Association of Litigation Funders of Australia

SUBMISSION TO THE SENATE ECONOMICS LEGISLATION COMMITTEE INQUIRY INTO TREASURY LAWS AMENDMENT (2021 MEASURES NO.1) BILL 2021

1 March 2021

Level 13, 333 George Street, Sydney NSW 2000

Association of Litigation Funders of Australia

Submission to the Senate Economics Legislation Committee Inquiry into the Treasury Laws Amendment (2021 Measures No.1) Bill 2021

Executive Summary

1 Schedule 2 of the Treasury Laws Amendment (2021 Measures No.1) Bill 2021 (**TLA Bill**) seeks to amend the continuous disclosure obligations and the misleading or deceptive conduct provisions of the *Corporations Act 2001* (**Corporations Act**) and the *Australian Securities and Investments Commission Act 2001* (**ASIC Act**) to remove strict liability for companies and officers that fail to disclose market-sensitive information.

2 The proposed amendments would weaken the continuous disclosure regime in the interests of protecting corporate management and insurers, and at the expense of the integrity of Australia's capital markets and the interests of the millions of Australians who invest in shares directly and through their superannuation funds.

3 The current continuous disclosure obligations and misleading or deceptive conduct provisions should be retained, and the proposed amendments contained in Schedule 2 of the TLA Bill should be rejected for the following reasons:

(a) the current continuous disclosure regime is critical for the protection of investors and the integrity and reputation of Australia's capital markets;

(b) investors are best served by a continuous disclosure regime with effective mechanisms for public and private enforcement to punish corporate misconduct and provide deterrence against future contraventions;

(c) the proposed amendments would make it more difficult for investors and the regulator to bring proceedings for material non-disclosure breaches, weakening the protections for investors and undermining the integrity and reputation of the financial markets;

(d) the current continuous disclosure regime performs better in protecting investors from insider trading and other forms of market abuse than comparable jurisdictions;

(e) the need for strong continuous disclosure laws to protect investors is underscored by the fact Australians have one of the highest levels of share ownership in the world;

(f) the arguments advanced by the corporate and insurance lobbies in favour of watering down Australia's continuous disclosure regime are misconceived and do not justify the changes proposed; and

(g) the further amendments proposed to the misleading or deceptive conduct provision are ill-conceived and have been proposed without any proper scrutiny of their consequences for investors or the integrity of Australia's financial markets.

4 The Senate Economics Legislation Committee (**Committee**) should recommend that the TLA Bill be amended to remove Schedule 2, which contains the proposed changes to the continuous disclosure obligations and misleading or deceptive conduct provisions.

Introduction

5 The Association of Litigation Funders of Australia (**ALFA**) welcomes the opportunity to make this submission to the Committee's Inquiry into the Treasury Laws Amendment (2021 Measures No.1) Bill 2021.

6 ALFA confines its comments in this submission to Schedule 2 of the TLA Bill. Schedule 2 seeks to amend the continuous disclosure obligations and the misleading or deceptive conduct provisions of the Corporations Act and ASIC Act.

7 ALFA is a professional body established in April 2018 to enhance the Australian litigation funding market by:

(a) providing education, training and information about litigation funding and the litigation funding market;

(b) engaging with government, legislators and other policymakers to help shape the legal and regulatory framework of litigation funding in Australia; and

(c) promoting best practice and ethical behaviour amongst litigation funders in Australia.

8 The members of ALFA are Investor Claim Partner, Litigation Lending Services, Augusta Ventures, Vannin Capital, Balance Legal Capital, Southern Cross Litigation Finance, Ironbark Funding, CASL, Court House Capital and Premier Litigation Funding.

9 This submission is made on behalf of the Association members and represents their collective views, but it does not necessarily represent the individual views of each member.

Australian share ownership and the current continuous disclosure regime

10 The continuous disclosure regime is critical to protecting the integrity of Australian capital markets and the people who invest in them, including the millions of Australians who invest in shares directly and through their superannuation funds.

11 The regime requires companies to disclose market-sensitive information in a timely manner where that information is not otherwise generally available. Entities that

contravene their continuous disclosure obligations may be subject to enforcement action by the Australian Securities and Investment Commission (**ASIC**) or private claims for loss or damage, including shareholder class actions. Directors and officers may also be liable where they are involved in a contravention by the company. The continuous disclosure obligations are strict in the sense that a company or person may be found liable for a non-disclosure contravention without the need to establish intention or fault.

