Australian Institute of Company Directors

18 Jamison Street
Sydney NSW 2000
www.companydirectors.com.au
ABN 11 008 484 197

T: +61 2 8248 6602
F: +61 2 8248 6633

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Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Sir/Madam

Inquiry into the regulation of the class actions regime

Thank you for the opportunity to provide a submission to the Parliamentary Joint Committee on Corporations and Financial Services' Inquiry into the regulation of the class actions regime (**Inquiry**).

The Australian Institute of Company Directors' (**AICD**) mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership reflects the diversity of Australia's director community: while 192 of the nation's ASX 200 companies have one or more AICD members serving on their board, our membership of more than 45,000 is drawn from directors and leaders of not-for-profits, large and small businesses and the government sector.

Our submission focuses on aspects of Australia's securities class actions regime specifically as the area of greatest concern to the director community, rather than the broader class action and litigation funding market. It addresses relevant Terms of Reference (**ToR**) in discussing**:**

- The AICD's long-held concerns in relation to the interaction between Australia's continuous disclosure and misleading and deceptive conduct laws, and the securities class action regime (**section 2**);
- Broader economic and governance impacts, including implications for the Directors & Officers (**D&O**) insurance market (**sections 3 and 4**);
- Proposed policy solutions to the problems created by the current regime (**section 5**); and
- The AICD's position on regulation of the litigation funding industry and contingency fees (**sections 6 and 7**).

1. Executive summary

The AICD strongly believes that Australia's securities class action market requires reform. The current regime is leading to adverse outcomes for Australian businesses and shareholders and is out of step with other jurisdictions, leading to a growing market for litigation funders to bring securities class actions that are motivated by profit over the public interest.

We support robust market disclosure and believe that regulatory settings should support and promote entities to provide information to investors, including forward-looking statements. We also recognise the critical role that class actions play in facilitating access to justice in other areas of the law, such as product liability and environment cases.

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With this in mind, we recommend that the Committee consider:

- Exclusive public enforcement of continuous disclosure and misleading and deceptive conduct laws;

- Reforming the continuous disclosure and misleading and deceptive conduct laws to require an element of fault or intent, in line with comparable jurisdictions including the United States and United Kingdom; and

- Improving the procedural framework to reduce the burden on plaintiffs, courts and businesses caused by competing class actions and unmeritorious claims.

We strongly support the Government's recent announcement that litigation funders will be required to obtain an Australian Financial Services Licence (**AFSL**) and comply with the managed investment scheme regulatory regime. In addition, we continue to oppose the introduction of contingency fees given the significant conflict of interests created by them.

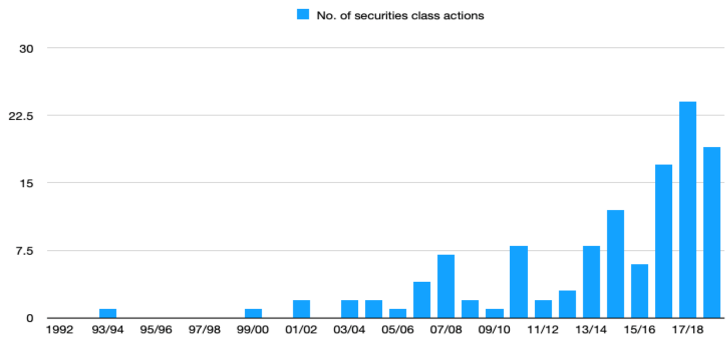
2. Interaction between market disclosure laws and the class actions regime

ToR:
- *factors driving the increasing prevalence of class action proceedings in Australia*
- *what evidence is becoming available with respect to the present and potential future impact of class actions on the Australian economy*

The AICD believes that a key factor driving the prevalence of securities class actions in Australia is the way in which our substantive disclosure laws and class action regime interact, creating a uniquely facilitative environment for securities class actions with adverse legal and economic consequences.

There has been a marked increase in the number of securities class actions filed since the inception of the class actions regime in 1992. In the first 14 years of the class actions regime, there were 8 securities class actions filed. Over the next 14 years, 114 securities class actions were filed. The trend is shown in the following graph:

Diagram 1



Source: Table 2, Professor Vince Morabito, 'Shareholder class actions in Australia – myths v facts' (Nov 2019)

We note for completeness that Professor Morabito has argued against the conclusion that there has been a proliferation of class actions in recent years, including because of the phenomena of related and competing class actions. Despite concerns that this may overstate the figures, it does not overstate the burden to business, recognising that each

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proceeding needs to be addressed and responded to (which consumes significant company resources and costs), and that the company is required to be involved in relevant court proceedings to address the competing claims. Competing class actions are addressed further in section 5 of this submission.

In the 2018 final report of its inquiry into class action proceedings and third-party litigation funders, the Australian Law Reform Commission (**ALRC**) summarised the available data regarding the number, operation, characteristics, key participants and outcomes of Part IVA proceedings (i.e., class action proceedings) in the Federal Court of Australia. Key findings included:

- **Shareholder claims are the dominant type of action**: Shareholder claims (i.e., class action proceedings brought on behalf shareholders against corporations who are alleged to have breached their continuous disclosure obligations under the Corporations Act or to have engaged in misleading and deceptive conduct, or both) constituted over one-third of all Part IVA proceedings;

- **Shareholder claims are always funded**: From 2013, all shareholder claims in the Federal Court were funded by third-party litigation funders; and

- **Group members receive a greater proportion of the settlement award in unfunded matters:** The median return to group members in funded matters was 51 per cent, whereas in unfunded proceedings the median return was 85 per cent of the settlement award. The remaining 49 per cent is split between funders and plaintiff law firms.[1]

Importantly, the AICD acknowledges both that class actions can be an important means of facilitating access to justice, and that robust disclosure laws are critical to market integrity and investor protection.

Our concern in the context of *securities* class actions is the consequences of combining our strict disclosure laws (with low thresholds for liability and limited defences) with a facilitative class action regime. In practice, the interaction between the two means that there is the threat that a class action could be filed whenever there is a significant shift in the company's share price.

In this regard, the following observations were made by legal experts as part of the ALRC's inquiry into class actions and litigation funders:

- Judgment calls in relations to earnings guidance require a synthesis of developing and uncertain information, often in relation to disparate parts of a business. While it is easy to be critical of judgments in hindsight, it should not be assumed that such decisions are not made with a very high level of diligence – the shareholder class action model does not allow for a fair and balanced consideration of the judgment call made in the moment. Rather, the price-driven model assumes that the wrong decision was made;

- Decisions are often made with acute awareness that disclosing 'just in case' the guidance is not achieved may inappropriately reduce shareholder value – which may itself result in a class action; and

[1] The ALRC Report confirms that for the period between 2013 and October 2018, the median settlement sum was $36 million (with the range being from $3 million to $132.5 million). The median return to shareholders was 51% (with the range being from 29% to 69%): ALRC Report, Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders (Report 134, 2018), 275.

- The acute awareness of class action risk may result in over-disclosure – which may of itself create an uninformed (or misinformed) market.[2]

This is particularly problematic given securities class actions can present a lucrative business opportunity for plaintiff firms and litigation funders in light of potential returns.[3] Professor Michael Legg of UNSW Law School notes that

> *Every stock drop will be attributed to the non-disclosure or misleading disclosure of material information. The Australian rule on costs, whereby the loser in litigation pays the winner's costs, is meant to deter such conduct — but that deterrent is ineffective if companies keep settling and plaintiffs can avoid the risk through buying after-the-event insurance. Class actions have become a lucrative investment and high returns will only attract more investors.*[4]

Australia's disclosure regime - legal advice and international comparators

In 2018, the AICD commissioned law firm Herbert Smith Freehills to undertake a review of international continuous disclosure and liability regimes. The advice is attached in Appendix 1 of this submission. There have been limited developments since the date of the advice in the Australian context, with the most notable being the Myer class action proceeding to judgment (the first securities class action judgment in Australia),[5] as well the recent temporary amendments to the Corporations Act to re-introduce a fault element to the continuous disclosure rules.

The legal analysis reveals that Australian listed company boards are faced with higher reputational and personal liability risks from disclosure-based shareholder class actions than boards in the world's major capital markets, including the UK and US.

Key conclusions:

- From a listed entity perspective, it is practically very difficult to ensure ongoing comprehensive compliance with Australia's strict continuous disclosure regime, which requires immediate disclosure of price sensitive information;

- Combined with Australia's relatively facilitative class action law, this creates a constant risk for listed companies that a class action can be brought whenever there is a significant decline in share price. The relatively easy allegation is that a class of shareholders has suffered loss as a result of a delay in disclosure of a material development in breach of the continuous disclosure rules; and

- By way of contrast, in the US and the UK, the link to liability under legislation is more remote, requiring an element of misleading conduct or misbehaviour on the part of the company and its officers. In some of the other smaller jurisdictions, where the legislative framework is closer to the Australian provisions, the disclosure requirements are not

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[2] Ibid, 275.

[3] Relevantly, Allens has argued that more than ever before, class actions are seen as lucrative profit-making opportunities for plaintiff lawyers and third-party funders: https://data.allens.com.au/pubs/pdf/class/papclassaug18.pdf.

[4] Tony Featherstone, 'The growing impact of rising shareholder class actions,' at https://aicd.companydirectors.com.au/membership/company-director-magazine/2018-back-editions/october/class-actions.

[5] *TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Limited* [2019] FCA 1747.

linked with class action laws. For example, Hong Kong does not currently have a class action regime.[6]

3. **Adverse impacts of the current regime, including impact on the Australian economy**

It is clear to the AICD that the current regime is driving adverse legal and economic consequences. These include:

- **D&O insurance market crisis (see section 4 below)**: The D&O insurance market continues to deteriorate, with premiums increasing rapidly - year-on-year premium increases of more than 50 per cent have become common, some reaching 400 per cent or more.[7] Of greater concern, insurers are increasingly unwilling to provide D&O cover with several effectively exiting from the Australian market. Insurers and brokers consistently cite securities class actions as the most significant driver for the increased cost of D&O insurance in Australia and restricted availability, including litigation funding driving increased shareholder claims. The negative impact of class actions on D&O cover extends well beyond the listed sector given the limited pool of insurance capital in this class of insurance. Insurance is a critical risk mitigation tool with appropriate cover being crucial to attracting and retaining the most skilled and dedicated directors to Australian boards - a need all the more acute given the impact of the pandemic;

- **Driving risk-aversion**: Data consistently shows that Australian boards are generally conservative and risk-averse. Notably, the AICD's latest director index sentiment for the first half of 2020 shows that 74 per cent of directors agree there is a risk-averse decision-making culture on Australian boards. The main reason given for this is the excessive focus on compliance over performance.[8] This constrains innovation and productivity, which is particularly problematic given the need to foster economic growth. Australia's regulatory environment creates a strong incentive for conservatism and risk-aversion in boardrooms;

- **Limitations on information released to the market:** Given the lack of protection around forward-looking statements, companies are less willing to be transparent and to provide future earnings guidance or other forward-looking information in the absence of a legal requirement to do so. Australia is out of step with other comparable jurisdictions, such as the United States and Canada, which provide a 'safe harbour' for companies to be able to disclose such information (recognising the important role this plays in informing the market).[9]

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[6] As discussed in the annual Securities Litigation Review (SLR), there is also no true concept of a securities class action in England and Wales in the sense of a representative action that is familiar in other jurisdictions (although there are broad mechanisms by which multiple claims against the same defendants raise common legal or factual issues may be joined together). The most common of these is where claimants apply for a group litigation order, with the effect that the court will manage their claims substantially as one. Importantly, this is an opt-in, not an opt-out regime, and a sufficient number of claimants will need to be persuaded to bring claims and join the group to make a claim financially viable (or to attract third-party funding). See William Savitt, The Securities Litigation Review - Edition 5, July 2019, https://thelawreviews.co.uk/edition/the-securities-litigation-review-edition-5/1194743/england-and-wales.

