Companies take heed: The misleading or deceptive conduct provisions are gaining prominence

Gill North
Companies take heed: The misleading or deceptive conduct provisions are gaining prominence

Gill North

Provisions that prohibit misleading or deceptive conduct are included in several Australian statutes. The article considers these provisions, with a particular focus on company disclosure matters. It reviews the regulation, empirical research, case law, class actions, and the links and connections across the provisions and with the continuous disclosure obligations. It argues that listed company directors and managers ought to carefully review their public disclosure processes and cultures. The focus and balance of the company disclosure regulatory framework appears to be shifting and the misleading or deceptive conduct provisions are becoming more prominent. Recent high-profile litigation by the Australian Securities and Investments Commission against listed companies alleging misleading or deceptive conduct and contravention of the continuous disclosure provisions has succeeded. Moreover, a growing number of class actions founded on misleading or deceptive conduct and a failure to disclose are being launched and settled.

INTRODUCTION

The law on misleading or deceptive conduct in Australia has generally developed as a consumer protection framework under federal and State competition, fair trading and fair conduct law. On 1 January 2011 the Competition and Consumer Act 2010 (Cth) took effect, with the Australian Consumer Law included as Sch 2. The Australian Consumer Law includes a series of provisions that prohibit misleading or deceptive conduct. Company and securities legislation in Australia also includes a range of provisions that prohibit misleading or deceptive conduct, reflecting an extension of the consumer protection principles to the company and financial disclosure arenas. Misleading or deceptive conduct prohibitions are included in the Australian Securities and Investments Commission Act 2001 (Cth) and in the Corporations Act 2001 (Cth). These provisions apply to a broad spectrum of disclosure documents produced by companies, financial service providers and financial product issuers.

The article explores and compares the primary misleading or deceptive conduct provisions in the Australian Consumer Law, the Australian Securities and Investments Commission Act and the Corporations Act. These sections are sometimes characterised as “catch-all” provisions “that can apply to objectionable conduct that might otherwise escape liability … on technical grounds”. As such, these provisions have been applied and interpreted by the courts expansively. The scope and inherent

---

1 BCom, CA (NZ); SIE(Dip), ASIA exams (UK); LLB (Hons), PhD (Aust).
3 As outlined above, s 1041H(3) of the Corporations Act 2001 (Cth) provides that conduct that contravenes ss 670A, 728, 953A and 1022A does not contravene s 1041H(1). Similarly, s 12DA(1A) of the Australian Securities and Investments Commission Act 2001 (Cth) provides that conduct that contravenes ss 670A, 728, 953A and 1022A of the Corporations Act does not contravene s 12DA(1) of Australian Securities and Investments Commission Act. Section 670A, 728, 953A and 1022A of the Corporations Act prohibit misstatements or misleading or deceptive disclosure within a range of documents including compulsory acquisition and buy-out documents, fundraising documents, financial services guides, statements of advice and product disclosure statements.
Companies take heed: The misleading or deceptive conduct provisions are gaining prominence

flexibility of the provisions, and the breadth of remedies available, suggest parties seeking redress in the company disclosure arena may increasingly utilise these sections.

The theoretical arguments supporting the misleading or deceptive conduct provisions within the company and securities legislation in Australia are similar to those that apply to mandatory disclosure regulation including the periodic and continuous disclosure regimes. The disclosure rules are intended to enhance the fairness and efficiency of a market, by ensuring public access for all investors and stakeholders to material company information to enable them to make well-informed decisions. In practice, the efficacy of a company disclosure framework depends on the quality of the information released in the public arena. When company disclosures are misleading or deceptive, decisions based on such information are likely to be poorly informed, and individual and overall losses borne by investors and the broader community may be compounded.

Empirical reviews of company disclosures by scholars and the Australian Securities and Investments Commission (ASIC) suggest there are significant issues in the Australian market, including failures by some listed entities to disclose in accordance with the periodic and continuous disclosure rules, and a lack of clarity and completeness in some of the periodic reports and announcements released by listed entities through the Australian Securities Exchange (ASX). During 2010 and 2011 ASIC released a series of guidance papers relating to company disclosure, including factors that should be considered to ensure that information released in the public arena is not misleading or deceptive.

This article argues that company directors and managers would be well advised to heed the ASIC guidance. Recent high-profile litigation by ASIC against James Hardie Industries NV and Fortescue Metals Group Pty Ltd for breaches of the misleading or deceptive conduct, continuous disclosure and due diligence and care provisions of the Corporations Act was successful, albeit the outcome of an appeal by Fortescue Metals to the High Court of Australia is pending. There have also been a series of class action settlements of significant amounts relating to alleged breaches of the misleading or deceptive conduct and continuous disclosure regimes. The recent case law and class actions confirm the significant links and overlaps across the misleading or deceptive conduct provisions, and the close relationship to the continuous disclosure and due care and diligence obligations.

---

2012 30 C&SLJ 342

4 See eg Commonwealth, Senate, Parliamentary Debates, Second Reading Speech, Corporate Law Reform Act (No 2) 1992, Hansard, p 3581 (26 November 1992) (Senator Bolkus, Minister for Administrative Services). Senator Bolkus indicated that “[t]he government considers it essential that there be timely disclosure of relevant information about the financial position and prospect of entities in which Australians invest. It is essential to enable informed judgments on investment decisions, whether made by individual Australians or by large institutional investors .... An effective disclosure system will often be a significant inhibition on questionable corporate conduct. Knowledge that such conduct will be quickly exposed to the glare of publicity, as well as criticism by shareholders and the financial press, makes it less likely to occur in the first place ... In essence, a well-informed market leads to greater investor confidence and in turn, to a greater willingness to invest in Australian business.” See also International Organization of Securities Commissions, Objectives and Principles of Securities Regulation (June 2010) p 3. Page 3 of the document states that the three objectives of securities regulation are protecting investors; ensuring that markets are fair, efficient and transparent; and reducing systemic risk.

5 Corporations Act 2011 (Cth), Pt 2M.3, Ch 6CA, ss 674-678; Australian Securities Exchange (ASX) Listing Rules Chs 3, 4. The primary continuous disclosure obligation applying to listed companies is ASX Listing Rule 3.1, which requires a listed company that “is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the ... securities, ... [to] immediately tell ASX that information” unless an exception applies. For a recent outline of the continuous disclosure rules, see Bloch M, Weatherhead J and Webster J, “The Development and Enforcement of Australia’s Continuous Disclosure Regime” (2011) 29 C&SLJ 253. A review of the periodic disclosure regulation is provided in North G, “Periodic Disclosure Regulation: Enhancements to Enable All Investors to Make Informed Decisions?” (2009) 27 C&SLJ 23.


8 As outlined below, the Federal Court of Australia initially dismissed the case against Fortescue Metals Group, but an appeal by ASIC to the Full Court of the Federal Court of Australia was successful.
The next section of the article discusses the regulation of misleading or deceptive conduct. This is followed by sections on relevant empirical research, policy guidance on company disclosure that is not misleading or deceptive, and a review of the misleading or deceptive disclosure case law and class actions. The article then explores the links across the misleading or deceptive provisions and the connections to the continuous disclosure regime, while the final section provides a conclusion.

**REGULATION**

The misleading or deceptive conduct provisions in Australia that may apply to company disclosure documents or statements include s 52 of the *Trade Practices Act 1974* (Cth), s 18 of the *Australian Consumer Law* (contained in Sch 2 of Pt XI of the *Competition and Consumer Act*), s 12DA of the *Australian Securities and Investments Commission Act* and s 1041H of the *Corporations Act*.  

Section 52 of the *Trade Practices Act* states:

A corporation must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

This provision has been repealed, but will continue to apply to transactions that occurred up to 31 December 2010. Section 18 of the *Australian Consumer Law* largely replicates s 52 of the *Trade Practices Act* and states:

A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Section 52 of the *Trade Practices Act* requires the existence of three factors: namely,

- a corporation;
- engaged in conduct that was “misleading or deceptive or likely to mislead or deceive”;
- which occurred “in trade or commerce”.

Section 18 of the *Australian Consumer Law* concerns a person engaged in such conduct. The elements of s 52 of the *Trade Practices Act* and s 18 of the *Australian Consumer Law* are examined initially. The misleading or deceptive conduct provisions in s 1041H of the *Corporations Act* and s 12DA of *Australian Securities and Investments Commission Act* are then reviewed. A breach of these provisions does not result in civil or criminal liability, but compensation may be payable to a person for loss or damages suffered as a result of a breach.

**A person**

The nature and scope of s 18 of the *Australian Consumer Law* differs from s 52 of the *Trade Practices Act* insofar as it applies to “a person” rather than a corporation. Section 52 of the *Trade Practices Act* is federal law and the constitutional basis of the statute relies on the corporations’ power in s 51(xx) of the *Australian Constitution*. At the time the *Trade Practices Act* was enacted, legislators enlarged the scope of the fair dealing framework by enacting equivalent provisions in State- and Territory-based fair trading legislation that applied to non-corporate persons. The fair trading provisions are no longer

---

9 For the sake of completeness, the other statutory provisions in the *Corporations Act* that concern misleading or deceptive conduct are as follows: s 670A concerns misstatements in, or omissions from, takeover and compulsory acquisition and buy-out documents; s 728 concerns misstatements in, or omissions from, a fundraising document; s 953A concerns misleading or deceptive disclosure in a Financial Services Guide or Statement of Advice; s 1022A concerns misleading or deceptive disclosure in a Product Disclosure Statement; s 1041E prohibits materially false or misleading statements that are likely to induce a person to apply, acquire or dispose of a financial product; s 1041F prohibits a person from inducing another person to deal in a financial product by means of false, misleading or deceptive statements; s 1308 outlines offences relating to false and misleading statements in a document; and s 1309 creates two offences relating to an officer giving false or misleading information.

