



Report of the independent review of the changes to the continuous disclosure laws

made by the Treasury Laws Amendment
(2021 Measures No. 1) Act 2021

February 2024

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In the spirit of reconciliation, the Treasury acknowledges the Traditional Custodians of country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all Aboriginal and Torres Strait Islander peoples.

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Letter of transmittal

7 February 2024

The Hon Stephen Jones MP
Assistant Treasurer
Minister for Financial Services
Parliament House
CANBERRA ACT 2600

Dear Minister

In September 2023, you appointed me to conduct an independent review of the amendments to the continuous disclosure laws made by the *Treasury Laws Amendment (2021 Measures No.1) Act 2021*.

I am pleased to present to you this report of my review.

Please let me know if I can be of any further assistance in relation to the matters covered in my report.

Yours sincerely

A handwritten signature in black ink that reads "K. A. Lewis". The signature is written in a cursive style with a large initial 'K'.

Kevin Lewis

Summary of findings and recommendations

In summary, the findings and recommendations of the Review are:

Primary findings and recommendations	
<p>Overarching finding: The two-year review period provided for in section 1683B of the Corporations Act has not been long enough to draw meaningful evidence-based conclusions about the impact of the 2021 Amendments on many of the matters mentioned in the Terms of Reference for the Review.</p>	
Finding in support of recommendation	Recommendation
<p>Finding 1: The 2021 Amendments have had, and are likely to continue to have, a negative impact on ASIC’s enforcement of continuous disclosure laws.</p>	<p>Recommendation 1: Subject to Recommendation 3, the Government should amend the Corporations Act to remove the requirement introduced by the 2021 Amending Act for ASIC to prove in civil penalty proceedings for a breach of continuous disclosure laws that the disclosing entity acted knowingly, recklessly or negligently.</p>
<p>Finding 2: The 2021 Amendments have had, and are likely to continue to have, little (if any) impact on the number and type of continuous disclosure class actions against disclosing entities. Meritorious continuous disclosure class actions are likely to proceed despite the 2021 Amendments. Accordingly, at this stage, there is no evidence of an urgent or compelling need to repeal the 2021 Amendments to facilitate continuous disclosure class actions.</p>	<p>Recommendation 2: The Government should retain for the time being the requirement for a private litigant to prove in civil compensation proceedings for a breach of continuous disclosure laws that the disclosing entity acted knowingly, recklessly or negligently.</p>
Secondary recommendations	
Condition for recommendation to apply	Recommendation
<p>If the Government decides to:</p> <ul style="list-style-type: none"> accept Recommendation 1 and remove the requirement for ASIC to prove in civil penalty proceedings for a breach of continuous disclosure laws that a disclosing entity acted knowingly, recklessly or negligently; and/or reject Recommendation 2 and remove the requirement for a private litigant to prove in civil compensation proceedings for a breach of continuous disclosure laws that a disclosing entity acted knowingly, recklessly or negligently. 	<p>Recommendation 3: Before announcing or implementing that decision, the Government should consider the statements made about the 2021 Amendments in Treasury’s consultation paper <i>Climate-related financial disclosure (June 2023)</i> and what, if any, action needs to be taken regarding those statements.</p>
<p>If the Government decides to:</p> <ul style="list-style-type: none"> reject Recommendation 1 and retain the requirement for ASIC to prove in civil penalty proceedings for a breach of continuous disclosure laws that a disclosing entity acted knowingly, recklessly or negligently; and/or accept Recommendation 2 and retain the requirement for a private litigant to prove in civil compensation proceedings for a breach of continuous disclosure laws that a disclosing entity acted knowingly, recklessly or negligently. 	<p>Recommendation 4: The Government should amend the Corporations Act to address more fully how knowledge, recklessness or negligence is to be attributed to the disclosing entity.</p> <p>Recommendation 5: The Government should consider whether the requirement to prove a disclosing entity acted knowingly, recklessly or negligently should attach to the determination of whether the relevant information should have been disclosed to the market, rather than to the determination of whether the relevant information was market sensitive.</p>
<p>Recommendation 6: The Government should also consider whether sections 674 and 675 of the Corporations Act should be amended to specify the applicable physical and fault elements.</p>	

Background

About this report

This report sets out the findings and recommendations of an independent review (**Review**) of the amendments (**2021 Amendments**) to the continuous disclosure laws made by the *Treasury Laws Amendment (2021 Measures No. 1) Act 2021 (2021 Amending Act)*.¹

A glossary of key terms used in this report has been included in Annexure B.

The Review was conducted under, and for the purposes of, section 1683B of the *Corporations Act 2001 (Cth) (Corporations Act)*.² That section was introduced as part of the 2021 Amending Act. It requires the Minister to cause a review to be conducted of the operation of the 2021 Amendments by an independent expert within 6 months after the second anniversary of the commencement of that section (i.e. by 14 February 2024).

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

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

About the Reviewer

On 19 September 2023, the Assistant Treasurer and Minister for Financial Services, the Hon Stephen Jones MP announced³ that Dr Kevin Lewis⁴ had been appointed as the Reviewer.⁵

Dr Lewis was the Chief Compliance Officer of ASX Limited (**ASX**) from 2010 to 2020. In that role, he was responsible for overseeing compliance by ASX-listed entities with the ASX continuous disclosure rules. He wrote ASX Listing Rules Guidance Note 8 *Continuous Disclosure: Listing Rules 3.1–3.1B* in 2012–13, which is widely regarded as having transformed the market's understanding of, and compliance with, ASX's continuous disclosure rules. He was also the principal author of the third

1 The Bill, Reading Speeches and Explanatory Memorandum for the 2021 Amending Act are available at https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6674.

2 References in this report to chapters and sections of an Act are to chapters and sections of the Corporations Act unless otherwise stated.

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

4 SJD (Harvard University), MBA (Sydney University), BJuris (Hons) and LLB (Hons) (University of Western Australia). From 2002 to 2017, Dr Lewis taught *Compliance: Theory and Practice in the Financial Services Industry* as part of the Sydney University Law School LLM program and was awarded the title 'Adjunct Professor' for the latter part of that period.

5 To support Dr Lewis, a small secretariat was established within the Treasury comprising Suna Rizalar, Paul Britt and Istiak Ahmed.

The Reviewer wishes to express his appreciation to the members of the secretariat for their tireless efforts and invaluable assistance in conducting the Review and preparing this report.

(2014) and fourth (2019) editions of the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations*, which contributed to a significant uplift in governance standards in Australia.

The terms of reference for the Review

The terms of reference for the Review⁶ (**Terms of Reference**) require the Reviewer to have regard to:

- whether the 2021 Amendments are working in support of an efficient, effective, and well-informed market
- the effect of the 2021 Amendments on the quality and nature of disclosures made by disclosing entities
- continuous disclosure regimes that operate overseas and the extent to which the Australian regime is consistent with those regimes, and
- whether the 2021 Amendments have given rise to barriers that may prevent compliance with or enforcement of the continuous disclosure obligations.

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

Public consultation

To help inform the findings and recommendations in this report, on 1 November 2023, a consultation paper (**Consultation Paper**) was published on the Treasury website⁷ seeking feedback on 14 questions. Those questions are enumerated and italicised in the 'Consultation feedback and the Review's findings and recommendations' section below.

The questions in the Consultation Paper were framed to address each of the matters required to be considered by the Reviewer under the Terms of Reference, as well as other matters.

Interested stakeholders were invited to make submissions on the consultation questions by 1 December 2023.

The Review received 21 submissions responding to the Consultation Paper, one of which was provided on the basis that the respondent's identity was to be kept confidential. Copies of the submissions are available on the Treasury website at <https://treasury.gov.au/consultation/c2023-445320>.

In making the findings and recommendations in this report, the Reviewer has had regard to all the submissions received from stakeholders in response to the Consultation Paper.

6 Available at <https://treasury.gov.au/review/continuous-disclosure-review-of-liabilities/terms-reference>.

7 See *Continuous disclosure: Review of changes made by the Treasury Laws Amendment (2021 Measures No.1) Act 2021 (November 2023)*, available at <https://treasury.gov.au/sites/default/files/2023-11/c2023-445320cp.pdf>.

It is noted that the Consultation Paper included a statement in footnote 7 that:

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

That statement is not correct. In fact, there were some minor consequential changes made in the 2021 Amending Act to sections 674 and 675, the relevant provisions imposing criminal penalties for a breach of continuous disclosure laws. Further, those sections did not, and still do not, specify a fault element.

The Reviewer would like to express his appreciation to each of the stakeholders who provided a submission. The submissions were most helpful in formulating the findings and recommendations in this report.