[7] Ewen McKay, 'D&O Challenge', http://aicd.companydirectors.com.au/membership/company-director-magazine/2019-back-editions/october/d-and-o-insurance-cover], October 2019.

[8] See the AICD Director Sentiment Index First Half 2020 at https://aicd.companydirectors.com.au/-/media/cd2/resources/advocacy/research/director-sentiment/final-full-results-pack-pdf.ashx.

[9] In the US, a safe harbour exemption may be secured through identifying a statement as forward-looking and using meaningful cautionary statements which identify important factors that could cause the actual results to

Notably, as a response to the COVID-19 pandemic, the US Securities & Exchange Commission (**S.E.C**) released a statement urging companies to provide as much forward-looking information as possible on the basis that this would not only materially benefit investors and companies, but also assist broader communication and coordination across the economy in addressing COVID-19.[10] Given the difficulties with producing such statements, the S.E.C encouraged companies to avail themselves of the safe-harbours available in the U.S. for forward-looking statements. The same protections are not available in Australia, making any similar call to arms impossible. Instead, the ASX took a very different approach, encouraging companies to actively consider withdrawing any forward looking guidance they had previously provided, so as not to 'predict the unpredictable'.[11] This approach reflects the need for temporary reform to ensure a safety net for entities wishing (or legally compelled due to market consensus) to provide forward-looking information in the current market;

- **Excessive time spent on disclosure**: Listed company directors regularly cite securities class action risks as a significant concern that consume board and company resources. The current regime has led to excessive focus on continuous disclosure issues at the expense of broader strategic considerations. This is especially critical in the context of Australia's recovery from the COVID-19 pandemic, where calculated risk-taking will be critical to accelerating growth and job creation. Further, where securities class action proceedings have been commenced against an entity, significant board and management distraction follows;

- **Ineffective mechanism to compensate shareholders**: Continuing shareholders will ultimately be the most impacted when settlements are reached with companies – it is their investments that will suffer as a result of legal and settlement expenses incurred and the increases in D&O insurance premiums, not those shareholders who are alleged to have sold their stock at the inflated prices. This issue has been referred to as the 'circularity problem' or a 'pocket-shifting exercise',[12] and is colourfully described by Professor Alexander of the United States as follows:

> *Payments by the corporation to settle a class action amount to transferring money from one pocket to the other, with about half of it dropping on the floor for lawyers to pick up.*[13]

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differ materially from those in the forward-looking statement. The safe harbour only applies to private civil suits and does not apply to civil and criminal enforcement actions brought by the S.E.C or other regulatory agencies, among other specific exceptions that apply. In Canada, a person or company is not liable for a misrepresentation if the document or public oral statement containing the forward-looking information contained, proximate to that information:

- reasonable cautionary language identifying the forward-looking information as such, and identifying material factors that could cause actual results to differ materially from a conclusion, forecast or projection in the forward-looking information; and
- a statement of the material factors or assumptions that were applied in drawing a conclusion or making a forecast or projection set out in the forward-looking information.

[10] See 'The Importance of Disclosure – For Investors, Markets and Our Fight Against COVID-19' at https://www.sec.gov/news/public-statement/statement-clayton-hinman

[11] Listed@ASX Compliance Update 31 March 2020, at https://www.asx.com.au/documents/asx-news/Listed-Compliance-Update-31-mar2020.pdf

[12] Notably, Professor Legg has observed that it is usually the small shareholders who do not trade actively but rather 'buy and hold' who are adversely affected by the circularity problem. It is most likely that such shareholders will buy the shares before any contravention (therefore not purchasing as a result of the contravention) and will still be holding them once the contravention comes to light. Consequently, the small shareholder will only fund, but not participate in, a settlement or judgment: ALRC report, 277

[13] Janet Alexander, 'Rethinking Damages in Securities Class Actions' (1996) 48 Stanford Law Review 1487, 1503.

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In the Australian context, Kevin Davis, Professor of Finance at the University of Melbourne, during the recent ALRC review, submitted that shareholder class actions 'make no sense at all' given:

> *Any penalties awarded against the company fall on remaining shareholders, not those who exited by sales at inflated prices. And the remaining shareholders have not, except to the extent of any excessive dividends paid out, benefited from the inflated prices. When the adverse information was eventually disclosed, the value of their shares would have fallen accordingly.*[14]

The logical conclusion is that securities class actions leads to a net negative impact on the value of the investments of all shareholders in a listed company (including on those class members themselves who remain continuing shareholders). It is notable that the only securities class action that has proceeded to final judgment found that, while there had been a breach of continuous disclosure rules by the company, the plaintiffs had not been able to establish that they suffered any loss as a result of the breach;[15] and

- **Undermines ability to attract investment:** The environment also risks having a 'chilling effect' on the ability of listed companies to attract investment, both domestically and from overseas markets, or to engage in mergers & acquisitions or capital raising activity. For example, the threat of a class action may deter merger activity from occurring or, to the extent any proceedings are already on foot, M&A activity is likely to be frustrated.

4. D&O insurance implications

ToR
- *the potential impact of Australia's current class action industry on vulnerable Australian business already suffering the impacts of the COVID-19 pandemic*
- *what evidence is becoming available with respect to the present and potential future impact of class actions on the Australian economy*

One significant and tangible consequence of Australia's securities class action industry is the impact on the availability of D&O insurance. The D&O insurance market is at a crisis point, and the market is expected to continue to harden against the backdrop of the COVID-19 pandemic.

Significant premium surges

According to insurance broker Marsh, in the past seven years prices have accelerated by about 250 per cent, with premium increases for ASX listed entities of 75 percent in the first three quarters of 2019, and accelerations of 88 per cent on average in 2018.[16] Companies that renew existing cover are paying considerably more for the same level of cover, and in some cases less cover. To put it in context, for coverage of between A$100 million and

[14] Kevin Davis, 'Shareholder Class Actions Make No Sense', at *http://www.kevindavis.com.au/secondpages/Miscellaneous/2018-07-16-Shareholder%20Class%20Actions%20Make%20No%20Sense.pdf*

[15] *TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Limited* [2019] FCA 1747.

[16] Marsh JLT Specialty, December 2019. The D&O Insurance Wave: Staying Above Water. at https://www.marsh.com/au/insights/research/directors-and-officers-hard-market.html.

A$200 million, larger corporate entities are spending between A$2 million to A$5 million where they previously spent between A$500,000 to A$800,000.[17]

The impacts of the Australian class actions regime are far-reaching as insurers seek to 'remediate' their entire D&O insurance portfolios.[18] While D&O increases have been most pronounced for Side C cover (to meet securities class action claims), we understand from our discussions with members and insurers, the cost of Side A and B cover (that applies to individual directors) has also increased. Impacts are not limited to listed companies, with private companies, SMEs, not-for-profits and charities all impacted as insurers are seeking to 'remediate' their entire D&O insurance portfolios.

Class actions significant driver for increased premiums

The last three years have seen a substantial increase in the cost of D&O, with insurers and brokers consistently agreeing that the most significant driver for the increased cost of D&O insurance in Australia is the volume and expense of securities class actions, partly as a result of litigation funding driving increased shareholder claims. [19] Diagram 1 above illustrates the increasing trend in the frequency of securities class actions for the period 1999 to 2018.

The failure of any class actions – until the recent *Myer* decision – to proceed to final judgment has also left the scope of disclosure laws unsettled and resulted in a desire to settle rather than pursue a court determination. According to another insurance broker Aon, the average settlement amount (excluding defence costs) for publicly announced securities class actions since 2012 is circa $45 million.[20]

While we recognise that a comprehensive economic analysis of the market has not been undertaken as recommended by the ALRC, the D&O insurance industry has produced substantial evidence demonstrating the link between securities class actions and increased D&O costs.

Insurers exit the Australian market and others significantly reduce capacity

As a consequence of these pricing pressures and the risk of securities class actions, several prominent insurers have withdrawn from the Australian D&O market, including Allianz,[21] WR Berkley,[22] and Lloyd's of London syndicates (Neon, Pioneer and Acapella).[23] We also understand that other major insurers like Zurich and QBE are no longer writing D&O for new clients and others like Chubb and Vero have introduced restrictions which considerably limit the amount of Side C (securities class action) entity cover they are prepared to write.[24]

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[17] Ibid.
[18] Ibid.
[19] Ibid 2; AXA XL, 'Underwriting Directors & Officers Insurance … what's the right price? D&O White paper'; Hans Van Leeuwen, 'Australia leads the world in skyrocketing insurance premiums', Australian Financial Review (**AFR**), 13 February 2020.
[20] Aon, 'D&O Market Update - March 2020', at https://aoninsights.com.au/wp-content/uploads/DO-Market-Update-March-2020-Final-1.pdf
[21] Insurance News, 3 July 2019. Allianz to exit Australia and NZ long-tail risks. https://www.insurancenews.com.au/breaking-news/allianz-to-exit-australia-and-nz-long-tail-risks
[22] Insurance News, 25 January 2019. D&O is 'canary in the coalmine' for law reformers.
[23] James Fernyhough, 'Disclosure reprieve won't fix D&O insurance crisis', AFR, 26 May 2020.
[24] AXA XL, 'Underwriting Directors & Officers Insurance … what's the right price? D&O White paper.'

Brokers have also noted that only three or four experienced primary insurers have an appetite for new business.[25] As noted, the D&O insurance market is at a crisis point, and the market is expected to continue to harden as insurers cut their risk exposure to preserve profitability and brokers struggle to find sufficient capacity for clients. While it is difficult to know if the COVID-19 crisis will directly result in higher D&O insurance costs (as prices were expected to rise in any event), it is bringing further stress to a market already hardening and in crisis.

Significant consequences for directors, entities and the Australian economy

Consistent feedback from members indicates that the increased cost of D&O insurance, combined with reductions in capacity, higher deductibles and greater exclusions, is a significant issue on board agendas. Companies are under pressure and forced to re-evaluate whether it remains viable to obtain securities class action coverage (Side C) due to the prohibitive cost, with some reducing limits for settlement costs and defence costs, and others considering foregoing cover altogether. Such decisions leave organisations exposed to direct financial losses of securities class actions, which ultimately result in a hit for ongoing shareholders when settlements are extracted from companies. The average class action seeks between A$50 million and A$75 million in compensation — and there have been a number of ASX shareholder claim settlements exceeding A$100million. For example, in the 2017 case involving QBE, the settlement sum was $132.5 million.[26] Total settlements from securities class actions (since the inception of the regime i.e. 1992 to 2020) are estimated to be above $1.8. billion, excluding legal costs.[27]

More broadly, this creates an uncertain and volatile business environment for listed Australian companies and may deter private companies, or foreign entities, from listing on the ASX.

If Side C entity cover is phased out or availability continues to reduce, the Australian market can expect to see directors named as defendants in shareholder class actions in order to access Side A and B D&O insurance cover. Any such development can reasonably be expected to affect the ability of companies to attract and retain appropriately qualified and experienced board members. Boards need experienced leaders at this time to ensure financial sustainability, survival and eventually a return to growth through innovation.

The AICD understands that some entities struggling to obtain adequate or cost-effective D&O cover are considering self-insurance. However, we are of the view that such an option may only be viable for the largest listed entities and would not protect directors for losses that cannot, under the Corporations Act, be indemnified by the company (such as certain civil penalties). Such a proposition is not a viable, market-wide solution to the D&O crisis.

If the market continues to deteriorate in the way it has over recent years, there is the distinct prospect of D&O insurance not being obtainable for a significant proportion of entities (listed, private, NFP). If that state is reached, it will make retention and attraction of skilled and experienced directors on listed company boards more challenging.