10 *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 223 (Stephen J).

11 *Commonwealth of Australia Constitution Act* (Cth), s 51(xx). Section 4 of the *Trade Practices Act 1974* (Cth) defines “corporation” to mean a body corporate that “(a) is a foreign corporation; (b) is a trading corporation formed within the limits of Australia or is a financial corporation so formed; (c) is incorporated in a Territory; or (d) is the holding company of a body corporate of a kind referred to in paragraph (a), (b) or (c)”. Section 6 extends the operation of the Act by relying on other constitutional powers including the trade or commerce powers, the Territories power, the Commonwealth agency powers, and the post and telegraph power.
relevant, as all Australian States and Territories have repealed the fair trading legislation and have adopted the new federal regime established with the introduction of the *Competition and Consumer Act 2010* (Cth).

Schedule 2 of the *Trade Practices Amendment Act (Australian Consumer Law) Act* (No 2) 2010 (Cth) inserted a new Pt XI into the *Competition and Consumer Act 2010* (Cth) that provides for the application of the *Australian Consumer Law* as a law of the Commonwealth. The States and Territories then enacted application legislation giving effect to the template *Australian Consumer Law*, effectively making the *Australian Consumer Law* a law of the Commonwealth and of each State and Territory. Consequently, the consumer protection provisions, including s 18, apply to the conduct of “persons”. Commonwealth, State and Territory consumer agencies are jointly responsible for the administration and enforcement of the *Australian Consumer Law*. ASIC is responsible for public enforcement of the provisions of the *Corporations Act* and the *Australian Securities and Investments Commission Act*.

### Misleading or deceptive conduct

Section 4(2)(a) of the *Competition and Consumer Act* defines conduct as:

- doing or refusing to do any act, including the making of, or the giving effect to a provision of, a contract or arrangement, the arriving at, or the giving effect to a provision of, and understanding or the requiring, or the giving of, a covenant.

The expression “misleading or deceptive” is not defined in any of the relevant legislation. The courts have indicated that it has the same meaning across the statutory provisions. Put simply, conduct is misleading or deceptive if it leads the victim into error. In *World Series Cricket Pty Ltd v Parish* (1977) 16 ALR 181, Brennan J indicated (at 201):

---

12 Section 131(1) of the *Trade Practices Amendment Act (Australian Consumer Law) Act* (No 2) 2010 (Cth) provides that Sch 2 applies as law of the Commonwealth to the conduct of corporations. Section 6(2) extends the Commonwealth’s reach through reliance on other constitutional powers, namely the trade and commerce powers (s 51(i), (ii)); the Territories power (s 122), the Executive power of the Commonwealth (s 61); and the incidental power (s 51(xxiv)). In addition, s 6(3A) extends the Commonwealth’s power with respect to consumer contracts involving the use of postal, telegraphic or telephonic services or radio broadcasts.

13 *Fair Trading Amendment (Australian Consumer Law) Act 2010* (No 107) (NSW); *Fair Trading Amendment (Australian Consumer Law) Act 2010* (No 72) (Vic); *Fair Trading Amendment (Australian Consumer Law) Act 2010* (No 54) (Qld); *Fair Trading Act 2010* (WA); *Fair Trading Amendment (Australian Consumer Law) Act; Australian Consumer Law (Tasmania) Act 2010; Statutes Amendment and Repeal (Australian Consumer Law) Act 2010* (No 23) (SA); *Consumer Affairs and Fair Trading Amendment (National Uniform Legislation) Act* (No 41) (NT). A referral of powers by the States and Territories to the Commonwealth was considered and rejected as an alternative model to create a national consumer protection law.

14 The power to make laws with respect to consumer protection rests with the States and Territories. The Intergovernmental Agreement for the Australian Consumer Law, signed by COAG on 2 July 2009, outlines the processes to enable future changes to be made to the template *Australian Consumer Law*.

15 Section 130 of the *Competition and Consumer Act 2010* (Cth) states that the word “corporations” has the same meaning as in s 4(1) of the *Trade Practices Act 1974* (Cth). Sections 5 and 6 of the *Competition and Consumer Act* extend the operation of the *Australian Consumer Law* to the extent that the Commonwealth constitutional powers allow. Section 2 of the *Australian Consumer Law* in Sch 2, Pt XI of the *Competition and Consumer Act 2010* (Cth) defines “authority” in relation to a State or Territory to mean “(a) a body corporate established for a purpose of the State or the Territory by or under a law of the State or Territory; or (b) an incorporated company in which the State or the Territory, or a body corporate referred to in paragraph (a), has a controlling interest”. It defines “authority of the Commonwealth” to mean “(a) a body corporate established for a purpose of the Commonwealth by or under a law of the Commonwealth or a law of the Territory; or (b) an incorporated company in which the Commonwealth, or a body corporate referred to in paragraph (a), has a controlling interest”.

16 The agency responsible for Commonwealth consumer protection matters is the Australian Competition and Consumer Commission.

17 Section 150H of the *Competition and Consumer Act 2010* (Cth) removes double jeopardy, allowing the same conduct to be enforced under the *Australian Consumer Law* of the Commonwealth and the *Australian Consumer Law* of a State or Territory.


19 *Parkdale Custom Built Furniture Pty Ltd v Pusa Pty Ltd* (1982) 149 CLR 191 at 198 (Gibbs CJ). See also *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 39 FCR 546; 79 ALR 83 at 92.
Before a statement can be said to be misleading or deceptive or falsely to represent a fact, it must convey a meaning inconsistent with the truth. A statement which conveys no meaning but the truth cannot mislead or deceive or falsely represent; although a statement which is literally true may nevertheless convey another meaning which is untrue, and be proscribed accordingly.

Silence may constitute misleading or deceptive conduct. In Demagogue Pty Ltd v Ramensky (1992) 39 FCR 31 Black CJ confirmed that silence is to be assessed as one component of the relevant circumstances of a case. His Honour indicated (at 32):

To say this is certainly not to impose any general duty of disclosure; the question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive … To speak of “mere silence” or of a duty of disclosure can divert attention from that primary question.

In Vitek v Estate Homes Pty Ltd [2010] NSWSC 237 at [40], Barrett J concluded that the appropriate test is whether there is a reasonable expectation that the other party will disclose. Importantly, a representation may be misleading or deceptive when a party fails to provide a qualification to a statement resulting in a misleading statement, or there is no disclosure following changes to circumstances since an initial statement or representation, and the changes make the previous statement or representation untrue or misleading.

Section 52 of the Trade Practices Act, s 18 of the Australian Consumer Law, s 1041H of the Corporations Act, and s 12DA of the Australian Securities and Investments Commission Act (the specified provisions) have broad reach. Section 52 of the Trade Practices Act has been widely invoked by commercial entities. In Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594, the majority of the High Court confirmed (at 606, 610-611) that s 52 should not be read down so as to apply only to conduct that misleads consumers.

The specified provisions impose strict liability. The provisions do not incorporate a mental element and the intention or knowledge of a company or person is not relevant. A company or person may engage in conduct that is misleading or deceptive or likely to mislead or deceive even when they act honestly and reasonably. The sections involve an objective interpretation of the facts and ask whether the conduct “as a whole” was misleading or deceptive or likely to mislead or deceive. To determine whether the conduct was misleading or deceptive, the class of persons likely to be affected has to be identified. The duties under the specified provisions cannot be excluded by means of a waiver or exclusion clause.

20 Section 4(2)(c) of the Competition and Consumer Act 2010 (Cth) states that a reference to refusing to do an act includes a reference to “(i) refraining (otherwise than inadvertently) from doing that act; or (ii) making it known that that act will not be done”.

21 See also Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (1988) 39 FCR 546; 79 ALR 83 at 95; Winterton Construction Pty Ltd v Hambros Australia Ltd (1992) 39 FCR 97.


23 See eg Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd (1986) 12 FCR 477 at 489-490; Collins Marrickville Pty Ltd v Henjo Investments Pty Ltd (1987) 72 ALR 601.

24 Yorke v Lucas (1985) 158 CLR 661 at 666 (Mason ACJ, Wilson, Deane and Dawson JJ).


27 See eg Petera Pty Ltd v EAJ Pty Ltd (1985) 7 FCR 375; [1985] ATPR 40-605 at 46,887. While contractual provisions cannot be used to exclude liability for misleading or deceptive conduct, the use of disclaimers may assist to prevent conduct being deemed misleading or deceptive.
In trade or commerce

Section 52 of the Trade Practices Act and s 18 of the Australian Consumer Law require that the conduct occur “in trade or commerce”. Conduct outside of these criteria includes transactions of a personal nature. Most business dealings fall within the terms of “in trade or commerce”. However, in Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594, the majority of the High Court (Mason CJ, Deane, Dawson and Gaudron JJ) indicated that there is an important difference between conduct “in trade or commerce” and conduct “in relation to” trade or commerce. They stated (at 603-604) that it is plain that s 52 was not intended to extend to all conduct regardless of its nature, in which a corporation might engage in the course of, or for the purposes of, its overall trading or commercial business … the section is concerned with … the conduct of a corporation towards persons … with whom it … has or may have dealings in the course of those activities or transactions which, of their nature, bear a trading or commercial character.

In relation to financial services

Since 1 July 1998, s 52 of the Trade Practices Act has not applied to conduct “in relation to financial services”. Similarly, the scope of s 18 of the Australian Consumer Law excludes such conduct. When the conduct concerns financial services or a financial product, the relevant provisions are s 12DA of the Australian Securities and Investments Commission Act and s 1041H of the Corporations Act. Section 12DA of Australian Securities and Investments Commission Act provides:

A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.