12 The current continuous disclosure laws are the product of decades of refinement, directed towards the objectives of protecting shareholders and maintaining the integrity and reputation of Australia's financial markets. ASIC recently observed:[1]

> *"In ASIC's experience the provisions are working well and operate to increase the attractiveness of Australian markets for investors. The economic significance of fair and efficient capital markets dwarfs any exposure to class action damages. Continuous disclosure and misleading or deceptive provisions anchor many other elements of the regulatory regime for financial markets, including low document capital raisings."*

13 The importance of robust continuous disclosure laws is underscored by the fact Australian households have one of the highest levels of share ownership in the world.[2] In 2020:

(a) approximately 35% of all Australian adults (around 6.6 million Australians) owned listed investment products;[3]

(b) almost $400 billion in Australian superannuation fund investments (funds with more than 4 members) were held in Australian-listed equities (or 21% of the total $1.9 trillion in investments);[4]

(c) approximately $182.4 billion in self-managed superannuation fund investments are held in Australian-listed equities (or 26% of a total of $698.7 billion in investments).[5]

14 However, corporate management and the insurance lobby have long advocated in favour of watering down Australia's continuous disclosure laws, in particular, to protect themselves from shareholder class actions arising from continuous disclosure contraventions.

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1 ASIC, Submission to the Australian Law Reform Commission Inquiry into Class Action Proceedings and Third-Party Litigation Funders, *Submission 72*.

2 ASIC, *Assessment of ASX Limited's listing standards for equities* (Report 480, June 2016), at [24].

3 ASX Limited, *ASX Investor Study 2020* (Annual Report, 2020).

4 Australian Prudential Regulations Authority, *Quarterly superannuation performance statistics highlights – September 2020* (Quarterly Report, 24 November 2020), at 4.

5 Australian Taxation Office, *Self-managed super fund statistical report—September 2020* (Quarterly Report, December 2020).

The government's proposed continuous disclosure changes

15 In 2017, the government commissioned the Australian Law Reform Commission (**ALRC**) to conduct an inquiry into class action proceedings and third-party litigation funding (**ALRC Inquiry**).[6]

16 In its final report, the ALRC recommended that the Government commission a review of the legal and economic impact of the operation, enforcement, and effects of the continuous disclosure regime.[7] Although ASIC had rejected the need for any review of Australia's continuous disclosure regime, the ALRC found that there was support for:[8]

> *"a balanced, unbiased legal and economic review and an analysis of whether there is <u>any</u> substance to the unforeseen and potentially adverse consequences that were raised by stakeholders with the ALRC."*

17 The ALRC further recommended that any such review should: undertake wide consultation; collect and draw from an evidence-base; and should be conducted by agencies with sophisticated understandings of the regulatory provisions, class action law and procedure, and the securities market.[9]

18 Despite the ALRC delivering its final report in December 2018, the government has taken no steps to commission such a review and has ignored the ALRC's other recommendations. Instead, it has used the COVID-19 crisis as an opportunity to commence a legislative assault on class actions and third-party litigation funding at the behest of corporate interests.

19 On 5 March 2020, in the midst of the pandemic, the government announced that it would task the Parliamentary Joint Committee on Corporations and Financial Services (**Joint Committee**) to conduct a further inquiry into litigation funding and the regulation of the class action industry (**Joint Committee Inquiry**) covering largely the same subject matter as the 2017 ALRC Inquiry.

20 On 22 March 2020, before the Joint Committee could commence its inquiry, the government announced new regulations requiring litigation funders to hold an Australian Financial Services Licence and comply with the managed investment scheme regime under the Corporations Act. It did so, despite the proposal having

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6 ALFA made written and oral submissions to the ALRC Inquiry. ALFA's written submissions may be accessed via this link: https://www.alrc.gov.au/wp-content/uploads/2019/08/58_association_of_litigation_funders_of_australia.pdf.

7 ALRC, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Final Report No 134, December 2018) (**ALRC Final Report**), at 259.

8 ALRC Final Report, at 265 (emphasis added).

9 ALRC Final Report, at 264.

previously been considered and rejected by the ALRC, ASIC and the Treasury Department.[10]

21 Then, on 25 March 2020, the government announced temporary changes to the continuous disclosure regime, made pursuant to emergency powers granted to the Treasurer in response to the COVID-19 pandemic.[11] These amendments removed strict liability for non-disclosure contraventions for a period of six months by introducing a requirement that, to be held liable, the company or individual must have acted with "*knowledge, recklessness or negligence"*.