5. Potential solutions

[25] Marsh JLT Specialty, December 2019. The D&O Insurance Wave: Staying Above Water. https://www.marsh.com/au/insights/research/directors-and-officers-hard-market.html
[26] QBE Market Announcement, 28 December 2017, 'QBE Agrees Class Action Settlement'.
[27] Marsh JLT Specialty, December 2019. The D&O Insurance Wave: Staying Above Water. https://www.marsh.com/au/insights/research/directors-and-officers-hard-market.html

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The primary goal of securities litigation should be to promote market integrity, and to punish corporate conduct that deliberately misleads or manipulates the market.

We believe it is clear that the current regime is not efficiently serving its purpose, and that securities class actions are now more about maximising returns for for-profit entities, rather than facilitating access to justice for shareholders.

There are also strong indications that this is leading to adverse economic and governance consequences, as outlined above. We acknowledge that the overall economic impact of our current laws remains relatively unexplored and that there is a lack of unanimity on the issue – this was one of the key reasons the AICD has been a strong supporter of the ALRC's recommendation that an independent review be conducted of the legal and economic impact of our substantive disclosure laws.

However, in our view, there is sufficient evidence to identify significant issues with the current regime, as well as a compelling case to address them.

The AICD's proposed solutions for improving the current regulatory settings (and ensuring that the objectives of securities litigation are met) are set out below.

A. *Provide that enforcement of continuous disclosure and misleading and deceptive conduct provisions should lie with ASIC, prohibiting private actions*

One approach to addressing the issues raised in this submission is to promote public enforcement of the relevant disclosure obligations by ASIC, and to remove the right for private actions to be brought.

This is the case in Hong Kong, for example, where the continuous disclosure laws are not linked to a class actions regime. The AICD proposed this approach as an emergency and temporary measure to address heightened uncertainty arising from the COVID-19 pandemic.[28] There is a strong case for implementing this reform on a permanent basis.

Moving to solely public enforcement, while significant, would not lead to any 'watering down' of market disclosure. ASIC would continue to enforce breaches of the law, and individuals and entities would remain liable for such breaches. There is additional regulatory protection from the ASX who oversees compliance with the Listing Rules and has a range of powers available to it (such as censure, ordering withdrawal of announcements, and suspension of trading). For example, during the recent period of COVID-19 uncertainty, we understand that the ASX has taken urgent action in a number of cases to prevent misleading or inaccurate releases from being made (or remaining in the market).

Directors and officers would also still need to comply with core statutory and general law duties, including the duty to act with care and diligence, which can carry with them civil and criminal liability.

While the ALRC inquiry clearly demonstrated that there are differences in policy approaches as to how best to enforce market disclosure obligations, in our view it would be preferable to ensure that the corporate regulator is properly empowered and resourced to take action where needed, rather than rely on private action to enforce the law.

[28] See https://aicd.companydirectors.com.au/-/media/cd2/resources/director-resources/covid19/pdfs/aicd-proposal-for-temporary-continuous-disclosure-safe-harbour.ashx.

There is a legitimate question to be asked as to why private actions (selected by lawyers and funders based on commercial not public interest imperatives)[29] are needed to enforce continuous disclosure laws, noting that ASIC already has significant enforcement powers. According to ASIC enforcement reports, over the last five years, with regards to continuous disclosure matters, ASIC has concluded:

- 5 civil matters
- 2 criminal matters
- 1 enforceable undertaking
- 16 administrative remedies (infringement notices).[30]

This would appear to be a relatively few number of cases when compared with the volume of securities class actions commenced over the same period. Accordingly, it suggests a disconnect between public and private enforcement. We recognise that more robust public enforcement of continuous disclosure laws would have resourcing implications for ASIC, however we believe such additional investment is warranted given the centrality of disclosure laws to Australian public markets.

Benefits of relying on public rather than private enforcement would include:

- Boards would have comfort that the approach taken to regulation would be balanced, and that enforcement decisions would be driven by the public interest rather than which cases would be most profitable to pursue. This would promote confidence in decision-making and reduce concerns about opportunistic litigation;

- ASIC has acknowledged the difficult judgment calls that can be involved in compliance with disclosure obligations, and will consider the regulatory benefits and public interest in bringing a case. By contrast, litigation funders are solely motivated by maximising their return on capital;

- Shareholders would not bear the substantial costs of securities class actions. As demonstrated by the ALRC Inquiry, class action litigation is expensive, and the transaction costs involved in securing relatively modest returns to individual group members are of significant concern (and, indeed, suggest that there is a lack of logic to using securities class actions as a mechanism to achieve access to justice); and

- The fact that securities class actions are typically brought as an open class (meaning that shareholders must expressly *opt out*) means that the total claim against the company can be readily inflated by the plaintiff firm and funders without all relevant shareholders considering they have suffered any loss.

In our view, if such a step were taken it is then worth considering whether alternative collective redress mechanisms for shareholders who have suffered loss may be desirable, noting that there is no such thing as a risk-free investment. One such mechanism could be to

[29] The Hon Ron Sackville AO QC has observed that the funding criteria applied by litigation funders, unsurprisingly, limits their involvement to the most commercially rewarding claims. Consequently, representative proceedings on behalf of shareholders are more frequently supported by litigation funders than representative proceedings on behalf of poor and disadvantaged groups: The Hon Ronald Sackville AO QC, 'Law and Poverty: A Paradox'(2018) 41 New South Wales Law Journal 80, 92-93
[30] ASIC enforcement outcomes January 2015 to December 2019: https://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-enforcement-outcomes/

enable ASIC to seek compensation on behalf of affected shareholders. This could include, where a company is found to have breached the continuous disclosure rules and ordered to pay damages, facilitating a compensation mechanism that affected shareholders could then claim against. The benefits of such a mechanism is that it would maximise returns to class members by reducing litigation fees, as well as costs of competing claims.

Notably, the ALRC included a recommendation in its final report that the government should review the enforcement tools available to regulators of products and services used by consumers and small businesses (including financial and credit products and services), to provide for a consistent framework of regulatory redress. This recommendation was intended to address the need to provide a broad range of options for those who seek to vindicate just claims (i.e., without resorting to litigation).

Irrespective of whether the laws are enforced publicly or privately, there are changes that could be made to the substantive legal framework to address the issues raised in this submission and bring Australia more into line with the rest of the world. Our suggestions are outlined below.

B. Improve substantive legal framework

The AICD supports continuous disclosure obligations as a vital component of robust disclosure and governance practices to deliver market integrity and investor confidence.

However, we believe that there are steps that could be taken to ensure a more appropriate balance is struck. Options that in the AICD's view would improve the legal environment are discussed below.

i. Incorporate a fault element for continuous disclosure and misleading and deceptive conduct rules given challenges with strict liability

The Corporations (Coronavirus Economic Response) Determination (No. 2) 2020 (Cth) (**Determination No. 2**) temporarily amends the continuous disclosure provisions of Corporations Act by re-inserting a requirement that a breach of the civil penalty provisions under those sections occurs only where information is withheld from disclosure with knowledge that it would, or recklessness or negligence as to whether it would, have a material effect on the price or value of the entity's securities.

The AICD is of the view that the policy objective of these changes is sound, and that they do not undermine shareholder rights. In important respects, they actually bring Australia more into line with overseas' jurisdictions that already incorporate an element of fault or culpability into their disclosure rules. Of particular note:

- In England and Wales, not only is mere negligence insufficient to ground liability in the context of private enforcement, but the claimant must establish that the conduct of the directing mind of the issuer was reckless or dishonest;[31] and

- Under US securities laws, in order to establish a contravention, a failure to disclose relevant information, or the disclosure of misleading or false information, must be willful.

[31] Ibid 2, 267-268

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It is incongruous that, until the recent temporary amendments to the Corporations Act which re-introduce a fault element to the continuous disclosure rules, directors and companies could be held liable without even negligence being established.

Such a strict liability approach is not appropriate for obligations which, at their heart, often involve difficult, time-sensitive judgment calls (a challenge made more acute by COVID-19). Indeed, the re-introduction of a fault element to the Australian law essentially amounts to a reinstatement of the law on continuous disclosure prior to 2001. It is not clear from the explanatory materials at the time, why the fault element was removed, or whether Parliament intended to make a substantive change. It may well have been an inadvertent effect of drafting.

There are strong arguments to set the fault threshold at an appropriate level to ensure that liability is not triggered unless there is a real fault (for example, gross negligence, recklessness or dishonesty). The Australian position is significantly more onerous than its international counterparts; the requisite level of wrongdoing in equivalent class actions in the United States requires proof of an intent to deceive, manipulate or defraud to ground a private right of action (Securities Exchange Act 1934 (US) s 10(b)) while UK law requires a dishonest omission or delay (Financial Services and Markets Act 2000 (UK) s 90A).

We believe that it would also be appropriate to incorporate a similar fault element into misleading and deceptive conduct provisions (particularly section 1014H of the Corporations Act). Legal commentators have observed that the reforms introduced by the Treasurer's recent Determination No. 2 do not necessarily provide sufficient protection where companies do give or update guidance, because they will still be exposed to class action risk under the misleading and deceptive conduct provisions of the Corporations Act if that guidance proves to be inaccurate. We note that in the United States, the analogous deceptive practices law has been interpreted by the Supreme Court to require *scienter*, or 'intent to deceive, manipulate, or defraud'.[32]

In our view, the most effective policy response to the current regulatory challenges is to address the issues that arise from applying strict liability to these types of matters as outlined above.

As an alternative some have argued for targeted appropriate defences, including a 'due diligence' or 'reasonable steps' defence for entities alleged to have breached continuous disclosure and misleading and deceptive conduct laws.

In the context of misstatements and omissions by listed entities in connection with market disclosures, a due diligence defence in effect requires the company and its directors to make all enquiries that are reasonable in the circumstances and believe on reasonable grounds that the statement was not misleading or deceptive.

We understand that due diligence defences currently exist for bidders and target statements and prospectuses for Initial Public Offerings under sections 670D and 731 of the Corporations Act – but not for statements in other documents, such as ASX announcements, investor presentations for rights offers and information memorandums for schemes of arrangement.

[32] Samuel Issacharoff and Thad Eagles, 'The Australian Alternative: A View from Abroad of Recent Developments in Securities Class Actions' (2014) 38(1) University of New South Wales Law Journal 190-191.

Further, a reasonable steps defence already applies to *individuals* alleged to have been involved in a breach of the continuous disclosure provisions under section 674(2B) of the Corporations Act, which provides that no contravention occurs if the person proves that they:

- Took all steps (if any) that were reasonable in the circumstances to ensure that the listed disclosing entity complied with its continuous disclosure obligations; and

- After doing so, believed on reasonable grounds that the listed disclosing entity was complying with its obligations.

However, a similar defence is not available for entities alleged to have breached the same obligations.

We remain of the view that incorporating a fault threshold at an appropriate level to ensure that liability is not triggered unless there is a real fault is the best solution at this time. However, a targeted defence such as a due diligence defence would also improve the substantive legal framework.

ii. Introduce a safe harbour for forward-looking statements

While demands for more forward-looking information in corporate disclosures have increased in recent years and will continue to do so (noting investor support for international frameworks that call for more disclosures on forward-looking information, including the international integrated reporting framework and the framework provided by the Task Force on Climate-related Financial Disclosures), directors are understandably cautious in providing prospective business information because of the liability risks.

In Australia, any forward-looking representation to the market is taken to be misleading if the person making the representation does not have reasonable grounds for making the statement. A court may order any person making the statement to pay compensation to any person who suffers damage as a result.

The ‘deeming’ feature in Australian law is combined with the lack of a safe harbour defence for forward-looking statements available in other jurisdictions such as the United States and Canada. In those jurisdictions, liability can be excluded in certain circumstances where the forward-looking statement is identified as such and accompanied by proximate cautionary statements.