Section 1041H of the Corporations Act states:

A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive.

The ambit of s 12DA of the Australian Securities and Investments Commission Act and s 1041H of the Corporations Act overlap significantly. The differences between the two provisions are the inclusion of the words “in trade or commerce” in s 12DA, and the scope of the financial services and financial product definitions. A “financial product” is defined in s 9 of the Corporations Act to have the same meaning as in Ch 7. Section 763A provides that a financial product is a facility through which, or through the acquisition of which, a person does one or more of the following: makes a financial investment; manages financial risk; makes non-cash payments. Section 764A indicates that a “financial product” includes a security, an interest in a registered managed investment scheme, a derivative, various insurance products, superannuation interests, retirement savings accounts, some deposit taking facilities and foreign exchange contracts. Section 12BAB of the Australian Securities and Investments Commission Act also defines “financial services” in relation to financial products. The definitions of financial services and financial product in the Australian Securities and Investments Commission Act are intentionally broad. Section 12DA of the Australian Securities and Investments Commission Act may apply to financial services and products that are not covered under Ch 7 of the Corporations Act.

Section 1041H(3) of the Corporations Act and s 12DA(1A) of the Australian Securities and Investments Commission Act specifically provide that conduct that contravenes ss 670A, 728, 953A and 1022A of the Corporations Act does not contravene s 1041H(1) of the Corporations Act or

---

28 See eg O’Brien v Smolonogov [1983] ATPR 40-418; cf Argy v Blunts & Lane Cove Real Estate Pty Ltd (1990) 26 FCR 112; [1990] ATPR 41-015. In O’Brien the sale of a private residence was held to be conduct that was not in trade or commerce. In contrast, the vendor’s real estate agent and solicitor were held to have engaged in misleading or deceptive conduct in trade or commerce in breach of s 52 in Argy.

29 Mason CJ, Deane, Dawson and Gaudron JJ indicated (at 604) that the dividing line between what is and what is not conduct “in trade or commerce” may be unclear in some areas and may require the identification of what imports a trading or commercial character to an activity which is not, without more, of that character.

30 Trade Practices Act 1974 (Cth), s 51AF.

31 Competition and Consumer Act 2010 (Cth), s 131A(1).
s 12DA(1) of the Australian Securities and Investments Commission Act. As previously outlined, these sections prohibit misstatements or misleading or deceptive disclosure within a range of documents, including compulsory acquisition and buy-out documents, fundraising documents, financial services guides, statements of advice, and product disclosure statements. Nonetheless, if the legislators intended to exclude all disclosure documents from the scope of s 1041H, this has not been fully achieved. Some company disclosure circumstances may be subject to ss 670A, 728, 953A or 1022A as well as s 1041H. The conduct in relation to a financial product encompassed within s 1041H(1) includes, but is not limited to, dealing in a financial product; issuing a financial product; publishing a notice in relation to a financial product; and making, or making an evaluation of, an offer under a takeover bid or a recommendation relating to such an offer. Case law confirms that “publishing a notice in relation to a financial product” may apply to information released by a company through the ASX company announcement platform.

Compensation

Contravention of the specified provisions does not result in civil or criminal liability. As Fox J indicated in Brown v Jam Factory Pty Ltd (1981) 53 FLR 340 at 348, s 52 “does not purport to create liability at all; rather [it provides] a norm of conduct, failure to observe which has consequences provided for elsewhere in the statute, or under the general law”. Compensation may be payable to a person for loss or damages suffered as a result of a breach.

Section 236 of Sch 2 Pt XI of the Competition and Consumer Act states that if a person (the claimant) suffers loss or damage because of the conduct of another person … the claimant may recover the amount of the loss or damage by action against that other person, or against any person involved in the contravention.

The wording of s 12GF of the Australian Securities and Investments Commission Act is virtually identical, and the effect of s 1041I(1) of the Corporations Act is equivalent.

The measure of loss or damage is generally the same as it is in contract or tort law and

[32] A person charged with an offence under s 670A is provided with possible defences under s 670D. Sections 731-733 provide a due diligence, lack of knowledge and a reasonable reliance defence to an offence under s 728(3). Section 670D provides for defences on the following bases: that the person did not know that the statement was misleading or deceptive; the person did not know that there was an omission from a document; the person placed reasonable reliance on information given to them; the person publicly withdrew their consent to being named in the document; a new circumstance arose and the person was not aware of the matter.


[34] See also ss 239, 243 and 246 of the Australian Consumer Law in Sch 2 of Pt XI of the Competition and Consumer Act 2010 (Cth). Section 239 provides for orders to redress loss or damage suffered by non-party consumers. Section 243 empowers the court to make a range of orders, including an order declaring the whole or any part of a contract void or void ab initio; an order varying such a contract; an order refusing to enforce any or all of the provisions or such a contract; an order directing the respondent to refund money or return property to the injured person; an order directing the respondent to pay the injured person; an order directing the respondent to repair, or provide parts for, goods that had been supplied; an order directing the respondent to supply specified services. A court also make orders under s 246, following an application by the regulator, directing a compliance program, an education and training program, and a review of the internal operations of a person’s business. Finally, other provisions of the Competition and Consumer Act provide for a range of enforcement powers and remedies including undertakings, injunctions, substantiation notices, public warning notices, adverse publicity notices, disqualification orders and non-punitive orders.

[35] Section 1041I(1) of the Corporations Act 2011 (Cth) provides that “A person who suffers loss or damage by conduct of another person that was engaged in contravention of section … 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”. In Gates v City Mutual Life Assurance Society Ltd (1986) 160 CLR 1 at 12, Mason, Wilson and Dawson JJ indicated that the question to be asked in relation to the measure of damages under the misleading or deceptive conduct provision is “how much worse off the plaintiff is as a result of entering into the transaction which the representation induced him to enter than he would have been if the transaction had not taken place”.

348 (2012) 30 C&SLJ 342
contributory negligence may be taken into account. 37 Section 137B of the Competition and Consumer Act states that if
(a) a person (the claimant) makes a claim under subs 236(1) of the Australian Consumer Law in relation to economic loss, or damage to property, suffered by the claimant because of the conduct of another person; and
(b) the conduct contravened s 18 of the Australian Consumer Law; and
(c) the claimant suffered the loss or damage as a result
   (i) partly of the claimant’s failure to take reasonable care; and
   (ii) partly of the conduct of the other person; and
(d) the other person did not intend to cause the loss or damage and did not fraudulently cause the loss or damage;
the amount of the loss or damages that the claimant may recover under subs 236(1) ... is to be reduced to the extent to which the court thinks just and equitable having regard to the claimant’s share in the responsibility for the loss or damage.
Equivalent sections are included in s 1041H of the Corporations Act and s 12GF(1B) of the Australian Securities and Investments Commission Act.

To obtain compensation, a claimant must establish a causal relationship between the alleged misleading or deceptive conduct and any loss or damage suffered. 38 The relevant conduct must be a material cause of the plaintiff being misled or deceived, but not necessarily the primary or the only cause. 39 The causal connection may fail when the relevant parties are misled because of an erroneous assumption or due to the conduct of a third party. 40 Causation may also be difficult to establish when there are series of steps in the causal chain. While arguments based on indirect causation have been raised and discussed by the New South Wales Court of Appeal, the extent of reliance required in these circumstances remains unclear. 41

Primary liability under the misleading or deceptive conduct provisions may be imposed on the company, an individual, or both. The class of potential defendants is significantly widened by assessorial liability that extends to personal liability. Assessorial liability under s 18 of the Australian Consumer Law arises through s 2. Section 2 of the Australian Consumer Law provides that a person is “involved” in a contravention if the person has aided, abetted, counselled or procured the contravention; induced the contravention; has been in any way knowingly concerned in, or party to, the contravention; or conspired with others to effect the contravention. 42 Similarly, individuals may be liable for breaches of s 1041H of the Corporations Act if they are “involved” in the contravention. 43 In Arktos Pty Ltd v Idyllic Nominees Pty Ltd [2004] FCAFC 119 at [13] the court indicated:

Principal liability is incurred on the basis that a director of a corporation who acts on its behalf in the course of trade or commerce “also acts for himself or herself in trade or commerce” and if the corporation is liable the director may also attract “primary liability” ... In such cases it is not necessary.

38 Taco Co of Australia Inc v Taco Bell Pty Ltd [1982] ATPR 40-303.
41 Digi-Tech (Aust) Pty Ltd v Brand [2004] NSWCA 58; Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd (2008) 72 NSWLR 653; [2008] NSWCA 206. The distinction drawn in Digi-Tech (Aust) Pty Ltd v Brand was between cases where the plaintiff’s conduct forms a link in the causation chain and where it does not.
42 The seminal case on the nature and scope of accessorial liability is Yorke v Lucas (1985) 158 CLR 661.
for an applicant to establish that a respondent director has knowledge of or is aware of the ingredients of the contravention, as is required to establish accessorial liability.\textsuperscript{44}

Proportionate liability may apply. Part VIA of the \textit{Competition and Consumer Act} provides for proportionate liability in relation to a claim seeking damages for economic loss or damage to property caused by conduct in contravention of s 18 of the \textit{Australian Consumer Law}. Division 2A of Pt 7.10 of the \textit{Corporations Act} and Subdiv GA of Pt 7.10 Div 2A of the \textit{Australian Securities and Investments Commission Act} allow proportionate liability on a similar basis in relation to claims for damages under s 1041H of the \textit{Corporations Act} and s 12DA of the \textit{Australian Securities and Investments Commission Act} respectively.\textsuperscript{45}

\textbf{MISLEADING OR DECEPTIVE COMPANY DISCLOSURE EMPIRICAL RESEARCH}

In capital markets, there is an inherent tension between company managers who generally prefer to retain discretion and control over the content and timing of public disclosures and stakeholder demands for comprehensive, timely and reliable corporate information. It has long been argued by some scholars that in the absence of mandatory disclosure, some companies would fail to publicly disclose or would misrepresent material information,\textsuperscript{46} particularly when the information contains adverse news.\textsuperscript{47}

Company disclosure regimes are intended to overcome the incentive misalignments and to promote timely disclosure of all material company information in the public arena. However, there is an increasingly large pool of global and Australian empirical evidence suggesting that even in jurisdictions with mandatory disclosure regimes, some company managers continue to disclose material information selectively or privately rather than in the public arena. Moreover, when corporate information is provided publicly, managers sometimes spin or disguise negative news, particularly if they are able to do this within regulatory bounds.