The continuous disclosure laws and why are they important

Australia's continuous disclosure laws are found in chapter 6CA of the Corporations Act. Broadly speaking, that chapter requires a 'disclosing entity'⁸ to disclose information that a reasonable person would expect to have a material effect on the price or value of the entity's securities on a continual basis and in a timely manner. In cases where the disclosing entity is listed on a financial market whose rules require the release of such information to the market (such as the ASX, NSX or SSX), these disclosures must be made to the market operator at the time and in the manner specified in those rules. The market operator will then arrange for the information to be published to the market at large. In all other cases, these disclosures must be made to the Australian Securities and Investments Commission (**ASIC**) or as ASIC otherwise directs.

A disclosing entity that contravenes its continuous disclosure obligations is liable to significant criminal⁹ and civil penalties,¹⁰ as is any other person (such as an officer or employee of the entity) who is 'involved in the contravention'.¹¹ For convenience, proceedings by ASIC seeking civil penalties are referred to in this report as '**civil penalty proceedings**'.

In addition, a person who suffers damage as a result of the contravention¹² can bring civil proceedings against the entity and any other person who was involved in the contravention for an order compensating them for that damage.¹³ For convenience, proceedings by a private litigant seeking such an order are referred to in this report as '**civil compensation proceedings**'. Typically, civil compensation proceedings are brought by way of a class action.

Australia's continuous disclosure laws are central to the integrity of its capital markets. The objective of these laws is:

... to enhance the integrity and efficiency of Australian capital markets by ensuring that the market is fully informed. The timely disclosure of market sensitive information is essential to maintaining and increasing the confidence of investors in Australian markets, and to improving the accountability of company management. It is also integral to minimising incidences of insider trading and other market distortions.¹⁴

As ASIC has underscored:

-
- 8 'Disclosing entities' include companies and managed investment schemes listed on an Australian securities market (such as the ASX, NSX and SSX) and certain other entities that have raised capital or undertaken a takeover or scheme of arrangement in Australia (see sections 111AC – 111AG).
 - 9 Under section 674 (for disclosing entities listed on an Australian securities market with continuous disclosure rules) and section 675 (for all other disclosing entities).
 - 10 Under section 674A (for disclosing entities listed on an Australian securities market with continuous disclosure rules) and section 675A (for all other disclosing entities). These sections are prescribed to be 'financial services civil penalty provisions' under section 1317E.
 - 11 The phrase 'involved in a contravention' is defined in section 79.
 - 12 For example, an investor who purchases securities in the entity while the market is not informed of the information in question and consequently pays too high a price for the securities.
 - 13 Under section 1317HA.
 - 14 *James Hardie Industries NV v ASIC* (2010) NSWCA 332, at paragraph 355.

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

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

... Reduced confidence in market integrity discourages investors from risking their savings by investing in an unfair market. This can lead to lower turnover, higher cost of trading and inefficient allocation of capital.¹⁵

The continuous disclosure laws also underpin one of the most significant and liberating features of Australia's capital markets, namely low document capital raisings. Australia is one of the few jurisdictions in the world that allow listed entities to raise significant capital without a prospectus or product disclosure statement. This is allowed on the basis that the market should already be aware of all, or nearly all, material information concerning the entity through the continuous disclosure announcements it has made. Consequently, in times of crisis, Australian listed entities have been able to raise much needed capital from the market quickly and efficiently. This in turn has helped to shield Australian listed entities and the Australian economy from the worst of events such as the Global Financial Crisis and the coronavirus pandemic.¹⁶

The effect of the 2021 Amendments

Immediately prior to the 2021 Amending Act coming into force, a disclosing entity was liable for civil penalties and/or a compensation order if:

- the entity had information that was not generally available
- the information, if it were generally available, was such that a reasonable person would expect it to have a material effect on the price or value of the entity's securities, and
- the entity failed to notify the market operator or ASIC (as applicable) of the information in accordance with its continuous disclosure obligations.

The 2021 Amendments imposed an additional requirement that ASIC (in the case of civil penalty proceedings¹⁷) or a private litigant (in the case of civil compensation proceedings) prove that the disclosing entity knew, or was reckless or negligent with respect to whether, the information would, if it were generally available, have a material effect on the price or value of the entity's securities (referred to for convenience in this report interchangeably as the **'fault element'** or **'requisite state of mind'**).

To prevent litigants avoiding this additional requirement by framing their claim as an action for misleading or deceptive conduct under section 1041H of the Corporations Act or under section 12DA

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

16 See for example ASX Information Paper [Capital Raising in Australia: Experiences and Lessons from the Global Financial Crisis 29 January 2010](#) and Chanticleer [Why the ASX Blitzes the World in Equity Raisings 21 April 2020](#).

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

of the *Australian Securities and Investments Commission Act 2001 (ASIC Act)* rather than a claim under chapter 6CA, the 2021 Amendments also included corresponding changes to require that where the misleading or deceptive conduct in question also involved a breach of a disclosing entity's continuous disclosure obligations, that ASIC or a private litigant prove the entity had the requisite state of mind when it engaged in the conduct.

References in this report to 'continuous disclosure laws' (including in the recommendations in this report) should be understood as extending to the amendments made to section 1041H and section 12DA by the 2021 Amending Act.

Events leading up to the 2021 Amendments

On 25 May 2020, the former government published the Corporations (Coronavirus Economic Response) Determination (No. 2) 2020 (**Coronavirus Determination**).¹⁸ The Coronavirus Determination temporarily amended the continuous disclosure provisions in the Corporations Act for a period of six months.¹⁹ The temporary amendments had the effect that disclosing entities would only be civilly liable for a breach of their continuous disclosure obligations if they acted with knowledge, recklessness or negligence in relation to the breach. This applied both to civil penalty proceedings by ASIC and to civil compensation proceedings by private litigants.

The purpose of the Coronavirus Determination was described in the explanatory statement for the determination²⁰ as follows:

COVID-19 has caused a considerable degree of uncertainty for business. In the current environment it is significantly more challenging for disclosing entities to know whether a given piece of information will have a material effect on the price or value of its ... securities and therefore forecast the entity's future earnings or prospects. In this environment, the continuation of many businesses may depend on investment, and investors rely on timely disclosure of information to financial markets. It is appropriate to encourage disclosing entities to continue to disclose information to markets or to ASIC by temporarily modifying the scope to commence civil proceedings for breaches of the continuous disclosure obligations in circumstances relating to COVID-19. At the same time, it is appropriate that serious breaches committed knowingly, recklessly or negligently during the period the instrument is in force may continue to be litigated. On this basis the Minister is satisfied that the modifications in the Determination is [*sic* are] appropriate to facilitate the continuation of business in circumstances relating to COVID-19.

Separately, on 13 May 2020, the House of Representatives referred to the Parliamentary Joint Committee on Corporations and Financial Services (**PJC**) an inquiry into litigation funding and the regulation of the class action industry. The PJC published an extensive report about that enquiry in December 2020 (**PJC Report**).²¹ The PJC Report found that securities class actions were frequently brought in Australia alleging contraventions of the continuous disclosure laws and that this had a

18 Available at <https://www.legislation.gov.au/F2020L00611/asmade/text>.

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

20 Available at <https://www.legislation.gov.au/F2020L00611/asmade/text/explanatory-statement>.

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

significant financial and compliance impact on the entities and officers subject to these actions. The PJC Report commented:

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

Given the apparent detriment caused by the increased prevalence of private litigant shareholder class actions, and the apparent lack of any accompanying public good, the committee considers reforms to the underlying substantive law on continuous disclosure are necessary. The committee adopts this approach rather than recommending further reforms to class action procedure because, in this instance, the problem itself appears relatively discrete and the optimal solution is to target the reform to the underlying source of the problem.²²

The PJC Report continued:

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

Shareholder class actions appear to often generate excessive profits for litigation funders and lawyers at the expense of listed companies and their shareholders. The company, rather than the directors and officers, are most often the liable party in shareholder class actions. Due to the circularity problem, the unnecessarily high costs of defending the class action litigation and any settlement payments are ultimately borne by shareholders. In essence, money is being taken from one group of shareholders and passed to another to compensate the latter group for wrongdoing by directors and officers. While some individual shareholders may gain, overall shareholders are losing money, particularly long-term or passive investors.

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

Additionally, the increasing prevalence of shareholder class actions has broader undesirable outcomes on the availability and cost of D&O [Directors and Officers] insurance, with consequential challenges for attracting and retaining experienced and high-quality directors and officers. A culture of risk-averse decision-making across Australian boards is a further adverse outcome of shareholder class actions, with harmful long-term impacts on economic growth, job creation and investors' return on equity...²³

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

22 PJC Report paragraphs 5.36 and 5.37.

23 PJC Report paragraphs 17.117–17.119.

Australia's continuous disclosure regime to launch opportunistic shareholder class actions.

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

The committee notes that one of the main points of contention was whether claims about continuous disclosure breaches should have to prove fault on the part of the company.

The committee notes that in 2002, the Howard government lowered the threshold for bringing shareholder class actions. Prior to 2002, a fault element was needed to bring a shareholder class action based on an alleged breach of the continuous disclosure laws. In 2002, the fault element was removed. The committee notes that in 2020, the Treasurer reinstated the fault element with respect to an alleged breach of the continuous disclosure laws for both private litigants and for the regulator, ASIC.

