

The Protection of Investors and the Compensation for their Losses: Australia

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June 2020

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The authors would like to thank Joanna Bird, Gill North and Kate O'Rourke for helpful comments in relation to this chapter, and to acknowledge the excellent research assistance of Lauren Perkins, Alexandra Rennie, Hannah Ryan and Mitheran Selvendran.

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Abstract

The concept of 'investor protection' has a long-standing legal pedigree in relation to the business corporation. Since the early 20th century, when Berle and Means famously highlighted shareholder vulnerability in the modern public corporation, investor protection has been an important ideal in corporate and securities law. In more recent times, the level of investor protection has been treated as a litmus test for a jurisdiction's quality of corporate governance and, also, as directly contributing to capital market structure.

An array of legal strategies exists around the world to address the perceived problem of investor vulnerability. Some of these strategies focus on shareholder protection. Others focus on encouraging greater investor participation as a self-help mechanism. Disclosure constitutes an important regulatory technique from the perspective of both investor protection and investor participation in corporate governance. Its effectiveness depends, however, on enforcement.

This paper examines, from a comparative perspective, protection of investors in Australia in circumstances where the corporation has released inadequate, or false and misleading, information, on which investors rely to their detriment.

The paper analyzes Australia's "twin peaks" regulatory framework, focusing on the performance of key regulators within that framework. It also considers the distinctive public and private enforcement mechanisms available to protect investors and the continuous disclosure regime, which applies under Australian law. The paper examines whether these mechanisms provide investors, who have relied on deficient corporate information, with adequate protection and relief. Finally, the paper considers the relatively recent advent of shareholder class actions in Australia, and their impact on private enforcement and the overall regulatory matrix.

Keywords: Australia, corporate governance, comparative corporate governance, corporate law, securities law, regulation, enforcement, directors' duties, continuous disclosure, investor losses, misleading and deceptive conduct, class actions

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OLIVIA DIXON* & JENNIFER G. HILL**

Table of Contents

1. Introduction.....	1
2. Australia’s Regulatory Backdrop.....	2
3. The Australian Market	4
3.1 Securities Markets.....	4
3.1. Regulation and Enforcement of Corporate Law	7
3.1.1. Australian Securities and Investments Commission.....	7
3.1.2. Australian Securities Exchange	14
4. Investor Protection - Legal Framework	15
4.1. Continuous Disclosure	16
4.2. Misleading or Deceptive Conduct	22
4.2.1. Background.....	22
4.2.2. Statutory Cause of Action.....	23
4.2.3. Proving Misleading or Deceptive Conduct.....	24
5. Shareholder Class Actions	25
5.1. Procedure	25
5.2. The Australian Experience.....	27
5.3. Conflict of Laws	30
6. Conclusion	32

1. Introduction

The concept of ‘investor protection’ has a long-standing legal pedigree in relation to the business corporation. Since the early 20th century, when Berle and Means famously highlighted shareholder vulnerability in the modern public corporation,¹ investor protection has been an important ideal in corporate and securities law. In more recent times, the level of investor

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¹ Berle, Jr., A.A. and Means, G.C, *The Modern Corporation and Private Property* (1932, New Jersey: Transaction Publishers).

protection has been treated as a litmus test for a jurisdiction's quality of corporate governance and, also, as directly contributing to capital market structure.²

An array of legal strategies exists around the world to address the perceived problem of investor vulnerability. Some of these strategies focus on shareholder protection. Others focus on encouraging greater investor participation as a self-help mechanism.³ Disclosure constitutes an important regulatory technique from the perspective of both investor protection and investor participation in corporate governance. Its effectiveness depends, however, on enforcement.⁴

This chapter examines the law in Australia relating to the protection of public investors in circumstances where the corporation releases inadequate, or false and misleading, information, which investors then rely upon to their detriment. The chapter discusses the public and private enforcement mechanisms available to protect investors in these circumstances and considers the extent to which they provide investors with adequate protection in practice.

The chapter is structured as follows. Part 2 discusses Australia's broad regulatory framework from a comparative perspective. Part 3.1 provides information about the contours of Australia's securities market. In 3.2, we consider regulation and enforcement of corporate law in Australia, focusing closely on the performance of key authorities within Australia's regulatory framework. Part 4 examines the legal framework ensuring that investors have sufficient, and accurate, information. Part 4.1 discusses Australia's continuous disclosure regime and its enforcement. Part 4.2 examines liability for misleading or deceptive conduct or statements by a corporation. Parts 5.1 and 5.2 discuss the advent of shareholder class actions in Australia, and their impact on private enforcement. Part 5.3 looks at issues relating to conflict of laws, choice of law and enforcement of foreign judgments. Part 6 concludes.

2. Australia's Regulatory Backdrop

Australia's corporate and financial services regulatory structure shares many features with other common law jurisdictions, including the United States.⁵ There are, nonetheless, some important structural differences, which are worth noting at the outset.⁶

² See, e.g., La Porta, R., Lopez-de-Silanes, F., Shleifer, A., and Vishny, R.W., 'Law and Finance' [1998] 106 *J Political Economy* 1113; La Porta, R., Lopez-de-Silanes, F., and Shleifer, A., 'Corporate Ownership Around the World' (1999) 54 *J Fin* 471. See generally Skeel Jr, D.A., 'Corporate Anatomy Lessons' (2004) 113 *Yale* 1519, 1544-5.

³ See generally Armour, J., Hansmann H. and Kraakman, R., 'Agency Problems and Legal Strategies' in Kraakman, R. *et al* (eds), *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd ed., 2017, Oxford: Oxford University Press), [2.2].

⁴ See generally Coffee, J.C., 'Law and the Market: The Impact of Enforcement' (2007) 156 *U Penn Law Review* 229; Jackson, H.E., 'Variations in the Intensity of Financial Regulation: Preliminary Evidence and Potential Implications' (2007) 24 *Yale J on Reg* 253.

⁵ For a general discussion of the history and philosophy of Australia's corporate and financial services regulatory structure, see Pearson, G., *Financial Services Law and Compliance in Australia* (Cambridge University Press, Cambridge, 2009), Chapter 2.

⁶ See generally Hill, J.G. 'Why Did Australia Fare So Well in the Global Financial Crisis?' in Ferran, E., Moloney, N., Hill, J.G. and Coffee, J.C. Jr, *The Regulatory Aftermath of the Global Financial Crisis* (Cambridge University Press, Cambridge, 2012), 235, 221-5.

Although, like the United States, Australia has a state-based system of corporate law, the Australian states referred their powers to the federal Parliament, enabling it to pass Commonwealth legislation, the *Corporations Act 2001 (Cth)* ('*Corporations Act*').⁷ Whereas in the United States 'federalization' of corporate law (via statutes, such as the *Sarbanes-Oxley Act 2002* and the *Dodd-Frank Act 2010*) has been extremely contentious,⁸ in Australia, it was welcomed by the business community as enhancing corporate efficiency. Another difference between Australia and the United States is that there is no clear structural dividing line between corporate law and securities law in Australia.⁹ The merging and centralization of corporate and securities law in Australia has also paved the way for national, rather than state-based, regulators. Australia provides an interesting contrast in this regard with another common law jurisdiction, Canada, where the creation of a national regulator has proven extremely challenging from a constitutional perspective.¹⁰

Australia operates under a 'twin peaks' model of financial regulation.¹¹ Under this model, regulatory responsibility is shared between the Australian Prudential Regulation Authority ('APRA') and the Australian Securities and Investments Commission ('ASIC'). APRA supervises deposit-taking, general insurance, life insurance and superannuation institutions,¹² and ASIC has responsibility for business conduct and consumer protection. Although there is clear conceptual differentiation between the responsibilities of each agency,¹³

⁷ Attempts to harmonize Australian corporate law date back to at least the early 1960s, when the various states agreed to pass uniform Companies Acts. For a detailed discussion of the evolution of Australian corporate law in this regard, see Austin, R.P. and Ramsay, I.M., *Ford, Austin and Ramsay's Principles of Corporations Law* (2015, 16th ed., LexisNexis), [2.170].

⁸ See, e.g., Bainbridge, S.M., 'Dodd-Frank: Quack Corporate Governance Round II (2011) 95 *Minn L Rev* 1779; Veasey, E.N., 'What Would Madison Think? The Irony of the Twists and Turns of Federalism' (2009) 34 *Del J Corp L* 35.

⁹ This was not always the case. Several Australian states, beginning with New South Wales in 1970, enacted separate Securities Industry Acts during that decade, however, corporations and securities law later came to be combined in a single Act. See, e.g., Ford, H.A.J., *Principles of Company Law* (1978, Butterworths, Sydney), 515ff.

¹⁰ See *Reference Re Securities Act*, 2011 SCC 66; Dharamdial, J., 'Prospects for cooperation in the *Reference Re Securities Act*, 2011 SCC 66', *The Court*, Osgoode Hall Law School, York University, 13 January 2012. Following the Canadian Supreme Court's 2011 decision that the proposed *Securities Act*, which would have created a national securities regulator, was unconstitutional, the federal government launched another initiative in 2014, via a Memorandum of Agreement (MOA) regarding the Cooperative Capital Markets System (MOA), to establish a pan-Canadian securities regulator. This initiative was also challenged in the courts. In May 2017, a majority of the Court of Appeal of Québec held that the MOA was unconstitutional. An appeal to the Supreme Court of Canada was set down for hearing in early 2018. See Ritchie, L.E., Yalden, R.M. and Rankin, W.D., 'Québec Court of Appeal finds aspects of the proposed co-operative capital markets model unconstitutional', *Osler*, 12 May 2017; Secrétariat aux relations canadiennes, Québec, *Reference Concerning the Constitutionality of the Implementation of Pan-Canadian Securities Regulation Under the Authority of a Single Regulator*, 18 October 2017.

¹¹ See generally Hill, J.G. 'Why Did Australia Fare So Well in the Global Financial Crisis?' in Ferran, E., Moloney, N., Hill, J.G. and Coffee, J.C. Jr, *The Regulatory Aftermath of the Global Financial Crisis* (Cambridge University Press, Cambridge, 2012), 235, 221-5.

¹² As at 30 June 2017, institutions over which APRA has supervisory responsibility held approximately \$6.1 trillion in assets. See 'About APRA', APRA webpage at www.apra.gov.au/AboutAPRA/Pages/Default.aspx.

¹³ For a depiction of the modern divide between conduct and prudential regulation in Australia, see Financial System Inquiry, *Interim Report* (Commonwealth of Australia, 2014), Chapter 7, Figure 7.2.

some overlap exists in the financial services area.¹⁴ It has also been argued that some responsibilities have blurred over time as a result of capital market developments and policy changes.¹⁵

Other organizations within Australia's financial market regulatory framework include the Reserve Bank of Australia, which controls monetary policy, systemic stability, and payments systems, and the Australian Securities Exchange ('ASX'), which is the primary securities exchange. ASX is responsible for monitoring compliance with its operating rules ('ASX Listing Rules') and promoting corporate governance standards.¹⁶

3. The Australian Market

3.1 Securities Markets

Australia has highly developed capital markets. Its capital markets were ranked fifth globally in the 2012 World Economic Forum Financial Development Report,¹⁷ on the basis of depth and strength,¹⁸ and eleventh in terms of size, according to the World Federation of Exchanges' 2016 rankings.¹⁹ The financial sector is the largest contributor to Australia's national output, generating \$152 billion or almost 9 per cent of Australian output for the 2017 financial year.²⁰

ASX is consistently ranked among the top five exchanges globally in terms of capital raising.²¹ As of December 2017, there were 2,147 companies listed on ASX, composed of 2,013 domestic and 134 foreign companies, and 128 wholesale and retail debt issuers.²² These

¹⁴ See Corporations and Markets Advisory Committee (CAMAC), *Guidance for Directors – Report* (Sydney: CAMAC, 2010), 25.

¹⁵ See Australian Government, *The Department of Treasury's Submission to the Financial System Inquiry*, 3 April 2014, p. 26, [84]-[86]; Financial System Inquiry, *Interim Report* (Commonwealth of Australia, 2014), Chapter 7, 3-92.

¹⁶ See 'The ASX Group', available at www.asx.com.au/about/asx-group.htm.

¹⁷ World Economic Forum, *The Financial Development Report 2012*, 12.

¹⁸ The Financial Development Report is a wide-ranging index, which ranks countries according to 'the strength of their financial markets, and the depth and breadth of access to capital and financial services'. 'Financial Development Index', *The Economist*, 11 September 2008.

¹⁹ This ranking was based on market capitalization of listed domestic companies See Index Mundi, *Market Capitalization of Listed Domestic Companies (Current US\$) – Country Ranking* (based on World Federation of Exchanges database), <https://www.indexmundi.com/facts/indicators/CM.MKT.LCAP.CD/rankings>.

²⁰ This assessment for FY 2017 is based on calculations derived from Australian Bureau of Statistics, cat no. 5206.0, *Australian National Accounts: National Income, Expenditure and Product*, June Quarter 2017, Table 14, Industry Gross Value Added (a), Chain Volume Measures (b): Trend, p 33, [http://www.ausstats.abs.gov.au/ausstats/meisubs.nsf/0/49FFA7822CD4303DCA258192001DA782/\\$File/52060_jun%202017.pdf](http://www.ausstats.abs.gov.au/ausstats/meisubs.nsf/0/49FFA7822CD4303DCA258192001DA782/$File/52060_jun%202017.pdf).

²¹ ASX, *Corporate Overview*, available at <https://www.asx.com.au/about/corporate-overview.htm>.