Holland found that listed companies in the United Kingdom did not willingly release information about downside risks or negative news within public disclosures unless it “involved a well-publicised problem, a profits warning, or they were faced by a clear regulatory requirement”.\textsuperscript{48} The companies “displayed a bias towards optimism in their disclosure behaviour and content and for avoiding discussion of downside risks”.\textsuperscript{49}

In the United States, Pastena and Ronen found company managers disclosed information as if they attempted “to delay the dissemination of negative information, relative to positive information”, disclosed primarily soft positive information rather than soft negative information, and disclosed negative information only after such information became hard.\textsuperscript{50} Miller also found disclosure patterns consistent with managers strategically choosing to disclose positive news while avoiding discussion of impending downturns in performance.\textsuperscript{51} A more recent study by Kothari et al confirmed that company management delayed the release of bad news to investors.\textsuperscript{52} Lewellen et al found evidence that

\textsuperscript{44} Cited in \textit{Clifford v Vegas Enterprises Pty Ltd (No 5) [2010] FCA 916.}
\textsuperscript{45} See also \textit{Trade Practices Act 1974 (Cth), Pt V1A.}
\textsuperscript{48} Holland J, \textit{A Model of Corporate Financial Communications} (Institute of Chartered Accountants of Scotland, 2006) p 132.
\textsuperscript{49} Holland, n 48, p 157.
Companies chose stock return benchmarks to report against that showed the results in a favourable light. The degree of downward bias was stronger for companies with relatively weaker earnings and share price performance.\(^{53}\) Interestingly, Rogers and Stocken found company managers’ willingness to misrepresent forward-looking information was a function of the market’s ability to detect the misrepresentation.\(^{54}\) That is, managers were more likely to issue forecasts that were biased when it was more difficult for investors to detect the bias.\(^{55}\)

A study by Graham et al comprising a combination of field interviews and a survey of more than 400 chief financial officers (CFOs) confirmed these trends. Although profitable companies were inclined to release bad news quickly, unprofitable companies were more likely to delay bad news.\(^{56}\) Some CFOs admitted they allow “fuzziness” in bad news disclosures and several indicated that they delayed the release of bad news “in hopes that the firm’s status will improve before the next required information release, perhaps saving the company the need to ever release the bad information”.\(^{57}\) Vyas examined the timeliness of write-downs by United States financial institutions during the financial crisis of 2007-2008. He found that companies with higher financial leverage, more complex exposures, and greater regulatory constraints (that is, larger write-downs would deplete the capital of the company or take them below the required capital standards) were less timely in making the required write-downs. Conversely, companies that were under investigation by the regulators, that faced greater litigation pressure, or that had better-quality corporate governance indicators were more timely in their write-downs.\(^{58}\)

Schrand and Zechman examined companies subject to SEC Accounting and Auditing Enforcement Releases for misreporting in the United States. Their analysis suggested that most instances of misreporting seemed to begin with an optimistically biased misstatement by an overconfident executive (whether intentional or not). When the initial performance expectations could not be met, the executives then made a conscious decision to continue misreporting on an escalating scale in order to hide the initial reporting errors. They describe this process as the slippery slope to financial reporting.\(^{59}\) Arlen and Carney reported that 91.3% of the fraud on the market cases in the United States during the period 1970 to 1990 involved either the concealment of a decline in earnings or the concealment of bad news. These concealment cases had serious impacts, with overall stock prices falling between 42 and 48% when the truth was revealed.\(^{60}\)

These global study findings, which indicate that some company managers tend to be reluctant to disclose negative information and when required to do so, may attempt to disguise bad news within

---


\(^{55}\) Rogers and Stocken, n 54.


\(^{57}\) Graham et al, n 56 at 65.


\(^{60}\) Arlen J and Carney W, “Vicarious Liability for Fraud on Securities Markets: Theory and Evidence” (1992) University of Illinois Law Review 691. Arlen and Carney found that 8.7% of the cases involved attempts to underestimate the value of securities when there were conflicts of interest or the managers were attempting to buy out the shareholders at an unfairly low price. See also Tillman R and Irgaard M, Control Overrides in Financial Statement Fraud: A Report to the Institute for Fraud Protection (16 January 2007). Tillman and Indergaard highlight that the most expensive corporate frauds to date have involved alleged CEO and CFO involvement or collusion.
public releases, were observed in the current author’s published study of Australian company
disclosure practices during the 2007 and 2008 financial years. This study found the following:
• A large proportion of negative earnings news was framed or presented with an optimistic bias. This tendency was reflected most clearly in the forecast benchmarks adopted by company management. Earnings news or forecasts that used statutory and quasi-statutory benchmarks calculated in accordance with accounting standards were weighted to disclosures of good news (defined as an increase in the year-on-year diluted earnings per share (EPS) rather than bad news (defined as a decrease in the year-on-year diluted EPS). In contrast, the forecasts in non-statutory based formats such as “underlying earnings” were weighted to bad news disclosures. The format with the heaviest weighting to disclosure of bad news was underlying net profit, a number that generally excluded most or all of the negative news.
• The level and quality of disclosure from companies reporting a loss were especially poor. The percentage of the sample companies that reported a change in year-on-year diluted EPS of more than 15% (compared to a prior forecast or the previous corresponding period) in 2007 and that provided any earnings updates or forecasts between the full year reporting periods, was only 5% in 2007 and 9% in 2008. The evidence indicated that outside of the result reporting periods, these companies either failed to provide any earnings updates or forecasts, or they provided this information using a management-selected format that tended to present the loss or bad news in a positive light. The study regression evidence, combined with the descriptive analysis, was consistent with the hypothesis that many companies tried to avoid disclosing prospective losses or bad news within the public arena, except when specifically required in the profit and loss account of the statutory reports.
• Risk commentary within the periodic reports and continuous disclosures was rare.
• Some company reports and announcements provided very little management discussion or analysis, particularly those from smaller companies.
• Much of the “meaty” information required for securities valuation was provided in the presentation briefing slides released through the ASX.
• Some entities were straightforward in explaining economic, industry or company specific difficulties. However, most of the management discussion and analysis within the periodic reports and continuous disclosures solely or predominantly drew attention to positive aspects of the results or developments.

ASIC subsequently reviewed issues around the presentation of financial information. In December 2010, it released a review of a selection of 30 June 2010 financial reports. It also provided commentary and guidance on a review of the financial reports, market announcements, investor and analyst presentations and related media releases for 50 of the top 200 listed entities in relation to profit disclosures not calculated in accordance with accounting standards (referred to as “alternative profits”). ASIC noted that of the 31 entities that disclosed alternative profits:
• 15 did not provide a reconciliation between the alternative and statutory profit figures;
• 21 gave the alternative profit more prominence than the statutory profit;

61 See North, n 6. The study methodology, data sources, and variables definitions are outlined in detail in the published article.
62 For example, profit before tax (PBT), earnings before interest and tax (EBIT), earnings before interest, tax and amortisation (EBITA), and earnings before interest, tax, depreciation and amortisation (EBITDA).
63 Australian Securities Exchange (ASX), Guidance Note 8, Continuous Disclosure Listing Rule 3.1 (June 2005) 19. Page 19 of ASX Guidance Note 8 states: “Listing Rule 3.1 provides examples of information that, if material, would require disclosure. One of those examples is a change in the entity’s previously released financial forecast or expectations. As a general policy, a variation in excess of 10% to 15% may be considered material, and should be announced by the entity as soon as the entity becomes aware of the variation. If the entity has not made a forecast, a similar variation from the previous corresponding period will need to be disclosed. In certain circumstances a smaller variation will be disclosable.”
64 See North, n 6.
Companies take heed: The misleading or deceptive conduct provisions are gaining prominence

- eight included only positive adjustments to the statutory figure in calculating the alternative profit and appeared to be attempting to remove the “bad news”;
- eight focused on a profit figure different from the prior year, and another five adopted an alternative profit format that differed from that adopted the prior year.