While Australian courts have generally adopted a pragmatic and reasonable approach in determining what constitutes reasonable grounds for a forward-looking statement, it is clear that plaintiff lawyers, with the benefit of 20/20 hindsight, apply an extremely high threshold. Given the commercial and legal risks involved, companies have strong incentives to settle a claim, rather than attempt to demonstrate ‘reasonable grounds’ and risk an adverse decision, especially when the settlement will avoid the cost and management distraction involved in lengthy court proceedings.

Introducing a safe harbour for forward-looking statements in the Australian context would address this issue, and encourage companies to provide more forward-looking information to the market. However, in order to be effective, it would need to be combined with a corresponding introduction of a fault element for continuous disclosure and misleading and deceptive conduct provisions. Otherwise, the initial forward-looking statement may be subject to a defence, but the obligation to keep that statement up to date would remain subject to strict liability (as discussed above).

iii. Address anomalies caused by stepping stone liability

Under the 'stepping stones' approach to director liability, an individual director can be liable for a breach of their duty of care and diligence under section 180 of the Corporations Act where their organisation is found to have committed a contravention of the law (including a breach of the organisation's disclosure obligations). In such circumstances, they will not have recourse to the business judgment rule in section 180(2) of the Corporations Act which, based on judicial decisions, does not apply to disclosure decisions (as they are deemed to be compliance matters despite the significant business judgments involved).

This circumvents the accessorial liability provisions of the Corporations Act, which require the regulator to prove that the officers were 'involved' in the contravention. It also deprives officers of any defences to accessorial liability that might otherwise have been available in the circumstances (for example, the 'reasonable steps' defence available to individuals in the context of continuous disclosure provisions).

The AICD has long-advocated for appropriate protections for directors who perform their roles with integrity and commitment, but who operate in a complex and compliance focused regulatory environment. There is also relatively broad acceptance in the legal community that the current business judgment rule is deficient, including for the reasons briefly outlined above. The AICD believes that a broader due diligence style defence would promote clearer guidelines for directors and support clearer lines of accountability.

While such a reform would have impacts outside the securities class actions regime, it is worth considering in the context of the particular issues considered as part of this Inquiry.

C. Implement procedural efficiencies

i. Urgent need to address multiplicity

Competing class actions cause significant costs and delays for both defendants and plaintiff class members. A recent example of this issue is the five separately funded, competing class actions filed against AMP Limited in different courts. The Federal Court has stated that competing class actions can cause 'increased legal costs for both sides, wastage of court resources, delay, and unfairness to respondents, particularly when they are commenced in different courts (such as in both the Federal Court and a State Supreme Court)'.[33] They undermine the economies of scale achieved by class actions, and they create an unfair impression that the company is under 'siege' in the public sphere, causing further damage to a company's brand and underlying market value. They also make it more difficult for disputes to be resolved, as there is no incentive to settle one claim while others are still on foot. This must be addressed.

The ALRC acknowledged the issues associated with multiple class actions, pointing to data that shows that since 1992, there have been 513 class actions commenced in relation to 335 legal disputes (with most overlapping matters being shareholder class action claims).

Both the ALRC and the Victorian Law Reform Commission (**VLRC**) Report on *Access to Justice: Litigation Funding and Group Proceedings* explored how to resolve the issue of competing class actions. We consider the cleanest and most effective solution would be

[33] *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 230 [196].

legislative intervention in order to provide a clear, nationally consistent framework for resolving competing class actions.

At a minimum, we recommend that the ALRC's proposal to give the Court an express statutory power to resolve competing representative proceedings is adopted. This would often require the Court to select one action to proceed, while staying the remaining competing proceedings. However, it could also encompass consolidation, joinder or amendment powers to create a class action that includes common issues derived from various claims.

ii. Introduce a screening or certification process

Additionally, some form of a certification process could be considered to screen out unmeritorious claims early in the process, as is the case in Canada and the United States.

In Canada, as the ALRC noted, both a court-based process is applied to screen out unmeritorious claims, and plaintiffs must show actual *reliance* on the relevant disclosure when pleading negligence or fraudulent misrepresentation in securities cases (as opposed to the market causation theory, accepted in *Myer*, which presumes that shareholders rely on the integrity of the market price in making their investment decisions such that a misleading statement or omission affects all shareholders through the share price).

A certification process also applies in the United States. Indeed, a leading US class actions expert has observed that:

> *'The most dramatic advantage for plaintiffs of the Australian class action regime over its American counterpart is that classes in Australia have a much lower initial barrier to overcome. In the United States, the trial court must 'certify' the class before the case can proceed, which involves defining the parameters of the class and class claims, appointing class counsel, and finding that the class meets the comparatively detailed requirements of the Federal Rules of Civil Procedure. In order to be certified, the court must find that the class is 'so numerous that joinder of all members is impracticable', that there are questions of law or fact common to the class, that the representative parties have claims and defences typical of the class, and that they and their counsel will adequately protect the interests of the unnamed members of the class.'*[34]

iii. **Ensure flexibility in relation to class closure**

Class closure orders are a process where class members identify and register themselves for the purposes of determining and distributing settlement amounts. Without such orders, it is difficult, if not impossible, to determine the appropriate settlement sum and for respondents to achieve finality of litigation. We recommend that the courts be provided an express statutory power to be able to make class closure orders in order to provide certainty and clarity for both plaintiffs and defendants.

[34] Samuel Issacharoff and Thad Eagles, 'The Australian Alternative: A View from Abroad of Recent Developments in Securities Class Actions' (2014) 38(1) University of New South Wales Law Journal, 191.

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6. Regulation of litigation funders

ToR: • *the regulation and oversight of the litigation funding industry and litigation funding agreements*

As acknowledged by the ALRC and VLRC, there are inherent risks associated with litigation funders: failure to meet their obligations under funding agreements; using the Federal Court of Australia for improper purposes; and exercising influence over the conduct of proceedings to the detriment of plaintiffs.[35]

The AICD has consistently argued that litigation funders should be subject to an appropriate and nationally consistent regulatory regime which goes beyond the need to simply have adequate conflicts of interest arrangements in place, as is presently the case under the *Corporations Regulations 2001* (Cth).

In this respect, we welcome the Federal Government's announcement that it will regulate litigation funders under the Corporations Act, including that funders will be required to hold an AFSL and comply with the managed investment scheme regime. As noted by the ALRC, the litigation funding market in Australia has been growing and industry revenue is forecast to grow at an annualised 7.8 per cent over the five years through to 2022–2023.[36] Relevantly, all securities class actions filed in the Federal Court between 2013 and 2018 were funded by litigation funders.[37]

The AICD has always considered it essential that a litigation funder should satisfy:

- The Base Level Financial Requirements set out in ASIC Regulatory Guide 166;
- The requirements imposed on AFSL licensees who are involved in incurring actual contingent liability to a client in the course of providing a financial service;
- A liquid capital reserve requirement which is reasonably proportionate to the amount of its investments in litigation;
- Stronger rules to prevent or manage conflicts of interest; and
- An annual auditing and reporting requirement.

In addition, we recommend considering a regulated guarantee for a minimum return to class members in a securities class action, after legal costs. If class members do not receive at least a substantial majority of any recovery after legal and funder's fees have been paid, it cannot be said that the action was brought for the benefit of class members or in the interests of justice. For example, in *Richard Kirby v Centro Properties Limited* VID326/2008, the litigation funder took 40 per cent of the settlement award, and the plaintiff law firm took 14 per cent.[38]

The AICD also supports litigation funders joining the Australian Financial Complaints Authority. This should provide class members with an appropriate platform to resolve

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[35] Ibid 2, 153.
[36] Ibid, 49.
[37] Ibid, 76.
[38] Ibid 2, 319.

complaints and disputes without the need to resort to legal action. Currently, there is limited visibility of class-member complaints regarding funder arrangements or conduct, despite the assertion that there is a public benefit to their presence in the market. Recourse to the AFCA could partly address this while removing the need for consumers to pursue complaints through the courts, thereby creating an additional avenue to pursue access to justice.

7. Contingency fees

ToR:
- *the potential impact of proposals to allow contingency fees and whether this could lead to less financially viable outcomes for plaintiffs*
- *the consequences of allowing Australian lawyers to enter into contingency fee agreements or a court to make a costs order based on the percentage of any judgment or settlement*

The AICD does not support proposals to allow contingency fees, given the potential for such arrangements to give rise to significant conflicts of interest, erode the lawyer/client relationship and undermine lawyers' ethical duties.

As noted by the NSW Bar Association in its submission to the ALRC Inquiry, the introduction of contingency fees "in giving legal practitioners a direct and potentially substantial financial interest in the outcome of any given case, runs a serious risk of compromising the legal practitioner's fundamental duty to the court, the overriding duty of candour and potentially also the duty to a client".

We also note the recent statement of the Law Council of Australia, which opposes contingency fees as a matter of principle. The Council has expressed a fundamental concern that contingency fees could not be introduced without adversely affecting litigants' interests and lawyers' ethical duties, and posited that contingency fees will not promote access to justice.[39]

In any event, existing fee mechanisms provide a sufficient degree of flexibility in relation to legal fees to promote access to justice. Legal practitioners are already entitled to include uplift fees in costs agreements or provide clients with conditional costs agreements. Given the fact that the funding and class actions market is already very active in Australia, the AICD queries whether there is any need for further fee flexibility for legal practitioners. We have not seen any compelling evidence that there is unmet demand, or limited access to justice, in the current market. Such evidence should be presented before such a fundamental aspect of the lawyer-client relationship is altered.

8. Next steps

We hope our comments will be of assistance. If you would like to discuss any aspect of this submission further, please contact Christian Gergis, Head of Policy, at

[39] See Law Council Media Release on 13 March 2020, 'Contingency fees opposed by Law Council, https://www.lawcouncil.asn.au/media/media-releases/contingency-fees-opposed-by-law-council

cgergis@aicd.com.au, Sally Linwood, Senior Policy Adviser at slinwood@aicd.com.au or Sophie Stern, Senior Policy Adviser at sstern@aicd.com.au.

Yours sincerely

Louise Petschler GAICD
General Manager, Advocacy

Appendix 1: Herbert Smith Freehills Advice

HERBERT SMITH FREEHILLS

Comparative analysis of international corporate disclosure and liability regimes

JUNE 2018

Contents

Framing the debate

Listing Rules 3.1 and 3.1A of the Australian Securities Exchange (**ASX**) require listed entities to continuously disclose material price-sensitive information to the market, subject to certain exceptions. On their own, these rules create a sensible and balanced continuous disclosure regime that protects investors and ensures the operation of a fair and informed market. The regulatory burden created by these rules is similar to that imposed by the relevant securities exchanges in other comparable jurisdictions.

However, the Australian regulatory environment includes an additional element beyond those found in major capital markets such as the UK and the US. Section 674 of the *Corporations Act 2001* (Cth) (**Corporations Act**), in conjunction with the civil penalties regime in the Corporations Act, provides for a right for any person who suffers loss as a result of a contravention of ASX Listing Rule 3.1 to seek compensation from the relevant listed company and any person involved in the contravention. This is not a feature of the continuous disclosure regime in major comparable jurisdictions.

From the perspective of Australian listed entities, it is very difficult, if not impossible, to ensure ongoing comprehensive compliance with the continuous disclosure regime. Combined with Australia's relatively facilitative class action law, this creates a constant risk for listed companies that a class action can be brought by plaintiff lawyers representing a class of shareholders whenever there is a significant decline in share price. The relatively easy allegation is that the class has suffered loss as a result of a delay in disclosure of a material development in breach of the continuous disclosure rule.

Shareholders are rarely significant beneficiaries of shareholder class actions. Any settlement reached will be reduced by substantial legal fees involved and to the extent the settlement funds erode the assets of the company, continuing shareholders will indirectly wear the cost. The cost-benefit equation associated with Australia's current continuous disclosure law needs to be reconsidered. It is clear that concerns regarding the proliferation of disclosure-based securities actions will increase rather than abate over the next decade.