²² ASX, *Historical Market Statistics – No. of Entities Listed on ASX: 2017*, available at [https://www.asx.com.au/about/historical-market-statistics.htm#No of Companies](https://www.asx.com.au/about/historical-market-statistics.htm#No%20of%20Companies).

companies have a combined market capitalization of \$1.5 trillion.²³ There has also been a steep rise in the number of foreign companies listed on ASX. These listings doubled in the four-year period to 2017.²⁴ Technology listings, too, have risen sharply and, with over 200 listings, constituted the third largest ASX sector in 2017.²⁵ According to ASX, it has also developed a listing ‘sweet spot’ for companies in the \$50-500 million market capitalization range.²⁶ In 2010, ASX created its own dark pool, ‘ASX Centre Point’,²⁷ which has experienced strong trading growth since its launch.²⁸ In addition to the market for corporate securities, ASX operates a number of markets for sophisticated institutional investors, including debt securities, futures and options markets, and warrants.²⁹

Australia has high levels of capital market investment by international standards. This is at least partly attributable to its distinctive system of retirement funding (‘superannuation’).³⁰ According to *The Economist*, as a result of superannuation, ‘Aussies are now a nation of capitalists’.³¹ According to the 2017 ASX Australian Share Ownership Study, 37 per cent of Australia’s adult population participated in the Australian securities market by holding ‘on-exchange investments’, which comprise anything traded on an exchange, including derivatives.³² These figures do not include share ownership interests held through superannuation funds that are not self-managed funds. If such interests were included, the share

²³ ASX, *Corporate Overview*, available at <https://www.asx.com.au/about/corporate-overview.htm>.

²⁴ See ASX, *ASX Limited Annual Report 2017*, Listing and Issuer Services, 3, <https://www.asx.com.au/documents/investor-relations/AnnualReport2017.pdf>.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ See ASX, *ASX Centre Point*, <https://www.asx.com.au/services/trading-services/asx-centre-point.htm>.

²⁸ See Cooper, M., ‘Accessing the Benefits of ASX’s Centre Point’, *The Australian Business Executive Magazine*, 12 April 2017 (discussing ASX’s dark pool, or ‘anonymous mid-point matching service’, against the historical backdrop of share trading in Australia). In FY2017, \$107 billion of securities were traded on Centre Point amounting to 9.9% of total on-market trades and 21.9% of the ASX’s trading revenues. See ASX, *ASX Limited Annual Report 2017*, Listing and Issuer Services, 19, 31, 33, <https://www.asx.com.au/documents/investor-relations/AnnualReport2017.pdf>.

²⁹ Redmond, P., *Corporations and Financial Markets Law* (7th ed., 2017), [2.150].

³⁰ See generally Financial System Inquiry, Final Report, Chapter 2 (November 2014); Hill, J.G. ‘Why Did Australia Fare So Well in the Global Financial Crisis?’ in Ferran, E., Moloney, N., Hill, J.G. and Coffee, J.C. Jr, *The Regulatory Aftermath of the Global Financial Crisis* (Cambridge, Cambridge University Press, 2012), 235, 295-9.

³¹ ‘Super-duper supers: In Australia’s superannuation scheme, everyone’s a winner’, *The Economist*, 28 May 2011, 6.

³² See Deloitte Access Economics and ASX, *ASX Australian Investor Study 2017*, 1, 21, <https://www.asx.com.au/documents/resources/2017-asx-investor-study.pdf>. The 2017 figure for the proportion of the Australian adult population holding on-exchange investments (37 per cent) is much higher than in the late 1980s (9 per cent), but lower than the period between 2000-05, when individual holdings of on-exchange investments peaked (52-53 per cent). *Ibid.*, Chart 3.1. There was a steep rise in share ownership by individuals during the 1990s as a result of the privatization of numerous government business enterprises, including the Commonwealth Bank of Australia and Telstra. Redmond, P., *Corporations and Financial Markets Law* (7th ed., 2017), [2.170]. The 2017 *ASX Australian Investor Study* shows on-exchange investment levels are considerably higher among men (44 per cent) than women (31 per cent). See Deloitte Access Economics and ASX, *ASX Australian Investor Study 2017*, 21, <https://www.asx.com.au/documents/resources/2017-asx-investor-study.pdf>.

ownership figure would be much higher in view of Australia's compulsory superannuation system.³³ As a result of its compulsory superannuation system,³⁴ Australia maintains 'the largest pool of funds under management in the Asia-Pacific region, and the third largest in the world'.³⁵ Aggregate assets of Australian superannuation funds, much of which is invested directly or indirectly in equity and debt capital markets,³⁶ were A\$2.5 trillion as at September 2017,³⁷ and are predicted to climb to A\$6.1 trillion by 2035.³⁸

It is estimated that two groups - domestic institutional investors and international shareholders - each hold approximately 40 per cent of shares in Australian listed companies,³⁹ with the balance held by households.⁴⁰ It is also estimated that approximately two-thirds of foreign share investment is held by investment institutions, such as U.S. pension or mutual funds, and global investment funds, such as Fidelity and BlackRock.⁴¹ This suggests that around two-thirds of all quoted Australian shares are held by institutional investors.⁴²

Although historically there has been limited research into the extent of blockholding in Australia,⁴³ a 2010 study found that for the sample period 2000-04, between 39-45 per cent of the top 200 companies ASX-listed ('ASX 200') had a 10 per cent or larger blockholder; 22-30 per cent had a 20 per cent or larger blockholder; and 8-9 per cent had an absolute controlling

³³ Redmond, P., *Corporations and Financial Markets Law* (7th ed., 2017), [2.170].

³⁴ See generally Financial System Inquiry, Final Report, Commonwealth of Australia, November 2014, Chapter 2.

³⁵ ASX Group, *IPO: The Road to Growth and Opportunity*, available at www.asx.com.au/documents/professionals/IPO - The road to growth and opportunity.pdf, page 2.

³⁶ Zandstra, A., Harris J. and Hargovan, A., 'Widening the Net: Accessorial Liability for Continuous Disclosure Contraventions' (2008) 22 *Australian Journal of Corporate Law* 51, 51.

³⁷ See ASFA, *Superannuation Statistics*, <https://www.superannuation.asn.au/resources/superannuation-statistics>. (date accessed)

³⁸ Super System Review Final Report, Part One, Overview and Recommendations ('Cooper Review') (June 2010), 5.

³⁹ Redmond, P., *Corporations and Financial Markets Law* (7th ed., 2017), [2.175] (citing Black, S. and Kirkwood, J., *Reserve Bank of Australia Quarterly Bulletin* (September Quarter, 2010)). Slight variations appear in studies from different periods. See, for example, Boros, E. and Duns, J., *Corporate Law* (3rd ed. 2013), [5.3.2(c)], citing statistics from a June 2012 report of the Australian Bureau of Statistics, *Australian National Accounts: Financial Accounts*, June Quarter, cat no 5232.0 (AGPS, Canberra, 2012) (domestic institutional investors held approximately 39 per and international shareholders held approximately 47 per cent as at 2012); Stapledon, G., 'The Development of Corporate Governance in Australia' in Mallin, C. (ed.), *Handbook on International Corporate Governance* (2nd ed., 2011), 330 (domestic institutional investors held approximately 36 per cent and international shareholders held 42% as at 2009).

⁴⁰ Redmond, P., *Corporations and Financial Markets Law* (7th ed., 2017), [2.175].

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ For a discussion of some early studies in this regard, see Chen, V., Ramsay, I. and Welsh, M., 'Corporate Law Reform in Australia: An Analysis of the Influence of Ownership Structures and Corporate Failure' (2016) 44 *Australian Business Law Review* 18.

blockholder (that is, a 50% + blockholder).⁴⁴ Despite this, the OECD describes Australia as having a predominantly ‘dispersed’ ownership structure,⁴⁵ with institutional share ownership in Australia slightly lower than comparable countries such as the United Kingdom and the United States.⁴⁶ According to the OECD’s 2017 Factbook, financial institutions own a majority of shares in the ASX 200, but their holdings rarely exceed 10 per cent.⁴⁷

The bond market is becoming an increasingly important source of corporate finance in Australia. The value of the private bond market as at 2017 was around \$1.1 trillion,⁴⁸ which was equivalent to approximately two-thirds of the equity value of companies listed on ASX.⁴⁹ Non-government bonds dominate the market, though there has also been a notable rise in government bonds (particularly federal government bonds) since the global financial crisis.⁵⁰ Financial institutions play an important intermediating role in the bond market. Almost half of private sector bonds are issued by these institutions, mainly banks.⁵¹ According to a 2014 report, the primary investors in the corporate bond market in Australia are superannuation funds and foreign investment corporations, with retail investors directly holding less than 1 per cent of the market.⁵²

3.1. Regulation and Enforcement of Corporate Law

3.1.1. Australian Securities and Investments Commission

ASIC occupies a central role in Australia’s corporate law regulatory framework.⁵³ An independent agency of the Commonwealth Government, ASIC is the primary business conduct

⁴⁴ Lamba, A.S. and Stapledon, G.P., *What Motivates Block Share Ownership?* (2014) 11 *Corporate Ownership & Control* 349, 356.

⁴⁵ OECD, *Corporate Governance Factbook 2017* (OECD 2017), 11, available at <http://www.oecd.org/daf/ca/Corporate-Governance-Factbook.pdf>. According to the OECD Factbook, only four countries, Australia, Ireland, the United Kingdom and the United States are categorized as having predominantly dispersed ownership structures. *Ibid.*

⁴⁶ Redmond, P., *Corporations and Financial Markets Law* (7th ed., 2017), [2.175].

⁴⁷ OECD, *Corporate Governance Factbook 2017* (OECD 2017), 12, Table 1.1, available at <http://www.oecd.org/daf/ca/Corporate-Governance-Factbook.pdf>.

⁴⁸ This figure includes issuance by both financial and non-financial corporations. Kent, C., Assistant Governor (Financial Markets), Reserve Bank of Australia, *Fixed Income Markets and the Economy*, The Bloomberg Address, Sydney, 9 August 2017.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, Graph 1.

⁵¹ *Ibid.*

⁵² Lepone, A. and Wright, D., *Report for the Financial Services Council: Capital Market Structure Comparisons*, 19 March 2014), 23, http://fsi.gov.au/files/2014/04/FSC_Chapter_2_Capital_Markets_Report.pdf.

⁵³ See *Morley v ASIC* (2010) 274 ALR 205, [724], describing ASIC as occupying a ‘special role...as a regulator’. For a history of ASIC, and its regulatory predecessors, see Mees B. and Ramsay I., ‘Corporate Regulators in Australia (1961-2000): From Companies’ Registrars to ASIC’ (2008) 22 *Aust J Corp L* 212.

regulator, with responsibility for a wide range of corporate matters.⁵⁴ It has a far broader remit than most comparable international regulators,⁵⁵ and, according to the 2014 Financial System Inquiry (FSI), some of ASIC's responsibilities are 'unique'.⁵⁶

ASIC has primary responsibility for investigating and enforcing the *Australian Securities and Investments Commission Act 2001* (Cth) ('ASIC Act') and the *Corporations Act*. The following provides a quick snapshot of its current operations. In the 2016-17 financial year, ASIC employed 1,641 staff members⁵⁷ and was responsible for the oversight of 2,500,401 companies registered in Australia.⁵⁸ During this period, ASIC completed 75 investigations and commenced 68 new investigations.⁵⁹ ASIC received A\$342 million in appropriation revenue from the Commonwealth Government in the 2016-17 financial year to support its activities.⁶⁰ However, a major change to its funding arrangements occurred in mid-2017, when the Australian government passed new legislation introducing an industry funding model.⁶¹ Under this new model, the cost of ASIC's activities will, in the future, be borne by the regulated entities themselves.⁶²

ASIC has broad regulatory and enforcement powers.⁶³ The *ASIC Act* expressly directs the regulator, in performing its functions and exercising its powers, to take 'whatever action it can take, and is necessary, in order to enforce and give effect to' the corporations legislation.⁶⁴ ASIC's powers include the power to conduct oral examinations, issue notices to produce books and documents, and apply for a search warrant to seize books.⁶⁵ ASIC may give

⁵⁴ For a complete list of matters falling within ASIC's mandate, see Financial System Inquiry, *Interim Report* (Commonwealth of Australia, July 2014), Chapter 7, Figure 7.3, 3-123.

⁵⁵ *Ibid* at 3-122.

⁵⁶ *Ibid*. For a discussion of some of the problems created by ASIC's increasingly broad, and arguably piecemeal, regulatory responsibilities, see Middleton, T., 'ASIC's Regulatory Powers – Interception and Search Warrants, Credit and Financial Services Licences and Banning Orders, Financial Advisers and Superannuation: Problems and Suggested Reforms' (2013) 31 *Company and Securities Law Journal* 208.

⁵⁷ See Australian Securities and Investments Commission, *Annual Report 2016/2017*, 110-11, <http://download.asic.gov.au/media/4527819/annual-report-2016-17-published-26-october-2017-full.pdf>.

⁵⁸ *Ibid* at 182.

⁵⁹ *Ibid* at 31.

⁶⁰ This revenue figure includes A\$27 million from the Enforcement Special Account (ESA). *Ibid* at 26.

⁶¹ See Senator The Hon. Mathias Cormann, Minister for Finance, Media Release, *ASIC Media Funding Model Passed Into Law*, MC 33/17, 15 June 2017; *ASIC Supervisory Cost Recovery Levy Act 2017*, No. 43, 2017.

⁶² See ASIC, *ASIC Industry Funding Factsheet*, <http://download.asic.gov.au/media/4558997/industry-funding-fact-sheet-published-29-november-2017.pdf>. This reform was based on recommendations of the Australian Government's 2014 Financial System Inquiry. See *Financial System Inquiry*, Final Report, Commonwealth of Australia, November 2014, xxvi, 250 - 253.