ASIC pointed out that profit figures prepared in accordance with accounting standards enable users of financial reports to make comparisons between entities and over time. It noted that the alternative profits disclosed were not determined on a consistent basis. Moreover, many entities excluded “non-recurring” items such as impairment losses and restructuring costs, even when those items appeared in previous years.66

In its review of the Operating and Financial Reviews (OFR) contained in the 2010 annual reports of 50 of the top 200 listed entities, ASIC found that
- most of the companies reviewed appear to have provided what they considered to be minimum disclosures. However, the content provided did not appear to comply with the obligation to provide information members would reasonably require;
- the OFR often lacked information and explanations that would provide users with an understanding of the drivers of an entity’s performance;
- most entities did not provide key performance indicators, production statistics or similar information;
- most entities did not present the OFR information in a single section of the financial report;
- about half of the entities reviewed did not disclose business strategies and prospects for future financial years to a level that might be expected;
- most entities provided more analysis in investor presentations or analyst briefings lodged with ASX.67

In December 2011, ASIC released a review of financial reports for the year ended 30 June 2011.68 It also provided commentary on profit disclosures in the financial reports, market announcements, investor and analyst presentations and related media releases for 120 listed entities. It indicated that over half of these entities disclosed a profit number not in accordance with International Financial Reporting Standards (IFRS) and it has contacted a number of these companies to discuss their disclosures further.69

The ASIC review findings highlight many of the same disclosure issues identified in the current author’s empirical research of the Australian market. The Australian disclosure patterns are similar to those identified in the global studies.

AUSTRALIAN POLICY GUIDANCE ON MISLEADING OR DECEPTIVE DISCLOSURE

When company disclosures including company reports, announcements and statements are not clear, concise or effective, there is an increased risk they will be misleading or deceptive, or likely to mislead or deceive users. The requirement for “clear, concise and effective” disclosure is found within Australian corporations law and policy documents.70 Gibson, an ASIC Commissioner, defines “clear,

67 ASIC 2010 Review, n 6. See also Gibson B, ASIC Commissioner, “Playing by the Rules: A New Regulatory Environment is Changing the Way that Corporations Relate to Investors and the Finance Community”, speech delivered at the AIRA Annual Conference 2009, 2 December 2009, pp 8-9. Gibson conceded that “perhaps the most informative material provided by companies to investors is provided at the investor analyst briefings that usually occur when the annual and half yearly results are announced”. She further noted that the “analysts’ briefings to investors released with the annual results are often more informative” than the annual reports, and the briefing material is “usually approved by the board … [It] is usually prospective and looks over the company’s business model and analyses the various segments”.
concise and effective” documentation to mean that documents must be readable – if they are lengthy, there must be a clear road map to enable the readers to select the information they need to make a sensible investment decision. They must be understandable. The content must be clear and relevant to the investment decision at hand. The risk must be put up front and in one place.71

Gibson indicates that the key elements of the company disclosure regimes are:
• disclosure of price-sensitive information to the market in a timely fashion;
• announcements that are not false, misleading or deceptive; and
• announcements that are clear, accurate and complete.72

She describes
• “clear announcements” as information contained in a market release that is factual and expressed in an objective and clear manner;
• “complete announcements” as documents that can be read as a whole without reference to other documents to locate price-sensitive information; and
• “accurate announcements” as disclosure of information that is factually correct, easily understandable, with due prominence to positive and negative information.73

Gibson highlights that it is “both the quality of information as well as the quantity of information which is crucial in determining whether disclosure advances the transparency and fairness of a market”.74

In November 2011, ASIC issued Regulatory Guide 228 (RG 228) concerning effective disclosure in prospectuses for retail investors.75 RG 228 states that ASIC will consider a prospectus to be generally “clear, concise and effective” if it:
• highlights key information (eg through an investment review …);
• uses plain language …;
• is as short as possible …;
• explains complex information, including any technical terms …; and
• is logically ordered and easy to navigate …76

RG 228 highlights that there must be appropriate balance and prominence of positive and negative information in prospectuses.77 The purpose of a disclosure document is to help retail investors assess the risks and returns of an offer and to make informed investment decisions.78 This means that positive information must not be given undue prominence in a way that is potentially misleading. ASIC indicates that the guidance in relation to prospectuses may be relevant to other disclosure areas such as the continuous disclosure obligations.79 This statement is important. A disclosure framework that attracts new investors and capital by means of a prospectus, but which then fails to keep these investors well informed during the investment holding period, is incomplete and inadequate. Investors require clear, concise and effective disclosure for the entire period of their investments. For this to occur, the disclosure framework must operate effectively on an integrated basis, including the regulation and practices governing capital raisings, periodic disclosure, continuous disclosure, and misleading or deceptive conduct.

73 Gibson, n 72, pp 11-12.
74 Gibson, n 67, p 5.
75 ASIC, RG 228, n 7.
76 ASIC, RG 228, n 7, p 12.
77 ASIC, RG 228, n 7, p 15.
78 ASIC, RG 228, n 7, p 5.
79 ASIC, RG 228, n 7, p 8.
ASIC has provided policy guidance on what may constitute misleading or deceptive financial disclosure. In December 2011 it released a guide on disclosing financial information other than in accordance with accounting standards. Regulatory Guide 230 (RG 230) states that financial information that is presented other than in accordance with relevant accounting standards “is being used increasingly in financial reports and other documents, such as transaction documents and market announcements”. It notes the risk that information that has not been prepared in accordance with IFRS “will be misleading unless it is appropriately presented and explained”. ASIC does not suggest that non-IFRS financial information should not be used, but it highlights important considerations to ensure such information is not misleading, namely that:

- IFRS financial information should be given equal or greater prominence compared to non-IFRS financial information, in particular IFRS profits; and
- Non-IFRS financial information should:
  - be explained and reconciled to the IFRS financial information;
  - be calculated consistently from period to period; and
  - be unbiased and not used to remove “bad news”.

ASIC indicates that directors should ensure that disclosures are prepared with regard to guidance in RG 230 and warns that it will contact companies where the disclosures breach accounting standards or are potentially misleading.

**DISCLOSURE-RELATED ENFORCEMENT**

While s 52 of the Trade Practices Act has been repealed and replaced by s 18 of the Australian Consumer Law, the extensive jurisprudence around s 52 continues to apply. The key principles that apply to company disclosure matters are outlined in the following cases.

**Fraser v NRMA Holdings**

The misleading or deceptive conduct provisions were discussed in Fraser v NRMA Holdings Ltd (1995) 55 FCR 452. A prospectus and a notice of a general meeting were sent to shareholders outlining a proposed reconstruction of the group. Two members sought a declaration that the prospectus and particular information in it was misleading or deceptive under s 52 of the Trade Practices Act. Black CJ and Von Doussa and Cooper JJ stated (at 468):

> The need for an applicant to establish materiality is of particular importance in a case like the present one where the proposal is complex and involves difficult questions of commercial judgment and matters of degree and conjecture as to the future about which there is room for a range of honestly and reasonably held opinions … The need to make full and fair disclosure must be tempered by the need to present a document that is intelligible to reasonable members of the class to whom it is directed, and is likely to assist rather than to confuse … In complex cases it may be necessary to be selective in the information provided, confining it to that which is realistically useful.

The Full Court of the Federal Court of Australia upheld the first complaint that the effect of the “persistent reiterations of the phrase ‘Free Shares’ [was] to engender … the notion that the shares may be acquired without any significant loss or outgoing to the offeree who accepts them” (at 462). The third complaint was also upheld because the prospectus failed to inform members about the disadvantages of the proposed restructuring.

**National Exchange Pty Ltd v Australian Securities and Investments Commission**

The general principles from s 52 case law were discussed in National Exchange Pty Ltd v Australian Securities and Investments Commission (2004) 49 ACSR 369; [2004] FCAFC 90. National Exchange

---

80 ASIC, RG 230, n 7.
81 ASIC, RG 230, n 7, p 4.
82 ASIC, RG 230, n 7, p 17.
83 ASIC, RG 230, n 7, p 17. These proposals are closely aligned to those recommended in North, n 6.
85 These proceedings were prior to the 1998 amendments that removed conduct in relation to financial services from s 52.
wrote to small shareholders of Onesteel Ltd offering to purchase their shares for $2 a share. The market price for the shares on the date of the letter was $1.93, so the headline offer appeared attractive. However, a less prominent part of the letter explained that the offer price of $2 a share would be paid in instalments over 15 years. ASIC sought orders that this conduct contravened s 1041H(1) of the Corporations Act 2001 (Cth). The Federal Court made such an order and National Exchange appealed.

National Exchange argued that the offers made to shareholders had to be read as a whole. In response, Dowsett J reiterated the well-established principle that “a truthful statement may nonetheless be misleading or deceptive” (at [36]). His Honour stated (at [39]) that it was impossible to imagine even the most unworldly of investors finding the offer attractive, given the arrangements for deferred payment of the purchase price … [and it was] impossible to avoid the conclusion that National Exchange expected that some people might accept the two dollar offers without fully understanding them and tried to maximise the chances of uninformed acceptance.

Justice Dowsett found (at [42]) that “many reasonable shareholders would have been inclined to accept the offer at face value, assuming that conditions as to payment would be subsidiary”. On this basis, the offers were likely to mislead or deceive reasonable offerees (at [35]).

GPG (Australia Trading) Pty Ltd v GIO Australia Holdings Ltd

In GPG (Australia Trading) Pty Ltd v GIO Australia Holdings Ltd (2001) 117 FCR 23; 40 ACSR 252, GPG was awarded damages for losses resulting from misleading or deceptive conduct by GIO under s 12DA of the Australian Securities and Investments Commission Act. The relevant conduct concerned statements made by GIO when AMP sought to acquire GIO via a scheme of arrangement. GPG purchased shares in GIO based on the information provided to shareholders about the proposed scheme. GIO subsequently announced that losses in its reinsurance business had increased and further provisioning was required. Following the announcements, AMP reduced the price payable for the GIO shares and GPG suffered significant losses on its investment as a consequence.

Justice Gyles of the Federal Court held that the initial disclosures by GIO were misleading, and a reasonable person would have believed that GIO’s reinsurance provisioning was adequate. Further, when GPG made the decision to invest in GIO, it relied on the GIO statements and the sufficiency of the provisioning.