Key comparative analysis findings

Under ASX Listing Rule 3.1 and s 674 of the Corporations Act, once an entity listed on the ASX is or becomes aware of any information concerning itself that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately tell ASX that information through an announcement to the market. Breach of this obligation is an offence by the company and also attracts a civil penalty. Additionally, any person 'involved in' a contravention may be liable to a civil penalty (subject to a reasonable steps defence). This in turn entitles anyone who suffers damage as a result to seek a compensation order from a court.

Section 674, combined with Australia's plaintiff-friendly class action regime, means that Australian companies and directors are exposed to liability in a class action brought by shareholders who allege that they have suffered financial loss due to a company's failure to comply with its continuous disclosure requirements.

In the leading capital markets, while the disclosure rule is consistent with Australia's, the link to director liability under legislation is more remote, requiring an element of misleading conduct or behaviour on the part of the company and its officers. In some of the other smaller jurisdictions, where the legislative framework is closer to the Australian provisions, the disclosure requirements are not linked with class action laws analogous to the Australian provisions which facilitate the commencement of class actions on behalf of broad classes of shareholders.

In Australia, in addition to s 674, companies and their officers have exposure under s 728(2) of the Corporations Act. A person is taken to make a misleading statement about a future matter in a disclosure statement if they do not have reasonable grounds for making the statement. A court may order any person involved in making such a statement to pay compensation to any person who suffers damage. An officer may also be held liable through principles of accessorial liability for misleading statements made by a company, for which they may be subject to a pecuniary penalty, or imprisonment, or both. There is no 'safe harbour' exemption which allows for the exclusion of liability by identifying a statement as a forward-looking statement and including a proximate cautionary statement.

By way of comparison, in the US, a safe harbour exemption may be secured through identifying a statement as forward-looking and using meaningful cautionary statements which identify important factors that could cause the actual results to differ materially from those in the forward-looking statement. The safe harbour only applies to private civil suits and does not apply to civil and criminal enforcement actions brought by the SEC or other regulatory agencies, among other specific exceptions that apply.

In Canada, a person or company is not liable for a misrepresentation if the document or public oral statement containing the forward-looking information contained, proximate to that information:

- reasonable cautionary language identifying the forward-looking information as such, and identifying material factors that could cause actual results to differ materially from a conclusion, forecast or projection in the forward-looking information; and
- a statement of the material factors or assumptions that were applied in drawing a conclusion or making a forecast or projection set out in the forward-looking information.

Attachment 1 – Australian position

Question	Answer	Source
Are listed companies subject to a continuous disclosure obligation?	Yes. Subject to some exceptions, once an entity listed on the Australian Securities Exchanges (ASX) is or becomes aware of any information concerning itself that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately tell ASX that information through an announcement to the market.	ASX Listing Rule 3.1 Corporations Act (**CA**), s 674
	Breach of this obligation is an offence by the company and also attracts a civil penalty.	CA, s 674
	A court may order the company to pay compensation to any person who suffers damage as a result of a breach. This may be used as a basis for bringing a shareholder class action.	CA, ss 1317DA, 1317E, 1317HA and 1317J.
	The Australian Securities and Investments Commission (ASIC) may issue an infringement notice to the company, which carries a financial penalty.	CA, s 1317DAC
To establish a contravention, does the failure to disclose relevant information to the market need to be intentional, reckless or negligent?	To succeed in establishing a criminal offence under s 674(2) of the *Corporations Act 2001* (Cth), the prosecution must prove that the entity intended to engage in the prohibited conduct.	Cth Criminal Code
	Where an entity's failure to disclose is merely negligent, there is no offence under s 674(2), however a pecuniary penalty or compensation order may be made.	CA, s 678
Are any defences available to a breach of continuous disclosure requirements?	A statutory defence is available if the person proves they took all steps that were reasonable in the circumstances to ensure that the listed disclosing entity complied with its obligations under subsection 674(2); and after doing so, believed on reasonable grounds that the listed disclosing entity was complying with its obligations under that subsection. This defence applies to a person who is involved in a listed disclosing entity's contravention of its continuous disclosure obligations rather than to the entity itself.	CA, s 674(2B)
Can directors be liable if the company breaches	Yes. Any person "involved in" a contravention may be liable to a civil penalty (subject to a reasonable steps defence).	CA, s 674.

this obligation? Please provide details of the extent of the liability.	A court may order the person involved to pay compensation to any person who suffers damage as a result of a breach. This may be used as a basis for bringing a shareholder class action.	CA, ss 1317DA, 1317E, 1317HA and 1317J.
	The maximum pecuniary penalty for individuals involved in a contravention is up to $200,000.	CA, s 1317G.
	A director who is prosecuted under principles of accessorial liability (i.e. aiding and abetting etc) for the company's breach of the continuous disclosure rule could be liable to fines of up to 200 penalty units (currently $210 per unit) or imprisonment for 5 years, or both.	CA, Schedule 3.
	Directors can be personally liable for breach of their directors' duties, including the duty of due care and diligence.	CA, s 180
	The company's breach of the continuous disclosure obligation (and a director's involvement in it) could be used as evidence of an alleged breach of directors' duties.	
	A finding that there has been a breach of the continuous disclosure rule by the company does not automatically mean that a director has breached their duties.	
Are there significant company / corporations law penalties for false or misleading statements in corporate reports?	Yes.	
	Subject to some qualifications, a court may order a person to pay compensation to any person who suffers damage for the reasons outlined in 1 to 3 below. This may be used as a basis for bringing a shareholder class action.	CA, s 1041I
	1. the person engages in conduct that is misleading or deceptive or is likely to mislead or deceive;	CA, s 1041H
	2. the person makes a statement or disseminates information that is false in a material particular or is materially misleading and does not care whether it was true or false or knew or ought reasonably to have known that it was materially false or misleading; or	CA, s 1041E
	3. the person makes or publishes a statement, promise or forecast that the person knows, or is reckless as to whether, the statement is misleading, false or deceptive.	CA, s 1041F
	Breach of 2 and 3 above is also an offence.	CA, ss 1041E and 1041F
	For the purposes of 1 to 3 above, representations about future matters are deemed to be misleading if the person who makes the representations does not have reasonable grounds for making the statement.	CA, s 769C
	In addition, the Corporations Act creates some specific offences relating to false and misleading statements that are made or authorised by a person who does not take reasonable steps to ensure that the statement is not false or misleading.	CA, ss 1308 and 1309
Are there any specific	Under various provisions of the Corporations Act, a statement about future matters must be based on reasonable grounds at the date the statement is made or it will be misleading.	CA, ss 670A(2), 728(2) and

requirements imposed by law in relation to forward-looking statements?		769C, ASIC Act s 12BB(1).
Can directors be personally liable for these statements? Please provide details of the extent of the liability.	Yes. A court may order any person involved in a contravention of 1 to 3 in the section above to pay compensation to any person who suffers damage. This may be used as a basis for bringing a shareholder class action.	CA, s 1041I
	It is possible for a director to be directly liable for the offences listed in 2 and 3 in the section above and for offences under ss 1308 and 1309, or through principles of accessorial liability (i.e. aiding and abetting etc) for someone else's breach. The penalty for an individual who is liable under 2 and 3 in the section above is imprisonment for 10 years or a fine the greater of the following: • 4,500 penalty units (currently $210 per unit); • if the court can determine the total value of the benefits that have been obtained that are reasonably attributable to the commission of the offence - 3 times that total value; or both. The maximum penalty for an individual who is liable under ss 1308 and 1309 depends on the type of breach but is between 100 and 200 penalty units or 2 – 5 years imprisonment, or both.	CA, Schedule 3.
	Directors can be personally liable for breach of their directors' duties, including the duty of due care and diligence. The company's breach of false or misleading statement rules (and a director's involvement in it) could be used as evidence of an alleged breach of directors' duties. A finding that there has been a breach of false or misleading statement rules by the company does not automatically mean that a director has breached their duties.	CA, s 180
Is there a "safe harbour" exemption from liability for forward looking statements in corporate reports?	No.	N/A

In a shareholder claim, what must the claimant prove to establish that the company's contravention caused their loss?	In shareholder claims based upon causes of action under the Corporations Act 2001 (Cth), shareholders must establish that they have suffered loss or damage "as a result of" (in the case of continuous disclosure) or "by" (in the case of misleading conduct) the contravening conduct. This requires a sufficient causal connection to be established between the contravening conduct and the loss or damage suffered. A sufficient causal connection: (i) is established if shareholders can prove direct reliance on the contravening conduct; and (ii) may be established through indirect reliance is sufficient, for example, market-based causation theories. There is some judicial support for indirect reliance, but there is continued uncertainty as no intermediate court has determined the issue.	*HIH Insurance Limited (in liquidation) & Ors [2016] NSWSC 482,*

Attachment 2 – Advices received from international jurisdictions

Canada

Question	Answer	Source
General Overview	Canada does not have a national securities regulator. Canada's provinces have enacted securities laws and regulations and provincial securities regulators are tasked with the enforcement of those laws and regulations. While there is a good degree of harmonisation among the provinces, there can be important differences. Securities regulation in Canada therefore consists of a patchwork of legislation, regulations, rules, instruments and policies. Capital markets are also regulated by stock exchanges, the most notable of which is the Toronto Stock Exchange (TSX), and self-regulatory organisations such as the Investment Industry Regulatory Organization of Canada (IIROC), all of which are subject to the oversight of the provincial securities commissions. These stock exchanges and self-regulatory organisations typically have by-laws, procedures and other rules that regulate the capital markets activity that falls within the scope of their jurisdiction. The Criminal Code of Canada contains a few offences that relate to securities and capital market matters, including general offences such as fraud that can apply in the securities context, and offences particular to securities, such as manipulation of a stock exchange and insider trading. However, provincial securities legislation also contains quasi-criminal provisions. Business corporation statutes also have a bearing on securities regulation. For example, this legislation addresses aspects of corporate governance and the exercise of shareholder rights such as voting and proxy solicitation, and also includes robust statutory protections of minority shareholders in the form of the oppression remedy. The common law also plays a role in the private enforcement of breaches of applicable securities law – for example, the common law tort of negligent misrepresentation is often relied on in proceedings concerning the adequacy of an issuer's public disclosure. In light of the above description, we have attempted to answer the questions below in a general, non-exhaustive manner and with reference to National Instrument 51-102 –Continuous Disclosure Obligations, which applies in all jurisdictions of Canada, and the Ontario Securities Act (the "Securities Act"), which applies only in the province of Ontario. We have focussed on Ontario because a large majority of the large cap listed issuers are headquartered in Toronto, Canada's business centre. There are a variety of different procedures pursuant to which a reporting issuer, or an officer or director thereof, may be subject to liability for failure to fulfil its continuous disclosure obligations. Each applicable procedure may afford defendants and plaintiffs alike with varying burdens of proof and limitations of liability and the answers that follow cite examples but do not purport to specifically address all such matters for all such available procedures. Moreover, these	Article:The Securities Litigation Review, 1st Edition, 2015

	procedures vary from jurisdiction to jurisdiction and not all the procedures set forth herein are available in all jurisdictions in Canada. Finally, the information contained herein does not constitute a legal opinion and may not be held out by any person as being legal advice provided by Davies Ward Phillips & Vineberg LLP. Any specific legal advice would need to be tailored to the specific facts at hand and to the laws and regulations governing the specific jurisdiction and procedure in question.	
Are listed companies subject to a continuous disclosure obligation?	Immediately after the occurrence of a "material change" in the affairs of a reporting issuer, the issuer must issue and file with the securities regulatory authority in each jurisdiction in which it is a reporting issuer (the "Applicable Regulators") a press release authorized by an executive officer disclosing the nature and substance of the material change. As soon as practicable thereafter, and in any event within 10 days of the date on which the change occurs, the issuer must file with the Applicable Regulators a Form 51-102F3 – Material Change Report with respect to the material change. The timely disclosure policy of the TSX requires the timely public disclosure of "material information", defined as information relating to the business and affairs of a reporting issuer that results in, or would reasonably be expected to result in, a significant change in the market price or value of any of its listed securities. This requirement supplements the provisions of National Instrument 51-102. Material information consists of both material facts and material changes relating to the business and affairs of an issuer and is a broader term than "material change" since it encompasses material facts that may not meet the definition of material change in National Instrument 51-102.	National Instrument 51-102 Securities Act Section 51 Toronto Stock Exchange Company Manual
To establish a contravention, does the failure to disclose relevant information to the market need to be intentional, reckless or negligent?	In general, no, subject to certain prescribed statutory burdens of proof discussed below and subject to the availability of certain defences described below and available at common law.	Ontario Securities Act Section 1(1), definition of misrepresentation relating to omissions does not include intentional, reckless or negligence elements.
Are any defences available to a breach of continuous	Yes, depending on the type of action being taken. In respect of any offences generally, the Securities Act provides that no person or company is guilty of an offence if the person or company did not know and in the exercise of reasonable diligence could not have known that the statement was	Section 122 of the Securities Act.