The COVID-19 amendments align the requirement to prove fault for continuous disclosure breaches in Australia with requirements in other jurisdictions, such as the US and UK. ***Raising the bar in this manner makes it much more difficult to bring a shareholder class action.*** [emphasis added]...²⁴

In the committee's view, the most appropriate approach going forward would be to retain the fault element. This would stem the flow of opportunistic class actions and brings the fault element requirement in Australia into line with comparable jurisdictions. Accordingly, the committee considers that the most appropriate course of action is for the Australian Government to permanently legislate the laws in the [Coronavirus Determination].²⁵

The PJC Report consequently recommended that the Government legislate to make the temporary changes to continuous disclosure laws in the Coronavirus Determination permanent.²⁶

On 20 October 2021, the former government provided a response (**Government Response**) to the PJC Report agreeing with the recommendation and stating that the 2021 Amendments, which had already been enacted at the time of the response, 'strike the right balance between ensuring shareholders and the market are appropriately informed while allowing companies to more confidently make forecasts of future earnings or provide guidance updates ***without facing the undue risk of class actions'*** [Emphasis added].²⁷

The relevant parts of the PJC Report and the Government Response have been set out at length above for readers to fully appreciate the reasons motivating the 2021 Amendments and so the findings and recommendations in this report can be better understood.

24 PJC Report paragraphs 17.124–17.128.

25 PJC Report paragraph 17.130.

26 PJC Report recommendation 29. Notably, the PJC Report included a separate minority report by the Labor members of the PJC (see pages 361–371 of the PJC Report). They argued that the temporary changes to continuous disclosure laws in the Coronavirus Determination were made 'without warning, without evidence and without any process of public consultation' and that they should not be made permanent without 'a proper process of review, deliberation and debate'. Hence, they specifically opposed recommendation 29 (see paragraph 1.21 on page 363 of the PJC Report).

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

Consultation feedback and the Review's findings and recommendations

Preliminary matters

As stated previously, the Review received 21 submissions responding to its Consultation Paper. Of these:

- **Nine** (comprising three groups representing or advising shareholders, two 'class action' law firms, a group representing class action funders in Australia, a global litigation funder, an academic and a respondent that wished to keep their identity confidential) favoured the repeal of the 2021 Amendments.
- **Eight** (comprising five groups respectively representing business, insurers, directors, governance professionals and investor relations professionals, a group representing corporate lawyers, a group representing dispute resolution lawyers, and a law firm) favoured the retention of the 2021 Amendments.
- **One** (a market operator) argued for the repeal of the 2021 Amendments vis-à-vis ASIC but their retention in relation to private litigants.
- **One** (ASIC) argued for the repeal of the 2021 Amendments vis-à-vis ASIC, but expressed no opinion on whether they should be retained for private litigants.
- **Two** (a group representing class action barristers and an academic) did not express any opinion on whether the 2021 amendments should be retained or repealed.

Enumerated below in italics are the 14 questions set out in the Consultation Paper and a brief outline of the main responses received on each question.

The questions have the same number as in the Consultation Paper but follow a different order to present the Review's findings and recommendations in a more logical and understandable manner.

The Reviewer would make two preliminary observations about the consultation submissions.

First, a substantial number of respondents cautioned that the two-year review period provided for in section 1683B has been too short to draw any meaningful evidence-based conclusions about the impact of the 2021 Amendments on many of the issues raised in the Consultation Paper.

For example, on the issue of the impact of the 2021 Amendments on market efficiency and effectiveness, ASX commented:

... 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.

Associate Professor Dr Michael Duffy (**Dr Duffy**) expressed similar reservations.

On the issue of the impact of the 2021 Amendments on compliance and enforcement, ASIC noted:

The relatively short time since the 2021 Amendments commenced means it is difficult to fully evaluate how they have affected ASIC's enforcement actions, none of which have yet concluded.

On the issue of the impact of the 2021 Amendments on class actions, the Class Actions Committee of the Federal Dispute Resolution Section of the Law Council of Australia (**LCA-FDRS**) remarked that there was evidence that securities class actions were in decline prior to the 2021 Amendments but the evidence was equivocal and it was too early for any impact by those amendments to be appreciable.

On the issue of the impact of the 2021 Amendments on D&O insurance, the Insurance Council of Australia (**ICA**) also warned that there are multiple factors at play that determine D&O insurance premiums and that the long tail nature of D&O claims, combined with the short period of time the 2021 Amendments had been in place meant that it was simply too early to make many meaningful observations on the impact of those amendments on D&O insurance.

The Reviewer agrees with the comments above and makes the following overarching finding:

Overarching finding

The two-year review period provided for in section 1683B of the Corporations Act has not been long enough to draw meaningful evidence-based conclusions about the impact of the 2021 Amendments on many of the matters mentioned in the Terms of Reference for the Review.

This report makes two key findings (Findings 1 and 2) and two primary recommendations (Recommendations 1 and 2) for consideration by the Government. It also makes four secondary recommendations (Recommendations 3, 4, 5 and 6) for consideration by the Government.

All the Review's findings and recommendations are caveated by the overarching finding above.

Secondly, some respondents sought in their submissions to continue to debate the relative merits and demerits of continuous disclosure class actions. The Reviewer does not believe it is necessary, for the purposes of the Review, to engage with or make any findings on that issue.

The different perspectives on continuous disclosure class actions have been thoroughly elucidated through the various stakeholder submissions to the PJC enquiry on class actions and the Senate Economics Reference Committee consultation on the Bill for the 2021 Amending Act and are well understood.

Class actions are a feature of the Australian legal system. They serve several purposes and can have positive and negative aspects.

Disclosing entities that breach continuous disclosure laws will continue to be subject to the risk of class actions for as long as the Corporations Act continues to confer a right on persons to seek compensation if they have suffered damage as a result. No respondent has proposed that the Corporations Act should be amended to remove this right and, if they had, consideration of such a proposal as part of the Review would be well outside the scope of the Terms of Reference.

Impact on market efficiency and effectiveness

The Consultation Paper asked:

1. *Do you consider that the 2021 Amendments have:*
 - (a) *resulted in the market for Australian listed securities²⁸ 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.
2. *Have you observed any changes in the nature and/or quality of disclosures by disclosing entities since the 2021 Amendments came into effect? If so, what changes have you observed and do you attribute those changes to the 2021 Amendments or to some other cause? What data or specific examples can you provide to support your observations?*
3. *Have the 2021 Amendments affected the ability of investors in Australian listed securities to make informed investment decisions? If so, how?*

Not surprisingly, there was a diversity of views on these matters across the different stakeholder groups.

In relation to question 1, proponents of class actions including the Association of Litigation Funders Australia (**ALFA**), Echo Law (**Echo**), Maurice Blackburn (**MB**) and Woodsford Group Limited (**Woodsford**) generally asserted that the 2021 Amendments have had, or could have, a negative impact on market efficiency and effectiveness and, therefore, they should be repealed. Groups affiliated with or advising shareholders such as the Australian Council of Superannuation Investors (**ACSI**), Australian Shareholders Association (**ASA**) and Ownership Matters (**OM**) expressed similar views. In doing so, these respondents generally focused on the effect the 2021 Amendments might have on the quality and timeliness of information made available to investors by disclosing entities and the consequential impact this might have on the efficiency and effectiveness of the market for Australian listed securities.

By way of example, the Woodsford submission stated that the need to prove the fault element under the 2021 Amendments would constrain both regulatory and private enforcement action and that this would weaken deterrence and lead to a drop in disclosure standards, resulting in the market being less efficient, effective and well informed.

However, other respondents such as the Australian Institute of Company Directors (**AICD**), Australasian Investor Relations Association (**AIRA**), Business Council of Australia (**BCA**), Governance Institute of Australia (**GIA**), Herbert Smith Freehills (**HSF**), the Business Law Section of the Law Council of Australia (**LCA-BLS**) and LCA-FDRS generally asserted that the 2021 Amendments have had a positive impact on market efficiency and effectiveness. They argued for their retention. In doing so, these respondents generally took a more expansive view of the term 'market' and factored in benefits such as reduced burdens on business and making Australia a more attractive place to raise capital.

In relation to questions 2 and 3, only one respondent observed any specific changes in the nature and/or quality of disclosures by disclosing entities and the ability of investors to make informed

²⁸ That is, securities quoted on, and issued by an entity listed on, an Australian financial market.

investment decisions since the 2021 Amendments had come into effect. BCA contended that the 2021 Amendments have encouraged more fulsome, less cautious disclosure – particularly in relation to earnings guidance and other forward-looking disclosures – leading to better informed and more efficient and effective securities markets. They supported that contention with data from the AlphaSense database.

