



Law Council
OF AUSTRALIA

Federal Dispute
Resolution Section

8 December 2023

Director, Continuous Disclosure Review Unit
Markets Conduct and Digital Division
Treasury
Langton Cres
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By email: continuousdisclosurereview@treasury.gov.au

Dear Colleagues

Continuous Disclosure: Review of liabilities for failure to meet obligations

This submission concerning the Treasury's consultation *Continuous Disclosure: Review of liabilities for failure to meet obligations* is made by the Class Actions Committee of the Federal Dispute Resolution Section of the Law Council of Australia (the **Committee**).

The Committee makes the following observations regarding the changes made by the *Treasury Laws Amendment (2021 Measures No.1) Act 2021* (Cth) (**2021 Amendments**). These remarks are in addition to the views expressed by the Law Council of Australia's Business Law Section, which are contained in a separate submission.

First, there does not appear to be any evidence that the 2021 Amendments have had a material impact, in either direction, on the efficiency or effectiveness of, or the level of information in, the market for Australian listed securities.

Secondly, the Committee notes that its members have not 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. However, the situation is equivocal. There is evidence that such class actions were in decline prior to the 2021 Amendments, and it is too early for an impact to be appreciable.

Thirdly, the 2021 Amendments have not yet been the subject of judicial interpretation or guidance, although that may shortly change, given proceedings currently on foot. Judicial decisions may provide useful information as to the impact of the 2021 Amendments.

Fourthly, notwithstanding the above, it is possible to express some views with reasonable confidence as to the natural tendency of the 2021 Amendments, including:

- (a) the 2021 Amendments are unlikely to have much, if any, impact on the incentives created by the *Corporations Act 2001* (Cth) (**Corporations Act**) to deter misleading conduct or misrepresentations by corporations and their officers, since other provisions proscribing disclosure that is misleading continue to operate strictly (that is, without the need to prove recklessness, intent or—except as regards expression of opinion—negligence);

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- (b) the 2021 Amendments tend to reduce the incentives created by the Corporations Act to deter an omission to disclose material information. As matters stood before the amendments, the strictness of the rules provided a powerful incentive for corporations and their officers to have systems in place to *ensure* all material information was disclosed; and
- (c) the significance of that clear reduction in the strength of incentives to ensure proper disclosure needs, however, to be assessed in light of two other matters, being:
 - (i) the substantially increased penalties to which corporations and their officers are now potentially exposed for contraventions of these laws; and
 - (ii) the circumstance that negligence may be more readily proved in a continuous disclosure case than in, for example, a section 180 case, since an appreciation of what information is material to the value or price of a company's shares is *generally* tolerably clear.

The Committee sees force in the proposition that civil penalty liability for corporate officers (as opposed to corporate liability) should be dependent on proof of personal fault.

The Committee notes the view of the Law Council's Business Law Section 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.

The Committee submits that the 2021 Amendments may benefit from a further review in a relatively short period, when it may be possible to better assess their impact with the benefit of relevant judgments and some empirical data.

The Committee would be pleased to discuss this submission further. Please contact Mr Ben Slade, Co-Chair of the Committee, on [REDACTED] or at [REDACTED], should you wish to do so. Thank you for considering this correspondence.

Yours sincerely



Peter Woulfe
Chair, Federal Dispute Resolution Section