disclosure requirements?	misleading or untrue or that it omitted to state a fact that was required to be stated or that was necessary to make the statement not misleading in light of the circumstances in which it was made In respect of civil actions for primary and secondary liability, the Securities Act sets out a defence relating to reasonable inquiries. For example, a person will not be liable for secondary market liability if that person or company proves that, (i) before the failure to make timely disclosure first occurred, the person or company conducted or caused to be conducted a reasonable investigation, and (ii) the person or company had no reasonable grounds to believe that the failure to make timely disclosure would occur.	Section 130(2) and following of the Securities Act Section 131(4) and following of the Securities Act. Part XXIII.1 of the Securities Act
Can directors be liable if the company breaches this obligation? Please provide details of the extent of the liability.	Yes. Applicable securities legislation provides for various ways in which directors liability may be invoked, including, administrative enforcement proceedings, primary market claims, secondary market claims and quasi criminal proceedings (the "**Various Enforcement Proceedings**"). Primary and secondary market claims are subject to particular rules regarding the calculation of damages. In respect of quasi criminal proceedings, the issuer and every director and officer of the issuer who authorizes, permits or acquiesces in the contravention of the Securities Act may be liable for a fine or imprisonment.	Section 122 of the Securities Act. Part XXIII of the Securities Act Part XXIII.1 of the Securities Act
Are there significant company / corporations law penalties for false or misleading statements in corporate reports?	A failure by the issuer to make timely disclosure of material changes will constitute a contravention of the Securities Act. Similarly, the making of a statement in a press release or material change report that, at the time and in light of the circumstances under which it was made, is a misrepresentation also constitutes a contravention of the Securities Act. In either event, the issuer and every director and officer of the issuer who authorizes, permits or acquiesces in the contravention may be liable for a fine of up to $5,000,000 or to imprisonment for a term of not more than five years less a day, or to both	S.122 of the Securities Act.
Are there any specific requirements imposed by law in relation to forward-	In general, market practice in Canada is to include robust cautionary language regarding forward looking statements. Such statements may, in certain circumstances provide a defence to claim for misrepresentation.	

looking statements?		
Can directors be personally liable for these statements? Please provide details of the extent of the liability.	Yes directors may be liable in all of the Various Enforcement Proceedings, as discussed in more detail above.	
Is there a “safe harbour” exemption from liability for forward-looking statements in corporate reports?	Yes, for primary and secondary shareholder liability, a person or Company is not liable for a misrepresentation if the document or public oral statement containing the forward-looking information contained, proximate to that information, 1. i. reasonable cautionary language identifying the forward-looking information as such, and identifying material factors that could cause actual results to differ materially from a conclusion, forecast or projection in the forward-looking information, and ii. a statement of the material factors or assumptions that were applied in drawing a conclusion or making a forecast or projection set out in the forward-looking information. 2. The person or company had a reasonable basis for drawing the conclusions or making the forecasts and projections set out in the forward-looking information.	Part XXIII of the Securities Act Part XXIII.1 of the Securities Act
In a shareholder claim, what must the claimant prove to establish that the company’s contravention caused their loss?	In respect of primary market liability, the defendant is not liable for such portion of damages that the defendant proves do not represent the depreciation in value of the security as a result of the misrepresentation relied upon. In respect of secondary market liability, the plaintiff must prove in relation to a failure to make timely disclosure, that the person or company, (a) knew, at the time that the failure to make timely disclosure first occurred, of the change and that the change was a material change; (b) at the time or before the failure to make timely disclosure first occurred, deliberately avoided acquiring knowledge of the change or that the change was a material change; or (c) was, through action or failure to act, guilty of gross misconduct in connection with the failure to make timely disclosure. In respect of the above provisions, the Securities Act is not more specific regarding causation, and general principles of	Part XXIII of the Securities Act. Part XXIII.1 of the Securities Act

common law are applicable to establishing causation.

Additional comments on shareholder class actions: Both in theory and in practice, shareholders can and do bring class actions for breach of a reporting issuers disclosure obligations. As a matter of practice, the threshold for certification for such a class action tends to be higher than a standard civil class action.

Hong Kong

Question	Answer	Source
Are listed companies subject to a continuous disclosure obligation?	Yes. Under Part XIVA of the Securities and Futures Ordinance (**SFO**), a listed company is obliged to disclose "inside information" to the public as soon as reasonably practicable after such information has come to its knowledge, unless one of the prescribed safe harbours applies. Inside information is specific information about a listed company, its shareholders, officers or securities which is not generally known to those accustomed or likely to deal in its listed securities, but if known, would be likely to materially affect the price of the listed securities. In addition to the failure to disclose, a listed company will also be in breach of the disclosure obligation if the information disclosed is false or misleading as to a material fact (including through omission where an officer of the company knows (or ought reasonably to have known) that, or is reckless or negligent as to whether, the information disclosed is false or misleading. Under the Listing Rules, a listed company must as soon as practicable after consultation with the Hong Kong Stock Exchange (**SEHK**), announce the information necessary to avoid a false market in its securities. Where a company is required to disclose inside information under Part XIVA of the SFO, it must also simultaneously announce the information under the Listing Rules.	 SFO, s 307A, SFO, s 307B Main Board Listing Rules, 13.09
To establish a contravention, does the failure to disclose relevant information to the market need to be intentional, reckless or negligent?	In respect of a listed company, no. Please see below in respect of directors.	
Are any defences available to a breach of continuous disclosure requirements?	There are no available defences under the SFO for breaches by the listed company. However, the SFO provides safe harbours which permit a listed company to withhold disclosure of inside information under certain circumstances. These include where: (a) disclosure is prohibited under, or would constitute a breach of, a Hong Kong court order or a Hong Kong statute; (b) the information concerns an incomplete proposal or negotiation; (c) the information is a trade secret; (d) the information is related to the provision of liquidity support to the listed company or its group by the exchange fund of the Hong Kong government or by an institution which performs the functions of a central bank (whether in Hong Kong or elsewhere); or (e) the Securities and Futures Commission (**SFC**) has waived disclosure (eg where disclosure would	SFO, s 307D

	contravene foreign legislation or a foreign court order). Safe harbours (b) to (e) above are only available if the listed company has taken reasonable precautions to preserve the confidentiality of the inside information, and confidentiality is in fact preserved. Please see below in respect of directors.	
Can directors be liable if the company breaches this obligation? Please provide details of the extent of the liability.	If a listed company is in breach of the disclosure obligation under the SFO, its directors are also in breach if their intentional, reckless or negligent conduct resulted in the breach or they failed to take all reasonable measures to ensure that proper safeguards exist to prevent the breach.	SFO, 307G
	The Market Misconduct Tribunal (**MMT**) may impose a wide range of civil sanctions and orders on a person in breach (which may include a director), including: - a disqualification order, prohibiting the person from being a director, liquidator, or receiver or manager of the property or business of a company, or from being involved (directly or indirectly) in its management, for up to five years except with the leave of the court; - a cold shoulder order, prohibiting the person from acquiring, disposing of or dealing (directly or indirectly) in Hong Kong in securities and other financial products for up to five years except with the leave of the court; - a cease and desist order, prohibiting conduct in breach of a disclosure requirement; - a regulatory fine (for listed companies, directors and chief executives only) to the government of up to HKD8 million; - a cost order to pay the SFC's and government' reasonable costs and expenses for the MMT proceedings and any investigation; - a disciplinary action referral order to any body recommending disciplinary action be taken; and - any other necessary order to prevent future breaches, including that the company appoint an SFC-approved independent professional adviser to review its compliance procedure or that its directors undergo an SFC-approved compliance training program.	SFO, 307N
	Directors of listed companies who are in breach of a disclosure requirement as mentioned above may also face civil claims for compensation from parties who have sustained pecuniary loss as a result of the breach. Liability to pay compensation (by way of damages) may regardless of whether such person also incurs any other liability (under Part XIVA of the SFO or	SFO, s 307Z

	otherwise).	
	In addition to the failure to disclose, if the information disclosed is materially false or misleading, this may also give rise to separate criminal offences under the SFO relating to disclosure of false or misleading information (see further below).	SFO, s277, s298
	Where disciplinary proceedings are conducted in relation to a breach of the Listing Rules, the SEHK may impose a number of disciplinary sanctions against directors, including:	Main Board Listing Rules, 2A.09
	- a private reprimand, public criticism or public censure; - requiring rectification or other remedial action to be taken in relation to the breach within a specified period; - reporting the conduct to the SFC, another regulatory authority (including a professional body) or an overseas regulatory authority; and - in the case of wilful or persistent failure by a director, state publicly that, in its opinion, the retention of office by the director is prejudicial to the interest of investors.	
Are there significant company / corporations law penalties for false or misleading statements in corporate reports?	Yes.	SFO, s277, s 298
	Subject to certain statutory defences, a person must not, in Hong Kong or elsewhere, disclose, circulate or disseminate (or authorise or be concerned in the disclosure, circulation or dissemination of) information which is likely to induce the sale, purchase or subscription of securities or dealing in futures contracts in Hong Kong, or is likely to affect the price of securities or futures contracts in Hong Kong, where the person knows that (or is reckless/negligent as to whether) the information is false or misleading as to a material fact, or through the omission of a material fact.	
	Breach of this prohibition can be pursued in the MMT (civil regime) or the criminal courts. The maximum criminal penalties upon conviction are a fine of HKD10 million and ten years imprisonment on indictment, or HKD1 million and imprisonment for three years on summary conviction.	SFO, s 302
	In relation to Hong Kong incorporated companies, a director is liable to compensate the company for any loss suffered by the company as a result of any untrue or misleading statement in the report or for the omission of any required information where the director knew the statement was untrue or misleading or was reckless as to whether it was, or knew the omission to be dishonest concealment of a material fact.	Companies Ordinance, s 448
	Additionally, a person commits an offence if they knowingly or recklessly make statements in any return, report, financial statement, certificate or other document required by the Companies Ordinance which are misleading, false or deceptive in any material particular. The maximum penalties are a fine of HK$300,000 and imprisonment of up to two years if convicted	Companies Ordinance, s 895

	on indictment, or a fine of up to HK$100,000 and imprisonment of up to six months on summary conviction.	
Are there any specific requirements imposed by law in relation to forward-looking statements?	No.	
Can directors be personally liable for these statements? Please provide details of the extent of the liability.	Yes. Please see above in respect of liability for false or misleading statements.	
Is there a "safe harbour" exemption from liability for forward-looking statements in corporate reports?	No.	
In a shareholder claim, what must the claimant prove to establish that the company's contravention caused their loss?	In a civil claim for compensation for breach of a disclosure requirement under the SFO, the claimant will need to show that they have sustained pecuniary loss and that such loss was sustained as a result of the relevant breach by the defendant. The SFO expressly provides that it is not necessary for the claimant to prove that the loss arises from the claimant having entered into a transaction or dealing at a price affected by the relevant breach. Damages may only be awarded if the court decides that it is fair, just and reasonable to do so in the circumstances of the case. There is no judicial authority on a civil claim under the SFO. When adjudicating such civil claim, it is expected that the court will likely apply common law principles like breach of duty, causation, remoteness, measure of damages, etc. The court may also grant an injunction in addition to, or in substitution for, damages. Findings of breach by the MMT are *prima facie* evidence of the breach of a disclosure requirement for the purpose of a civil claim, but are not a prerequisite to an award of damages. It should be noted that Hong Kong does not have class action laws. The above statutory right to a civil claim does not limit or diminish any rights conferred on a claimant under the common law or any other enactment.	SFO, s 307Z