In contrast, OM submitted that there had been no discernible increase in earnings guidance or other forward-looking disclosures. OM also noted that the volatile economic conditions of 2021 to 2023 including long-running COVID lockdowns across NSW and Victoria, the ongoing pandemic worldwide, rapid increases in interest rates and substantial geopolitical instability. This, OM observed, made it difficult to determine whether any change in forward-looking guidance was due to economic conditions rather than the 2021 Amendments.

The LCA-BLS posited that the reason no discernible evidence of a change in listed entity disclosure practices was likely because:

... the 2021 Amendments did not change the actual disclosure obligation under ASX Listing Rule 3.1 or section 674 (applicable to listed entities) or 675 (applicable to unlisted entities) of the [Corporations Act].

... the disclosure obligation is the same and the bar set by the new ‘fault’ test to be established to enforce the disclosure obligation is low. Establishing a breach based on negligence is a bar that [ASIC] has been able to clear in section 180 cases associated with continuous disclosure over many years.

Further, the changes have not stopped security-holder class actions, several of which have been filed alleging breaches of section 674A.

MB expressed a similar view, arguing that ‘prudent companies’ ought to have assumed there had been no change to the fault element attached to their disclosure obligations because of the 2021 Amendments.²⁹ Consequently, they should not have changed their disclosure practices and, therefore, it should be expected that the 2021 Amendments would have had ‘no material impact at all on the market for Australian-listed securities’.

Based on the submissions received, the Reviewer considers that insufficient time has passed to determine whether the 2021 Amendments are having a material impact, one way or the other, on disclosure standards and consequently on the efficiency and effectiveness of, and the level of information in, the market for Australian listed securities.

Impact on compliance and enforcement

The Consultation Paper asked:

11. *Have the 2021 Amendments given rise to barriers that may hinder the effective enforcement by ASIC of a disclosing entity’s continuous disclosure obligations under the Corporations Act. If so, what are those barriers and how do you think they should be addressed?*
12. *Have you observed any changes in the number and/or effectiveness of enforcement actions by ASIC against disclosing entities for breach of their continuous disclosure obligations since the 2021 Amendments came into effect? If so, what changes have you observed and do you attribute those changes to the 2021 Amendments or to some other cause? What data or specific examples can you provide to support your observations?*

29 See the passage from the MB submission set out in the text accompanying note 35 below.

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.

Again, there were diverse views on these matters across the stakeholder groups.

Proponents of class actions (such as ALFA, Echo, MB, and Woodsford) generally argued that the 2021 Amendments had diminished ASIC's ability to enforce continuous disclosure laws and, therefore, they should be repealed.³⁰

Other respondents (such as AICD, AIRA and LCA-BLS) generally argued that the 2021 Amendments have had no discernible impact on ASIC's enforcement activities and, therefore, there was no reason to repeal or amend them.³¹

In the Reviewer's opinion, the parties best placed to determine whether the 2021 Amendments are having a material impact on compliance with, or enforcement of, continuous disclosure requirements are the agencies charged with monitoring and enforcing compliance with those requirements: ASIC and, in the case of ASX-listed entities, ASX.

ASIC in its submission questioned the decision of the PJC and the previous government to extend the requirement to prove a disclosing entity had the requisite state of mind to civil penalty proceedings by ASIC, submitting:

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

The reasons cited in favour of the 2021 Amendments ... [in the paragraph above] do not apply to ASIC's enforcement of the continuous disclosure obligations...

ASIC's enforcement activities are undertaken selectively, in the public interest, and in accordance with our published enforcement policy. ASIC does not commence civil penalty proceedings '*opportunistically*'...

30 The most vociferous of these was a submission by global litigation funder Woodsford opining that the 2021 Amendments had '*severely impacted*' ASIC's enforcement powers and citing the fact that ASIC had not brought '*any proceedings*' for continuous disclosure breaches that specifically involve the 2021 Amendments as being '*indicative of the negative impact the 2021 Amendments have had on ASIC's powers and abilities to appropriately police corporate Australia*'.

ASIC has in fact brought one proceeding alleging contravention of section 674 as amended by the 2021 Amendments (*ASIC v Nuix Limited*) and one proceeding alleging contravention of section 674 as modified by the Coronavirus Determination (*ASIC v McPherson's Limited*). These proceedings have not concluded and ASIC's submission commented that it was therefore too early to assess the impact of the fault element requirement on ASIC's enforcement activities.

31 The LCA-BLS did mention in its submission that its members had observed that ASIC has issued relatively fewer continuous disclosure infringement notices since the 2021 Amendments than before (which it applauded because it considers infringement notices to be an unsuitable enforcement tool for conduct involving the exercise of judgment). It also noted that ASIC does not appear to have been hindered in taking other forms of continuous disclosure enforcement action since the 2021 Amendments.

The Reviewer agrees with ASIC's comments. The passages cited at length from the PJC Report and the Government Response in this report clearly indicate that the driving concern behind the adoption of the fault element for civil proceedings relating to a continuous disclosure breach was to stem the tide of 'opportunistic class actions' against disclosing entities. To address that concern only required the application of the fault element to civil compensation proceedings by private litigants. It did not require the application of the fault element to civil penalty proceedings by ASIC.

No reasons were given in the PJC Report or the Government's Response, nor in the explanatory statements or Ministerial media releases³² for the Coronavirus Determination or the 2021 Amending Act, as to why the fault element had been extended to civil penalty proceedings by ASIC.

ASIC in its submission described the impact of the fault element on its enforcement activities:

... the need to prove the fault element makes our investigations and enforcement action for alleged contraventions of the continuous disclosure laws harder to prove, more resource intensive and less certain. ...

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

Generally, ASIC will only issue infringement notices if we consider we are able to bring civil penalty proceedings for the contravening conduct in the event that the infringement notice penalty is not paid... Given this, in addition to the impact on civil penalty proceedings, the need to ultimately prove the fault element is likely to reduce ASIC's appetite to use infringement notices for contraventions of continuous disclosure.³³

The Reviewer accepts ASIC's comments and makes the following key finding in support of Recommendation 1 below:

Finding 1

The 2021 Amendments have had, and are likely to continue to have, a negative impact on ASIC's enforcement of continuous disclosure laws.

32 See The Hon Josh Frydenberg MP media release dated 25 May 2020, *Temporary changes to continuous disclosure provisions for companies and officers*, available at <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/temporary-changes-continuous-disclosure-provisions> and The Hon Josh Frydenberg MP media release dated 10 August 2021, *Reforms to Australia's continuous disclosure laws pass parliament*, available at <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/reforms-australias-continuous-disclosure-laws-pass>.

33 ASX in its submission also observed that it would be 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' and that '[m]isalignment 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'.

ASIC concluded in its submission that it would be:

... in the public interest for strict liability to be reinstated for civil penalty proceedings alleging contravention of the continuous disclosure laws. This may mean the provisions take a differential approach to regulator and private litigant actions. To an extent, the provisions already do this by allowing ASIC to impose infringement notices without proving fault.

We also note that a differential liability regime is proposed in Treasury's Consultation Paper Climate-related financial disclosure dated June 2023 for similar reasons.

ASX supported ASIC's proposal for a 'differential liability regime', stating that:

... 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.

The Reviewer agrees with ASIC's and ASX's submissions and makes the following recommendation:

Recommendation 1

Subject to Recommendation 3, the Government should amend the Corporations Act to remove the requirement introduced by the 2021 Amending Act for ASIC to prove in civil penalty proceedings for a breach of continuous disclosure laws that the disclosing entity acted knowingly, recklessly or negligently.

Impact on class actions

The Consultation Paper asked:

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?*
5. *If the 2021 Amendments were to be repealed, would that have:*
 - (a) *a materially positive impact;*
 - (b) *a materially negative impact;*
 - (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.

Again, there was a diversity of views on these matters across the different stakeholder groups.

Proponents of class actions (such as ALFA, Echo, MB and Woodsford) generally argued that class actions are a useful adjunct to regulatory action by ASIC and that the 2021 Amendments had introduced uncertainties and evidentiary impediments that would likely make class actions more risky, costly and time-consuming and therefore should be repealed.

Other respondents (such as AICD, GIA, HSF, ICA, LCA-BLS and LCA-FDRS) generally argued that the 2021 Amendments had brought about a better balance between investor protection and discouraging opportunistic shareholder class actions and, therefore, should be retained.

In response to question 4, four respondents (HSF, MB, Woodsford and AICD) referenced the following statistics from a study by King & Wood Mallesons (KWM) titled *The Review: Class Actions in Australia 2022/2023* (11 October 2023):³⁴

Year	Total securities class actions	Total non-securities 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

However, the four respondents reached quite different conclusions on how these statistics should be interpreted.

HSF, for instance, focused on the total number of class actions over the period from 2016 to 2023, rather than the total number of securities class actions, and concluded:

At least 53 class actions were filed during the 2022/2023 financial year. This is the lowest total since the 2016/2017 financial year, during which only 36 class actions were filed. There has been a **decrease in number of class actions filed in each of the financial years since the 2021 Amendments were first introduced** in the second half of 2020, with 65 class actions filed in 2020/2021, 56 filed in 2021/2022 and 53 filed in 2022/2023. [Emphasis added]

While it is difficult to prove a direct causal link, we believe that the 2021 Amendments have played a role in this outcome.