86 Dowsett J cited Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd (1978) 140 CLR 216 at 227.

87 Dowsett J outlined (at [18]) the following principles from s 52 case law that apply with similar effect to s 1041H(1) of the Corporations Act: “Conduct will only be misleading or deceptive, or likely to mislead or deceive if there is a nexus between such conduct and any actual or anticipated misconception or deception. In identifying such nexus regard must be had to the circumstances of the particular case … In some cases, a representation may be made to identified individuals; in other cases the representation may be to the public at large or to a section thereof … When the representation is made to the public or to a section thereof, one must consider its effect upon an ordinary or reasonable member of the class in question … It is necessary to inquire as to how a particular or anticipated misconception has arisen or may arise. In so doing, the Court will consider the effect of the relevant conduct on reasonable members of the class.” His Honour confirmed (at [35]) that to determine whether the conduct was misleading or deceptive or likely to mislead or deceive requires an affirmative response to the following questions: “Was there a false representation? What was the intention underlying the conduct in question? … Was the conduct such as to lead to an erroneous assumption on the part of representees? Did the conduct mislead or deceive or was it likely to do so, having regard to the behaviour of a reasonable representative of the whole class of representees?”

88 ASIC successfully initiated an action against Mr Vines, the chief financial officer and chair of the due diligence committee at GIO, for a breach of his duty of care under s 180 of the Corporations Act 2001 (Cth). The court found that Vines failed to be sufficiently active in monitoring the level of reinsurance claims: Vines v Australian Securities and Investments Commission (2007) 73 NSWLR 451; 62 ACSR 1.
A class action alleging misleading or deceptive conduct was subsequently launched on behalf of other shareholders against GIO. GIO eventually agreed to a settlement of $97 million plus costs of $15 million.

**Australian Securities and Investments Commission v Citrofresh International Ltd**

In *Australian Securities and Investments Commission v Citrofresh International Ltd* (2007) 164 FCR 333; [2007] FCA 1873, ASIC alleged a breach of s 1041H of the *Corporations Act 2001* (Cth) by Citrofresh International Ltd (Citrofresh). Citrofresh made an announcement through the ASX that indicated that following successful laboratory tests, the company intended to market a global range of products to provide protection against the spread of the HIV/AIDS virus. The company consented to orders against it for misleading or deceptive conduct.

ASIC also alleged misleading or deceptive conduct by Narain, the chief executive officer (CEO) of Citrofresh, on the basis that he drafted the ASX announcement and instructed the company secretary to release it to the market. Narain succeeded at first instance in defending the claim against him. On appeal in *Australian Securities and Investments Commission v Narain* (2008) 169 FCR 211; [2008] FCAFC 120, the Full Court of the Federal Court held that his participation in the conduct was sufficient to attract primary liability and referred the case back to the trial judge. Finkelstein J indicated (at [9]) that the expression “in relation to” in s 1041H should be construed broadly. His Honour pointed out (at [9]) that an important “object of [Pt 7.10 of the *Corporations Act*] is to ensure that participants in the market for financial products and financial services act with integrity and honesty and that consumers are adequately protected”. Jacobson and Gordon JJ stated (at [69]) that the expression “in relation to” signifies “the need for there to be some relationship or correlation between the two subject matters that are specified”. They concluded (at [76]) that the relationship contemplated by s 1041H(10) may be indirect or less than a substantial connection.

Justice Goldberg subsequently ordered Narain to pay a pecuniary penalty of $20,000 and disqualified him from managing a corporation for a period of seven years: see *Australian Securities and Investments Commission v Citrofresh International Ltd (No 3)* (2010) 77 ACSR 392; [2010] FCA 292. His Honour accepted that Narain had not been dishonest and had not made a personal gain from the contravention. Nevertheless, he indicated (at [47]) that

> it is in the public interest that in such circumstances a significant period of disqualification be imposed so as to bring to the attention of directors of corporations that they must take their duties and responsibilities as directors very seriously.

It was appropriate to impose personal liability on the managing director because otherwise the company could avoid liability by using an innocent agent to publish a misleading or deceptive statement.

**James Hardie Industries NV v Australian Securities and Investments Commission**

The pleadings in *James Hardie Industries NV v Australian Securities and Investments Commission* included three alleged misrepresentations. The first involved statements made in slide 4 of a presentation lodged with the ASX in June 2002. The relevant statements were “future claims separated and fully funded” and “no future liability – no provision required”. The second and third representations related to statements made by MacDonald, the CEO, to institutional investors at

---

89 *King v GIO Australia Holdings Ltd* [2000] FCA 1543.
90 *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* [2003] FCA 980; *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* [2003] FCA 1420.
93 *James Hardie Industries NV v Australian Securities and Investments Commission* [2010] NSWCA 332 at [4].
meetings in Edinburgh and London. ASIC alleged the first representation breached s 1041H and all three representations contravened s 1041E of the Corporations Act 2001 (Cth).

Justice Gzell of the New South Wales Supreme Court held in Australian Securities and Investments Commission v MacDonald (No 11) (2009) 230 FLR 1; 71 ACSR 368 at [1022] that the statements in slide 4 and the representations made at the Edinburgh and London meetings were misleading.94 All of the representations “were designed … to have the effect of encouraging the purchase of JHINV shares and the maintenance or stabilisation of the market for those shares” (at [1022]).95 The members of the market to whom slide 4 was addressed included the sophisticated and the unsophisticated, and the reaction of each was likely to be similar (at [1062]).96 Although the sophisticated investors may have understood the uncertainties associated with the asbestos claims, the less sophisticated stakeholders would have read the announcement and believed “the Foundation had sufficient funds to pay all legitimate asbestos claims” (at [318]).97 As such, the statements in slide 4 contravened ss 1041H and 1041E. The Edinburgh and London representations did not breach s 1041E, however, because the inducing effect upon the audience of analysts, institutional investors and fund managers at the Edinburgh meeting and the non-investing audience at the London presentation was lacking (at [1066]).98

ASIC also alleged two contraventions of the continuous disclosure obligations. The first related to a resolution by the James Hardie Industries Ltd (JHIL) board on 15 February 2001 to execute a deed of covenant and indemnity (DOCI). Justice Gzell held (at [1274]-[1275]) that JHIL negligently failed to disclose the DOCI information in contravention of ASX Listing Rule 3.1 and s 1001A(2) of the Corporations Law as carried into the Corporations Act 2001 (Cth). The second was a failure by JHINV to notify the ASX of the ABN 60 Foundation (Foundation) information. On 25 March 2003 JHINV resolved

• that JHINV execute a trust deed establishing the Foundation;
• to approve a capital reduction by JHIL;
• to request JHIL to issue 1,000 shares to the Foundation;
• that the fully paid shares held by JHINV be cancelled for no consideration; and
• that it enter into a deed of covenant indemnity and access.

Justice Gzell held (at [1312]-[1313]) that JHINV failed to notify the ASX of this information in accordance with ASX Listing Rule 3.1 between 25 March and 20 June 2003, thereby contravening s 674(2) of the Corporations Act 2001 (Cth).

In James Hardie Industries NV v Australian Securities and Investments Commission [2010] NSWCA 332 the New South Wales Court of Appeal dismissed appeals relating to the continuous disclosure breaches and the penalty imposed. It also dismissed an appeal and a cross appeal pertaining to the misleading disclosure actions. Spigelman CJ and Beazley and Giles JA confirmed (at [118]) that the statements in slide 4 were undoubtedly misleading. The “slides were generally available on the ASX website as stand alone information, unaccompanied by any explanation or other context” (at [158]). Further, at the time the slides were lodged with the ASX, JHINV knew the Foundation was seriously underfunded (at [118]-[119]). Their Honours indicated that the allegations relating to the second and third representation depended on the circumstances and context (at [333]). While s 1041E “does not require proof of actual inducement” (at [341]), the only evidence ASIC presented concerned the likely effect of the representations on “ordinary investors”. No information was provided on the expected effect on the classes of investors who attended the London and Edinburgh meetings (at [333]).

94 See also James Hardie Industries NV v Australian Securities and Investments Commission [2010] NSWCA 332 at [59].
95 See also James Hardie Industries NV v Australian Securities and Investments Commission [2010] NSWCA 332 at [59].
96 See also James Hardie Industries NV v Australian Securities and Investments Commission [2010] NSWCA 332 at [62].
97 See also James Hardie Industries NV v Australian Securities and Investments Commission [2010] NSWCA 332 at [66].
98 See also James Hardie Industries NV v Australian Securities and Investments Commission [2010] NSWCA 332 at [294].
Finally, ASIC also alleged that the 10 directors of JHIL, including the CEO, secretary and general counsel, CFO and seven non-executive directors, had breached the duty of care and diligence obligation under s 180(1) of the Corporations Act in relation to the preparation and approval of a draft ASX announcement. The draft ASX announcement claimed that the Foundation was fully funded and that it had sufficient funds to meet all legitimate asbestos claims.99 Gzell J upheld these allegations at first instance. Appeals to the Court of Appeal by the non-executive directors and some of the appeals by the secretary were successful, but these decisions were overturned by the High Court. The High Court held that the seven non-executive directors of JHIL each breached her or his duties as a director of the company.100 In addition, the company secretary and general counsel contravened s 180(1) of the Corporations Act by failing to discharge his duties as an officer of JHIL with the degree of care and diligence that a reasonable person in his position would have exercised.101