South Africa

Question	Answer	Source
Are listed companies subject to a continuous disclosure obligation?	Yes. The Listings Requirements (LR) of the Johannesburg Stock Exchange (the JSE) place a general obligation of disclosure on listed companies (Issuers). Issuers must, without delay, unless the information is kept confidential for a limited period of time, release an announcement providing details relating, directly or indirectly, to such Issuer that constitutes price sensitive information. Price sensitive information is defined as unpublished information that is specific or precise which if it were made public, would have a material effect on the price of the Issuer's securities. In terms of the Financial Markets Act, 2012 (the FMA) an exchange (the JSE is a licensed exchange in terms of the FMA) may require an issuer of listed securities to disclose to it any information at the Issuer's disposal about those securities, or about the affairs of that Issuer, if such disclosure is necessary to achieve one or more objects of the FMA. The objects of the FMA include the aim of ensuring that the South African financial markets are fair, efficient and transparent. Breaches of these obligations could result in reprimand, financial penalty or ultimately suspension or termination of listing. In terms of the FMA an exchange in formulating listings requirements must make provision for the above penalties if there is a contravention or failure to comply with the listings requirements. If a person fails to pay a fine the exchange may file with a competent court a statement certified by it as correct, stating the amount of the fine imposed and such statement thereupon has all the effects of a civil judgment against the person in favour of the exchange for a liquid debt in the amount specified in the statement.	JSE LR 3.4 JSE Practice Note 2/2015 Section 14 of the FMA JSE LR 1.6 – 1.10; 1.21 Section 11(1)(g) and (3) of the FMA
To establish a contravention, does the failure to disclose relevant information to the market need to be intentional, reckless or	A contravention under the FMA could be established irrespective of the intention, recklessness or negligence of the relevant person. The sanction, however, may be influenced by the conduct of the person. A contravention of the LR would generally be constituted whether it is intentional, reckless or negligent, but the sanction may be influenced by the intention, recklessness or negligence of the Issuer.	

negligent?		
Are any defences available to a breach of continuous disclosure requirements?	No specific defences are set out in the LR or the FMA.	
Can directors be liable if the company breaches this obligation? Please provide details of the extent of the liability.	Yes. The LR provides that all directors of issuers are bound by and must comply with the LR in their capacities as directors and in their personal capacities. The FMA also provides that the LR would bind the company, its directors, officers, employees and agents. The penalties above could equally apply to directors. In addition, directors could be disqualified from holding the office of director for any period of time.	LR 3.62 Section 11(5) of the FMA
Are there significant company / corporations law penalties for false or misleading statements in corporate reports?	Yes. The South African Companies Act, 2008 (the Companies Act) provides for the inclusion of a report by the directors with respect to the state of affairs, the business and profit or loss of the company including any matter material for the shareholders to appreciate the company's state of affairs and any prescribed information. The Companies Act provides that a person is guilty of an offence if the person is a party to the falsification of any accounting records of a company, with a fraudulent purpose, knowingly provided false or misleading information in any circumstances in which the Companies Act requires the person to provide information or was knowingly a party to any act or omission by a company calculated to defraud a creditor or employee of the company, or a holder of the company's securities, or with another fraudulent purpose. Any person convicted of an offence in terms of the Companies Act is liable in the case of a contravention of the above section to a fine or to imprisonment for a period not exceeding 10 years, or to both a fine and imprisonment.	Section 30, 214, 216 and 218(2) of the Companies Act

	In addition any person who contravenes a provision of the Companies Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention.	
Are there any specific requirements imposed by law in relation to forward-looking statements?	Yes. The LR specifically deals with profit forecasts and estimates. There are detailed requirements applicable to forecasts or estimates and statements or information relating to the future prospects of an Issuer. The FMA provides that no person may, directly or indirectly, make or publish in respect of securities traded on a regulated market, or in respect of the past or future performance of a company whose securities are listed on a regulated market: • any statement, promise or forecast which is, at the time and in the light of the circumstances in which it is made, false or misleading or deceptive in respect of any material fact and which the person knows, or ought reasonably to know, is false, misleading or deceptive; or • any statement, promise or forecast which is, by reason of the omission of the material fact, rendered false, misleading or deceptive and which the person knows, or ought reasonably to know, is rendered false, misleading or deceptive by reason of the omission of the fact. A person who contravenes the above section commits an offence. A person who commits this offence is liable on conviction to a fine not exceeding R50 million or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.	LR 8.35 and further Section 81 of the FMA Section 81(3) and 109 of the FMA
Can directors be personally liable for these statements? Please provide details of the extent of the liability.	Yes, the provisions apply to "any person". For the extent of the liability see above.	
Is there a “safe	No, not specifically.	

harbour" exemption from liability for forward-looking statements in corporate reports?	
In a shareholder claim, what must the claimant prove to establish that the company's contravention caused their loss?	A shareholder would have to prove a loss and that the loss was caused by the company's contravention.

Additional comments on shareholder class actions: Class actions are fairly new in South Africa, but a class action would be possible in these circumstances if it there are questions of law and fact common to the class (i.e. the shareholders). A class action in South Africa requires certification by a court.

United Kingdom

Question	Answer	Source
Are listed companies subject to a continuous disclosure obligation?	Yes. <u>Inside information</u> Listed companies are required to notify a Regulatory Information Service (**RIS**) as soon as possible of any inside information which directly concerns the company (subject to a limited ability to delay disclosure if specific conditions are met). Companies are required to have adequate procedures, systems and controls in place to ensure that the information is escalated to the board to enable it to decide whether any information is inside information which should be disclosed. <u>[Periodical financial information]</u> A listed company is required to publish annual reports as soon as possible and in any event within four months after the end of each financial year. The annual financial report must include the audited financial statements, a management report and responsibility statements. A listed company is also required to publish half-yearly financial reports as soon as possible and in any event no later than three months after the end of the period to which it relates. The half-yearly reports must include a condensed set of financial statements, an interim management report and responsibility statements.	Article 17, Market Abuse Regulation 596/2014 (**MAR**) Listing Rules (**LR**) 7.2 Transparency Rules (**DTR**) DTR 4.1.3 DTR 4.2.
To establish a contravention, does the failure to disclose relevant information to the market need to be intentional, reckless or negligent?	<u>Inside information</u> The Financial Conduct Authority (**FCA**) can impose a financial penalty and/or a censure and/or a restitution order for a failure to comply with the requirements under MAR including a failure to satisfy the requirement to disclose inside information to an RIS. To establish a contravention for a failure to satisfy the continuous disclosure obligation under MAR, it must be shown that the person has contravened the requirement or has been knowingly concerned in the contravention of that obligation. Therefore, there is no requirement for fault or intention in relation to the contravention by the company itself.	Section 123, Section 382, Financial Services and Markets Act 2000 (**FSMA**)

	[Periodical financial information] The FCA can impose a financial penalty and/or a restitution order for a breach of the obligations under DTR 4 in relation to periodic financial reports. To establish a contravention for a failure to comply with the requirements in relation to periodic financial reports, it must be shown that the person has contravened the requirement or has been knowingly concerned in the contravention. Again, therefore there is no requirement for fault or intention in relation to the contravention by the company itself.	Section 91, Section 382 FSMA
Are any defences available to a breach of continuous disclosure requirements?	No	N/A
Can directors be liable if the company breaches this obligation? Please provide details of the extent of the liability.	Inside information Yes. A director can be liable for a breach of the continuous disclosure requirement in MAR if he/she has been knowingly concerned in the contravention. Under section 123 FSMA, the FCA can impose a financial penalty of such amount as it considers appropriate and/or issue a censure and/or impose a restitution order (although a restitution order has not been imposed on a director to date). [Periodical financial information] Yes. A director can be liable if he/she was knowingly concerned in the failure to comply with the obligation to publish periodic financial information under DTR 4. The FCA may impose a financial penalty of such amount as it considers appropriate and/or issue a censure and/or impose a restitution order (although a restitution order has not been imposed on a director to date).	Section 123 Section 382, FMSA Section 91 Section 382, FMSA
Are there significant company / corporations law penalties for false	Yes, under both civil and criminal law. Civil liability A company that issues false or misleading statements in a periodic financial report may be liable to a financial penalty	Section 91

or misleading statements in corporate reports?	and/or censure or restitution order from the FCA . Under section 90A FSMA, a company is liable to pay compensation to a person who acquires, continues to hold or disposes of the securities and has suffered a loss as a result of: 1. any untrue or misleading statement in information published via an RIS, which includes annual and half yearly reports; or 2. the omission from that published information of any information required to be included in it. A company will only be liable under section 90A FSMA if a director knew that the statement was untrue or misleading, or was reckless as to whether it was, or knew the omission was a dishonest concealment of a material fact. <u>Criminal liability</u> It is a criminal offence for a person: 1. to make a statement which they know to be materially false or misleading; 2. to dishonestly conceal any material facts; or 3. recklessly make (dishonestly or otherwise) a statement which is materially false or misleading, for the purpose of inducing (or being reckless as to whether it may induce) a person to make an investment decision or exercise any rights relating to investments. The offence is punishable with imprisonment for up to seven years or an unlimited fine, or both. A body corporate can be convicted of the offence as well as an individual.	Section 382 FSMA Section 90A and Sch 10A, FSMA Section 89, Financial Services Act 2012 (**FS Act 2012**)
Are there any specific requirements	No. There are no special additional requirements that relate to forward-looking statements.	N/A

imposed by law in relation to forward-looking statements?		
Can directors be personally liable for these statements? Please provide details of the extent of the liability.	<u>Civil liability</u> Apart from the regulatory liability of directors described above for being knowingly concerned in a regulatory breach, the basic rule is that a director of a listed company cannot be liable to investors in respect of an untrue or misleading statement in published information. This is, however, subject to certain limited exceptions, that is: liability under section 90 FSMA (in respect of a misleading prospectus), civil liability for breach of contract, civil liability under the Misrepresentation Act 1967, criminal liability or liability arising from a person having assumed responsibility for the accuracy of the information. A director can be liable to compensate the company (but not any third party) for any loss suffered as a result of any untrue or misleading statement in an annual report but only if he/she knew it was misleading or was reckless as to whether it was, or knew it was a dishonest concealment of a material fact. <u>Criminal liability</u> Under the CA, directors must not approve the annual accounts unless they give a true and fair view of the company. Directors must approve the annual report and accounts and ensure that they are prepared in accordance with the requirements of CA. If a director fails to ensure that the annual report and accounts are prepared in accordance with these requirements, he/she will be guilty of an offence and liable to a fine unless he/she took reasonable steps to secure compliance. If a director deliberately or recklessly makes a false or misleading statement in order to induce another person to make an investment decision he/she will be guilty of an offence and liable to a fine or imprisonment	Paragraph 7 (2), Sch 10A FSMA Section 463, Companies Act 2006 (**CA**) Section 414, CA Section 414D, CA Section 419 CA Sections 89 and 92, FS Act 2012