MB focused on the total number of securities class actions since the 2021 Amendments had come into effect and concluded:

³⁴ Available at <https://www.kwm.com/au/en/insights/latest-thinking/publication/the-review-class-actions-in-australia-2022-2023.html>. Two respondents ((ALFA) and Woodsford) also referenced a study by Professor Vince Morabito of Monash University titled 'Empirical perspectives on twenty-one years of funded class actions in Australia' (April 2023), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4422278.

Data collated by defendant firm King & Wood Mallesons for the period from 2016 to 2023 shows that the frequency of securities litigation has **increased each year since the 2021 Amendments received royal assent in August 2021**, from a low in the 2020/2021 financial year. This should be unsurprising. [Emphasis added]

In our opinion, the temporary amendments made in the midst of the COVID-19 pandemic were unnecessary. Given that the pre-existing regime had appropriate carve-outs for information that a company's officers could not reasonably be expected to have known, the obvious and publicly acknowledged uncertainty that resulted from the rapidly changing economic situation at the height of COVID-19 made securities litigation less likely, not more likely.

That view is borne out by the fact that the reduction in securities class actions in financial year 2020/2021 was reversed in following years, even as the temporary changes were made permanent. It was the unprecedented economic environment created by the COVID-19 pandemic which led to a temporary reduction in securities litigation, rather than the amendments to the disclosure regime.

Woodsford focused on the number of securities class actions over the period from 2016–17 to 2022–23 and concluded:

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** ... [Emphasis added]

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.

AICD focused on the number of securities class actions in 2022–23 and concluded:

... AICD understands that of the 14 securities class action claims [*sic* that] have been filed in the 2022/2023 review period, there are at least 7 filings that include pleadings relying on section 674A of the Corporations Act or the temporary Coronavirus measures (in other words, the continuous disclosure laws requiring a fault element). Although pleadings have not been made publicly available for a further 7 filings in the 2022/2023 review period, we note that the claim period relates to the period in which the 2021 Amendments or the temporary coronavirus measures were in place.

In ... AICD's view, this suggests that **the 2021 Amendments to the fault threshold in section 674A of the Corporations Act have not detracted from securities class action claims being made. As noted above, feedback to ... AICD from directors and legal experts suggests that 'negligence' is still a low fault threshold and we should expect to see claims continue to be brought under these liability settings.** [Emphasis added]

The Reviewer has not drawn any conclusions about the impact of the 2021 Amendments on the number of continuous disclosure class actions from the statistics presented in the KWM study. This is due to the absence of a more granular breakdown of the different types of securities class actions into continuous disclosure class actions versus other types of class actions. The relevant period (2021–22 and 2022–23) is also too short to discern any pattern or to have any statistical significance.

Of greater import to the Reviewer was the coalescing of views across a number of respondents about the vulnerability of disclosing entities to a continuous disclosure claim based on the fault element of negligence and the likely impact this might have on the number of continuous disclosure class actions.

AICD's comments on this matter, highlighted above, resonated strongly with the submissions of several class action proponents.

For example, in its consultation submission, Echo remarked:

In reality, evidence of a company's knowledge of the non-disclosed information, coupled with its objective materiality, will in most cases form a sufficient basis for establishing that a company was at least reckless or negligent as to whether the information was material.

ALFA similarly observed:

It is difficult to see in what circumstances an entity can 'have' (in the sense of being aware of, under Listing Rules 3.1 and 19.2) information that is *objectively* material (i.e., any reasonable person considering that information would expect it to be material) but nevertheless go on to form a subjective state of mind about its immateriality that is *not* knowing, reckless or negligent.

Class action proponents generally argued that the 2021 Amendments should be repealed. However, importantly, most of them were clearly of the view that there would be little or no change in the number and type of class actions brought against disclosing entities for breaching their continuous disclosure obligations, regardless of whether the 2021 Amendments were repealed or retained.

ALFA, for instance, stated it was:

... not aware that the enactment of the 2021 Amendments has been the sole cause, or even a significant cause, of any change to the number or type of class actions that have been or will be brought and that repealing the 2021 Amendments (of themselves) would not materially impact the number or type of class actions against disclosing entities.

The Commercial Bar Association of Victoria's Class Actions Section (**CBAV-CAS**) similarly remarked:

While applicants have had to grapple with how they might go about establishing the mental element and what that means for prospects of success, it is not apparent to us that there have been any material number of securities actions that have not been commenced that would have been commenced but for the effect of the [Coronavirus Determination] or the [2021 Amending Act]. Accordingly, the short answer to question 4 is "no".

... For equivalent reasons to those described above, we consider that the answer to ... [question 5] is likely to be "no". ...

Since the first class actions were commenced against disclosing entities alleging contravention of their continuous disclosure obligations in the early 2000s, such actions have been subject to various legal issues and uncertainties, some of which remain unresolved.

To our understanding, uncertainty with respect to those and other matters has not presented a material impediment to the commencement of otherwise meritorious claims. Consistent with that history, it is not apparent to us that any uncertainty occasioned by the [Coronavirus Determination] or the [2021 Amending Act] has had or is likely to have any tempering effect on the number or type of proceedings commenced

against disclosing entities, and there is no reason to anticipate that its repeal might materially change the approach of applicants.

MB said:

Prior to the [2021 Amendments], listed companies were required to disclose information that a *reasonable person* would expect to materially affect the price of value of their securities. It follows, of course, that no liability would attach for a failure to disclose information that a reasonable person would not expect to materially affect the price of securities. ...

... the pre-amendment structure effectively mirrors the content of the standard of care in negligence, which is defined by the standard of conduct expected of a reasonable person. For that reason, to describe continuous disclosure obligations either as imposing 'strict liability' or as lacking any fault element, displays a basic misunderstanding of the continuous disclosure provisions as they existed prior to the amendments. The fault standard under the pre-amendment regime was directly analogous to the objective fault standard which characterises the standard of care in negligence.

For the reasons [above] ... contrary to their stated intention, the 2021 Amendments have had no significant effect on the fault element of the disclosure obligations of listed entities themselves.³⁵

For completeness, we note that even if the [2021 Amendments] had imposed stricter fault requirements, in our view that would have had little if any impact on the nature and frequency of securities class actions. As we observed in our 2018 submissions to the ALRC, typically the subjective knowledge of particular officers, the adequacy of systems and processes, and the conduct of individuals within a company cannot be clearly ascertained by outsiders until internal documents have been provided in the discovery process, and those documents have been reviewed by the plaintiff's legal representatives. That process typically does not start until after proceedings are commenced, and can involve the review of hundreds of thousands or millions of documents. As a result, changing the fault element would be an ineffective way to change the frequency of occurrence of securities class actions, even if it had some impact on prospects of success.

The ALFA, CBAV-CAS, Echo and MB submissions strongly suggest the outcome hoped for by the PJC – namely that the introduction of a fault element would make it '***much more difficult to bring a shareholder class action***'³⁶ – was overly sanguine and that the 2021 Amendments have had, and are likely to continue to have, little (if any) impact on the number and type of continuous disclosure class actions.³⁷

35 Hence MB's opinion, referenced in note 29 and the accompanying text above, that the 2021 Amendments have not had a material impact on the efficiency and effectiveness of the market for Australian listed securities.

36 See the passage of the PJC Report quoted at note 24 above.

37 ICA in its consultation submission expressed the view that despite the multiple variables at play that determine the price of D&O insurance premiums, 'the ICA and insurers can say with certainty that the [2021 Amendments] will reduce the number of securities class actions from what there would have been in the absence of the reforms due to the threshold requirement of fault-based liability rather than the previous strict liability regime.' Given the views expressed by class action proponents in their submissions, the Reviewer does not regard this as a certainty.

The Reviewer makes the following key finding in support of Recommendation 2 below:

Finding 2

The 2021 Amendments have had, and are likely to continue to have, little (if any) impact on the number and type of continuous disclosure class actions against disclosing entities. Meritorious continuous disclosure class actions are still likely to proceed despite the 2021 Amendments. Accordingly, at this stage, there is no evidence of an urgent or compelling need to repeal the 2021 Amendments to facilitate continuous disclosure class actions.

The Reviewer also makes the following recommendation:

Recommendation 2

The Government should retain for the time being the requirement for a private litigant to prove in civil compensation proceedings for a breach of continuous disclosure laws that the disclosing entity acted knowingly, recklessly or negligently.

Of course, the Government can (and should) reconsider the appropriateness of this requirement should evidence emerge that it is having a negative effect on disclosure standards.