22 The government stated the temporary changes would protect business, under pressure from the COVID-19 crisis, from "*opportunistic*" shareholder class actions. The Treasurer stated that:[12]

> *"The Morrison Government will temporarily amend the continuous disclosure provisions that apply to companies and their officers, to enable them to more confidently provide guidance to the market during the Coronavirus crisis.*
>
> *Given the impact of the Coronavirus crisis and the uncertainty it continues to generate, it has been considerably more difficult for companies to release reliable forward-looking guidance to the market. Therefore, the government will temporarily amend the Corporations Act… so that companies and officers will only be liable if there has been 'knowledge, recklessness or negligence' with respect to updates on price sensitive information to the market."*

23 At the time, many investors expressed their opposition to the changes, concerned that they would instead protect poor quality disclosure practices unrelated to COVID-19 at a time when shareholders most needed reliable and timely information.[13]

24 ALFA and others also raised concerns that the government was using the COVID-19 crisis as cover to introduce changes that had long been advocated for by the corporate and insurance lobbies, removing investor protections that might not easily be regained once the crisis had passed.[14] These concerns now appear to have been justified.

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10 Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Litigation funding and the regulation of the class action industry* (Report, December 2020) (**Joint Committee Report**), at p 361.

11 Corporations Act, s 1362A; The Hon Josh Frydenberg MP, "Temporary changes to continuous disclosure provisions for companies and officers" (Media Release, 25 March 2020).

12 The Hon Josh Frydenberg MP, "Temporary changes to continuous disclosure provisions for companies and officers" (Media Release, 25 March 2020).

13 Chanticleer, 'Investors the losers from disclosure changes', *Australian Financial Review* (online), (26 May 2020) <https://www.afr.com/chanticleer/the-costs-and-risks-of-continuous-disclosure-changes-20200526-p54wi0>.

14 ALFA, Submission No. 57 to the Parliamentary Joint Committee on Corporations and Financial Services, Inquiry into litigation funding and the regulation of the class action industry, Parliament of Australia (11 June 2020), at [98].

25 In September 2020, the temporary amendments were subsequently extended for a further six-months and were due to expire on 23 March 2021.[15]

26 The Joint Committee delivered its report on 7 December 2020, with the majority recommending that the temporary amendments to the continuous disclosure regime be made permanent.[16] Labor members of the Committee delivered a separate report rejecting the recommendation, concluding that the proposal was "*reckless and grossly irresponsible*".[17]

27 On 17 February 2021, the government introduced the TLA Bill now before the Committee. Schedule 2 of the Bill seeks to implement the Joint Committee's recommendation by making permanent the temporary changes to the continuous disclosure regime introduced in March 2020.

28 The TLA Bill goes further, also carving out from the prohibition against misleading or deceptive conduct under the Corporations and ASIC Act any conduct where the continuous disclosure obligations also have been contravened, unless the requisite fault element of "*knowledge, recklessness or negligence*" has also been established. These further amendments to the misleading or deceptive conduct provisions have not been the subject of any proper public consultation or review, even by the Joint Committee Inquiry.

29 It now seems that, contrary to the Treasurer's statements in March 2020 when introducing the temporary amendments to the continuous disclosure obligations, the pandemic has provided cover for a legislative agenda that will have the effect of permanently shifting the balance away from the interests of ordinary investors and well-regulated capital markets, and towards the narrow sectional interests of the corporate and insurance lobbies.

30 Since the TLA Bill was announced, the proposed amendments have been widely criticised by investors groups and other shareholder representatives, with the Australian Council of Superannuation Investors stating:[18]

> *"Continuous disclosure provisions are fundamental to market integrity and should not be diminished. Investor confidence in the Australian market relies on disclosures being accurate. These changes could undermine that confidence by providing protection for companies making poor disclosures."*

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15 Corporations (Coronavirus Economic Response) Determination (No. 2) 2020.

16 Joint Committee Report, Recommendation 29, at 351.

17 Joint Committee Report, at 363.

18 Sarah Danckert and Charlotte Grieve, "Investors slam Frydenberg's watering down of company laws", *The Sydney Morning Herald* (online) (18 February 2021) <https://www.smh.com.au/business/markets/investors-slam-frydenberg-s-watering-down-of-company-laws-20210217-p573ag.html>.

