OWNERSHIP MATTERS

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Director
Continuous Disclosure Review Unit
Market Conduct and Digital Division
The Treasury
Parkes ACT
Email: continuousdisclosurereview@treasury.gov.au

Review of Treasury Laws Amendment (2021 Measures No.1) Act (2021)

Dear Director,

Thank you for the opportunity to make a submission on the review of the 2021 Amending Act's changes to Australia's continuous disclosure regime. Ownership Matters (OM), formed in 2011, is an Australian owned governance advisory firm serving institutional investors. This submission represents the views of OM and not those of its clients.

The amendments to Australia's continuous disclosure regime in August 2021 were a classic example of Australia's corporate leaders and those that serve them influencing public policy on the basis of minimal evidence to reduce yet further the miniscule chance they would face any form of effective sanction for poor conduct. The changes made it more difficult to prove a continuous disclosure breach by requiring a plaintiff or ASIC to prove that a disclosing entity or its officers acted with "knowledge, recklessness or negligence". As with so many arguments for reducing penalties on corporate leaders the argument was that it would lead Australia's capital markets into a broad sunlit upland, in this case involving increased forward-looking disclosure to investors and an end to inefficient class actions with the collateral benefit of lower directors' & officers' insurance premiums and, of course, a further reduction in the already miniscule chance of any director or officer facing civil action from ASIC for a breach of continuous disclosure obligations.

This sunlit upland has, unsurprisingly, failed to materialise:

- There has been no discernible change in listed entity disclosure practices and no discernible increase in entities providing forward looking disclosure. It is also difficult, given the volatile economic conditions over the period 2021 – 2023 including long-running COVID lockdowns across NSW and Victoria, the ongoing pandemic worldwide, rapid increases in interest rates and substantial geopolitical instability, to determine whether any change in the level of market

information such as forward looking guidance provided by entities was due to regulatory change or economic conditions.

- Market operator ASX publishes quarterly summaries of its compliance activity. These show that over the nine months to March 2023 the ASX issued 143 price queries to listed entities seeking explanation of major price movements and 78 'aware' letters, which ASX typically issues when it considers a listed entity may not have fulfilled its continuous disclosure obligations. Over the nine months to 31 March 2020, ASX issued 186 price queries and 69 aware letters (data for periods prior to July 2019 is not available and the nine month periods were selected to give comparable periods with minimal impact from the COVID pandemic). There is no real evidence from this that investors have been better informed as a result of the August 2021 changes; if a reduced risk of class actions had led to management teams being more willing to provide information to the market then this would presumably have led to a marked decline in 'aware' letters. Extrapolating from this data is however very difficult given the number of other influences, a point that has not dissuaded advocates of weakening the continuous disclosure regime from seizing on anecdotal data to buttress their arguments.
- There has also been no discernible sign of a substantial reduction in director and officer insurance premiums. Data on this is difficult to collect given policies usually prohibit disclosure of premiums but listed entity Harvey Norman recently disclosed in its 2023 notice of meeting (see p.25) that after being quoted $2.56mn for an annual D&O premium for the 12 months to October 2021 (up from $257,0000) it had been quoted $2.1mn - $2.2mn for the period to October 2024. Ignoring any entity-specific factors relating to the risks of insuring HVN, this suggests some decline in premiums but not a rapid reduction. It is also extremely difficult to separate regulatory changes from other factors driving D&O premiums such as a rise in litigation from objectively poor disclosure practices by companies: For example, Downer EDI has recently received multiple class actions relating to its downgrades during FY23 and the revelation it had misstated its past financial results. Data from law firms that typically represent listed entities rather than plaintiffs also suggests that the regulatory changes have not had a material impact on the level of shareholder class actions.

Proponents of the changes to the continuous disclosure regime argued changing the regime would address the perceived problem of inefficient class actions seeking to recover funds from listed entities (and their insurers), effectively transferring assets of the company from one set of shareholders to another. Advocates of this view have noted a major problem with class actions is the absence of consequences for those responsible for poor disclosure, such as directors and management teams. In this case the remedy would be more enforcement actions by the regulator ASIC for continuous disclosure breaches rather than attempting to reduce the ability of both the regulator and class action proponents to file actions.

Australia remains however a jurisdiction where action against directors and executives of listed entities for any form of wrongdoing is rare, and when such action is brought, the likelihood of success for the regulator remains low. In such a supportive penalty environment for management, class actions, imperfect as they are, remain the only form of discipline available for poor disclosure practices by listed entities and their boards and management teams outside negative public commentary and occasional embarrassment at listed entity meetings.

In summary, OM did not support the 2021 changes to the continuous disclosure regime and does not support the changes remaining in place. OM also notes the changes do not appear to have had any of the positive impacts the proponents of the changes forecast. The impact indeed appears to have been minimal but the changes have reduced the already low chance of ASIC bringing enforcement action for continuous disclosure breaches against listed entities by making such breaches more difficult to prove. Lack of prosecution for disclosure breaches reduces investor confidence in Australian capital markets which imposes penalties on Australia's economy generally.

Please feel free to contact us concerning any aspect of our submission. For the avoidance of doubt we are happy for our submission to be made public.

Yours sincerely,

Dean Paatsch & Martin Lawrence

Ownership Matters Pty Ltd