiased legal and economic review of the Australian provisions and an analysis of whether there is any substance to the unforeseen and potentially adverse consequences that were raised by stakeholders with the ALRC."*[59]

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[56] ASIC, Submission No 72 to Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (September 2018) at [20].

[57] ALRC, Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third Party Litigation Funders (Final Report No 134, December 2018).
[58] Ibid at p.259.
[59] Ibid at [9.24] – [9.25] at p.264-265.

56. Despite the ALRC conducting an extensive inquiry and producing an extensive and detailed report containing recommendations, the previous Government took no action with respect to the recommendations made. In particular, the then Government took no steps with respect to Recommendation 24 of the ALRC Report. Instead, the Government went ahead in March 2020 with tasking the Parliamentary Joint Committee on Corporations and Financial Services (the "PJC") to conduct another inquiry covering largely the same issues as the ALRC Inquiry. The PJC Report was delivered in December 2020 and recommended by way of majority that the temporary amendments made to the Continuous Disclosure regime in light of the Covid pandemic be made permanent. This recommendation was not based on any evidence or review as recommended by Recommendation 24 of the ALRC Report. Notably the Labor members of the PJC delivered a separate dissenting minority report which rejected the recommendation to make the temporary changes to the Continuous Disclosure regime permanent and criticised the lack of proper process and review stating:

> *"This Committee should not recommend permanent changes to 'a fundamental tenet of our markets' in the absence of a proper process of review, deliberation and debate. ……….the Committee's recommendation that Mr Frydenberg's changes to Australia's continuous disclosure regime be made permanent is, with respect, reckless and grossly irresponsible."*[60]

57. Woodsford submits (as submitted previously by ASIC) that there was no need to make the temporary changes to the continuous disclosure regime permanent post Covid as the continuous disclosure regime was working well prior to Covid. However, if permanent changes were to be considered, there should have been an appropriate process of review and any changes needed to be supported by appropriate evidence. In making the 2021 Amendments, that didn't happen. As such the 2021 Amendments should be repealed in full.

Recommendations

58. Woodsford recommend that the *Treasury Laws Amendment (2021 Measures No. 1) Act 2021* (Cth) be repealed in full and the situation prior to the Coronavirus Declarations be reinstated. The 2021 Amendments are at odds with the objects of the continuous disclosure regime, the intention of the distinction between civil penalty provisions and criminal offences and reliable enforcement for corporate wrongdoing.

59. The 2021 Amendments were originally introduced for the purpose of *temporarily* modifying the existing continuous disclosure regime during the Covid pandemic. The *temporary* change was made due to the unprecedented nature of the pandemic and which made the assessment of information that might materially impact a company's securities incredibly difficult at that time.

[60] Ibid at [1.20] at p.363.

The *temporary* measure was introduced by way of relief for companies and their officers as they navigated times and issues never previously experienced. However, with the pandemic now over, there is no justifiable reason to maintain this relief and water down Australia's continuous disclosure laws at the expense of investors and the integrity of Australia's financial markets.

1 December 2023