⁶³ See ASIC, Information Sheet 151, *ASIC's Approach to Enforcement*, September 2013, 3; Redmond, P., *Corporations and Financial Markets Law* (7th ed., 2017), [11.110] – [11.120]. See also *Morley v Australian Securities and Investments Commission* [2010] NSWCA 331, [725] (discussing the range of powers conferred on ASIC in connection with enforcement).

⁶⁴ *ASIC Act*, s 1(2)(g).

⁶⁵ *ASIC Act*, ss 19, 29, 30, 33 and 35.

a copy of a written record of the oral examination and any related books to a person's lawyer, if the lawyer satisfies ASIC that the person is carrying on, or is contemplating in good faith, a proceeding that relates to the examination.⁶⁶ The purpose is to 'enable the fruits of [ASIC's] compulsory examination to be made available for use in civil litigation'.⁶⁷

Enforcement actions by ASIC can serve a variety of goals, including deterrence, punishment, investor protection, preservation of assets, corrective disclosure and compensation.⁶⁸ Where there is a contravention of a law it administers, ASIC has said that it will pursue the enforcement remedies most suited to its regulatory goals in any given case.⁶⁹ ASIC has a wide range of options in this regard.⁷⁰ It can, for example:

- Refer matters to the Commonwealth Director of Public Prosecutions ('CDPP') for criminal prosecution;⁷¹
- Apply to the court under the civil penalty regime for declarations of contravention, pecuniary penalty orders, or compensation orders for contravention of the civil penalty provisions of the *Corporations Act*;
- Bring civil proceedings on behalf of investors for recovery;
- Bring civil proceedings for injunctive or other relief;
- Obtain enforceable undertakings;
- Issue infringement notices;
- Issue stop orders;
- Make a banning order against a person; and
- Apply to a court for a disqualification order against a person.

⁶⁶ *ASIC Act*, s 25(1).

⁶⁷ See *Boys v Australian Securities Commission* (1998) 80 FCR 403, 420. See also See Legg, M.J., 'Shareholder Class Actions in Australia – The Perfect Storm' (2008) 31 *UNSW LJ* 669; McConvill, J. and Smith, D., 'Can Minority Shareholders 'Free Ride' on ASIC's Civil Penalty Litigation?' (2002) 20 *Company and Securities Law Journal* 302, 302.

⁶⁸ See generally ASIC, Information Sheet 151, *ASIC's Approach to Enforcement*, September 2013.

⁶⁹ ASIC, Information Sheet 151, *ASIC's Approach to Enforcement*, September 2013, 4. For discussion of factors that ASIC will take into account in deciding which remedy to pursue, see Table 2, *ibid* at 8-9.

⁷⁰ See Redmond, P., *Corporations and Financial Markets Law* (7th ed., 2017), [11.110] – [11.120]. The decisions of ASIC are subject to review by the Administrative Appeals Tribunal under both the *Corporations Act*, Part 9.4A and the *ASIC Act*, s 244.

⁷¹ The CDPP is an independent prosecuting agency, established under the *Director of Public Prosecutions Act 1983* (Cth). It does not have investigative powers or functions. The decision to investigate matters and the decision to refer matters to the CDPP is a decision for the relevant referring agency (such as ASIC, APRA or the Australian Federal Police). See CDPP, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process*, [1.1] – [1.3].

In criminal matters, ASIC's role is generally confined to investigation because the decision to lay criminal charges under the *Corporations Act* or the *ASIC Act* lies with the CDPP.⁷²

ASIC has standing to bring or intervene in various types of civil proceedings,⁷³ including injunctive relief⁷⁴ and to bring proceedings in the name of a third party, if as a result of an investigation or examination, this appears to be in the public interest.⁷⁵ Administrative options may be utilized in connection with enforcement, including ASIC's power to issue stop orders⁷⁶ and infringement notices,⁷⁷ to accept enforceable undertakings,⁷⁸ to vary, suspend or cancel an Australian Financial Services licence,⁷⁹ or to make orders excluding person from the financial services industry.⁸⁰

Enforceable undertakings constitute a form of negotiated resolution, distinct from litigation, administrative actions, or infringement notices.⁸¹ However, ASIC Regulatory Guide 100 notes that ASIC will only use this form of settlement if it considers that an enforceable undertaking provides 'a more effective regulatory outcome' than non-negotiated sanctions.⁸² ASIC will not consider an enforceable undertaking unless it has reason to believe that a relevant contravention has occurred and has commenced an investigation. Enforceable undertakings are not used 'to forestall an investigation'.⁸³

⁷² See *ASIC Act*, s 49. Primary responsibility for criminal prosecution lies with the CDPP, in accordance with a Memorandum of Understanding between the CDPP and ASIC. See Redmond, P., *Corporations and Financial Markets Law* (7th ed., 2017), [11.115]; Memorandum of Understanding: Australian Securities and Investments Commission and Commonwealth Director of Public Prosecution, 1 March 2006, [5.1]. However, ASIC itself has power to prosecute certain minor regulatory offences. ASIC, Information Sheet 151, *ASIC's Approach to Enforcement*, September 2013, 5.

⁷³ See *Corporations Act*, s 1330.

⁷⁴ *Corporations Act*, s 1324; *ASIC Act*, s 12GD. See, e.g., *Australian Securities and Investments Commission v Sweeney* [2001] NSWSC 114; *Australian Securities and Investments Commission v Pegasus Leveraged Options Group Pty Ltd* [2002] NSWSC 310.

⁷⁵ *ASIC Act*, s 50.

⁷⁶ Used to prevent the dissemination of, and issue of securities or financial products pursuant to, defective disclosure documents: *Corporations Act*, s 739 (disclosure documents issued under Ch 6D) and s 1020E (for Product Disclosure Statements issued under Pt 7.9). See also *Thompson v Australian Securities and Investments Commission* (2002) 117 FCR 159.

⁷⁷ See ASIC, Information Sheet 151, *ASIC's Approach to Enforcement*, September 2013, 7. Part 9.4AA of the *Corporations Act* allows for the issue by ASIC of infringement notices for alleged contraventions of the continuous disclosure provisions in ss 674 and 675 of the *Corporations Act*.

⁷⁸ *ASIC Act*, s 93AA.

⁷⁹ *Corporations Act*, ss 914A, 915B and 915C.

⁸⁰ *Corporations Act*, Part 7.6, Div. 8.

⁸¹ ASIC, Information Sheet 151, *ASIC's Approach to Enforcement*, September 2013, 6-7.

⁸² ASIC, Regulatory Guide 100, February 2015, RG 100.18.

⁸³ *Ibid* at 100.17.

When ASIC selects litigation as the preferred enforcement mechanism, it has a very high success rate. In 2016-17, for example, ASIC was successful in 90 per cent of criminal litigation and 91 per cent of civil litigation.⁸⁴ It is noteworthy, however, that, even though ASIC has power to bring compensation proceedings to recover damages or property on behalf of affected consumers,⁸⁵ it rarely commences such proceedings, preferring instead to rely on other regulatory tools or to encourage the affected parties to take private legal action themselves.⁸⁶ A high profile exception to this general approach occurred in 2010 when ASIC initiated litigation against several major Australian banks,⁸⁷ to recover compensation for investors, who had suffered significant losses due to the collapse of Storm Financial.⁸⁸ Nonetheless, in spite of ASIC's general reluctance to seek compensation orders in litigation, the regulator often extracts consumer and credit compensation by other means, through, for example, negotiated agreements.⁸⁹

ASIC plays a particularly important role in Australia's civil penalty regime.⁹⁰ Under this distinctive regime, which was introduced into the *Corporations Act* in 1993, ASIC is the primary enforcement mechanism for contravention of so-called 'civil penalty provisions'. These include provisions concerning statutory directors' duties, related party rules, insolvent

⁸⁴ Australian Securities and Investments Commission, *Annual Report 2016/2017*, 31, available at <http://download.asic.gov.au/media/4527819/annual-report-2016-17-published-26-october-2017-full.pdf>. ASIC completed 10 criminal actions and 55 civil actions in 2016-17. *Ibid*.

⁸⁵ *ASIC Act*, s 50.

⁸⁶ See ASIC, Information Sheet 151, *ASIC's Approach to Enforcement*, September 2013, 3, stating that ASIC uses its enforcement powers, *inter alia*, to 'recover money in appropriate circumstances' [emphasis added]. See also *ibid* at 6, highlighting the fact that, rather than seeking compensation on behalf of investors who have suffered loss, ASIC will often encourage them to take private legal action.

⁸⁷ See ASIC, *Storm Financial: Summary of ASIC Actions*, <http://storm.asic.gov.au/proceedings/summary-of-asic-actions/>; ASIC, Media Release 14-244, *ASIC and Bank of Queensland Reach Storm Financial Settlement*, 22 September 2014. Litigation brought by ASIC to obtain compensation for Storm investors resulted in compensation payments by Bank of Queensland (approximately A\$17 million); Commonwealth Bank of Australia (CBA) (up to A\$136 million); and Macquarie Bank Ltd (approximately A\$75 million). *Ibid*.

⁸⁸ For background to the collapse of Storm Financial, see Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Financial Products and Services in Australia*, November 2009, [3.23] – [3.32]. The Parliamentary Joint Committee on Corporations and Financial Services acknowledged the 'catastrophic' effect that Storm's collapse had on many investors. See Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Financial Products and Services in Australia*, November 2009, [3.1] – [3.2]. The worst affected investors were double-g geared Storm clients, who had not been given the opportunity to respond to margin calls. *Ibid* at [3.1]. The consequences of Storm's collapse on these investors in particular were 'financially and emotionally devastating'. *Ibid* at [3.5].

⁸⁹ See, for example, Australian Securities and Investments Commission, *Annual Report 2016/2017*, 60, <http://download.asic.gov.au/media/4527819/annual-report-2016-17-published-26-october-2017-full.pdf>; Australian Securities and Investments Commission, *Annual Report 2015/2016*, 54, <http://download.asic.gov.au/media/4058626/asic-annual-report-2015-2016-complete.pdf>.

⁹⁰ The civil penalty regime is found in *Corporations Act*, Part 9.4B of the *Corporations Act*. See See Austin, R.P., Ramsay, I.M., *Ford, Austin and Ramsay's Principles of Corporations Law* (16th ed., LexisNexis Butterworths, 2015), [3.400]. The regime originally constituted an attempt to draw a clearer line between civil and criminal liability, although the boundaries have tended to become increasingly blurred over time. See, e.g., *Rich v ASIC* (2004) 50 ACSR 242; *Re Chemeq Ltd (ACN 009 135 264)*; *ASIC v Chemeq Ltd* (2006) 234 ALR 511, [90].

trading provisions, continuous disclosure requirements, and market misconduct offences, such as market manipulation and insider trading.⁹¹

ASIC's role in enforcing statutory directors' duties under the civil penalty regime has received particular attention, since it has made Australia an outlier to some other major common law jurisdictions.⁹² Whereas, for example, the United States and the United Kingdom rely primarily on a private enforcement model for breach of directors' duties,⁹³ Australia's civil penalty regime relies mainly on public enforcement by ASIC.⁹⁴ As a result, it is now widely accepted that the Australian statutory directors' duties themselves have a 'public' nature.⁹⁵ Enforcement tools and remedies currently available to ASIC under the civil penalty regime include: (i) pecuniary penalties (of up to A\$200,000 for an individual and A\$1 million for corporations);⁹⁶ (ii) compensation orders;⁹⁷ and (iii) disqualification orders.⁹⁸

Although ASIC has power to seek compensation orders for breach of statutory directors' duties under the civil penalty regime, data on its remedy choice supports the view that ASIC's regulatory goal is not to obtain compensation for individual shareholder losses, but rather to secure 'maximum voluntary compliance'.⁹⁹ This data shows that ASIC seeks

⁹¹ For a complete list of sections of the *Corporations Act* that operate as civil penalty provisions, see the table in *Corporations Act*, s 1317E(1). See, for example, items 1 (officers' duties); item 3 (related parties rules); item 14 (continuous disclosure); item 15 (market integrity rules); item 41 (market manipulation); items 42 – 43 (false trading and market rigging); item 45 (insider trading).

⁹² See generally Hill, J.G. and Conaglen, M., 'Directors' Duties and Legal Safe Harbours: A Comparative Analysis' in Smith, D.G. and Gold, A.S. (eds), *Research Handbook on Fiduciary Law* (Edward Elgar Publishing Ltd, 2018), 305; Jones, R.M. and Welsh, M., 'Toward a Public Enforcement Model for Directors' Duty of Oversight' (2012) 45 *Vand J Transnat'l L* 343.

⁹³ US and UK corporate law adopts a model of private shareholder litigation, although it should be noted that, in practice, such litigation tends to be virtually non-existent in the United Kingdom. See Armour, J., Black, B., Cheffins, B. and Nolan, R., 'Private Enforcement of Corporate Law: An Empirical Comparison of the United Kingdom and the United States' (2009) 6 *J Empirical Legal Stud* 687.

⁹⁴ See Welsh, M., 'Realising the Public Potential of Corporate Law: Twenty Years of Civil Penalty Enforcement in Australia' (2014) 42 *Federal Law Review* 217. Historically, Australia relied on a UK-style private enforcement model, however, the introduction of the civil penalty regime in 1993 was designed to extend and complement this private enforcement model, particularly in the context of breach of statutory directors' duties. See generally Varzaly, J., 'The Enforcement of Directors' Duties in Australia: An Empirical Analysis' (2015) 16 *Eur Bus Org L Rev* 281.