Is there a "safe harbour" exemption from liability for forward-looking statements in corporate reports?	Yes. Section 463 CA provides a "safe harbour" for directors from liability for misleading statements in the narrative parts of the annual report and accounts. Under section 463, a director will not be liable to any third party who has placed reliance on statements contained in the narrative parts of the annual report and a director is only liable to the company for those statements if he/she knew the statement was misleading or was reckless as to whether it was misleading or he/she dishonestly omitted material information. This does not apply to any other corporate reports, but there is no direct liability of a director for those other reports unless the director is knowingly concerned in a breach of the regulatory requirements in relation to the content of the report.	Section 463, CA
In a shareholder claim, what must the claimant prove to establish that the company's contravention caused their loss?	There is no civil statutory liability of directors to shareholders. In relation to the statutory liability of a company to shareholders, in order to establish a claim for loss against the company for a misleading statement or omission to make a disclosure, a shareholder must show that a director knew that the statement was materially misleading or was reckless as to whether it was, or that a director dishonestly concealed a material fact, and that he acquired, continued to hold or disposed of the relevant securities in reliance on the misleading statement or omission, that the reliance was reasonable and that he suffered a loss as a result. The FCA can also make a restitution order against the company under section 382 FSMA if the company has contravened a requirement under FSMA, including in relation to the continuous disclosure obligation or publication of periodic financial information (and could make a restitution order against a director who was knowingly concerned in the contravention). In order for a shareholder to claim for restitution if such an order is made, it must show that it has suffered a loss or been adversely affected as a result of the contravention.	Paragraph 3(4),Sch 10A FSMA Section 382, FMSA

United States

Question	Answer	Source
Are listed companies subject to a continuous disclosure obligation?	Yes. <u>Securities Exchange Commission</u> Listed companies are required to file periodic reports with the Securities Exchange Commission (**SEC**) which provide information about the company's financial position, and update information included in previous reports. Reports are electronically filed with the SEC at the end of the applicable fiscal reporting period, and also after certain material events have occurred (such as entering into material agreements, acquisitions of businesses or assets, and changes in management). Additionally, continuous disclosure requirements are imposed on listed companies to correct prior inaccurate disclosures, to avoid or attempt to remediate insider trading, and if the company is purchasing its own securities or offering its securities. Further, Regulation FD (Fair Disclosure) requires any "reporting company"[1] to make public any material, non-public information (oral or written) disclosed by a senior official or officer of the company to the financial community or security holders, to avoid a disparity of access to information between market participants.	Section 13(a) and Section 15(d), the Securities Exchange Act of 1934 (**Exchange Act**)
	<u>US securities exchanges</u> SEC periodic reports and filings must also be filed with securities exchanges on which the companies' securities are listed. The NYSE and the NASDAQ, the two primary US securities exchanges, accept SEC reports and filings through the SEC's electronic filing platform (EDGAR) as being simultaneously filed with the securities exchange. In addition to the SEC filing requirements, the NYSE and the NASDAQ require companies to promptly and publicly disclose any material information which might affect the market, such as important developments with customers or suppliers, financial disclosures, or any event requiring the filing of a Form 8-K.[2] An exception to the NASDAQ and NYSE disclosure requirement exists for information which the relevant company needs to maintain confidential, provided that the company ensures that it does not lead to any unfair trading advantage as a result.	Section 202.5 and 202.6 of the NYSE Regulation Section 5250 of the NASDAQ Regulation
To establish a	Under US securities laws, in order to establish a contravention, a failure to disclose relevant information, or the disclosure of	15 U.S.C.A. §

[1] A reporting company under the Exchange Act includes companies which fall under the scope of the Exchange Act due to: (i) a securities exchange listing, (ii) the companies' total assets exceed US$10 million and has a class of equity securities held by 2,000 or more persons, or 500 or more person who are not accredited investors (such as banks, the senior management of the issuer, or high net worth individuals), or (iii) companies that have issued to the public equity or debt securities not listed on any US exchange.

[2] A Form 8-K is a specific form required to be filed pursuant to certain material events such as entering into material agreements, acquisitions of businesses or assets, and changes in management.

contravention, does the failure to disclose relevant information to the market need to be intentional, reckless or negligent?	misleading or false information, must be wilful. If an issuer becomes aware of the falsehood or misleading nature of statements it has made, it must correct such statements pursuant to Rule 10b-5 of the Exchange Act. In the event of a contravention of the NYSE / NSADAQ rules, the markets generally issue a letter of deficiency and a Public Reprimand Letter, and if the company fails to correct the breach, they may be delisted.	78ff
Are any defences available to a breach of continuous disclosure requirements?	Yes. Under US securities laws, in addition to the usually asserted defences, such as lack of reliance or causation, a defendant may assert an affirmative defence under Section 18[3] if he/ she can show that he/ she acted in good faith and had no knowledge that the statement at issue was false or misleading. In addition, a person may not be imprisoned if he/ she can prove that he/ she had no knowledge of such rule or regulation which was violated. An exception applies to the NASDAQ and NYSE continuous disclosure requirements in relation to information which listed companies are required to maintain confidential, provided that they ensure that it does not lead to any unfair trading advantage.	15 U.S.C. §78r(a) 15 U.S.C.A. §78ff(a) Section 202.01 of the NYSE Rules and Regulations. Section IM-5250-1 of the NASDAQ Rules and Regulations.
Can directors be liable if the company breaches this obligation? Please provide details of the extent of the liability.	Yes. Directors can face civil and criminal liability based on violations of state and federal securities laws for fraudulent misrepresentation or material omissions in documents that are filed with the SEC. Any director who makes or causes the making of a false or misleading statement in a document filed with the SEC (including those in relation to the company's accounts), or fails to ensure that the Company complies with its continuous disclosure obligations can be personally held liable for the misrepresentation. This excludes directors who can prove that they acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action. Directors can also face liability under rule 13b2-2 of the Exchange Act if they:	15 U.S.C.A. § 78r and § 78t

[3] Section 18(a) of the Exchange Act provides an express civil remedy for false or misleading statements or omissions in Exchange Act filings (15 U.S.C. § 78r(a)).

	• Make a materially false statement to an accountant in connection with an audit or the preparation of an SEC filing. • Fraudulently influence, coerce, manipulate or mislead an accounting firm during an audit, with the intention of rendering the financial statements materially misleading. Further, directors can be personally liable for breach of their directors' duties, including the duty of due care and the duty of loyalty. A company's breach of the continuous disclosure obligation and/ or fraudulent misrepresentations (and a director's involvement in it) could be used as evidence of an alleged breach of directors' duties. Note that companies can eliminate director (and in some states officer) liability to the corporation for damages through its incorporation documents, but liability generally cannot be limited for a director's intentional misconduct. A finding that there has been a breach of the continuous disclosure rule by the company does not automatically mean that a director has breached their duties.	Rule 13b2-2 of the Exchange Act E.g., N.Y. Bus. Corp. § 717[4]
Are there significant company / corporations law penalties for false or misleading statements in corporate reports?	Yes. Under US Securities law, a natural person can be fined up to US$5,000,000 or imprisoned up to 20 years, or both, and corporations can be fined up to US$25,000,000 for wilfully making or causing a false or misleading statement to be made.	15 U.S.C.A. § 78ff
Are there any specific requirements imposed by law in relation to forward-looking statements?	Yes. To be considered a forward-looking statement , the statement must fall within one of the following catergories: (a) a statement containing a projection of revenues, income (including income loss), earnings (including earnings loss) per share, capital expenditures, dividends, capital structure, or other financial items; (b) a statement of the plans and objectives of management for future operations, including plans or objectives relating to the products or services of the issuer; (c) a statement of future economic performance, including any such statement contained in a discussion and analysis of financial condition by the management or in the results of operations included pursuant to the rules and regulations of the Commission; (d) any statement of the assumptions underlying or relating to any statement described in subparagraph (A), (B), or (C);	15 USC § 77z-2(i)(1)

[4] Statutory law of the state in which the corporation is incorporated will define directors duties (most states' statutes are based on the Model Business Corporations Act), in addition to common law rules and the corporation's articles or certificate of incorporation and by-laws.

	(e) any report issued by an outside reviewer retained by an issuer, to the extent that the report assesses a forward-looking statement made by the issuer; or (f) a statement containing a projection or estimate of such other items as may be specified by rule or regulation of the Commission. Additionally, forward-looking statements which fall within certain exclusions may not benefit from the safe harbor, for instance if the issuer has previously violated any securities law or if the statement is made in connection with a tender offer or an initial public offering. Finally, any private action must be based on an untrue statement of a material fact or omission of a material fact necessary to make the statement not misleading.	
Can directors be personally liable for these statements? Please provide details of the extent of the liability.	Yes. As explained above, directors may face liability for any false or misleading they make, including within forward-looking statements. Note that if a director is making an oral or written forward-looking statement, he/ she may shield himself/ herself from liability by including certain disclaimers (i.e., identifying the statement as forward-looking and including a meaningful cautionary statement) in their oral statements.	15 U.S. Code § 77z–2
Is there a "safe harbour" exemption from liability for forward-looking statements in corporate reports?	Yes. A safe harbor may be secured through one of the three methods: 1. Identifying the statement as forward-looking and using meaningful cautionary statements which identify important factors that could cause the actual results to differ materially from those in the forward-looking statement. 2. The forward-looking statement is immaterial. 3. A plaintiff fails to prove that the forward looking statement was made with actual knowledge of the falsity or misleading nature of the statement. However, the safe harbor only applies to private civil suits and does not apply to civil and criminal enforcement actions brought by the SEC or other regulatory agencies, among other specific exceptions that apply. The safe harbor is also unavailable for forward-looking statements in connection with an initial public offering, with a tender offer or contained in a registration statement issued by an investment company.	15 U.S. Code § 77z–2
In a shareholder claim, what must the claimant prove to establish that the company's contravention	In order to bring a claim, a shareholder must prove actual reliance on the allegedly false statement and that the shareholder suffered a loss as a result.	Section 18(a) Securities Exchange Act. *In re MDC Holdings Sec.*

caused their loss?		*Litig.*, 754 F. Supp. 785, 806 (S.D. Cal. 1990)

Additional comments on shareholder class actions: Shareholder class actions asserting violations of US securities laws frequently are filed in US courts. Such putative class action filings can and do assert shareholder claims that, among other things, the listed company failed to disclose material information which renders other company disclosures or statements misleading.

Attachment 3 – Template provided to international counsel

Question	Answer	Source
Are listed companies subject to a continuous disclosure obligation?*		
To establish a contravention, does the failure to disclose relevant information to the market need to be intentional, reckless or negligent?		
Are any defences available to a breach of continuous disclosure requirements?		
Can directors be liable if the company breaches this obligation? Please provide details of the extent of the liability.		
Are there significant company / corporations law penalties for false		

or misleading statements in corporate reports?^	
Are there any specific requirements imposed by law in relation to forward-looking statements?**	
Can directors be personally liable for these statements? Please provide details of the extent of the liability.	
Is there a “safe harbour” exemption from liability for forward-looking statements in corporate reports?~	
In a shareholder claim, what must the claimant prove to establish that the company’s contravention caused their loss?***	

* A “continuous disclosure obligation” is an obligation under law, regulation or the rules of a 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.

^ Please confine your answer to general ongoing corporations law requirements that apply to annual reports and other “business as usual” public reporting/disclosure by corporations. You do not need to cover special requirements for prospectuses, disclosures to consumers/customers etc.

** For example, is a person taken to make a misleading statement about a future matter if they do not have reasonable grounds for making the statement?

~ For example, can a company exclude liability by identifying a statement as a forward-looking statement and including a proximate cautionary statement in the corporate report?

*** For example, whether a claimant is required to prove actual reliance on the contravening conduct (director causation), or whether indirect causation is sufficient for claimants to establish causation.

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KUALA LUMPUR
Herbert Smith Freehills LLP
LLP0010119-FGN

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