**Australian Securities and Investments Commission v Fortescue Metals Group Ltd**

In Australian Securities and Investments Commission v Fortescue Metals Group Ltd (No 5) [2009] FCA 1586; Australian Securities and Investments Commission v Fortescue Metals Group Ltd (2011) 190 FCR 364; [2011] FCAFC 19, ASIC alleged that Fortescue Metals had engaged in misleading or deceptive conduct under s 1041H of the Corporations Act and under s 52 of the Trade Practices Act, by “falsely representing to the investing public that the framework agreements were enforceable agreements to build, finance and transfer the railway, port and mine”.102 Justice Gilmour of the Federal Court dismissed the application.103 The actions by ASIC against Fortescue Metals and Forrest, the CEO, alleging contraventions of s 674 were also initially dismissed by the Federal Court.104 Gilmour J concluded that “FMG, its board and Forrest held their opinion as to the meaning and legal effect of the framework agreements honestly and reasonably”.105

ASIC appealed, indicating that the case raised important issues as to the proper interpretation and application of the provisions governing company announcements.106 The Full Court of the Federal Court concluded that “the trial judge erred in failing to conclude that FMG’s public statements would have been understood as statements of fact by ordinary and reasonable members of the investing public” (at [119]). Keane CJ indicated (at [10]) that the s 1041H contravention was a stepping-stone toward the conclusion that Fortescue Metals had contravened s 674(2) of the continuous disclosure provisions. Having concluded that the frameworks were not enforceable agreements that obliged the Chinese contractors to construct the infrastructure, the ASIC case under s 674 also succeeded. That is, “once the misleading statements had been made by Fortescue Metals, s 674 required that they be corrected” (at [181]).

Keane CJ and Emmett and Finkelstein JJ of the Full Court of the Federal Court held that Fortescue Metals and Forrest had contravened s 674(2). Their Honours indicated that Forrest had knowingly participated in the relevant events leading to Fortescue Metals’ contravention of s 1041H within the scope of s 79(c) of the Corporations Act. He had also been involved in Fortescue Metals’ contravention of s 674(2)(c) and was unable to establish a defence under s 674(2B) of the Corporations Act.

---

99 Australian Securities and Investments Commission v MacDonald (No 1) (2009) 230 FLR 1; 71 ACSR 368.


105 Australian Securities and Investments Commission v Fortescue Metals Group Ltd (No 5) [2009] FCA 1586 at [54].

ASIC alleged that Forrest breached his statutory duty to act with care and diligence in failing to verify the information provided to the ASX. The Full Federal Court upheld this claim and indicated that Forrest’s failure to ensure that the information released to the ASX was accurate contravened s 180(1). Notably, the “contravention of 1041H and s 674(2) [were] … used as stepping stones toward the conclusion that Forrest contravened s 180 of the Act” (at [10]).

Fortescue Metals and Forrest were granted the right to appeal to the High Court, and a decision is pending.107

The Hardie and Fortescue outcomes will be closely scrutinised as the first contested actions involving the statutory continuous disclosure, misleading or deceptive conduct and duty of care and diligence provisions.

CLASS ACTIONS

The relationship between public and private enforcement of company disclosure matters is an interesting one. While tensions can arise, arguably the role and conduct of class action litigators generally complement those of ASIC. As Jeremy Cooper, the Deputy Chairman of ASIC, indicated in 2005:

Where shareholders have suffered loss, ASIC’s most direct concern is the regulatory effect on the market and action taken by ASIC is generally geared towards minimizing these effects and preventing further occurrences … ASIC cautiously welcomes the emergence of the shareholder class action in Australia as a “self-help” mechanism whereby shareholders are able to seek damages for loss incurred at the hands of directors and advisers who negligently or dishonestly cause loss to these shareholders.108

The phenomenon of litigation-funded shareholder class actions has gained momentum over the last decade. Australian shareholders have already received significant levels of compensation through class actions founded on alleged misleading or deceptive conduct and failures to comply with the continuous disclosure obligations. As previously outlined, a class action alleging misleading or deceptive conduct by GIO at the time AMP sought to acquire GIO via a scheme of arrangement was settled.109

In 2008 Aristocrat Leisure agreed to settle shareholder claims made through a class action with a total payment of $144.5 million including costs of $8.5 million.110 The plaintiffs sought damages for investor losses resulting from alleged misleading or deceptive conduct and a breach of the continuous disclosure obligations by the company in relation to a series of profit forecasts provided to the market.111

In September 2010 Multiplex agreed to pay $110 million including costs to settle shareholder claims without admission of liability. The applicants of the class action pleaded that Multiplex breached the misleading or deceptive conduct provisions and contravened ss 674 and 675 of the continuous disclosure regime. They alleged that the company failed to keep the market informed of cost and delay issues associated with the Wembley project and the likely effect on the company’s

108 Cooper J, Deputy ASIC Chairman, “Corporate Wrongdoing: ASIC’s Enforcement Role”, address to the International Class Actions Conference, Melbourne, 2 December 2005, pp 4, 15.
109 King v GIO Australia Holdings Ltd [2000] FCA 1543.
Companies take heed: The misleading or deceptive conduct provisions are gaining prominence

profits. More specifically, Multiplex was aware of delays in the construction schedule and cost blowouts by August 2004, but did not inform the market of these until 2005. All of these allegations were denied by Multiplex.

On 1 July 2011 the Federal Court approved a payment by Oz Minerals of $60 million including costs to settle shareholder claims. This represented the first settlement involving multiple shareholder class actions. The actions alleged that the company engaged in misleading or deceptive conduct and breached its continuous disclosure obligations when it understated its debt and failed to disclose the full extent of its refinancing difficulties.

Most recently, the Federal Court approved a settlement amounting to $200 million, including costs, arising from disclosure matters in relation to Centro group entities. The auditing firm PricewaterhouseCoopers paid $67 million and Centro companies paid the remainder. The statement of claim alleged that Centro Retail Ltd and Centro Properties Ltd breached their continuous disclosure obligations and engaged in misleading and deceptive conduct by failing to adequately disclose the full extent of their maturing debt obligations; the risk that they may not be able to refinance their maturing debts at forecast cost or at all; and the risk that there was no longer a reasonable basis for their respective profit forecasts.

Further disclosure-related class actions are proceeding, including suits against ABC Learning, Leighton Holdings, and National Australia Bank.

While it is clear that the advent of successful class actions has altered the disclosure landscape, it is too early to assess the full impact of these actions on the corporate disclosure culture and practices. The number of scenarios that allow a potential class action remains limited, because likely settlements need to be large enough and sufficiently likely to cover the procedural costs and risks associated with multi-party actions. In addition, key elements that need to be established for successful disclosure-related class actions in Australia are still uncertain. It is not yet clear how

113 P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 4) [2010] FCA 1029 at [11]. At [18]-[24] Finkelstein J outlined the factors that led to the conclusion that the Multiplex settlement was fair and reasonable under s 33V of the Federal Court of Australia Act 1976 (Cth): (1) The terms of the settlement were agreed in arm’s length negotiations. (2) When the settlement was agreed, the case has reached the stage of proceedings where the applicants’ solicitors and counsel had sufficient information to assess the merits of the case. (3) The settlement was recommended by the applicants’ solicitors and counsel. (4) The class members would recover in the order of 62 cents in the dollar, which was a significant recovery. (5) No class member opposed the settlement and a large number of the members were experienced institutional investors with in-house legal departments.
115 Kirby v Centro Properties Ltd (No 6) [2011] FCA 650. An estimated $120 million after legal costs was paid to 6,000 institutional and retail investors.
116 IMF (Australia) Ltd, 2008 Annual Report, p 14. This claim alleges that ABC Learning failed to disclose information concerning its financial position to the ASX.
117 “Maurice Blackburn Announces Class Action Against Leighton Holdings”, Maurice Blackburn Press Release and Announcement (1 September 2011). It is alleged that Leighton Holdings breached the continuous disclosure provisions of the Corporations Act in failing to tell investors information regarding the material cost increases and delays on Airport Link and the Desalination Project, and the need for further write-downs on Al Habtoor Leighton Group before April 2011.
118 “NAB Class Action”, Maurice Blackburn Press Release and Announcement (18 November 2010). Maurice Blackburn Lawyers issued proceedings in the Supreme Court of Victoria against National Australia Bank Ltd on behalf of shareholders who purchased or acquired an interest in shares between 1 January 2008 and 25 July 2008. The action is to recover losses suffered as a result of alleged non-disclosures relating to the exposure by the National Australia Bank to toxic debt in Collateralised Debt Obligations (CDOs).
119 Walker J, Managing Director of IMF (Australia) Ltd, “Continuous Disclosure: Key Issues for Companies and Their Advisors“, speech delivered at a seminar arranged by the Centre for Corporate Law and Securities Regulation of the University of Melbourne, Sydney, 16 July 2008.
120 Hughes S and Walker J, “FA9 – Where are We Going? Perspectives from ASIC and IMF Litigation Funding“, presentation to Forensic Accounting & Business Valuation Conference, 9-11 September 2009, http://www.imf.com.au/pdf/173154_FA9%20- %20Where%20are%20we%20going.pdf viewed 7 August 2012. Walker indicates that companies that are at risk of a litigation-funded class action present the following four indicia: 1. The company is listed 2. The company has a large market
shareholder losses must be determined; whether the purchase of securities at an inflated price is sufficient to establish loss; on what basis investor reliance is assessed; that is, whether market reliance is sufficient or reliance by individual shareholders needs to be shown; what causation links are required; and how materiality must be established.\[^{122}\]

The successful actions to date have been settled to avoid long court actions focused on these elements. As Finkelstein J highlighted in *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 4)* [2010] FCA 1029 (at [24]), in this type of litigation, “the parties are well served by a ‘bird in the hand’ approach”. It “is impossible to ignore the vagaries of litigation … the risk of failure … the expense that will be incurred by protracted litigation and the likely appeals that follow when novel points of law are at issue” (at [24]).