Finally on this topic, some respondents identified concerns about the interplay between the 2021 Amendments and the potential class action risks arising from the new climate reporting requirements proposed by the Government. In particular, HSF submitted:

In December 2022 and June 2023, the Federal Government conducted consultations on the proposed reporting regime on climate-related financial disclosure. One aspect of the proposed regime which has caused some concern among our clients is the limited protection available to companies in relation to forward-looking statements made in accordance with the mandatory reporting on climate transition planning and target setting.

... The second consultation paper, in June 2023, stated that the operation of the existing continuous disclosure laws (including the 2021 Amendments) provided sufficient protections for companies on the basis that the “additional fault element that requires knowledge, recklessness or negligence... results in a requirement for a higher threshold to be proven before liability can be attached and should raise the threshold for class action cases”.

As such, in our view, any repeal of the 2021 Amendments would be at odds with this position and, accordingly, the Federal Government would need to re-consider its position

on liability for companies required to comply with the proposed climate reporting regime.³⁸

The relevant passages from Treasury's second consultation paper on climate-related financial disclosure³⁹ stated:

... excluding climate-related financial disclosures from continuous disclosure obligations carries the risk of distorting investment decisions by limiting available information. Presently, listed companies must disclose material price sensitive information on a timely basis. Should a company's climate disclosures constitute material price sensitive information, it should be provided to the market. Exempting listed companies from this obligation would undermine the integrity of ASX Listing Rules and the market itself.

It is not expected that all changes to underlying assumptions relating to climate disclosures would need to be reported to the market. However, if assumptions attached to a previous disclosure is subsequently found to be incorrect and result in a material effect on the price or value of the entity's securities, then it is expected that the market would be informed.

The Treasury Laws Amendment (2021 Measures No. 1) Act 2021 amended the Corporations Act so that relevant entities and/or officers are only liable for civil penalty proceedings in respect of continuous disclosure obligations where they have acted with "knowledge, recklessness or negligence" in failing to update the market with price sensitive information. These amendments provided for a review by an independent expert in two years. Once complete, Treasury will monitor and consider [the] findings of the review. ...⁴⁰ [Emphasis added]

Continuous disclosure obligations would apply as they do presently, requiring entities to make timely and accurate disclosures. It is not proposed that the thresholds be changed as there is an additional fault element that requires knowledge, recklessness or negligence. ***This results in a requirement for a higher threshold to be proven before liability can be attached and should raise the threshold for class action cases.***⁴¹ [Emphasis added]

38 AICD made a substantially similar submission to that quoted by HSF in the text, while AIRA and GIA also argued that the 2021 Amendments should not be repealed having regard to the additional risks about to be imposed on disclosing entities and their boards and senior management by the new climate-related financial disclosure requirements.

AICD, AIRA and GIA additionally cited emerging risks around the disclosure of data breaches stemming from cyber-attacks as another reason not to repeal the 2021 Amendments.

Noting the concerns raised by various respondents about emerging disclosure risks in the areas of climate reporting and cyber-attacks, the Reviewer would commend to ASX that it consider updating ASX Listing Rules Guidance Note 8 *Continuous Disclosure: Listing Rules 3.1 – 3.1B* to include in the worked examples in Annexure A a material update to climate-related disclosures and a cyber-attack.

The Reviewer also notes that Guidance Note 8 was last updated in June 2021, prior to the 2021 Amending Act coming into force. Consequently, Guidance Note 8 does not currently reflect the 2021 Amendments, nor the recent significant court decisions in *ASIC v GetSwift Limited* [2021] FCA 1384, *Crowley v Worley Limited* [2022] FCAFC 33, *Bonham v Iluka Resources Ltd* [2022] FCA 71 and *ASIC v Australia and New Zealand Banking Group Limited (No 2)* [2023] FCA 1217.

Again, the Reviewer would commend to ASX that it consider updating Guidance Note 8 to reflect the 2021 Amendments and other significant developments since those amendments came into force, as well as any further changes the Government may make to the continuous disclosure laws following this Review.

39 Treasury consultation paper *Climate-related financial disclosure (June 2023)* available at <https://treasury.gov.au/sites/default/files/2023-06/c2023-402245.pdf>.

40 Treasury consultation paper *Climate-related financial disclosure (June 2023)*, at page 21.

41 Treasury consultation paper *Climate-related financial disclosure (June 2023)*, at page 28.

Having regard to Treasury's reservation about the Review in the first highlighted statement and the specific reference to class actions in the second highlighted statement, the Government might reasonably take the view that implementing Recommendations 1 and 2 of this report is consistent with Treasury's statements in its second consultation paper on climate-related financial disclosure – but that is a matter for Government to decide.

On this issue, the Reviewer makes the following secondary recommendation:

Recommendation 3

If the Government decides to:

- accept Recommendation 1 and remove the requirement for ASIC to prove in civil penalty proceedings for a breach of continuous disclosure laws that a disclosing entity acted knowingly, recklessly or negligently; and/or
- reject Recommendation 2 and remove the requirement for a private litigant to prove in civil compensation proceedings for a breach of continuous disclosure laws that a disclosing entity acted knowingly, recklessly or negligently,

before announcing or implementing that decision, the Government should consider the statements made about the 2021 Amendments in Treasury's consultation paper Climate related financial disclosure (June 2023) and what, if any, action needs to be taken regarding those statements.

Impact on D&O insurance

The Consultation Paper asked:

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

There was a diversity of views on these matters.

OM said there had been no discernible sign of a substantial reduction in D&O insurance premiums since the 2021 Amendments had come into effect.

Contrastingly, HSF said they were aware of significant premium reductions having been offered in the D&O market following the introduction of the 2021 Amendments, with these reductions typically being in the range of 20 to 30 per cent but going up to as much as 50 per cent in some cases.

MB argued that since the number of securities class actions appears to have been unaffected by the passage of the 2021 Amendments, changes to the availability and/or cost of D&O insurance could not

be attributed to changes in litigation risk. Instead, MB attributed these changes to an oversupply and heightened competition in the market for D&O insurance in the period from 2010 to 2016, which drove premiums below sustainable rates. This was followed by a significant increase in premiums as a result of a reduction in supply and opportunistic pricing on the part of some insurers.

AICD, AIRA, BCA, GIA, ICA and LCA-BLS submitted that since the 2021 Amendments had come into effect the costs of D&O insurance premiums had peaked or levelled out. They acknowledged that this could not be wholly attributed to the 2021 Amendments and that there were other market forces at play. However, they all expressed concern that repealing the 2021 Amendments could risk a return to increases in D&O insurance premiums, resulting in additional cost pressures for listed entities.

The Reviewer notes the concerns about the availability and cost of D&O insurance and considers that implementing Recommendation 2 in this report should help to assuage those concerns.

Consistency with other markets

The Consultation Paper asked:

8. *Would you say that the continuous disclosure regime in the Corporations Act following the 2021 Amendments is:
(a) materially tougher than;
(b) materially more lenient than; or
(c) in broad alignment with,
the disclosure regimes that operate in major overseas markets? Please explain the reason(s) for your answer.*
9. *The PJC Report stated that the 2021 Amendments would bring Australia's continuous disclosure regime closer to the regimes in comparable jurisdictions such as the United States and United Kingdom.⁴² 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.⁴³ Do you agree with the PJC Report or with ASIC in this regard? Please explain the reason(s) for your answer.*

Again, there was a diversity of views on these matters.

LCA-BLS expressed the view that:

... the PJC Report correctly identifies that the lack of a fault element in the Australian regime prior to the 2021 Amendments was unique amongst comparative jurisdictions. Likewise, Australia's plaintiff-friendly regime imposed the most onerous disclosure obligations upon listed entities and directors, compared with any comparable overseas jurisdiction. The 2021 Amendments, while not a complete match for the US and UK regimes, largely due to the inclusion of a negligence test and a lack of safe-harbour

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

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

defences, did bring Australia's regime much more in line with the US and UK regimes than previously.

LCA-FDRS had a slightly different view:

The Committee notes the view of the [LCA-BLS] that the 2021 Amendments have better aligned Australia with the liability regime in comparative international markets. The Committee notes that Canada, Hong Kong and South Africa have strict liability regimes and that whilst private claims in the UK and US are not strict liability, regulators in those jurisdictions are able to take enforcement action without establishing fault.

Woodsford commented:

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. This means that Australia is now out of sync with all comparable jurisdictions.

AICD sought specific advice on these matters from HSF and attached detailed analysis of the comparative regulatory position in Australia, US, UK, Canada, Hong Kong and South Africa. The analysis concluded that '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 consistent with the laws and risks in the global capital markets lack merit'.

ASX cautioned:

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.

Professor Emeritus Peta Spender (**Professor Spender**) similarly observed:

There is no doubt that Australia needs to consider the competitiveness of its financial markets and it is therefore appropriate to consider the regulation of disclosure in other jurisdictions. However, I am doubtful about the value of comparisons that are regularly made when people say that Australia's regime is 'tougher' than the disclosure regimes that operate in major overseas markets. As I have previously submitted, serious questions arise about methodology when comparisons are made.