31 There are also reports that grassroots shareholder activists are starting to organise against the proposed amendments.[19]

The government's proposed changes to continuous disclosure should be rejected

32 Australia's continuous disclosure regime was developed in response to the 1987 stock market crash and the view that the ensuing financial disaster for Australian investors could have been avoided had they received timely and adequate disclosure of relevant information.[20] Since that time, the continuous disclosure regime has been critical to building and maintaining the integrity and reputation of Australia's capital markets and protecting those who invest in them.

33 Financial markets can only operate fairly where market-sensitive information is accurate, released in a timely manner and freely available to all participants.[21] Where shareholders do not have confidence that markets are operating fairly, because they are not receiving accurate information or because they perceive information is being withheld or selectively disclosed, they tend to withdraw their investments.[22]

34 In its submission to the ALRC Inquiry, ASIC explained the importance for Australia's continued economic prosperity of maintaining confidence in the financial markets and the effectiveness of the current continuous disclosure regime in maintaining that confidence:

> *"Australian markets have a total $1.84 trillion market capitalisation with an average turnover of $5.9 billion a day. Despite being a comparatively small economy, Australia is one of the top 20 global destinations for foreign direct investment. In 2017, Australia saw foreign direct investment inflows double to $48 billion.*
>
> *This is no coincidence. Australia's continuous disclosure regime supports investor participation and confidence in markets which in turn has helped increase market turnover, lower transaction costs and the cost of capital and improve the efficiency of capital allocation within the market."*

35 A strong continuous disclosure regime is of particular importance to the protection of retail investors, who are highly vulnerable to the negative consequences of insider

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19 Sarah Danckert, "'Your rockets are at risk': Reddit traders campaign to save sharemarket disclosure rules", *The Sydney Morning Herald* (online) (26 February 2021) <https://www.smh.com.au/business/markets/your-rockets-are-at-risk-reddit-traders-campaign-to-save-sharemarket-disclosure-rules-20210226-p57646.html>.

20 Meraav Bloch, James Weatherhead and Jon Webster, 'The development and enforcement of Australia's continuous disclosure regime', (2011) 29 *Company and Securities Law Journal* 253, 253; ALRC Final Report, at [9.8].

21 ASIC, Submission 72 to the Australian Law Reform Commission Inquiry into Class Action Proceedings and Third-Party Litigation Funders (September 2018) (**ASIC Submission to the ALRC Inquiry**), at [25]-[26].

22 ASIC submission to the ARLC Inquiry, at [25]-[26].

trading and other market abuses arising from the non-disclosure or selective disclosure of price-sensitive information. Australian share markets have one of the highest proportion of retail investors globally, with around 6.6. million Australians holding Australian-listed equities,[23] with a further $600 billion invested in Australian-listed equities through the superannuation system.

36 The strength of the continuous disclosure regime is best served by effective enforcement mechanisms to punish misconduct and provide a deterrence against future contraventions. ASIC has recognised the important and complimentary role that shareholder class actions play, providing an avenue for shareholders to privately enforce their legal rights and obtain redress for corporate misconduct including breaches of continuous disclosure obligations.[24]

37 In light of the vociferous complaints by the corporate lobby about the costs and burdens of shareholder class actions, it would be expected that the continued risk of exposure to such actions might also have a positive influence in encouraging an improved quality of corporate governance, and in particular encourage fulsome and timely market disclosures.[25]

38 Given the importance of the continuous disclosure regime in protecting shareholders and the integrity and reputation of Australia's financial markets, ALFA is concerned by the government's proposal to water down that regime, especially given it has failed to undertake any unbiased, evidence-based review of the proposed changes, as recommended by the ALRC.

39 The stated purpose of the proposed amendments is to prevent shareholders from bringing class actions against listed entities and their directors for failures to disclose material information unless they can establish the mental element of knowledge, recklessness or negligence. However, the amendments will not solely prevent shareholders from recovering loss or damage suffered as a result of 'no-fault' disclosure contraventions.

40 Even where there has been egregious intentional or negligent misconduct by a company or its directors, requiring that be proved in order to establish liability will likely cause forensic difficulties for shareholders seeking redress through private class actions. The information asymmetries between a company and its shareholders mean that shareholders are always at a disadvantage in trying to prove a material non-disclosure. Introducing a further requirement to establish a mental element of intention or negligence is likely to exacerbate that forensic disadvantage.