⁹⁵ See, for example, Welsh, M., 'Realising the Public Potential of Corporate Law: Twenty Years of Civil Penalty Enforcement in Australia' (2014) 42 *Federal Law Review* 217, 223-228; Harris, J., Hargovan, A. and Austin, J., 'Shareholder Primacy Revisited: Does the Public Interest Have Any Role in Statutory Duties?' (2008) 26 *Company and Securities Law Journal* 355; Hill, J.G. and Conaglen, M., 'Directors' Duties and Legal Safe Harbours: A Comparative Analysis' in Smith, D.G. and Gold, A.S. (eds), *Research Handbook on Fiduciary Law* (Edward Elgar Publishing Ltd, 2018), 305. See also ASIC, *ASIC's Approach to Enforcement*, Information Sheet 151 (September 2013), 6; *ASIC v Cassimatis* (No. 8) [2016] FCA 1023, [455].

⁹⁶ *Corporations Act*, s 1317G.

⁹⁷ *Corporations Act*, ss 1317H and 1317HA.

⁹⁸ *Corporations Act*, s 206C.

⁹⁹ Welsh, M., 'Realising the Public Potential of Corporate Law: Twenty Years of Civil Penalty Enforcement in Australia' (2014) 42 *Federal Law Review* 217, 230-1, 233, 239. ASIC has itself stressed the importance of 'effective deterrence' in its approach to civil penalty enforcement. See Australian Securities and Investments Commission, *ASIC's Approach to Enforcement*, Information Sheet 151 (September 2013), 4.

pecuniary penalty and disqualification orders far more often than it seeks compensation orders.¹⁰⁰ This remedy pattern accords with ASIC's self-image as a protector of the 'public interest'.¹⁰¹ It is also consistent with the view that companies, shareholders and other persons who have sustained losses, possess important self-help options. For example, companies that have suffered harm can apply for compensation orders under the civil penalty regime,¹⁰² and affected individuals can bring private legal proceedings via statutory derivative suits¹⁰³ or class actions, which are discussed in detail later in this chapter.

Notwithstanding the apparently broad regulatory tools and enforcement powers considered above, it has been argued in recent years that ASIC lacks some key investigatory powers¹⁰⁴ and has been hampered by the relatively low civil and administrative penalties it can pursue, compared to other international regulators.¹⁰⁵ For example, the power to order disgorgement is considered to be an important deterrent, as it prevents unjust enrichment. Unlike many of its regulatory peers, ASIC currently lacks power to order disgorgement.¹⁰⁶

The Final Report of Australian Government's Financial System Inquiry ('FSI'), which was released in December 2014, agreed that there were some significant weaknesses in the regulatory tools at ASIC's disposal.¹⁰⁷ This report made a number of recommendations designed to address these concerns and to strengthen ASIC's enforcement role, particularly in relation to financial market consumer protection.¹⁰⁸ The report's recommendations included the need for:- improved funding arrangements (which have now been implemented via industry funding); stronger regulatory tools, including the power to order disgorgement; and

¹⁰⁰ Welsh, M., 'Realising the Public Potential of Corporate Law: Twenty Years of Civil Penalty Enforcement in Australia' (2014) 42 *Federal Law Review* 217, 237-39.

¹⁰¹ See ASIC, *ASIC's Approach to Enforcement*, Information Sheet 151 (September 2013), 6. See also *ASIC v Cassimatis (No 8)* [2016] FCA 1023, [461], [496]ff, [503]; Redmond, P., *Corporations and Financial Markets Law* (7th ed., 2017), at [7.84]. See also *ASIC v Adler* (2002) 168 FLR 253, [56]; *Forge v ASIC* (2004) 213 ALR 574, 654, [381]; *International Swimwear Logistics Ltd. v Australian Swimwear Co Pty Ltd.* [2011] NSWSC 488, [106].

¹⁰² See *Corporations Act*, ss 1317J(2) and (3).

¹⁰³ See *Corporations Act*, Part 2F.1A. For background to the introduction of a statutory derivative suit in Australia and discussion of the preconditions that need to be satisfied for such an action to be brought, see Redmond, P., *Corporations and Financial Markets Law* (7th ed., 2017), [8.100].

¹⁰⁴ See Middleton, T., 'ASIC's Regulatory Powers – Interception and Search Warrants, Credit and Financial Services Licences and Banning Orders, Financial Advisers and Superannuation: Problems and Suggested Reforms' (2013) 31 *Company and Securities Law Journal* 208.

¹⁰⁵ A 2014 report by ASIC, which formed the basis for its submission to the Australian Government's 2014 Financial Services Inquiry, found, for example, that penalties for corporate misconduct available to some other Australian regulators and to comparable international regulators were both broader and higher than those at ASIC's disposal. See ASIC, *Penalties for Corporate Wrongdoing*, Report 387, March 2014, 5-6.

¹⁰⁶ ASIC has stated that disgorgement is an important deterrent, which prevents unjust enrichment. *Ibid* at 19, [66]. For discussion of ASIC's lack of power to order disgorgement, in contrast to regulators in Canada, Hong Kong, the United Kingdom and the United States, see, *ibid*, 19-21; Financial System Inquiry, *Interim Report* (Commonwealth of Australia, 2014), Chapter 7, 3-125 and Table 7.2, 3-125.

¹⁰⁷ See Financial System Inquiry, Final Report, Commonwealth of Australia, November 2014, xx.

¹⁰⁸ Financial System Inquiry, Final Report, Commonwealth of Australia, November 2014, 236.

significantly higher criminal and civil penalties.¹⁰⁹ A Commonwealth government Senate Committee, reached a similar conclusion in 2014. This committee highlighted the need for ASIC to have sufficient enforcement tools to ensure that it is 'respected and feared' by the business community.¹¹⁰ Reform proposals to give effect to this aspiration are currently underway in Australia.¹¹¹

3.1.2. Australian Securities Exchange

Under its listing agreement with ASX, each entity admitted to the ASX official list is contractually bound to ASX to comply with the ASX Listing Rules,¹¹² including the continuous disclosure obligations¹¹³ and the periodic reporting obligations.¹¹⁴

In contrast with ASIC, ASX has limited investigatory and enforcement powers over listed entities. If ASX suspects a contravention of the ASX Listing Rules, it may request that an entity provide ASX with any information, document or explanation about that matter within the timeframe specified by ASX,¹¹⁵ which may be released to the market.¹¹⁶ However, ASX has no power to fine or impose any other criminal or civil penalties for breach of the ASX Listing Rules. If a listed entity refuses to comply with its obligations under the listing rules, ASX may suspend trading in its securities,¹¹⁷ in extreme cases terminate its listing,¹¹⁸ or obtain a court order requiring the entity to comply with its obligations under the ASX Listing Rules.¹¹⁹ To the extent that ASX suspects a serious contravention of the ASX Listing Rules or the *Corporations Act*, it is required to give a notice to ASIC with details of the contravention.¹²⁰

¹⁰⁹ Ibid at 236, 250-252.

¹¹⁰ See The Senate, Economics References Committee, *Performance of the Australian Securities Investments Commission*, Commonwealth of Australia, June 2014, xxi, 454, [28.8]. The Senate Committee's review, which was released in mid-2014, was particularly critical of ASIC. The review described it as a 'timid, hesitant regulator, too ready and willing to accept uncritically the assurances of a large institution that there were no grounds for ASIC's concerns or intervention'. Ibid at xviii.

¹¹¹ See generally Australian Government, *ASIC Enforcement Review: Positions Paper 7, Strengthening Penalties for Corporate and Financial Sector Misconduct* (Commonwealth of Australia, 2017).

¹¹² *Corporations Act*, ss 793B and 793C.

¹¹³ See, in particular, ASX Listing Rule 3.1 which requires immediate disclosure by a listed entity of certain price sensitive information, See ASX Listing Rules, Chapter 3.

¹¹⁴ See ASX Listing Rules, Chapters 4 and 5.

¹¹⁵ ASX Listing Rule 18.7.

¹¹⁶ ASX Listing Rule 18.7A.

¹¹⁷ ASX Listing Rule 17.3.1.

¹¹⁸ ASX Listing Rule 17.12.

¹¹⁹ *Corporations Act*, s 1101B.

¹²⁰ *Corporations Act*, s 792B(2)(c).

4. Investor Protection - Legal Framework

The civil penalty regime under the *Corporations Act* has important implications for investor protection. Since 2001, the civil penalty regime has included a range of financial services provisions which provide enhanced protection for investors.¹²¹ These financial services provisions capture, *inter alia*, continuous disclosure.¹²² Any person who ‘suffers damage in relation to a contravention of a financial services civil penalty provision may apply for a compensation order.’¹²³ Furthermore, under s 1041H of the *Corporations Act* (which imposes civil liability, but is not itself a civil penalty provision),¹²⁴ a person is prohibited from engaging in misleading or deceptive conduct in relation to a financial product or service. Any person found liable under these provisions may be subject to a compensation order if the defendant has contravened a financial services civil penalty provision and the damage resulted from the contravention.¹²⁵ Shareholders, if they are to succeed in a claim for compensation, must therefore prove that a provision has been contravened, damage has resulted, and the damage was caused by the contravention.

These provisions are subject to both private and public enforcement mechanisms. Under the *Corporations Act* and the *ASIC Act*, shareholders have standing to seek compensation on their own behalf, by way of either a statutory derivative suit or a class action.¹²⁶ ASIC also has standing to enforce contraventions of civil penalty provisions,¹²⁷ including the ability to seek a compensation order for the benefit of the relevant company,¹²⁸ or, in certain circumstances, other persons affected by contraventions, including contraventions of the continuous disclosure provisions.¹²⁹ However, as noted earlier, recovery of compensation does not appear to be the foremost priority in ASIC’s general enforcement strategy.

¹²¹ See s 1317E(1) *Corporations Act*. The financial services provisions were included as civil penalty provisions by the *Financial Services Reform Act 2001* (Cth). See generally Austin, R.P. and Ramsay, I.M., *Ford, Austin and Ramsay’s Principles of Corporations Law* (2015, 16th ed., LexisNexis), [3.400].

¹²² *Corporations Act*, ss 674(2), (2A), 675(2), (2A).

¹²³ *Corporations Act*, s 1317J(3A). However, under the civil penalty provisions applying to corporations, only ASIC or a corporation, or responsible entity, may apply for a compensation order: *Corporations Act*, ss 1317J(1) and 1317J(2).

¹²⁴ See *ASIC v Fortescue Metals Group Ltd* (2011) 190 FCR 364, [10].

¹²⁵ *Corporations Act*, s 1317HA(1).

¹²⁶ Shareholders have standing to bring a statutory derivative action under Part 2F.1A of the *Corporations Act*. However, while a class action results in compensation directly to the shareholder, a derivative action, if successful, results in any damages or compensation being for the benefit of the company with only an indirect benefit accruing to the shareholder.

¹²⁷ *Corporations Act*, Section 1317J(1).

¹²⁸ *Corporations Act*, s 1317H.

¹²⁹ See *Corporations Act*, s 1325(2).

4.1. Continuous Disclosure

Corporate disclosure can be either mandatory or voluntary.¹³⁰ Mandatory corporate disclosure has become an ‘ubiquitous’ feature of current corporate regulation.¹³¹ This is in spite of criticism of its alleged overuse and the growing recognition, both internationally and in Australia, of its limitations as a regulatory tool.¹³²

Mandatory disclosure is underpinned by a variety of policy rationales.¹³³ One of the most important of these is protection of investors, particularly unsophisticated investors.¹³⁴ Other rationales include maintaining and restoring market trust and confidence,¹³⁵ promoting market egalitarianism, and combating fraud.¹³⁶ These generic policy goals lie close to the surface of Australia's continuous disclosure regime.¹³⁷ The aim of ensuring fair and efficient markets is of particular contemporary significance, given the high levels of investment in Australian capital markets as a result of superannuation.¹³⁸

The continuous disclosure regime first came into effect in 1994¹³⁹ and constitutes a key regulatory mechanism for ensuring that public company investors in Australia are adequately

¹³⁰ See Seligman J., ‘The Historical Need for a Mandatory Corporate Disclosure System’ (1983) 9 *J Corp L* 1, 18; Easterbrook, F.H. and Fischel, D.R., ‘Mandatory Disclosure and the Protection of Investors’ (1984) 70 *Va L Rev* 669, 684-85 on the interplay between mandatory and voluntary disclosure rules.

¹³¹ See Ben-Shahar, O. and Schneider, C.E., ‘The Failure of Mandated Disclosure’ (2011) 159 *U Pa L Rev* 647, 650. For discussion of why mandatory disclosure appeals to lawmakers, see *ibid.*, 682-83.

¹³² See *ibid.*, 679ff. In the Australian context, see comments by two senior ASIC regulators. See Price, J., ‘Our Markets: A Regulatory Update’, Speech, G100 Dinner, 24 September 2014, 7; Mitchell, J., ‘Disclosure not enough, admits ASIC’, *Investor Daily*, 12 May 2014.

¹³³ See Enriques, L. and Gilotta, S., ‘Disclosure and Financial Market Regulation’ in Moloney, N., Ferran, E. and Payne, J., eds., *The Oxford Handbook on Financial Market Regulation* (Oxford University Press, 2015), 511, 513ff.

¹³⁴ It has been said, for example, that mandatory disclosure seeks to safeguard ‘the naïve from the sophisticated’. Ben-Shahar, O. and Scheider, C.E., ‘The Failure of Mandated Disclosure’ (2011) 159 *U Pa L Rev* 647, 649. See also Hill, J.G., ‘Images of the Shareholder – Shareholder Power and Shareholder Powerlessness’ in Hill, J.G. and Thomas, R.S., eds., *Research Handbook on Shareholder Power* (Edward Elgar Publishing Ltd, 2015), 53.

