



Australian Government

# **Government response to the 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*

12 August 2024

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## Ministerial foreword

I am pleased to release the Government's response to Dr Kevin Lewis's independent review of the changes that were made to the continuous disclosure regime by the *Treasury Laws Amendment (2021 Measures No.1) Act 2021* (2021 Amendments). I would like to firstly, extend my thanks to Dr Lewis for the thorough and considerate report.

The Albanese Government is committed to ensuring that the integrity and transparency of Australia's capital markets is maintained. The continuous disclosure framework is one of the key ways in which market integrity is maintained. The continuous disclosure rules create an obligation for companies to make disclosures about market-sensitive information in a timely manner.

The timely release of market-sensitive information is essential for investors to make informed decisions, which helps increase investment returns and Australia's economic prosperity. Accordingly, it is important that ASIC is able to pursue egregious breaches of continuous disclosure laws expeditiously and efficiently, in order to promote market behaviour that make Australia's capital markets more attractive.

It is pleasing to note that many of the problems driving the 2021 amendments have stabilised, especially in terms of the price stabilisation in the market for Directors and Officer Insurance, that had increased rapidly in the years prior to the 2021 amendments.

I sincerely thank Dr Lewis for his considered report which will assist the Government in maintaining our commitment to fostering fair, strong, and transparent capital markets in Australia.



**Stephen Jones MP**

Assistant Treasurer and Minister for Financial Services

# Background

## Continuous Disclosure Laws

Australia's continuous disclosure laws are found in chapter 6CA of the *Corporations Act 2001* (**Corporations Act**). The regime enhances 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.

Broadly, the continuous disclosure laws require disclosing entities to disclose market-sensitive information on a continuous basis and in a timely manner.

A breach of these obligations attracts criminal and civil penalties for both the entity and any officer of the entity who was involved in the breach. A person who suffers loss as a result of the breach can also bring a civil action for damages against the entity and any officer of the entity who was involved in the breach.

## 2021 Amendments

The changes made to the continuous disclosure regime by the *Treasury Laws Amendment (2021 Measures No.1) Act 2021* (**2021 Amendments**) came into effect on 14 August 2021.

These changes were intended to reduce the incidence of opportunistic class actions against listed companies accused of not keeping the market informed of price sensitive information. These amendments were initially introduced on a temporary basis during the COVID-19 pandemic as companies encountered market uncertainty. They were later made permanent through the 2021 Amendments.

The 2021 Amendments therefore introduced a 'fault element', that is, a requirement to show that a company or its officers had acted with either knowledge, recklessness or negligence, in breaching their continuous disclosure obligations for civil liability actions.

## Reason for the Review

Dr Kevin Lewis undertook the review as required under section 1683B of the Corporations Act in accordance with the terms of reference. Dr Lewis considered:

- whether the changes made to the continuous disclosure regime 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 listed companies
- continuous disclosure regimes that operate overseas and the extent to which the Australian regime is consistent with those regimes

- whether the amendments have given rise to barriers that may prevent compliance with or enforcement of the continuous disclosure obligations.

For the avoidance of doubt the independent review was focused solely on the 2021 Amendments, and not a broader review the continuous disclosure regime.

As part of the review, a Consultation Paper<sup>1</sup> was published which attracted 21 submissions in response. These submissions have been published on the Treasury website.

## Review findings

The review's final report was tabled on 14 May 2024 and has been made available on the Treasury website.<sup>2</sup>

The review made the overarching finding that the two-year review period was not long enough to draw meaningful evidence-based conclusions on many of the matters mentioned in the Terms of Reference.

The review made two other findings that the 2021 amendments:

- have had, and are likely to continue to have a negative impact on ASIC's enforcement of continuous disclosure laws (Finding 1)
- have had and are likely to continue to have, little (if any) impact on the number and types of continuous disclosure class actions against disclosing entities and that meritorious continuous disclosure class actions are still likely to proceed (Finding 2).

Based on these findings, the review made 6 recommendations. The Government has agreed to 4 recommendations and has noted 2 recommendations.

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1 *Continuous disclosure: Review of changes made by the Treasury Laws Amendment (2021 Measures No.1) Act 2021* published on the Treasury website on 1 November 2023 available at [treasury.gov.au/consultation/c2023-445320](https://treasury.gov.au/consultation/c2023-445320).

2 Available at [treasury.gov.au/publication/p2024-528447](https://treasury.gov.au/publication/p2024-528447).

# Australian Government Response

## ASIC Enforcement (Recommendation 1)

**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.

### Government Response to matters relating to ASIC enforcement:

The Government **Agrees** to Recommendation 1.

ASIC as the regulator plays a critical role in ensuring the transparency of the market by incentivising robust disclosure practices. The removal of the requirement for ASIC to prove the fault element in civil proceedings for breaches of continuous disclosure obligations would allow for more efficient enforcement of the regime.

## Private Litigation (Recommendation 2)

**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.

### Government Response to matters relating to private litigation:

The Government **Agrees** to Recommendation 2.

The Government also notes Dr Lewis's observation that the Government should reconsider whether the fault element should be retained for private litigants if in the longer term, there is evidence to show that there has been a negative effect on disclosure standards or practices.

## Climate-related financial disclosure (Recommendation 3)

**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.

### Government Response to matters relating to climate disclosure:

The Government **Agrees** to Recommendation 3.

The Government considered the implications of Recommendations 1 and 2 while drafting the legislation to implement climate-related financial disclosure.

## Attribution of fault to a disclosing entity (Recommendation 4)

**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.

### Government Response to matters relating to fault attribution:

The Government **Agrees** to Recommendation 4.

The Government agrees to amend the Corporations Act to expressly provide how state of mind can be attributed to the entity within the continuous disclosure regime. During implementation, the Government will consider the appropriate model for attribution be extended to the civil liability regime.

## Recommendations 5 and 6

**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.

**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.

### Government Response to Recommendations 5 and 6:

The Government **Notes** Recommendations 5 and 6.

The Government will consider pursuing recommendations 5 and 6 at a later time when the opportunity arises to consider broader changes to the Continuous Disclosure Regime.