41 An argument that was advanced in the Joint Committee Inquiry in favour of amending the continuous disclosure regime is to bring it into line with other comparable

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23 Augusta Ventures, Submission No. 70 to the Australian Law Reform Commission Inquiry into Class Action Proceedings and Third-Party Litigation Funders (August 2018), at [9].

24 ASIC submission to the ARLC Inquiry, at [47].

25 See, S Foley, Submission No. 8 to the Australian Law Reform Commission Inquiry into Class Action Proceedings and Third-Party Litigation Funders (25 July 2018).

jurisdictions.[26] However, of the five comparable jurisdictions considered by the Joint Committee, only two (US and UK) have fault-based liability for private non-disclosure claims; the other three (Canada, Hong Kong and South Africa) have strict liability.[27]

42 Further, the argument that Australia should amend its continuous disclosure regime to bring it into line with the US and UK is not based on any assessment of the relative effectiveness of the regimes in those jurisdictions. In fact, international research into 'information leakage', a measure indicative of insider trading and other forms of market abuse, found that Australia's markets were performing better than those in the US, UK and Canada.[28] The comparatively high proportion of local retail investors in the Australian equities market also justifies stronger protections for shareholders than may exist in other jurisdictions.

43 Finally, while the US and UK have non-strict liability for continuous disclosure contraventions in private litigation, the regulators in those jurisdictions can still take enforcement action without establishing fault. The amendments proposed in the TLA Bill, however, would remove ASIC's ability to seek penalties for strict-liability disclosure contraventions, weakening the deterrent effect of regulatory action and leaving Australia an outlier amongst comparable jurisdictions.

44 The corporate lobby nevertheless argues that the amendments are necessary to address an explosion in the number of "*unmeritorious*" and "*opportunistic"* shareholder class actions.[29] This argument is ill-founded and contains a number of egregious misconceptions.

45 The first is that litigation funders facilitate the prosecution of unmeritorious claims. The financial risks that litigation funders, and law firms acting on a no-win no-fee basis, take when bringing shareholder class actions are significant. Class action proceedings can take years to resolve and the costs can run into many millions of dollars. Litigation funders also take on the risks of an adverse costs order against the plaintiff if the claim is unsuccessful.

46 It would be commercially irrational for litigation funders to take on these risks to prosecute unmeritorious claims. It is the experience of ALFA's members that litigation funders instead adopt rigorous due diligence before determining whether to support any case.

47 The second misconception is that class actions brought to recover loss or damage suffered by shareholders as a result of non-disclosure contraventions are somehow "*opportunistic*". The word implies that corporate managers, who cause shareholders loss or damage by their conduct, are oppressed by being held responsible for their

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26 Joint Committee Report, at [17.130]
27 Joint Committee Report, Table 17.2, at 88.
28 ASIC Submission to the ALRC Inquiry, at [36]-[38].
29 Joint Committee Report, at [17.124]-[17.130].

conduct while the shareholders, who are the real victims, are somehow behaving unconscionably in seeking to recover their losses.

48 The third misconception is that there has been an explosion in the number of shareholder class actions. This is not supported by the empirical evidence. Analysis by Professor Vince Morabito of the number of shareholder class actions commenced in Australia shows a steady increase from 2015 to 2018 but then a decline in 2019.[30] This is in the context of the wide-ranging corporate misconduct revealed during this period by the Royal Commission into Banking and Financial Services and the emergence of an increasing number of competing class actions (class actions brought against the same company by different claimants on behalf of the same or overlapping classes).

49 The raw number of shareholder class actions also needs to be examined. Since 1992, when the class action procedure first became available in the Federal Court of Australia, there have been a total of 122 shareholder class actions commenced. However, only 63 companies or company groups have been the subject of a class action brought by their shareholders over that period, and of these only 23 are ASX 200 companies or company groups.[31]

50 Looking at the five years from 1 July 2014 to 30 July 2019, when the “explosion” in shareholder class actions is said to have occurred, only 34 companies or groups of companies where the subject of class actions filed on behalf of their shareholders.[32] That is an annual average of only 6.8 companies or groups of companies that were subject to shareholder class actions, out of more than 2,000 listed on the ASX.

51 As Professor Morabito concludes, the empirical data does not support the argument that there has been an explosion in shareholder class action litigation. In ALFA’s submission, what this data shows is a system that is rightly operating to hold the small numbers of transgressors accountable, for losses caused to their investors.