¹³⁵ See Enriques, L. and Gilotta, S., ‘Disclosure and Financial Market Regulation’ in Moloney, N., Ferran, E. and Payne, J., eds., *The Oxford Handbook on Financial Market Regulation* (Oxford University Press, 2015), 511, 513ff.

¹³⁶ See Seligman J., ‘The Historical Need for a Mandatory Corporate Disclosure System’ (1983) 9 *J Corp L* 1, 18ff.

¹³⁷ See Companies and Securities Advisory Committee (CASAC), *Report on An Enhanced Statutory Disclosure System* (1991), 6-7.

¹³⁸ See generally Financial System Inquiry, Final Report, Ch. 2 (November 2014).

¹³⁹ See *Corporate Law Reform Act 1994*, Schedule 1, Item 92. For historical and policy background to the introduction of Australia’s continuous disclosure regime, see Golding, G. and Kalfus, N., ‘The Continuous Evolution of Australia’s Continuous Disclosure Laws’ (2004) 22 *Company and Securities Law Journal* 385, 385-87; Redmond, P., *Corporations and Financial Markets Law* (7th ed., 2017), [11.125]; Austin, R.P. and Ramsay, I.M., *Ford, Austin and Ramsay’s Principles of Corporations Law* (2015, 16th ed., LexisNexis), [11.290].

informed on a timely basis.¹⁴⁰ The regime was designed to provide a comprehensive statutory system for the timely disclosure of market sensitive information.¹⁴¹ Its introduction was a response to loss of investor confidence following corporate misconduct in the 1980s and the stock market collapse of 1987.¹⁴² One of ASIC's Commissioners has described continuous disclosure by listed companies in Australia as 'a bedrock of market integrity'.¹⁴³

Australia's continuous disclosure regime comprises a combination of securities exchange listing requirements and statutory provisions.¹⁴⁴ The centrepiece of the regime is ASX Listing Rule 3.1, which requires a listed corporation to disclose market sensitive information concerning its securities to ASX immediately upon becoming aware of the information.¹⁴⁵ Statutory backing for this requirement is provided under s 674(2), which appears in Chapter 6CA of the *Corporations Act*.¹⁴⁶ The regime has been described as 'protective legislation,' which should, therefore, be construed in a way that is beneficial to the public.¹⁴⁷ It is worth noting that the continuous disclosure regime is also beneficial to corporate insiders, because it provides a mechanism for sharing price sensitive information to the market, which allows insiders to trade without fear of breaching insider trading prohibitions under the *Corporations Act*.¹⁴⁸

¹⁴⁰ The influential 1997 Wallis Report highlighted the importance of disclosure, stating that '[f]inancial markets cannot work well unless participants act with integrity, to ensure mutual trust, and unless there is adequate disclosure to facilitate informed judgments'. See Commonwealth of Australia, *Financial System Inquiry: Final Report* ('Wallis Report'), 'The Financial System: Towards 2010', Chapter 7 (1997), 235.

¹⁴¹ For discussion of the legislative history of the continuous regime, see *ASIC v Southcorp Ltd* [2003] FCA 1369, [7]ff.

¹⁴² See *Re Chemeq Ltd (ACN 009 135 264)*; *ASIC v Chemeq Ltd* (2006) 234 ALR 511, [44]-[45]; *Jubilee Mines NL v Riley* [2009] WASCA 62; (2009) 253 ALR 673, [45] (per Martin CJ). See generally, Bloch, M., Weatherhead, J. and Webster, J., 'The Development and Enforcement of Australia's Continuous Disclosure Regime' (2011) 29 *Company and Securities Law Journal* 253.

¹⁴³ See Price, J., 'Continuous Disclosure', Speech, Chartered Secretaries Australia (CSA) 2012 Annual Conference, 3 December 2012.

¹⁴⁴ For discussion of the interaction between the ASX Listing Rules and statutory provisions, see *Jubilee Mines NL v Riley* (2009) WASCA 62; (2009) 253 ALR 673, [55]ff; *ASIC v Newcrest Mining Ltd* [2014] FCA 698, [21]-[34].

¹⁴⁵ See ASX Listing Rules, *Guidance Note 8 – Continuous Disclosure: Listing Rules 3.1-3.1B*, December 2016, [4.1]-[4.5].

¹⁴⁶ Chapter 6CA is entitled 'Continuous Disclosure'. Chapter 6CA commenced operation in 2002. Subsequent amendments to the provisions came into effect on 1 July 2004. Section 674(2) of the *Corporations Act* imposes a statutory obligation to disclose information in accordance with listing rules. However, s 674 only requires disclosure of information that is 'not generally available'. Section 676 specifies when information is (or by implication, is not) 'generally available'.

¹⁴⁷ See *Exicom Pty Ltd v Futuris Corporation Ltd* (1995) 123 FLR 394, 397. See *James Hardie Industries NV v Australian Securities and Investments Commission* [2010] NSWCA 332, [354], noting, however, the potential difficulty of distinguishing between 'protective' and 'punitive' proceedings. See also *Rich v Australian Securities and Investments Commission* [2004] HCA 42; (2004) 220 CLR 129 at [32]). For a general discussion of the importance of the continuous disclosure regime from an investor protection perspective, see *Re Chemeq Ltd (ACN 009 135 264)*; *ASIC v Chemeq Ltd* (2006) 234 ALR 511, [42]-[46]. Cf Easterbrook, F.H. and Fischel, D.R., 'Mandatory Disclosure and the Protection of Investors' (1984) 70 *Va L Rev* 669, 672-73.

¹⁴⁸ We are grateful to Kate O'Rourke for drawing our attention to this point. For discussion of insider trading prohibitions, see generally Austin, R.P. and Ramsay, I.M., *Ford, Austin and Ramsay's Principles of Corporations*

The continuous disclosure regime provides an interesting contrast with a number of other jurisdictions. As Martin C.J. noted in *Jubilee Mines NL v Riley*,¹⁴⁹ Australia's corporate disclosure regime is 'materially different' to disclosure regimes in the United Kingdom, Canada and the United States.¹⁵⁰ In the United States,¹⁵¹ for example, securities law has historically been based on periodic,¹⁵² rather than immediate, disclosure.¹⁵³ This theoretically provides corporate managers with considerable discretion over the timing of corporate disclosures, though there are some notable constraints on this discretion.¹⁵⁴ Many jurisdictions, including the United States, have listing rules that contain a continuous disclosure requirement.¹⁵⁵ The New York Stock Exchange rules, for example, create a continuing obligation for corporations trading on the exchange to release all material information.¹⁵⁶ Yet, enforcement of this rule is weak, with no right to a private cause of action for violation.¹⁵⁷

Australia's continuous disclosure regime, however, has far more regulatory bite,¹⁵⁸ at least in theory, due to the fact that it is a 'co-regulatory' scheme between ASX and ASIC.¹⁵⁹

Law (2015, 16th ed., LexisNexis), [9.600]ff; Redmond, P., *Corporations and Financial Markets Law* (7th ed., 2017), [11.240].

¹⁴⁹ [2009] WASCA 62.

¹⁵⁰ *Ibid* at [53]. For an international comparison of the continuous disclosure regime, see Golding, G. and Kalfus, N., 'The Continuous Evolution of Australia's Continuous Disclosure Laws' (2004) 22 *Company and Securities Law Journal* 385, 412-25.

¹⁵¹ See Yablon, C.M. and Hill, J.G., 'Timing Corporate Disclosures to Maximize Performance-Based Remuneration: A Case of Misaligned Incentives' (2000) 35 *Wake Forest L. Rev.* 83, 93-96.

¹⁵² Australian law relies on periodic financial reporting in addition to continuous disclosure. See *Corporations Act*, Part 2M.3; Golding, G. and Kalfus, N., 'The Continuous Evolution of Australia's Continuous Disclosure Laws' (2004) 22 *Company and Securities Law Journal* 385, 385-86.

¹⁵³ See, for example, SEC, *Proposed Rule: Selective Disclosure and Insider Trading*, Release Nos. 33-7787, 34-42259, IC-24209 (Dec 20, 1999), stating that 'the federal securities laws do not generally require an issuer to make public disclosure of all important corporate developments when they occur. Periodic reports...call for disclosure of specified information on a regular basis'.

¹⁵⁴ Constraints include the famous US 'disclose or abstain' (from trading) rule; the obligation to correct or update prior periodic disclosures; listing rule requirements; and Regulation FD (Fair Disclosure), which targets selective disclosure. See generally Yablon, C.M. and Hill, J.G., 'Timing Corporate Disclosures to Maximize Performance-Based Remuneration: A Case of Misaligned Incentives' (2000) 35 *Wake Forest L. Rev.* 83, 94; Golding, G. and Kalfus, N., 'The Continuous Evolution of Australia's Continuous Disclosure Laws' (2004) 22 *Company and Securities Law Journal* 385, 412ff.

¹⁵⁵ See Golding, G. and Kalfus, N., *ibid*, 385, 412.

¹⁵⁶ See New York Stock Exchange Listed Company Manual, 202.05.

¹⁵⁷ Golding, G. and Kalfus, N., 'The Continuous Evolution of Australia's Continuous Disclosure Laws' (2004) 22 *Company and Securities Law Journal* 385, 412.

¹⁵⁸ See generally Boros, E. and Duns, J., *Corporate Law* (3rd ed., Oxford University Press), [15.5.1]. Nonetheless, some scholars have at times criticized enforcement of the continuous disclosure regime. See, for example, North, G., 'A Call for a Bold and Effective Corporate Disclosure Regulatory Framework' (2010) 28 *Company and Securities Law Journal* 331.

¹⁵⁹ See North, G., *ibid*, 333. The co-regulatory model is underpinned by a Memorandum of Understanding between ASIC and ASX. See *Memorandum of Understanding between Australian Securities and Investments Commission and ASX Limited ABN 98 008 691* (October 2011). See also North, G., 'The Corporate Disclosure Co-regulatory

This provides the listing rules with the full statutory backing of the *Corporations Act*, and raises the spectre of enforcement by ASIC under the civil penalty regime.

In spite of the *prima facie* breadth and stringency of Australia's continuous disclosure regime, it should be noted that the scheme includes some important exemptions, or carve-outs, which provide management with considerable discretion concerning disclosure.¹⁶⁰ These exceptions, which are contained in ASX Listing Rule 3.1A, represent an acknowledgement of the need to balance policy justifications for a high level of disclosure as expected by investors and regulators, with the 'legitimate commercial interests' of listed corporations and their security holders.¹⁶¹

The exceptions have been the subject of strong criticism, with one financial commentator describing them as a 'Handbook for Keeping Shareholders in the Dark'.¹⁶² Some of the exceptions are vague;¹⁶³ others, such as an exception for information relating to an 'incomplete proposal or negotiation,'¹⁶⁴ effectively allow management itself to determine the timing of disclosure.¹⁶⁵ One of the conditions for exemption from the continuous disclosure obligation is that the information must be 'confidential,'¹⁶⁶ and loss of confidentiality will undo exempt status.¹⁶⁷

Some Australian cases have stated that the purpose of the continuous disclosure regime is to ensure that the market is 'fully informed.'¹⁶⁸ However, given the disclosure exceptions, it has been argued that the conceptual basis of the regime is not, in fact, full disclosure, but rather,

Model: Dysfunctional and Rules in Limbo' (2009) 37 *Australian Business Law Review* 75, who argues that the co-regulatory model is 'deeply flawed' due to the dual status of ASX as both a market operator and co-regulator.

¹⁶⁰ See ASX Listing Rules, *Guidance Note 8 – Continuous Disclosure: Listing Rules 3.1 - 3.1B*, 19 December 2016, [5.1]ff. See also Yablon, C.M. And Hill, J., 'Timing Corporate Disclosures to Maximise Performance-Based Remuneration: A Case of Misaligned Incentives?' (2000) 35 *Wake Forest L Rev* 83, 95-96.

¹⁶¹ See ASX Listing Rules, *Guidance Note 8 – Continuous Disclosure: Listing Rules 3.1 - 3.1B*, 19 December 2016, [5.1].

¹⁶² Kohler, A., 'What to Say, How to Say It, When and to Whom – These are the Questions', *The Age*, 17 February 2007 (cited in Bloch, M., Weatherhead, J. and Webster, J., 'The Development and Enforcement of Australia's Continuous Disclosure Regime' (2011) 29 *Company and Securities Law Journal* 253, 255). For discussion of the 'hazy penumbra' of some of the continuous disclosure carve-outs, see Yablon, C.M. And Hill, J., 'Timing Corporate Disclosures to Maximise Performance-Based Remuneration: A Case of Misaligned Incentives?' (2000) 35 *Wake Forest L Rev* 83, 95. See also North, G., *Effective Company Disclosure in the Digital Age* (Wolters Kluwer, 2015), 220-23, 254-55, noting the tension between materiality and confidentiality in relation to disclosure.

¹⁶³ For example, '[t]he information comprises matters of supposition or is insufficiently definite to warrant disclosure' (ASX Listing Rule 3.1A.1).

¹⁶⁴ ASX Listing Rule 3.1A.1.

¹⁶⁵ This is a particularly vexed issue in the context of mergers and acquisitions. See generally Yablon, C.M. And Hill, J., 'Timing Corporate Disclosures to Maximise Performance-Based Remuneration: A Case of Misaligned Incentives?' (2000) 35 *Wake Forest L Rev* 83, 96.

¹⁶⁶ ASX Listing Rules, *Guidance Note 8 – Continuous Disclosure: Listing Rules 3.1 - 3.1B*, 19 December 2016, [5.8].

¹⁶⁷ See, e.g., *ASIC v Newcrest Mining Ltd* [2014] FCA 698, [30]-[34].

¹⁶⁸ *James Hardie Industries NV v Australian Securities and Investments Commission* [2010] NSWCA 332, [355].