The Reviewer considers that the amendments to the continuous disclosure laws recommended in this report will make the regulatory position in Australia more consistent with that in the US, UK, Canada, Hong Kong and South Africa. It will do so by restoring ASIC's ability to take enforcement action in relation to continuous disclosure breaches without having to prove knowledge, recklessness or negligence.

The Reviewer also agrees with the views expressed by ASX and Professor Spender on this topic.

Impact on the competitiveness of Australian equity markets to attract new listings

The Consultation Paper asked:

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.

Only four respondents addressed this matter.

AICD, BCA and LCA-BLS all submitted that the repeal of the 2021 Amendments could have a materially negative impact on the competitiveness of Australian equity markets to attract new listings compared to major overseas equities markets.

ASX agreed, noting that:

There [*sic* are] 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.

However, ASX also submitted 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.

The Reviewer notes the comments above. In the Reviewer's opinion, implementing the amendments to the continuous disclosure laws recommended in this report is unlikely to have a material impact, one way or the other, on the competitiveness of Australian equity markets to attract new listings.

The attribution of fault to a disclosing entity

The Consultation Paper noted that one of the issues the Review would consider was whether the 2021 Amendments should have included attribution rules providing how the knowledge, recklessness or negligence of a disclosing entity's officers, employees and agents should be attributed to the entity.⁴⁴

Typically, a disclosing entity is a body corporate acting in its own right, or as the trustee of a trust. As such, it is an artificial legal construct that does not have a mind of its own and can only act through its human officers, employees and agents.

44 See note 6 on page 5 of Consultation Paper.

The core change in the 2021 Amending Act was to require ASIC and private litigants, in civil proceedings for a breach by a disclosing entity of the continuous disclosure laws, to prove that the entity had the requisite state of mind (that is, it acted knowingly, recklessly or negligently) when it committed the breach. This raises the issue of how ASIC or a private litigant should prove the state of mind of a disclosing entity. For convenience, this issue is referred to in this report as the **‘fault attribution issue’**.

ASIC’s submission to the Senate Economics Reference Committee in relation to the Bill for the 2021 Amending Act⁴⁵ specifically raised the fault attribution issue and explained the legal difficulties involved. It suggested that these difficulties could be overcome by inserting a provision in chapter 6CA similar to section 769B(3). That section, which applies to both criminal and civil proceedings under chapter 7, provides that:

If, in a proceeding under [chapter 7] in respect of conduct engaged in by a body corporate, it is necessary to establish the state of mind of the body, it is sufficient to show that a director, employee or agent of the body, being a director, employee or agent by whom the conduct was engaged in within the scope of the person’s actual or apparent authority, had that state of mind. ...⁴⁶

ASIC repeated its suggestion on section 769B(3) in its submission on the Consultation Paper.⁴⁷

ALFA also raised the fault attribution issue in its submission on the Consultation Paper, commenting that the 2021 Amendments had:

... introduced uncertainty as to how to attribute the requisite state of mind to a breaching entity. Under the common law, the attribution of a corporate state of mind is often limited to the corporation’s board and senior executives. Therefore, the fault elements in the 2021 Amendments may permit corporations to raise defences, including in relation to misleading and deceptive conduct, that are based on a lack of knowledge where relevant information has not been presented to the board. As noted by ASIC, this does not sit comfortably with the actual and constructive knowledge standard in Listing Rule 19.2, which was recently reinforced by the Full Court of the Federal Court in *Crowley v Worley*. In that case, the Full Court found that even opinions which ought to have been – but

45 Available at <https://www.aph.gov.au/DocumentStore.ashx?id=80da5aaa-e2e6-40ce-9b61-df1421d9f4ae&subId=707608> (see, in particular, paragraphs 22–31 of that submission).

The fault attribution issue was also raised in the submissions to the Senate Economics Reference Committee by the Class Actions Committee of the Law Council of Australia (available at <https://www.aph.gov.au/DocumentStore.ashx?id=6a626c7b-e849-4718-b161-d3bb21bd9969&subId=703532>) and MB (available at <https://www.aph.gov.au/DocumentStore.ashx?id=cebf1cad-d40e-4d69-99cb-4fe65fac6f05&subId=703342>).

46 For completeness, section 769B(1) provides that conduct engaged in on behalf of a body corporate: (a) by a director, employee or agent of the body, within the scope of the person’s actual or apparent authority; or (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, employee or agent of the body, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent; is taken, for the purposes of a provision of Chapter 7, or a proceeding under Chapter 7, to have been engaged in also by the body corporate.

Section 769B(2) provides that conduct engaged in by a person (for example, the giving of money or property) in relation to: (a) a director, employee or agent of a body corporate, acting within the scope of their actual or apparent authority; or (b) any other person acting at the direction or with the consent or agreement (whether express or implied) of a director, employee or agent of a body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent; is taken, for the purposes of a provision of Chapter 7, or a proceeding under Chapter 7, to have been engaged in also in relation to the body corporate.

47 See paragraphs 18 and 19 of that submission.

were not – formed by an officer of an entity, can be constructively held by that entity. At best, this apparent divergence introduces uncertainty into the regime, and at worst, it permits corporations to rely on their own poor reporting and information management to avoid liability.

Suffice to say, ASIC's concerns about the fault attribution issue were not addressed in the 2021 Amending Act and it is unclear why. One can only speculate that it was considered at the time that this issue was adequately dealt with by section 1317QE. That section provides:

If an element of a civil penalty provision is done by an employee, agent or officer of a body corporate acting:

- (a) within the actual or apparent scope of the employee's, agent's, or officer's employment; or
- (b) within the employee's, agent's, or officer's actual or apparent authority;

the element must also be attributed to the body corporate.

However, the word 'done' in the opening line of section 1317QE does not sit comfortably in cases where the relevant physical element of a civil penalty provision is not the doing of an act but rather the failure to do an act (namely, a failure to disclose information required to be disclosed under section 674A or 675B). Further, while the language of section 1317QE is perfectly apposite to attributing to a body corporate acts done by an officer, employee or agent of the body corporate within their actual or apparent authority, it is less so when it comes to attributing to the body corporate their state of mind when doing those acts.

The Reviewer notes an alternative way of dealing with the fault attribution issue to that suggested by ASIC. This would be to incorporate, by reference, into chapter 6CA the rules dealing with corporate criminal responsibility in part 2.5 of the schedule to the *Criminal Code Act 1995* (Cth) (**Criminal Code**). A provision in chapter 6CA stating that part 2.5 of the Criminal Code applies to the civil penalty provisions in chapter 6CA as if those provisions were an offence under or based upon the Corporations Act ought to suffice in this regard.⁴⁸

For the convenience of readers, the relevant provisions of part 2.5 of the Criminal Code are set out in Annexure A to this report.

48 It is noted that section 678 already provides for the application of the Criminal Code to criminal proceedings under chapter 6CA.

The Reviewer, therefore, makes the following secondary recommendation:

Recommendation 4

If the Government decides to:

- reject Recommendation 1 and retain the requirement for ASIC to prove in civil penalty proceedings for a breach of continuous disclosure laws that a disclosing entity acted knowingly, recklessly or negligently; and/or
- accept Recommendation 2 and retain the requirement for a private litigant to prove in civil compensation proceedings for a breach of continuous disclosure laws that a disclosing entity acted knowingly, recklessly or negligently,

the Government should amend the Corporations Act to address more fully how knowledge, recklessness or negligence is to be attributed to the disclosing entity.

The Government could implement Recommendation 4 by:

- accepting ASIC's suggestion and enacting a provision in chapter 6CA similar to section 769B(3)⁴⁹
- accepting the alternative suggestion above and enacting in chapter 6CA a provision incorporating by reference the rules dealing with corporate criminal responsibility in part 2.5 of the Criminal Code, or⁵⁰
- doing both of the above.

The Reviewer commends to the Government the last of these three alternatives. Adopting this alternative would open up additional ways to prove a disclosing entity had the requisite state of mind. It would also reinforce to disclosing entities and their boards and senior management the critical importance of having adequate systems for the management, control and supervision of their officers, employees and agents, including for conveying relevant information to relevant persons within the entity, as well as a strong compliance culture.

Other matters

The Consultation Paper, asked:

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

49 For completeness, it is noted that adopting this alternative would also require the inclusion of provisions in chapter 6CA similar to section 769B(1) and (2) (see note 46 above), as well as consequential changes to section 1317QE.

In the Reviewer's opinion, these provisions ought to apply to both criminal and civil proceedings under chapter 6CA, in the same way that sections 769B(1), (2) and (3) apply to both criminal and civil proceedings under chapter 7.

50 It is noted that section 678 already provides for the application of the Criminal Code to criminal proceedings under chapter 6CA.

