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***Continuous disclosure: Review of changes***

Dear Dr Lewis,

1. Thank you for the opportunity to make a submission to this important review.
2. I welcome the independent review of the changes to Chap 6CA and Part 7.10 Corporations Act that were made by the Treasury Laws Amendment (2021 Measures No.1) Act 2021 (the 2021 Amendments). Where relevant, I refer to the consultation paper *Continuous disclosure: review of changes made by Treasury Laws Amendment (2021 Measures No.1) Act 2021* November 2023 (the Consultation Paper).

**Introduction and Background**

3. I research litigation and financial markets law and have written extensively in these areas for over 30 years.
4. I made a submission to the Senate Economics References Committee (SERC) about the 2021 Amendments in June 2021.<sup>1</sup> I also gave evidence to that Committee on 9 June 2021.<sup>2</sup> I will not repeat the general comments that I made in the submission and evidence, but I maintain the views that were expressed at that time regarding the 2021 Amendments.
5. Insofar as the present review encompasses issues to do with securities class actions in Australia, I also refer to my submission to the Parliamentary Joint Committee (PJC) inquiry on Litigation Funding and the Regulation of the Class Action Industry in 2020.<sup>3</sup> I gave

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<sup>1</sup> [Submission 13 - Professor Spender.pdf](#)

<sup>2</sup> [ParlInfo - Economics References Committee : 09/06/2021 : Treasury Laws Amendment \(2021 Measures No.1\) Bill 2021, Provisions \(aph.gov.au\)](#)

<sup>3</sup> [Professor Spender \(2\).pdf](#)

evidence before the PJC on 13 July 2020. I maintain the views that were expressed in that submission and evidence.<sup>4</sup>

6. My comments below are confined to specific questions, as set out in the Consultation Paper.

### Questions 4 and 5 – Class actions

*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 If the 2021 Amendments were to be repealed, would that have: (a) a materially positive impact; (b) a materially negative impact; or (c) no material impact at all, on the number and/or type of class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.*

7. Regarding Question 4, I welcome information that may be provided to the review regarding the number or types of class actions against disclosing entities that have or may have been made since the 2021 Amendments.
8. Regarding Question 5, I emphasise the importance of considering the 2021 Amendments as they affect the substantive obligations of corporations to make disclosures to preserve the integrity of the markets. As I have mentioned in my previous submissions, this is the central concern. Nevertheless, when analysing positive and negative impacts, I wish to highlight the significance of private enforcement of these obligations.
9. Various submissions in the inquiries undertaken during the period 2020 – 2021 commented that private enforcement of the relevant obligations is a necessary adjunct to public enforcement, so we need to consider whether the repeal of the 2021 Amendments will facilitate private and public enforcement. In my view, it is unrealistic to support the suggestion that public enforcement alone is optimal. Certainly the 2021 Amendments may cause lawyers to pause before commencing because of the need to satisfy the negligent or reckless standard and uncertainty about attribution. The witnesses that appeared before SERC explained that the 2021 Amendments may make it more difficult to commence proceedings because the evidence required can only be compelled at the discovery stage. Conversely, under the previous drafting of Chap 6CA, investors could rely on publicly available information when commencing proceedings.

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<sup>4</sup> [ParlInfo - Parliamentary Joint Committee on Corporations and Financial Services : 13/07/2020 : Litigation funding and the regulation of the class action industry \(aph.gov.au\)](https://aph.gov.au/ParlInfo/committees/parliamentary_joint_committee_on_corporations_and_financial_services/13/07/2020/litigation_funding_and_the_regulation_of_the_class_action_industry)

## Questions 8 and 9 – the comparability of the Australian continuous disclosure regime with similar regimes in major overseas markets

*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.*

10. 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.
11. For example, question 9 of the Consultation Paper refers to the PJC Report<sup>5</sup> which 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.'<sup>6</sup> The Consultation Paper continues: 'a useful comparison of the continuous disclosure laws in various jurisdictions can be found in paragraphs 17.48 – 17.58 in table 17.2 of the PJC report.'
12. When one examines the sources relied upon by the PJC for this proposition, one finds that table 17.2 is extracted from a submission made by the Australian Institute of Company Directors which includes some information provided by Herbert Smith Freehills (HSF) as Appendix 1: *Comparative analysis of international corporate disclosure and liability regimes dated June 2018*. The table is helpful but there are some questions about its methodology. HSF sent a questionnaire to 'international counsel' asking them direct questions about disclosure (see Attachment 3 – Template provided to international counsel).
13. Question 1 is as follows:
- Are listed companies subject to a continuous disclosure obligation?
14. A 'continuous disclosure obligation' is defined as 'an obligation under law, regulation or the rules of the stock exchange to immediately publish new material price sensitive information about the company (in a manner that will bring it to the attention of the market) as soon as the company or its officers become aware of it.'

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<sup>5</sup> Parliamentary Joint Committee, *Litigation funding and the regulation of the class action industry* (Report December 2020) (PJC Report)

<sup>6</sup> PJC Report at [17.128]

15. The international counsel answered this question for their respective jurisdictions. For example, the UK response (page 20) answers 'Yes' and refers to the obligation to notify as soon as possible of any 'inside information' which directly concerns the company under the UK MAR Article 17. This response also refers to periodical financial information. As I mentioned in my previous submissions, it is important to distinguish between continuous, periodic, and special disclosure of information by companies to the market therefore the latter reference to periodic financial information is irrelevant to the continuous disclosure obligation.
16. Regarding the former reference to inside information, the obligation under the UK MAR to disclose inside information differs to the continuous disclosure obligation in Australia under the combination in Chap 6CA and the Listing Rules. The response from Hong Kong also refers to the obligation to disclose inside information (page 12). While it is certainly true that the obligation to make continuous disclosure is designed to some extent to combat the deleterious effect of inside information, the information encompassed by the two obligations does not necessarily overlap.
17. The purpose of providing these examples is not to undermine the hard work that has been done by HSF in drawing this material together. It just means that the evidence does not necessarily support the proposition that the 2021 Amendments would bring Australia's continuous disclosure regime closer to the regimes in comparable jurisdictions such as United States and United Kingdom or that the Australian regime is 'tougher'.
18. It may be necessary to jettison this proposition altogether. It may be that Australia's continuous disclosure regime is not comparable to other jurisdictions. An explanation of the complexities associated with comparisons between the regimes in Australia, the UK and the US were examined by Professor Hanrahan in 'Core Issues in the Regulation of Misleading Silence in Corporate Law' in Elise Bant and Jeannie Paterson (eds), *Misleading Silence* (Hart Publishing, 2020). I commend this work to you.
19. The comparability that I have discussed above only reflects the legal rules. There are other perhaps more important questions about comparability that were discussed before the PJC and SERC. These questions are answerable by disciplines other than law, and they are crucial questions; for example, about the deep liquidity of the Australian financial markets due to our superannuation rules and whether the level of retail investor participation (either directly or indirectly via superannuation) is unusually high. Related questions of policy also arise. Perhaps Australia should have best practice disclosure laws, which has flow on effects for corporate governance and future challenges such as climate change.

I would be happy to expand upon the issues raised above in order to assist the review.

Yours sincerely,

Professor Emeritus Peta Spender