‘fairness.’¹⁶⁹ Several cases adopt this interpretation, asserting that the regime is designed to promote a level playing field by ensuring ‘equal access’¹⁷⁰ to information and preventing ‘selective disclosure of market sensitive information’.¹⁷¹

Selective disclosure of confidential information surfaced as a hot topic in Australia, following the Newcrest Mining Ltd (‘Newcrest’) scandal. In mid-2014, ASIC commenced legal proceedings against Newcrest in the Federal Court of Australia (‘Federal Court’), alleging that Newcrest had selectively disclosed confidential information to analysts.¹⁷² ASIC argued that this disclosure resulted in loss of confidentiality, which then deprived the company of protection under the exceptions to continuous disclosure.¹⁷³

The Federal Court accepted this argument and held that Newcrest had become obliged to give detailed disclosure to the ASX under s 674(2) of the *Corporations Act* following loss of confidentiality due to the briefings.¹⁷⁴ In finding that Newcrest had breached s 674(2), Justice Middleton emphasized the ‘fairness’ rationale for continuous disclosure, stating that ‘equal access to market sensitive information is paramount in ensuring that markets operate on an informed, and equally informed, basis’.¹⁷⁵ ‘Fairness’ also emerged as one of the guiding principles for financial market regulation in the final report of the Financial System Inquiry in 2014.¹⁷⁶

Breach of the continuous disclosure regime by a listed company can result in serious consequences,¹⁷⁷ and several cases have tied the stringency of the penalties for breach to the underlying importance of the regime.¹⁷⁸ Under s 674(2) of the *Corporations Act*, which is a financial services civil penalty provision, each contravention can attract a pecuniary penalty, payable to the Commonwealth Government, of up to A\$1 million.¹⁷⁹ It has been said that these

¹⁶⁹ See Bloch, M., Weatherhead, J. and Webster, J., ‘The Development and Enforcement of Australia’s Continuous Disclosure Regime’ (2011) 29 *Company and Securities Law Journal* 253, 254-55.

¹⁷⁰ See *Jubilee Mines NL v Riley* [2009] WASCA62; (2009) 253 ALR 673, 87.

¹⁷¹ See, e.g., *ASIC v Southcorp Ltd* [2003] FCA 1369, [2].

¹⁷² ASIC also released a report in May 2014 ASIC, Report 393, *Handling of Confidential Information: Briefings and Unannounced Corporate Transactions*, May 2014. See Wilkins, G., ‘Corporate Watchdog Growls at Research Analysts’, *Sydney Morning Herald*, 28 May 2014.

¹⁷³ See ASIC, Media Release 14-133, ‘Newcrest admits to breaching continuous disclosure laws’, 18 June 2014.

¹⁷⁴ *ASIC v Newcrest Mining Ltd* [2014] FCA 698, [30]-[34].

¹⁷⁵ *Ibid* at [87].

¹⁷⁶ A triad of principles underpin the Financial System Inquiry – namely, ‘efficiency’, ‘resilience’ and ‘fairness’. See Financial System Inquiry, Final Report, Commonwealth of Australia, November 2014, Box 2: General Principles for Policy Makers, 12.

¹⁷⁷ See ASX Listing Rules, *Guidance Note 8 – Continuous Disclosure: Listing Rules 3.1 - 3.1B*, 19 December 2016, 78-9.

¹⁷⁸ See *ASIC v Newcrest Mining Ltd* [2014] FCA 698, [87]; *Re Chemeq Ltd (ACN 009 135 264)*; *ASIC v Chemeq Ltd* (2006) 234 ALR 511, [46].

¹⁷⁹ See ss1317G(1A) and 1317G(1B)(b). For discussion of the consequences generally of breach of the civil penalty regime, see Austin, R.P. and Ramsay, I.M., *Ford, Austin and Ramsay’s Principles of Corporations Law* (2015, 16th ed., LexisNexis), [3.390]-[3.400].

penalties are ‘punitive,’ rather than ‘protective,’ in nature.¹⁸⁰ In *ASIC v Newcrest Mining Ltd*,¹⁸¹ Justice Middleton imposed a total of A\$1.2 million in penalties with respect to two contraventions by Newcrest of s 674(2).¹⁸² According to the judge, ‘general deterrence’ was the primary consideration in fixing the penalty.¹⁸³ Alternatively, ASIC has power to issue infringement notices for alleged contraventions of the continuous disclosure provisions, with penalties of up to A\$100,000.¹⁸⁴ Breach of s 674(2) is also a criminal offence.¹⁸⁵ In addition to proceedings initiated by ASIC, actions for compensation may be brought by shareholders, either individually,¹⁸⁶ or more commonly, by way of class actions.¹⁸⁷

Although the primary obligation is on the entity itself, breach of mandatory disclosure obligations by a listed corporation can also have severe consequences for its directors and officers. First, they may themselves breach s 674(2A) if they are ‘involved in’ the contravention. Involvement in contraventions is defined in s 79 of the *Corporations Act* to mean any person who has: (a) aided, abetted, counselled or procured the contravention; (b) induced, whether by threats or promises or otherwise, the contravention; (c) been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention; or (d) conspired with others to effect the contravention. Therefore, if a corporate body breaches these rules, any officer knowingly concerned in the breach is potentially liable for damages. Breach of s 674 (2A) exposes directors and officers to a penalty of up to \$200,000 under the financial services civil penalty provisions. In these circumstances, they may also be liable to compensate persons who have suffered loss or damage as a result of their breach.¹⁸⁸

Perhaps the most significant contemporary development in relation to the liability of company directors and officers relates to what has been termed ‘stepping stone’ liability.¹⁸⁹ The stepping stone approach to liability is a two-step process, whereby the courts may impose

¹⁸⁰ *Re Chemeq Ltd (ACN 009 135 264); ASIC v Chemeq Ltd (2006) 234 ALR 511, [90]*. Cf in a competition law context, cf the comments by Finkelstein J. in *ACC v ABB Transmission and Distribution Ltd (No 2) (2002) 190 ALR, 169, [17]* (cited by French J. in *Re Chemeq Ltd (ACN 009 135 264); ASIC v Chemeq Ltd (2006) 234 ALR 511, [92]*).

¹⁸¹ [2014] FCA 698.

¹⁸² Middleton J. imposed a penalty of A\$800,000 for the first contravention and A\$400,000 for the second contravention. He considered that a lower penalty was justified for the second contravention, on the basis that it was a less serious breach and the information disclosed was less sensitive than in the case of the first contravention. *Ibid* at [83]-[84].

¹⁸³ *Ibid* at [87]. For factors relevant to the level of penalty for breach of the continuous disclosure regime, see also *Re Chemeq Ltd (ACN 009 135 264); ASIC v Chemeq Ltd (2006) 234 ALR 511, [90]-[99]*.

¹⁸⁴ The size of the penalty is variable depending on the market capitalization of the listed entity. See *Corporations Act*, s 1317DAE; ASX Listing Rules, *Guidance Note 8 – Continuous Disclosure: Listing Rules 3.1 - 3.1B*, 19 December 2016, 78, fn 311. See generally ASIC, Regulatory Guide 73, *Continuous Disclosure Obligations: Infringement Notices*, October 2017.

¹⁸⁵ *Corporations Act*, ss 1311(1) and 1311(2).

¹⁸⁶ See *Jubilee Mines NL v Riley* [2009] WASCA 62; (2009) 253 ALR 673.

¹⁸⁷ Boros, E. and Duns, J., *Corporate Law* (3rd ed. 2013), [15.5.1(a)].

¹⁸⁸ *Corporations Act*, s 1317HA.

¹⁸⁹ See generally, Herzberg, A. and Anderson, H., ‘Stepping Stones – From Corporate Fault to Directors’ Personal Civil Liability’ (2012) 40 *Federal Law Review* 181.

liability on company directors and officers for failure to prevent a corporate contravention of the law.¹⁹⁰ There are a number of recent cases in which ASIC has brought civil penalty proceedings against directors or officers for a breach of the statutory duty of care under s 180(1) of the *Corporations Act*,¹⁹¹ using as the first step a contravention of s 674(2), or other mandatory disclosure duties, or breach of s 1041H, the misleading and deceptive conduct provision.¹⁹² Judicial acceptance of stepping stone liability in Australia has greatly increased the potential liability exposure of directors and officers for contraventions of the law by their corporations.

4.2. Misleading or Deceptive Conduct

Quality is just as important as quantity when it comes to corporate information. Investor protection demands, not only that disclosure be complete, but also that it be accurate.¹⁹³ The notional benefits of mandatory disclosure would be subverted unless companies were prohibited from making bogus statements and announcements. Section 1041H of the *Corporations Act* fulfils this role by proscribing misleading or deceptive conduct in relation to a financial product or a financial service.

4.2.1. Background

The original source of the prohibitions on misleading or deceptive conduct was section 52 of the *Trade Practices Act 1974* (Cth)¹⁹⁴ (as it was formerly known),¹⁹⁵ a general consumer protection provision applying to misleading or deceptive conduct in trade or commerce. A shareholder successfully sued under this provision in *Fraser v NRMA Holdings Ltd*¹⁹⁶ based on misleading statements made in the context of the demutualization of NRMA. Subsequently, specific prohibitions on misleading or deceptive conduct in various contexts were adopted in the *Corporations Act*,¹⁹⁷ including conduct that is otherwise misleading or deceptive in relation

¹⁹⁰ See Zhou, A., 'A Step Too Far? Rethinking the Stepping Stone Approach to Officers' Liability' (forthcoming 2018, *Federal Law Review*).

¹⁹¹ See, for example, *ASIC v Fortescue Metals Group Ltd* (2011) 190 FCR 364, [10]; *ASIC v Cassimatis (No 8)* [2016] FCA 1023. Section 180(1) of the *Corporations Act* is itself a civil penalty provision.

¹⁹² Decisions reflecting this approach include high profile caselaw, such as the James Hardie litigation and the Centro Group litigation. See, for example, *ASIC v Hellicar* (2012) 86 ALJR 522 and *ASIC v Healey* (2011) 196 FCR 291. See also *ASIC v Fortescue Metals Group Ltd* (2011) 190 FCR 364, [10]; *ASIC v Cassimatis (No 8)* [2016] FCA 1023. See generally Herzberg, A. and Anderson, H., 'Stepping Stones – From Corporate Fault to Directors' Personal Civil Liability' (2012) 40 *Federal Law Review* 181; Bednall, T. and Hanrahan, P., 'Officers' Liability for Mandatory Disclosure: Two Paths, Two Destinations?' (2013) 31 *Company and Securities Law Journal* 474; Zhou, A., 'A Step Too Far? Rethinking the Stepping Stone Approach to Officers' Liability' (forthcoming 2018, *Federal Law Review*).

¹⁹³ See *Jubilee Mines NL v Riley* [2009] WASCA 62, [55]ff; *ASIC v Newcrest Mining Ltd* [2014] FCA 698, [87].

¹⁹⁴ *Trade Practices Act 1974* (Cth), s 52 provided: 'a corporation must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.'

¹⁹⁵ The former s 52 of the *Trade Practices Act 1974* (Cth) is now found in Schedule 2, s 18 of the *Competition and Consumer Act 2010* (Cth).

¹⁹⁶ (1995) 55 FCR 452.

¹⁹⁷ And false or misleading conduct in relation to financial services was removed from the ambit of the *Trade Practices Act 1974* (Cth), s 51AF(2).

to securities,¹⁹⁸ takeover documents¹⁹⁹ and fundraising documents.²⁰⁰ However, the case law on section 52 remains applicable.²⁰¹

4.2.2. Statutory Cause of Action

The misleading or deceptive conduct²⁰² provisions in relation to financial services or a financial product are provided for in s 1041H²⁰³ of the *Corporations Act* and s 12DA²⁰⁴ of the *ASIC Act*. Section 1041I of the *Corporations Act* and Section 12GF(1) of the *ASIC Act* provide that a person who suffers loss or damage by conduct in contravention of section 1041H or section 12DA, respectively, may recover the amount of loss or damage by action against the person contravening the section or against any person involved in the contravention.²⁰⁵ The duties under the provisions cannot be excluded by means of a waiver or exclusion clause.²⁰⁶ Although there are no defences to s 1041H, there are a number of provisions that may limit liability arising from a breach of the misleading or deceptive conduct provisions.²⁰⁷

Section 670A of the *Corporations Act* contains a prohibition on providing various takeover documents if there is a misleading or deceptive statement in the document. Section 728(1) of the *Corporations Act* provides that a person is prohibited from offering securities under a disclosure document where there is a misleading or deceptive statement in the disclosure document, any application form accompanying the disclosure document, or any other document that contains the offer. However, unlike a contravention of s 1041H or s 12DA, a number of defences are available with respect to both provisions.²⁰⁸

¹⁹⁸ *Corporations Act*, s 1041H; *ASIC Act*, s 12DA.

¹⁹⁹ *Corporations Act*, s 670A.

²⁰⁰ *Corporations Act*, s 728.

²⁰¹ See *National Exchange Pty Ltd v ASIC* (2004) 49 ACSR 369, [18]; *Rawley Pty Ltd v Bell* (No. 2) (2007) 61 ACSR 648, [37].

²⁰² A similar provision relating to false or misleading statements is found in *Corporations Act*, s 1041E. However, that section requires deliberate, negligent or reckless conduct, whereas s 1041H imposes liability without any requirement of fault.

²⁰³ *Corporations Act*, s 1041H(1) provides: 'a person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial services, that is misleading or deceptive or is likely to mislead or deceive.'

²⁰⁴ *ASIC Act*, s 12DA provides: 'a person must not, in trade or commerce, engage in conduct in relation to a financial service that is misleading or deceptive or is likely to mislead or deceive.'