52 A further argument advanced for amending the continuous disclosure regime is that shareholder class actions simply involve one group of shareholders compensating another for losses caused by the actions of the company’s directors and officers. This ‘circularity’ argument is, on the surface, attractive but it relies on an oversimplification of the economics of shareholder class actions and is ultimately misconceived.

53 Experienced participants in class action litigation know that defence costs and settlements are predominantly paid out of insurance policies held by the respondent companies rather than from companies’ own assets.[33] The directors and officers may

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30 Vince Morabito, ‘Shareholder class actions in Australia - myths v facts’ (November 2019), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3484660>, at 15.

31 Ibid, at 16-17.

32 Ibid, at 16.

33 Phi Finney McDonald, Submission No. 34 to the Australian Law Reform Commission Inquiry into Class Action Proceedings and Third-Party Litigation Funders (30 July 2018), at [2.5].

also be liable and cross-claims may be brought against companies' auditors or advisors for their involvement in the alleged contraventions.[34]

54 The perceived problem of circularity is further undermined by different behaviours demonstrated by different classes of shareholders. For instance, after revelations of a breach of disclosure, disappointed and distrustful retail shareholders will in many cases sell out of a company to avoid further losses. In such circumstances there is no circularity; instead through a class action those individuals may recoup some of the losses they have suffered as a result of the company's misconduct.

55 Small retail investors typically are not regular traders but rather 'buy and hold' shares in a company for the long term.[35] These investors also stand to benefit the most from the restorative effect on company value that shareholder class actions can bring through changes in governance and personnel,[36] and the specific deterrent effect that class actions have against future disclosure failures.

56 In any event, the proposed amendments to the continuous disclosure laws do not seek to address the purported 'circularity problem' by more efficiently allocating the burden of disclosure breaches to the directors and officers individually responsible. Instead, the amendments give greater protection to those same individuals by making it more difficult for ASIC and shareholders to bring actions against them. Rather than address a perceived inefficiency in the mechanism for compensating shareholders injured, the remedy proposed by the government will have the effect of making it more difficult for injured shareholders to receive any compensation at all.

57 Corporate management and the insurance industry argue that shareholder class actions also need to be curtailed because of the direct upward pressure the risk of class actions is placing on D&O insurance premiums, discouraging managers from taking board appointments.[37]

58 This argument ignores the reality that D&O insurance covers a wide range of potential claims, not simply those associated with shareholder class actions. Rather than blaming class action plaintiffs and those who act for them, the increased cost of D&O insurance might more logically be the predictable result of increased corporate misconduct that has come to light in recent years through, for example, the Royal

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34 See, for example, the Vocation class action where a settlement of $50 million was reached on behalf of shareholders against the company's former auditors and a number of former directors, as well as the company itself in liquidation, and cross-claims were brought against the company's former legal advisors: Cat Fredenburgh, '$50M settlement resolved class action against Vocation, PwC", *Lawyerly* (online) (30 November 2020) <https://www.lawyerly.com.au/50m-settlement-resolves-class-action-against-vocation-pwc/#:~:text=Lawyerly&text=A%20%2450%20million%20settlement%20has,Winter%20%26%20Slattery%20and%20individual%20directors>.

35 Michael Legg, 'Shareholder class actions in Australia – the perfect storm?' (2008) 31(3) *University of New South Wales Law Journal* 669, 709.

36 ASIC Submission to the ALRC Inquiry, at [49].

37 Joint Committee Report, at [17.13]-[17.16].

Commission into Banking and Financial Services and an increasing number of 'speeding tickets' being issued by the ASX.[38]

59 The amendments to continuous disclosure laws proposed by the TLA Bill do nothing to address this identified increase in corporate misconduct. Instead, the government's solution is to raise the bar against shareholders seeking redress for damages suffered as a result of that misconduct. This is akin to suggesting that the response to an increase in the number of drivers receiving speeding fines should be to remove strict liability for speeding offences and require the police to instead prove the driver was knowingly or negligently travelling over the speed limit.

60 It has been suggested that recent premium rises might also be explained by a historical under-pricing of D&O insurance, leading to price rises to reflect risks that were always present in the market but not previously priced.[39] The ALRC found that there was a lack of verifiable data to establish a link between class actions and increased D&O insurance premiums.[40] Further, the practice of insurers of "bundling" Side C, securities claim cover with D&O insurance, may exacerbate the significance of these arguments.