Two respondents (AIRA and MB) raised the issue of whether the fault element introduced in the 2021 Amendments had been applied to the correct physical element.⁵¹

AIRA submitted:

At present, the mental fault element is confined to the materiality assessment in LR 3.1. The 2021 Amendments did not extend the mental fault element to decisions made by companies under LR 3.1A. The exclusions to the continuous disclosure obligation also require companies to make judgements as to whether disclosure of potentially price sensitive information can be delayed in reliance on the carve-out (for example, on the basis that the information is insufficiently definite to warrant disclosure, remains confidential, and a reasonable person would not expect it to be disclosed). Given this carve-out is often the more difficult judgement call for officers of a company to make in practice, expanding the mental fault element to the consideration of this carve-out would be a welcome change to the continuous disclosure regime. In practice, this would ensure that companies and officers were only subject to potential civil liability if they relied on the carve-out where they knew, or were negligent or reckless, as to whether the company could rely on Listing Rule 3.1A.

MB similarly submitted:

Further uncertainty is introduced by the fact that the fault element applies not at the level of disclosure, but at the level of assessment of whether information is material. That is, a company does not become liable under the new regime because it was negligent in failing to disclose information. It becomes liable because it was negligent in assessing whether information would have a material effect on the price of its securities. The textual structure of the amendment, which is limited to assessments of materiality, thus sits incongruously with its stated intention, which was to introduce a fault element to the obligation to disclose.

The civil penalty provisions in sections 674A and 675B appear to have been drafted on the basis that the relevant physical element is not just a simple failure to disclose information required to be disclosed under those sections. Rather, it is the bringing about of a circumstance or result – namely, that the market is not aware of market sensitive information (that is, information concerning a disclosing entity that a reasonable person would expect to have a material effect on the price or value of the entity’s securities). This perhaps explains why the fault element has been attached to the determination of whether the relevant information is market sensitive rather than to whether the information should have been disclosed to the market.

51 To explain, the language of physical elements and fault elements comes from the criminal law. Most criminal offences have a physical element (e.g. assaulting a person) and a fault element (e.g. with the intention of doing them bodily harm). The prosecution must prove the existence of both the physical element and the applicable fault element to convict a person of the offence. See also note 54 below.

Without forming a concluded view on the issue, the Reviewer sees some force in the AIRA and MB submissions. The Reviewer, therefore, makes the following secondary recommendation:

Recommendation 5

If the Government decides to:

- reject Recommendation 1 and retain the requirement for ASIC to prove in civil penalty proceedings for a breach of continuous disclosure laws that a disclosing entity acted knowingly, recklessly or negligently; and/or
- accept Recommendation 2 and retain the requirement for a private litigant to prove in civil compensation proceedings for a breach of continuous disclosure laws that a disclosing entity acted knowingly, recklessly or negligently,

the Government should consider whether that requirement should attach to the determination of whether the relevant information should have been disclosed to the market, rather than to the determination of whether the relevant information was market sensitive.

In examining this issue, it has become apparent to the Reviewer that the criminal penalty provisions in sections 674 and 675 also warrant further consideration, in particular whether the applicable physical and fault elements should be spelt out in greater detail.

Sections 674 and 675 currently do not specify a fault element. Accordingly, under section 5.6 of the Criminal Code, by default, the fault element is taken to be:

- intention, if the view is taken that these provisions relate to conduct only; or
- recklessness, if the view is taken that these provisions relate to a circumstance or result.

In the latter case, recklessness can be established by proving intention, knowledge or recklessness.⁵²

How to characterise sections 674 and 675 for these purposes is unclear to the Reviewer. The view could be taken that they involve conduct only – namely, the failure to disclose information that ought to have been disclosed to the market under those sections – in which case, the fault element is intention. Or the view could be taken that they involve the bringing about of a circumstance or result – namely, that the market is not aware of market sensitive information – in which case, the fault element is recklessness.

The Reviewer makes the following secondary recommendation:

Recommendation 6

The Government should also consider whether sections 674 and 675 should be amended to specify the applicable physical and fault elements.

52 See section 5.4(4) of the Criminal Code.

Two respondents (AICD and Dr Duffy) submitted that Chapter 6CA should undergo more extensive change than was undertaken by the 2021 Amending Act.

AICD suggested that the criminal offences and civil penalty provisions for disclosing entities in Chapter 6CA should be rewritten to couch them in similar terms to the due diligence defences in sections 674A(4) and 675A(4)⁵³ so as to require a disclosing entity only to take ‘all reasonable steps in the circumstances’ to comply with its disclosure obligations.

Dr Duffy suggested that if the 2021 Amendments are to be repealed and a form of strict liability reinstated, fairness may suggest that a more substantive due diligence (safe harbour) defence – perhaps along the lines of laws in Ontario, Canada – should be considered and made available.

These suggestions are outside the scope of the Terms of Reference and therefore have not been addressed in this report.

53 These provisions relieve a person from liability for being involved in a continuous disclosure breach by a disclosing entity if they took all steps that were reasonable in the circumstances to ensure that the entity complied with its disclosure obligations and, after doing so, believed on reasonable grounds that the entity was complying with those obligations.

Annexure A: The attribution rules in part 2.5 of the Criminal Code

Part 2.5 of the Criminal Code provides (relevantly):

12.1 General principles

- (1) This Code applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.
- (2) A body corporate may be found guilty of any offence, including one punishable by imprisonment.

12.2 Physical elements⁵⁴

If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.

12.3 Fault elements other than negligence

- (1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.
- (2) The means by which such an authorisation or permission may be established include:
 - (a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
 - (b) proving that a high managerial agent⁵⁵ of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
 - (c) proving that a corporate culture⁵⁶ existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or

54 Under section 3.1 of the Criminal Code, an offence usually consists of physical elements and fault elements.

The physical element of an offence may be: (a) conduct; (b) a result of conduct; or (c) a circumstance in which conduct, or a result of conduct, occurs (section 4.1(1) of the Criminal Code). For these purposes, 'conduct' means an act, an omission to perform an act or a state of affairs (section 4.1(2) of the Criminal Code).

A fault element for a particular physical element may be intention, knowledge, recklessness or negligence (section 5.1(1) of the Criminal Code). The law that creates a particular offence may also specify other fault elements for a physical element of that offence (section 5.1(2) of the Criminal Code).

In order for a person to be found guilty of committing an offence, the prosecution must prove: (a) the existence of such physical elements as are, under the law creating the offence, relevant to establishing guilt; and (b) in respect of each such physical element for which a fault element is required, one of the fault elements for the physical element (section 3.2 of the Criminal Code).

55 'High managerial agent' is defined in section 12.3(6) of the Criminal Code to mean 'an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy'.

56 'Corporate culture' is defined in section 12.3(6) of the Criminal Code to mean 'an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place'.

- (d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.
- (3) Paragraph (2)(b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.
- (4) Factors relevant to the application of paragraph (2)(c) or (d) include:
 - (a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and
 - (b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence. ...

12.4 Negligence

...

- (2) If:
 - (a) negligence is a fault element in relation to a physical element of an offence; and
 - (b) no individual employee, agent or officer of the body corporate has that fault element;that fault element may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).
- (3) Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:
 - (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
 - (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

Annexure B: Glossary of key terms

2021 Amending Act	<i>Treasury Laws Amendment (2021 Measures No. 1) Act 2021</i>
2021 Amendments	The amendments made to the continuous disclosure regime by the 2021 Amending Act
ACSI	Australian Council of Superannuation Investors
AICD	Australian Institute of Company Directors
AIRA	Australasian Investor Relations Association
ALFA	Association of Litigation Funders Australia
APRA	Australian Prudential Regulatory Authority
ASA	Australian Shareholders Association
ASX	Australian Securities Exchange
ASIC	Australian Securities and Investments Commission
CBAV-CAS	Commercial Bar Association of Victoria's Class Actions Section
Consultation Paper	<i>Continuous disclosure: Review of changes made by the Treasury Laws Amendment (2021 Measures No.1) Act 2021</i> published on the Treasury website on 1 November 2023.
Corporations Act	<i>Corporations Act 2001 (Cth)</i>
Criminal Code	The schedule to the <i>Criminal Code Act 1995 (Cth)</i>
D&O insurance	Directors and officers insurance
Dr Duffy	Associate Professor Dr Michael Duffy
Echo	Echo Law
HSF	Herbert Smith Freehills
GIA	Governance Institute of Australia
ICA	Insurance Council of Australia
KWM	King & Wood Mallesons
LCA-BLS	Business Law Section of the Law Council of Australia
LCA-FDRS	Class Actions Committee of the Federal Dispute Resolution Section of the Law Council of Australia
MB	Maurice Blackburn
NSX	National Stock Exchange of Australia
OM	Ownership Matters
PJC	Parliamentary Joint Committee on Corporations and Financial Services
PJC Report	Parliamentary Joint Committee Report, 'Litigation Funding and the Regulation of the Class Action Industry', December 2020
Professor Spender	Professor Emeritus Peta Spender
Reviewer	Dr Kevin Lewis
SSX	Sydney Stock Exchange
Woodsford	Woodsford Group Limited