²⁰⁵ See, e.g. *Arktos Pty Ltd v Idyllic Nominees Pty Ltd* [2004] FCAFC 119, [13]; *Clifford v Vegas Enterprises Pty Ltd* (No. 5) [2010] FCA 916; Harris, J. and Webbey, S., 'Personal Liability for Corporate Disclosure Problems' (2011) 29 *Company and Securities Law Journal* 463.

²⁰⁶ See, e.g., *Petera Pty Ltd v EAJ Pty Ltd* (1985) 7 FCR 375.

²⁰⁷ See, e.g., s 1044B (limit of liability based on any applicable State or Territory professional standards law) and ss 1041L and 1041N (application of proportionate liability to damages claims under s 1041I or breach of s 1041H).

²⁰⁸ *Corporations Act*, ss 670D, 731, 732, 733.

4.2.3. Proving Misleading or Deceptive Conduct

The expression ‘misleading or deceptive’ is not defined in any of relevant legislation, however, courts have indicated that it has the same meaning across the statutory provisions.²⁰⁹ Whether conduct is misleading or deceptive, or is likely to mislead or deceive, is an objective question of fact to be determined by the court.²¹⁰ In a general sense, conduct is likely to mislead or deceive if there is a real, but not remote, possibility of it doing so.²¹¹ Conduct may include silence where the context requires disclosure to avoid a person being misled or deceived.²¹² Forecasts and forward-looking statements fall within the scope of the provision.²¹³ A person is taken to make a misleading statement about a future matter if they do not have reasonable grounds for making the statement.²¹⁴ Merely causing confusion is insufficient to render the conduct or statement misleading or deceptive.²¹⁵

While conduct that was intended to mislead or deceive would fall within the scope of these provisions, there is no general requirement to prove intention.²¹⁶ The provisions are drafted to focus on the consequences of the misleading statement rather than the contravener’s state of mind.²¹⁷

A contravention of these provisions does not result in criminal liability, but compensation may be payable to a person for loss or damages suffered as a result of a breach.²¹⁸ To obtain compensation, a claimant must establish a causal relationship between the alleged misleading or deceptive conduct and any loss or damage suffered.²¹⁹ The relevant conduct must be a material cause of the plaintiff being misled or deceived, but does not necessarily have to be the primary or only cause.²²⁰ If the shareholder does not prove causation, he or she will not be entitled to compensation for any losses suffered.²²¹

²⁰⁹ *GPG (Australia Trading) Pty Ltd v GIO Australia Holdings Ltd* (2001) 117 FCR 23, [100].

²¹⁰ See *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 198-99.

²¹¹ *Ibid.*

²¹² See *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31; *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 39 FCR 546; *Winterton Construction Pty Ltd v Hambros Australia Ltd* (1992) 39 FCR 97.

²¹³ See *ASIC v PFS Business Development Group Pty Ltd* (2006) 57 ACSR 553, [365], [369]; *Downey v Carlson Hotels Asia Pacific Pty Ltd* [2005] QCA 199 (unreported, Queensland Court of Appeal, 10 June 2005) [124].

²¹⁴ *Corporations Act*, ss 670A(2), 728(2); *ASIC Act*, s 12BB(1).

²¹⁵ *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191.

²¹⁶ *National Exchange Pty Ltd v ASIC* (2004) 49 ACSR 369, [27]-[28].

²¹⁷ *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216, 228; *Brown v Jam Factory Pty Ltd* (1981) 53 FLR 340, 348; *ASIC v Online Investors Advantage Inc.* [2005] QSC 324 (unreported, Supreme Court of Queensland, 26 October 2005) [138].

²¹⁸ *Corporations Act*, s 1041I; *ASIC Act*, s 12GF.

²¹⁹ *Taco Co of Australia Inc v Taco Bell Pty Ltd* [1982] ATPR 40-303.

²²⁰ See *Henville v Walker* (2001) 206 CLR 459, 469, [14]; *Transglobal Capital Pty Ltd v Yolarno Pty Ltd* [2005] ATPR 42-058.

²²¹ See *Johnston v McGrath* (2005) 195 FLR 101, 108.

As with a breach of the continuous disclosure regime, liability for civil damages for misleading or deceptive conduct is potentially broad, reaching any person who is ‘involved in’ the contravention.²²² In *ASIC v Citrofresh International Ltd (No 2)*,²²³ which is an example of ‘stepping stone’ liability discussed above, the Federal Court held that the managing director of a company breached his duty of care under s 180(1) of the *Corporations Act* by authorising and facilitating a company to make a misleading and deceptive ASX announcement.²²⁴

Similar to actions relating to continuous disclosure breaches, actions for breach of the misleading and deceptive conduct provisions are likely to be more viable when brought as a class action. In many cases, the same conduct will involve a breach of both the continuous disclosure provisions and the provisions prohibiting false or misleading conduct. For example, in *ASIC v Fortescue Metals Group Ltd*,²²⁵ the Full Federal Court held that the making of a misleading statement could give rise to an obligation under the continuous disclosure provisions to correct it. However, as the Full Federal Court decision on liability was overturned on appeal to the High Court,²²⁶ it was unnecessary for the High Court to express a view on the relationship between the continuous disclosure and misleading disclosure provisions.

5. Shareholder Class Actions

5.1. Procedure

As noted above, ASIC will often encourage investors who have suffered loss to take private legal action, by means of, for example, shareholder class actions, rather than the regulator itself seeking compensation on behalf of such persons.

Class actions were, however, non-existent in Australia prior to the 1990s. They were first introduced through the enactment of the *Federal Court of Australia Amendment Act 1991* (Cth) which provided for ‘representative proceedings’ through inserting Part IV A into the *Federal Court of Australia Act 1976* (Cth) (‘FCA Act’). Part IVA commenced on 4 March 1992. There are essentially identical rules in New South Wales and Victoria.²²⁷

The commencement of proceedings is straightforward as, unlike in the US regime, there is no certification requirement that requires an applicant to demonstrate compliance with s 33C of the FCA Act. The class action procedure requires that a valid class action have: seven or

²²² See *Corporations Act*, s 79.

²²³ [2010] FCA 27.

²²⁴ A similar finding was made by the NSW Supreme Court against the CEO, CFO, company secretary/general counsel and non-executive directors of James Hardie in *ASIC v Macdonald (No 11)* [2009] NSWSC 287. The CEO did not appeal the decision at first instance. The decision against the CFO was affirmed on appeal by the NSW Court of Appeal in *Morley v ASIC* [2010] NSWCA 331. The decision against the non-executive directors and the company secretary/general counsel was affirmed on appeal by the High Court in *ASIC v Hellicar* [2012] HCA 17 and *Shafroon v ASIC* [2012] HCA 18 respectively.

²²⁵ (2011) 190 FCR 364, [181].

²²⁶ *Forrest v ASIC* (2012) 291 ALR 399.

²²⁷ Similar regimes came into effect in Victoria on 1 January 2000, under Part 4A of the *Supreme Court Act 1986* (Vic.) and in NSW on 4 March 2011, under Part 10 of the *Civil Procedure Act 2005* (NSW).

more people who have claims against the same person(s);²²⁸ the claims are ‘in respect of, or arise out of, the same, similar or related circumstances’;²²⁹ and the claims ‘give rise to at least one substantial common issue of law or fact.’²³⁰ The Full Court of the Federal Court has confirmed that a class action with multiple respondents does not require each person in the class to have a case against each respondent, provided that at least seven people have a case against each respondent.²³¹ In Australia, class members are not parties to the litigation and have remained ‘essentially passive.’²³² The High Court has stated that the opt-out nature of class actions in Australia means that group members ‘need take no positive step in the prosecution of the proceeding to judgment to gain whatever benefit its prosecution may bring.’²³³

While there is a general prohibition on solicitors charging contingency fees in all states and territories of Australia,²³⁴ it is now common for third party litigation funders to meet cost orders made against the class representative and to provide security for costs where sought by the respondent. Initially, third party litigation funding was the subject of numerous challenges based on the criticism that it permits a party with no ‘skin in the game’ to control the litigation. However, in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*,²³⁵ the High Court held that third party litigation funding was not an abuse of process or contrary to public policy. More than ‘triple the number of class actions were commenced in the three years following the decision than in the three years prior.’²³⁶ According to the Federal Court of Australia Case Management Handbook, ‘litigation funding has proven to be the life-blood of most of Australia’s representative proceeding litigation at Federal and State level.’²³⁷

Although IMF (Australia) Ltd is the predominant third party funder in Australia, there are a number of other active funders, including: Comprehensive Legal Funding LLC; Hillcrest Litigation Services Limited; International Litigation Funding Partners Pty Limited; LCM Litigation Fund Pty Ltd; Litigation Lending Services Limited. Legislative amendments in July 2013 formally exempt litigation funders from the need to hold an Australian Financial Services Licence, but require them to maintain adequate practices for managing conflicts of interest.²³⁸

²²⁸ *Federal Court Act 1976* (Cth), s 33C(1)(a); *Supreme Court Act 1986* (Vic), s 33C(1)(a); *Civil Procedure Act 2005* (NSW), s 157(1)(a).

²²⁹ *Federal Court Act 1976* (Cth), s 33C(1)(b); *Supreme Court Act 1986* (Vic), s 33C(1)(b); *Civil Procedure Act 2005* (NSW), s 157(1)(b).

²³⁰ *Federal Court Act 1976* (Cth), s 33C(1)(c); *Supreme Court Act 1986* (Vic), s 33C(1)(c); *Civil Procedure Act 2005* (NSW), s 157(1)(c).

²³¹ *Cash Converters International Limited v Gray* [2014] FCAFC 111.

²³² *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No. 2)* [2010] FCA 176 at [16], [17].

²³³ *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 32.

²³⁴ See, e.g., *Legal Profession Act 2004* (NSW), s 325; *Australian Solicitors’ Conduct Rules 2011*, rule 12.2.

²³⁵ [2006] 229 CLR 386.

²³⁶ See Morabito, V., ‘An Empirical Study of Australia’s Class Action Regimes: Class Actions Facts and Figures’, (Dec. 2009).

²³⁷ Law Council of Australia and Federal Court of Australia, *Federal Court of Australia Case Management Handbook* [13.12].

²³⁸ *Corporations Amendment Regulation 2012 (No. 6)* (Cth). See also ASIC Regulatory Guide 248 Litigation schemes and proof of debt schemes: managing conflicts of interest, which highlights the tensions between litigation funders, law firms and group members.

Where a third party's claim for damages against a director is likely to exceed the insurance monies available to cover the claim and the director's legal costs, legislation²³⁹ in force in NSW, the ACT, and the NT imposes a charge over some or all of the insurance funds in favour of the claimant. This creates a potential conflict between directors' contractual right to receive advances from insurers to cover litigation defence costs and the third party's rights, under the charge, to the insurance monies.

The court has the power to terminate a class action where it is satisfied that it is in the interests of justice to do so. Persuasive factors include if the costs of group proceedings are likely to exceed the costs of separate proceedings; the relief sought could be obtained by other proceedings; the class action proceedings will not provide an efficient and effective means of dealing with the claims; or it is otherwise inappropriate to bring the claims as a class action.²⁴⁰

Any proposed settlement between the parties requires the approval of the Court.²⁴¹ Both sides must persuade the Court that the proposed settlement is in the interests of class members.²⁴² The court will then consider whether the proposed settlement is a 'fair and reasonable' compromise of the claims of the class members.²⁴³

Recently, a number of proposed settlements have been questioned or disallowed by the courts. In a proposed settlement of a class action arising out of the collapse of *Storm Financial Limited*,²⁴⁴ the Full Federal Court held that the proposed distribution of the settlement sum between group members discriminated between the returns to group members who had been given the opportunity to contribute to the funding of the proceeding and those who had not. Similarly, in the *Vioxx*²⁴⁵ class action, the Federal Court declined to approve a settlement made by the representative applicant because it failed to differentiate adequately the respective strengths of group members.

5.2. The Australian Experience

The first Australian shareholder class action, *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)*,²⁴⁶ commenced in the Federal Court on 31 August 1999. Since that time, shareholder class actions have become prevalent in Australia due to 'an accessible class action procedure; statutory causes of action based on misleading or deceptive conduct and breach of continuous disclosure requirements, for which individual shareholders have standing to pursue monetary damages; increasing numbers of individual and institutional

²³⁹ See *Law Reform (Miscellaneous Provisions) Act 1946* (NSW), s 6; *Civil Law (Wrongs) Act 2002* (ACT), ss 206-209; *Law Reform (Miscellaneous Provisions) Act 1956* (NT), ss 26-29.

²⁴⁰ *Federal Court Act 1976* (Cth), s 33N.

²⁴¹ *Federal Court Act 1976* (Cth), s 33V; *Supreme Court Act 1986* (Vic), s 33V; *Civil Procedure Act 2005* (NSW), s 173

²⁴² Federal Court Practice Note CM17 (1 Aug. 2011).

²⁴³ While the legislation does not set out any criteria against which a settlement should be judged, the Federal Court has issued a practice note which sets out the Court's general practice in considering settlements. See Practice Note CM17: Representative Proceedings Commenced Under Part IVA of the *Federal Court of Australia Act* (1 Aug. 11).

²⁴⁴ *ASIC v Richards* [2013] FCAFC 89.

²⁴⁵ *Joan Reaves v Merck Sharp Dohme (Australia) Pty Ltd* (No. 6) [2013] FCA 447.