Perhaps the most important point to be drawn from the class action record comes from a straw poll by IMF (Australia) Ltd of institutional investors involved in the class actions. The poll found that the primary driver for participation in the disclosure-related class actions is the potential deterrent effect rather than the settlement moneys.\[^{123}\]

**THE REGULATORY LINKS, CONNECTIONS AND CONSEQUENCES**

**The applicable misleading or deceptive conduct provisions**

Misleading or deceptive conduct that involves the provision of financial services is clearly excluded from s 52 of the *Trade Practices Act* and s 18 of the *Australian Consumer Law*. The relevant provision is either s 1041H of the *Corporations Act* or s 12DA of the *Australian Securities and Investments Commission Act*. The particular circumstances that might contravene s 12DA of the *Australian Securities and Investments Commission Act* but not s 1041H of the *Corporations Act* or vice versa are not entirely certain. In addition, the policy rationale for including the phrase “in trade or commerce” in s 52 of the *Trade Practices Act* and s 18 of the *Australian Consumer Law* while excluding it from s 1041H of the *Corporations Act* is not known. Nevertheless, there is significant overlap in the legal elements and applicability of the specified misleading or deceptive conduct provisions.

Some of the misleading or deceptive conduct actions have pleaded contravention of more than one of the misleading or deceptive conduct provisions. For instance, in the Multiplex class action, the applicants pleaded the company had contravened the misleading or deceptive prohibitions in ss 1041H, 1041E, 670A and 728 of the *Corporations Act*, s 12DA of the *Australian Securities and Investments Commission Act* and s 9 of the *Fair Trading Act 1999* (Vic).

In the GPG case, GPG pleaded that the misleading or deceptive conduct of GIO contravened s 52 of the *Trade Practices Act*, s 42 of the *Fair Trading Act 1987* (NSW), s 12DA of the *Australian Securities and Investments Commission Act*, and s 995(2) of the *Corporations Law*.\[^{124}\] The Federal Court held that the appropriate provision was s 12DA of the *Australian Securities and Investments Commission Act*, there being no relevant difference between that provision and the other statutory provisions sued upon.\[^{125}\] In *Clifford v Vegas Enterprises Pty Ltd (No 5)* [2010] FCA 916, the applicant pleaded that non-disclosure of material information contravened s 52 of the *Trade Practices Act*, s 1041H of the *Corporations Act* and s 10 of the *Fair Trading Act 1987* (WA). Barker J indicated (at [51]) that as the relevant misleading or deceptive conduct went to “matters in relation to the business of Vegas, rather than the shares in Vegas”, the preferable view was that the *Trade Practices Act* provisions applied.

\[^{122}\] See *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 4)* [2010] FCA 1029 at [2]. Finkelstein J noted (at [2]) that class actions (perhaps more than other cases) lend themselves to compromise because of the uncertainty of their results, difficulties of proof, complexities in the assessment of damages and the expense of long trials.

\[^{123}\] Walker, n 120.

\[^{124}\] Section 995 of the *Corporations Law* was the predecessor to s 1041H of the *Corporations Act 2001* (Cth).

\[^{125}\] *GPG (Australia Trading) Pty Ltd v GIO Australia Holdings Ltd* (2001) 117 FCR 23; 40 ACSR 252 at [100].
The links between misleading or deceptive conduct and the continuous disclosure obligations

Prior to 2001, the misleading or deceptive conduct, the statutory continuous disclosure provisions, and the insider trading prohibitions were included within ss 995, 1001C, and 1002G respectively of Div 2 of Pt 7.11 of the Corporations Act. The structure of the Corporations Act was changed by the passing of the Financial Services Reform Act 2001 (Cth). Chapters 6-6D now outline the disclosure obligations relating to company securities and Ch 7 governs financial services and markets including prohibited conduct. Nonetheless, the case law, class actions, and empirical research suggest increasingly close links between the misleading or deceptive conduct and the continuous disclosure provisions.

Some parties may argue that ASIC used the statutory continuous disclosure provisions in the Fortescue case to pursue conduct that should naturally be confined to s 1041H. It will be interesting to see how the High Court considers this argument. In the current author’s view, the ASIC pleadings were valid because ASX announcements that are misleading or deceptive require correction to ensure clear, concise and effective continuous disclosure.

CONCLUSION

Misleading or deceptive conduct provisions were enacted within Australian consumer law and companies and securities legislation to promote an acceptable standard of conduct (and disclosure). In the present era of global markets and finance, disclosure frameworks that provide regular comprehensive information in the public arena should be viewed as a “necessary public good” to serve the economic and other interests of a nation. Companies are legal constructs that operate in society with the associated rights, obligations and benefits determined by the Parliament. Companies elect to become “public” and to list on the ASX to raise capital from the public and to enable public trading of their securities. These steps impose legal obligations, including the requirement to provide timely public disclosure of material information, in a manner that is clear, concise and effective, and which is not misleading or deceptive.

Yet the ASIC studies of disclosures during 2010 and 2011 paint a rather negative picture of the Australian listed company disclosure culture and processes. Most of the ASIC reviews were of disclosures of the largest listed entities, and most focused on information provided in the annual report. The annual report provides the most comprehensive disclosure of company information during a financial year, but the information is not timely due to its delayed release. The content disclosed in the timelier half year and preliminary final reports is generally much less than is provided in the annual report. Further, the quantity and quality of disclosure by smaller listed entities is generally much poorer than for the larger companies. Readers should particularly note the repeated finding that companies provide the highest quality information in the briefing slides released through the ASX. These slides are used, explained and discussed by company managers in institutional briefings that are often by invitation only. Companies are not required to provide open access to these meetings by means of webcasts or conference calls.

In practice, failures to disclose material information or misleading or deceptive reporting by companies can have serious consequences for investors and the broader community. The ASIC
reviews and empirical studies indicate that company managers, like most of us, often prefer to avoid the disclosure of “bad news” or to disguise it with an optimistic bias. While this may be done within regulatory bounds and without intent, sometimes the need to continue to manage “earnings news” leads to subsequent misreporting that is intentional and of a greater magnitude.\(^{134}\) The negative impacts of such misleading or deceptive conduct on stakeholders are generally most acute when companies are in financial difficulties and/or are facing serious cash flow issues.

The empirical findings suggest that some Australian company managers continue to operate under the traditional disclosure model or culture. This model encourages close relationships between the company managers and a core group of institutions, and it provides these market participants with comprehensive information on a regular basis. At the same time, the public reports and disclosures are sometimes limited to a minimal level of lower quality information.\(^{135}\) Such disclosure models are hopelessly outdated in the modern information and digital eras, and the risks to companies that do not adapt to the digital environment and to the call for greater corporate accountability are increasing. Company managers would be well advised to heed the disclosure warning signals that have become increasingly loud over the last year.

All listed company managers and directors should re-examine their disclosure cultures and processes in light of the recent public and private enforcement actions and the ASIC policy guidance. The economic and reputational risks and costs relating to failures by companies to disclose and misleading or deceptive conduct are mounting. Although there have been only a handful of actions initiated by ASIC or shareholders seeking compensation for losses or damages sustained as a result of misleading or deceptive company disclosure, this scenario looks set to change. One can expect an increased number of actions founded on the misleading or deceptive conduct provisions. First, the courts have interpreted the misleading or deceptive conduct provisions expansively. Lockhart and Gummow JJ indicated in *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* (1993) 42 FCR 470 at 503 that

\[\text{The evident purpose and policy underlying \ldots s 52, recommends a broad construction of its constituent provisions, the legislation being of a remedial character so that it should be construed so as to give the fullest relief which the fair meaning of its language will allow.}\]

One might argue that the continuous disclosure provisions are broad, as a breach of the continuous disclosure obligations may involve a failure to disclose, a delay in public disclosure, or selective disclosure.\(^{136}\) However, the statutory continuous disclosure regime is limited by the generally available carve-outs.\(^{137}\) The scope of these carve-outs is uncertain as there has been only minimal case law on these provisions.\(^{138}\)

Secondly, ASIC has used the misleading or deceptive conduct provisions as a building block or stepping-stone to establish continuous disclosure and due care and diligence prosecutions. It did this successfully in the *Hardie* and *Fortescue* cases. These litigation outcomes are likely to prompt further continuous disclosure actions founded on misleading or deceptive conduct.

Thirdly, many of the disclosure-related class actions allege contraventions of the misleading or deceptive conduct and the continuous disclosure provisions. The plaintiffs in the *Aristocrat*, *Multiplex* and *Oz Minerals* actions alleged misleading or deceptive conduct and a breach of the continuous

\[\text{134} \text{Schrand and Zechman, n 59.}\]

\[\text{135Arguably the circumstances outlined in *James Hardie Industries NV v Australian Securities and Investments Commission* [2010] NSWCA 332 arose because the company directors hoped to avoid fully disclosing the extent of the potential asbestos-related liability to the market.}\]


\[\text{137Corporations Act 2001 (Cth), ss 676, 677.}\]

\[\text{138Questions relating to the general availability of information have not been a significant issue in any of the continuous disclosure actions to date.}\]
Companies take heed: The misleading or deceptive conduct provisions are gaining prominence
disclosure obligations. While none of the allegations made in the disclosure-related class actions were tested in the courts, a high percentage of the actions have resulted in successful settlement outcomes, the agreed settlements have been significant, and these actions have had the support of both institutional and retail investors. Importantly, institutional investors indicate that the primary motivation driving their participation in the class actions is the deterrent effect.