61 The alternative explanations canvassed above ought to be properly investigated before taking the drastic step of weakening the continuous disclosure regime.

62 The proposed amendments to the continuous disclosure obligations would make permanent the temporary changes introduced by the Government in March 2020, and as such they have received the most attention. However, the new amendments to the misleading or deceptive conduct provisions proposed by the TLA Bill are as ill-conceived as the continuous disclosure changes and potentially introduce a number of additional unforeseen consequences.

63 The TLA Bill proposes to amend the Corporations and ASIC Acts to carve out from the prohibition against misleading or deceptive conduct any conduct that would breach the existing continuous disclosure obligations, unless the requisite fault element of "*knowledge, recklessness or negligence*" can also be established.

64 The Explanatory Memorandum to the Bill explains that, in the recent decisions of the Federal Court in *TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Limited*[41] and *Crowley v Worley Limited*,[42] claims for material non-disclosure and misleading or deceptive conduct were determined on very similar factual bases, and it is common in shareholder class actions for continuous disclosure and misleading or deceptive conduct allegations to be brought together in the same claim.[43]

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38 A Prof Sean Foley and Dr Angelo Aspris, Submissions No. 78 to the Parliamentary Joint Committee on Corporations and Financial Services, Inquiry into litigation funding and the regulation of the class action industry, Parliament of Australia (11 June 2020), at 2.

39 Joint Committee Report, at [17.19].

40 ALRC Final Report, at [9.81].

41 [2019] FCA 1747.

42 [2020] FCA 1522.

43 TLA Bill Explanatory Memorandum, Supplementary Analysis, at 45-46.

65 The purported reasoning for the amendments is therefore to address a concern that that introducing a fault element into the continuous disclosure obligations would be ineffective without also introducing this requirement into the misleading and deceptive conduct provisions, at least in so far as the alleged misleading conduct is said to relate to a failure to update the market with price sensitive information.[44]

66 However, carving out from misleading or deceptive conduct any conduct that would breach the continuous disclosure obligations (unless fault can be established) raises the possibility that fault would need to be established in most shareholder claims for misleading or deceptive conduct.

67 The uncertainty created by these amendments is likely to lead to satellite litigation as to the effect of the amendments and whether the alleged misleading or deceptive conduct also breached the continuous disclosure obligations, even if the latter allegation is not made by the plaintiff in the proceeding. Such uncertainty can only be productive of further expense and delay for all parties involved in shareholder class actions.

68 Perversely, these amendments would also put the protections against misleading or deceptive conduct in relation to financial products and services under the corporation laws out of step with the general protections against misleading or deceptive conduct under s 18 of the *Australian Consumer Law*.[45]

69 As explained above, these newly proposed amendments to the misleading or deceptive conduct provisions of the Corporations and ASIC Acts have not been the subject of any proper review or consideration by the ALRC or Joint Committee. Instead, they appear to have been introduced in response to lobbying of government following the temporary amendments to the continuous disclosure regime.[46]

70 In its submission to the ALRC, ASIC observed the following in respect of the importance of maintaining the current misleading or deceptive conduct provisions under the corporation law:[47]

> *"[The] misleading or deceptive conduct provisions are fundamental to ensuring consumers are adequately protected and market integrity is maintained and apply across financial products and services and trade and commerce generally. We see no justification to amend these provisions. It is fundamental that investors can rely on disclosures to the market, that information provided to them is accurate and investors and the market are not led into error."*

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44 TLA Bill Explanatory Memorandum, Supplementary Analysis, at 45-46.

45 Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

46 Explanatory Memorandum to the Treasury Laws Amendment (2021 Measures No.1) Bill 2021, Supplementary Analysis, at 41.

47 ASIC Submission to the ALRC Inquiry, at [23].

71 ALFA is concerned that the amendments to the misleading or deceptive conduct provisions proposed in the TLA Bill are ill-conceived and have been prepared without any proper consideration given to consequences for the protection of shareholders or the integrity of Australia's financial markets.

Conclusion

72 For the reasons set out in this submission, the Committee should recommend amending the TLA Bill to remove all of Schedule 2, which contains the proposed amendments to the continuous disclosure obligations and misleading or deceptive conduct provisions of the Corporations and ASIC Acts.

73 ALFA is grateful to the Committee for the opportunity to provide this submission. It would welcome the opportunity to present to the Committee, to answer any questions, or to provide any further or other assistance.

Association of Litigation Funders of Australia

1 March 2021