²⁴⁶ Federal Court of Australia, Proceeding No N 955 of 1999. See also Moore, M., 'Ten Years Since King v GIO' (2009) 32(3) *UNSWLJ* 883.

shareholders that are willing to sue; and the acceptance of third party litigation funding as a method for financing litigation, including high-value class actions.²⁴⁷

Since 2000, there have been numerous significant shareholder class actions, which have resulted in substantial settlements. Most shareholder class actions involve allegations that the respondent company contravened the prohibition against misleading or deceptive conduct and/or the continuous disclosure obligations. The table below identifies shareholder class action settlements over \$50 million.²⁴⁸

Company	Settlement Date	Allegations	Settlement Amount
GIO	2003	Misleading representations in takeover, reinsurance losses, business risk	\$112 M
Aristocrat	2008	Continuous disclosure, profit downgrade	\$144.5 M
Sons of Gwalia	2009	Continuous disclosure, misleading or deceptive conduct, corporate collapse	\$70 M
Multiplex	2010	Continuous disclosure, profit downgrade	\$110 M
OZ Minerals	2011	Continuous disclosure, debt position	\$60 M
Centro	2012	Continuous disclosure, debt position	\$200 M
NAB	2012	Continuous disclosure, business risk	\$115 M
Sigma Pharmaceuticals	2012	Continuous disclosure as part of rights issue, profit downgrade	\$57.5 M
GPT	2013	Continuous disclosure, misleading or deceptive conduct	\$75 M
Leighton Holdings	2014	Continuous disclosure, misleading or deceptive conduct	\$69.45 M

Of the thirty-five new proceedings filed to 30 June 2016,²⁴⁹ seven shareholder class actions were filed alleging breaches of the continuous disclosure obligations and/or misleading or deceptive conduct.²⁵⁰ Despite this, fundamental elements that need to be proven in disclosure-related class actions in Australia have yet to be authoritatively determined.²⁵¹

²⁴⁷ Legg, M., 'Shareholder Class Actions in Australia – The Perfect Storm?' (2008) 31(3) *UNSWLJ* 669.

²⁴⁸ Data for the table was sourced from King & Wood Mallesons, 'The Review: Class Actions in Australia 2015/16'.

²⁴⁹ See King & Wood Mallesons, 'The Review: Class Actions in Australia 2015/16'.

²⁵⁰ *Ibid.*

²⁵¹ See, e.g., Legg, M., 'Shareholder Class Actions in Australia – The Perfect Storm' (2008) 31(3) *UNSWLJ* 669; Beach, J., 'Class Actions: Some Causation Questions' (2011) 85 *Australian Law Journal* 579; Drinnan, R. and Campbell, J., 'Causation in Securities Class Actions' (2009) 15 *UNSW LJ* 32;

In shareholder claims based on causes of action under the *Corporations Act*, the loss or damage incurred by the shareholder must ‘result from’ (in the case of continuous disclosure)²⁵² or ‘by’ (in the case of misleading or deceptive conduct)²⁵³ the conduct which has contravened the relevant statutory provisions. Where a statutory provision requires a causal link to be established between conduct and loss, Australian courts recognize the importance of assessing causation within the meaning of the relevant legislation.²⁵⁴ A historically disputed issue is whether it is necessary for each claimant to prove actual reliance on the contravening conduct (‘direct causation’), or whether the requirement can be satisfied by general notions of reliance by the market affecting the price at which each claimant purchased and/or sold their shares or securities (‘market-based causation’).²⁵⁵

Traditionally, Plaintiffs seeking to raise market-based causation rely on a line of authorities commencing with *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd*.²⁵⁶ In that case, the Federal Court found that the respondent had misled consumers by making representations to the public about one of its products. The misrepresentations caused the public to purchase more of Pfizer’s product and less of the applicant’s product. As a result, Janssen-Cilag, a competitor to Pfizer, suffered reduced market share and losses even though it had not relied on the misrepresentations per se. The court held that Janssen-Cilag could recover on the basis that an entitlement to recover loss or damage was not confined to persons who relied on the contravening representations. However, ‘loss or damage must directly result from or be caused by the respondent’s conduct’.²⁵⁷

However, in *Janssen-Cilag*, the plaintiff suffered loss passively. If a misleading disclosure or omission causes the share price of a company to be inflated, it does not necessarily follow that a shareholder will suffer loss. The shareholder would need to take active steps to suffer the loss, for example, by making a decision to purchase during the inflation period. Later cases such as *Digi-Tech*²⁵⁸ and *Ingot*²⁵⁹ argue that investors suffering losses due to misleading or deceptive acts or omissions do not suffer loss passively and as such, must prove direct

²⁵² *Corporations Act*, s 1317HA states: ‘A Court may order a person...to compensate another person...for damage suffered...if: (a) the liable person has contravened a financial services civil penalty provision; and (b) the damage resulted from the contravention.’ Sections 674(2) and (2A), which contain the continuous disclosure obligations, are financial services civil penalty provisions: *Corporations Act*, s 1317DA.

²⁵³ *Corporations Act*, s 1041I states: ‘A person who suffers loss or damage by conduct of another person that was engaged in contravention of sections 1041E, 1041F, 1041G or 1041H may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention, whether or not that other person or any person involved in the contravention has been convicted of an offence in respect of the contravention.’

²⁵⁴ See, *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514; *Adler v Australian Securities and Investments Commission* (2003) 179 FLR 1.

²⁵⁵ Compare, e.g. *P Dawson Nominees Pty Ltd v Multiplex Ltd* [2007] FCA 1061 at [11]; *P Dawson Nominees Pty Ltd v Bookfield Multiplex Ltd* (No. 4) [2010] FCA 1029 at [15] – [17]; *Hobbs Anderson Investments Pty Ltd v Oz Minerals Ltd* [2011] FCA 801 at [9] – [10]; *Kirby v Centro Properties Ltd* (No. 6) [2012] FCA 650 at [4]; *Pathway Investments Pty Ltd v National Australia Bank Limited* (No. 3) [2012] VSC 625 at [11] – [12].

²⁵⁶ (1992) 37 FCR 526. See also *McCarthy v McIntyre* [1999] FCA 784; *Ford Motor Company of Australia v Arrowcrest Group Pty Ltd* (2003) 134 FCR 522.

²⁵⁷ *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* (1992) 37 FCR 526 at [18].

²⁵⁸ *Digi-Tech (Australia) Ltd v Brand* (2004) 62 IPR 184 at [158] – [159]

²⁵⁹ *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* (2008) 73 NSWLR 653 at [12] – [22] and [617] – [619].

causation. Their entry into the transactions gives rise to the loss, which forms an integral link in the chain of causation.²⁶⁰

The 2016 decision of in *HIH Insurance Limited (in liquidation)* ('HIH')²⁶¹ has removed some of this uncertainty, the judgment holding that the market-based causation is applicable in shareholder claims against listed companies. Although not a class action, in that case, Justice Brereton in the NSW Supreme Court held that market-based causation was available to the shareholders as a means of connecting the company's misconduct to the shareholder's loss and damage. In that case, HIH released overstated financial results to the market; the market misapprehended that HIH was trading more profitably than it really was and had greater net assets than it really had; HIH shares traded on the market at an inflated price; and shareholders paid that inflated price to acquire their shares, and thereby suffered loss. The measure of loss applied was the difference between the (inflated) price paid by shareholders and the price they would have paid had a misconduct not occurred.

5.3. Conflict of Laws

In matters that arise under the *Corporations Act*,²⁶² a court's jurisdiction over a person or business is established in accordance with the normal principles of personal jurisdiction over individuals or bodies corporate.²⁶³ When the proceedings are brought against a company, the company must have some presence inside the forum to be properly subject to the jurisdiction of the forum court. This requirement is relatively easy to satisfy. If the company is incorporated within Australia, it will have a registered office in Australia.²⁶⁴ For foreign companies doing business in Australia, the *Corporations Act* requires that they be registered with ASIC and have a registered office and local agent in Australia.²⁶⁵ Every foreign company must nominate a state or territory for registration, although the *Corporations Act* is federal legislation.²⁶⁶

Almost every Australian court has jurisdiction in civil matters arising under the *Corporation's Act*.²⁶⁷ In international cases, the usual principals of *forum non conveniens* apply to proceedings before Australian courts that relate to the internal legal relations of companies.²⁶⁸

Choice of law rules for questions of corporate law rely on both the *Foreign Corporations (Application of Laws) Acts 1989* (Cth) ('*Foreign Corporations Act*') and the general law. The *Foreign Corporations Act* gives prominence to the law of the place of incorporation as the governing law for the companies' issues that it covers.²⁶⁹ However, the

²⁶⁰ Ibid.

²⁶¹ *Re HIH Insurance Limited (in liquidation)* [2016] NSWSC 482.

²⁶² Or any matters that arise under the *Australian Securities and Investments Commission Act 2001* (Cth), or any rules of court made under the *Corporations Act*.

²⁶³ Mortensen, R., Garnett, R., and Keyes, M., *Private International Law in Australia*, 2nd ed., LexisNexis Butterworths, Sydney (2011), 544-5.

²⁶⁴ *Corporations Act*, s 117(2)(g).

²⁶⁵ *Corporations Act*, s 601.

²⁶⁶ *Corporations Act*, s 119A.

²⁶⁷ *Corporations Act*, ss 1337B-1337E. The exception is the Federal Magistrates Court.

²⁶⁸ *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

²⁶⁹ *Foreign Corporations (Application of Laws) Acts 1989* (Cth), s7.

limited coverage of the *Foreign Corporations Act* means that the general law still governs issues concerning foreign companies not mentioned in the Act and questions involving Australian companies.²⁷⁰

Under Australian law, a foreign judgment will be recognized and enforced in Australia if it falls within the registration process provided for under Part 2 the *Foreign Judgments Act 1991* (Cth) ('*Foreign Judgments Act*'); Part 7 of the *Trans-Tasman Proceedings Act 2010* (Cth), with respect to New Zealand judgments; or it otherwise qualifies for recognition under the common law or equity.²⁷¹

The *Foreign Judgments Act* is based upon reciprocity of enforcement. To be enforceable,²⁷² the foreign judgment must be issued by a country or court set out in the *Foreign Judgments Regulations 1992* (Cth) ('*Foreign Judgments Regulations*'). For example, the United States is not listed in the Foreign Judgment Regulations, meaning a judgment from an American court is not enforceable under the Foreign Judgments Act. The foreign judgment sought to be enforced under the Act must be a 'money judgment.'²⁷³

If a foreign judgment does not fall within the scope of the Act, a bilateral agreement or the common law may provide alternative mechanisms for enforcement. For example, Australia is party to the bilateral treaty for the *Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters 1994* with the United Kingdom. Enforcement under the common law requires:

- the foreign court must have exercised jurisdiction in 'the international sense';
- the foreign judgment must be final and conclusive; and
- the foreign judgment must be for a fixed (definite) sum of money.²⁷⁴

A foreign court will have exercised jurisdiction in the international sense if the court exercised jurisdiction in circumstances which would constitute common law jurisdiction, for example, if the judgment debtor was served with the originating process of the foreign court while present in its territory or the defendant voluntarily submitted to the jurisdiction of the foreign court. A corporation will be present in a foreign country if it carries on business there at a fixed place and for more than a minimal period of time.²⁷⁵ A defendant may voluntarily submit to the jurisdiction of a foreign court by contesting the merits of the plaintiff's claim,²⁷⁶ by appearing as plaintiff in the foreign proceedings,²⁷⁷ or by expressly agreeing to submit to

²⁷⁰ Mortensen, R., Garnett, R., and Keyes, M., *Private International Law in Australia*, 2nd ed., LexisNexis Butterworths, Sydney (2011), 550.

²⁷¹ Australia is not a party to the *Hague Convention on Recognition of Foreign Judgments in Civil and Commercial Matters 1971*.

²⁷² *Foreign Judgments Act 1991* (Cth), s 5(1).

²⁷³ *Foreign Judgments Act 1991* (Cth), s 1.

²⁷⁴ See, e.g., *Wong v Jani-King Franchising, Inc* [2014] QCA 76 relating to recognition of a Texas judgment in the amount of nearly \$1 million by the Supreme Court of Queensland.

²⁷⁵ *Adams v Cape Industries plc* [1990] 1 Ch 433.

²⁷⁶ *Vertzyas v Singapore Airlines* (2000) 50 NSWLR 1.

²⁷⁷ *Eisenberg v Joseph* [2001] NSWSC 1062.

the jurisdiction of the foreign court.²⁷⁸ As well as the enforcement of foreign money judgments at common law, there is equitable jurisdiction to give effect to certain foreign non-monetary judgments. For example, a foreign court order can freeze the assets of the defendant situated in the forum.²⁷⁹

6. Conclusion

Australia's disclosure rules are intended to 'enhance the fairness and efficiency of the securities market by ensuring public access for investors to material company information to enable them to make informed decisions.'²⁸⁰ Where a company releases inadequate or false and misleading information, which investors rely upon to their detriment, in theory they are protected by both public and private enforcement mechanisms. However, whether these mechanisms provide investors with adequate protection in practice is subject to continuing debate. While breach of the continuous disclosure and misleading or deceptive conduct provisions are read broadly by Australian courts, the carve-out provisions can limit the breadth of the provisions in practice. Further, private enforcement of statutory breaches through shareholder class actions currently favours substantial settlements over concluded litigation, in part because key elements of the offence remain undecided by Australian courts.

²⁷⁸ *Dunbee v Gilman & Co (Australia)* (1968) 70 SR (NSW) 219.

²⁷⁹ *Davis v Turning Properties* (2005) 222 ALR 676.

²⁸⁰ North, G., 'Companies Take Heed: The Misleading or Deceptive Conduct Provisions are Gaining Prominence' (2012) *Company and Securities Law Journal* 342 citing Commonwealth, Senate, Parliamentary Debates, Second Reading Speech, Corporate Law Reform Act (No 2) 1992, Hansard, p 3581 (26 November 1992).

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