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1 December 2023

Director
Continuous Disclosure Review Unit
Market Conduct and Digital Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: continuousdisclosurereview@treasury.gov.au

Dear Director,

Submission to the Treasury consultation paper 'Continuous disclosure: review of changes made by the *Treasury Laws Amendment (2021 Measures No. 1) Act* 2021'

The Australasian Investor Relations Association (AIRA) is pleased to submit this response to the Department of Treasury's consultation paper issued in November 2023 on the changes made to the continuous disclosure regime by the *Treasury Laws Amendment (2021 Measures No. 1) Act* 2021.

AIRA is the peak body representing investor relations practitioners in Australia and New Zealand. The Association's 160 corporate members now represent over A$1.2 trillion of market capitalisation, over 80% of the total market capitalisation of companies listed on ASX.

We exist to provide listed entities with a single voice in the public debate on corporate disclosure and to improve the skills and professionalism of members. Our vision and purpose is that investor relations enables and creates sustainable value for all capital market stakeholders by building and strengthening market confidence in listed and unlisted entities.

Introduction

The continuous disclosure regime in Australia is front of mind for Australian companies and their officers. While the obligations under Listing Rule 3.1 and 3.1A of the Australian Securities Exchange (ASX) create a sensible and balanced approach to continuous disclosure, the additional criminal and civil penalty provisions found under the *Corporations Act 2001* (Cth) (Act) have been subject to ongoing debate.

Prior to the temporary measures that were introduced during the COVID-19 pandemic in 2020, the Australian regime set a high bar for liability and was regarded as one of the toughest disclosure regimes in the world. In 2021, the Government made permanent the temporary amendments to the Corporations Act (2021 Amendments), including new sections 674A and 675A which provided that a company or its officers will only be liable for civil penalty proceedings in respect of a breach of their continuous disclosure obligations where it can be shown they have acted with "knowledge, recklessness or negligence" (mental fault element) as to whether certain information would have a material effect on the price or value of the securities of the relevant entity.

While AIRA does not consider that the 2021 Amendments provide a complete solution to the issues arising out of the continuous disclosure regime in Australia, we believe they are certainly a step in the right direction and are generally supportive of retaining the amendments. If anything, we believe that the 2021 Amendments could be further expanded.

Furthermore, we are of the opinion that the implementation of the new Climate and Sustainability standards reporting framework, along with the requirements for listed entities to disclose information about data breaches stemming from cyber-attacks, further justifies the maintenance of the existing amendments.

Consideration of specific questions

Impact on market efficiency and effectiveness, and the nature and quality of disclosures by disclosing entities

Since the 2021 Amendments were introduced, AIRA has not become aware of any decrease in the number of announcements being made by ASX300 companies, nor is it aware of any decrease in the quality of announcements being made. To the contrary, AIRA believes that disclosure continues to improve year on year in the Australian market and that the ASX300, as a whole, has become increasingly sophisticated over the years in its understanding of the regime. Overall, we believe that companies genuinely try to do the right thing and that the 2021 Amendments have not negatively impacted the effectiveness of the regime.

In practice, the companies that try to get it 'right' (and that do not behave negligently or recklessly) should not ordinarily be caught by the continuous disclosure regime. Whereas the companies who tend to get it 'wrong' are typically those with poor processes in place or ones where there is genuine wrongdoing. In other words, it seems evident that a company that has not acted negligently or recklessly should be 'in the right' and a company that has acted negligently or recklessly should be 'in the wrong'. We believe the additional mental fault element has merely codified a defense which should have always been in place.

AIRA believes the 2021 Amendments have, on balance, had a positive impact on the nature and quality of disclosure, given they have provided additional comfort to officers that, in the absence of a lack of care or willful neglect on their part, they and their company ought not to be exposed to civil compensation claims.

We understand that the Continuous Disclosure Review Unit's terms of reference do not extend to any expansion of the 2021 Amendments. Having said that, in AIRA's view there is one particular area in which the expansion of the protection should be considered.

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. Likewise, in the absence of such mental fault element, a defense would be available.

Impact on D&O insurance

Earlier in 2023, AIRA undertook a study on the cost of being a listed company in Australia based on FY22 data. The study showed that the third highest cost for listed companies was the cost of maintaining D&O insurance – being a median insurance premium cost of $1.2 million per company. AIRA's study found that companies in the ASX50 – 100 band were paying higher D&O insurance premiums than ASX1 – 49 companies, primarily due to the higher risk of a class action or enforcement action against companies in the ASX50 – 100 band.

Anecdotal evidence from the insurance market suggests that since the 2021 Amendments came into effect it appears that the costs of such premiums have peaked or levelled out. Given the 2021 Amendments provide companies and officers with a defence against the risk of liability under a civil penalty claim for breach of continuous disclosure, AIRA believes that removing the 2021 Amendments from the Corporations Act risks a return to increases in D&O premiums, resulting in additional cost pressures for ASX listed companies (particularly those already subject to higher premiums in the ASX50 – 100 band).

Compliance and enforcement

AIRA does not believe the 2021 Amendments have had any material impact on the number or effectiveness of enforcement actions by ASIC against entities for breach of their continuous disclosure obligations, given ASIC's power to prosecute an entity for criminal offences or issue administrative penalties under the original s 674(2) remains unchanged. In the circumstances, AIRA does not believe that retaining the 2021 Amendments would hinder ASIC's current remit, nor that removing the 2021 Amendments would help ASIC's current remit.

Conclusion

AIRA welcomes the opportunity to contribute to Treasury's consultation on this topic. We believe there is sufficient scope to improve the continuous disclosure regime in Australia, and the 2021 Amendments are certainly a positive step in the right direction.

Our submission does, however, raise some recommendations that we believe could be addressed to ensure the overall regime is efficient and effective. We trust that our comments are understood in this light.

AIRA would be delighted to expand on this submission in discussion with Treasury. Please do not hesitate to contact me on [redacted] if you would like to take up such a discussion or require any further information.

Yours sincerely

Ian Matheson
Chief Executive Officer