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**The Rationale for and Enforcement of Continuous Disclosure Frameworks in Securities
Regulation in South Africa**

By

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Student No. 133851



October, 2022

**The Rationale for and Enforcement of Continuous Disclosure Frameworks in Securities
Regulation in South Africa**

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Student No. 133851

**Submitted in Partial Fulfilment of the Requirements for the Degree of Master of Laws
(International Financial Law and Regulation) at Strathmore University**

Strathmore Law School

Strathmore University

Nairobi, Kenya

October, 2022

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Abstract

Companies listed on financial markets are expected to disclose new non-public material information to investors and market participants. Continuous disclosure entails that investors always envisage being promptly informed of any new price-sensitive information concerning a listed entity as a *sine qua non* for their informed investment decisions. Enforcement of continuous disclosure obligations through criminal actions, civil penalties and private enforcement mechanisms instils investor confidence and, most importantly, enhances the integrity and efficiency of the market. South Africa's continuous disclosure framework does not have civil and criminal statutory liability penalties for issuers' and directors' breach of continuous disclosure obligations. The study utilised doctrinal legal research and comparative legal analysis in analysing South Africa's continuous disclosure framework. The absence of civil and criminal statutory liability provisions was found to undermine both private and public enforcement of continuous disclosure obligations. The study also found that international instruments on securities regulation highlight the rationale for continuous disclosure and encourage public and private enforcement of continuous disclosure obligations. The research recommends the enactment of criminal and civil liability provisions to change the status *quo*. The study is fundamental to policymakers, retail and institutional investors and financial regulators.

Keywords: Enforcement of Continuous Disclosure Obligations, Price-sensitive Information, Efficient Markets, Protection of Investors, Securities Regulation.

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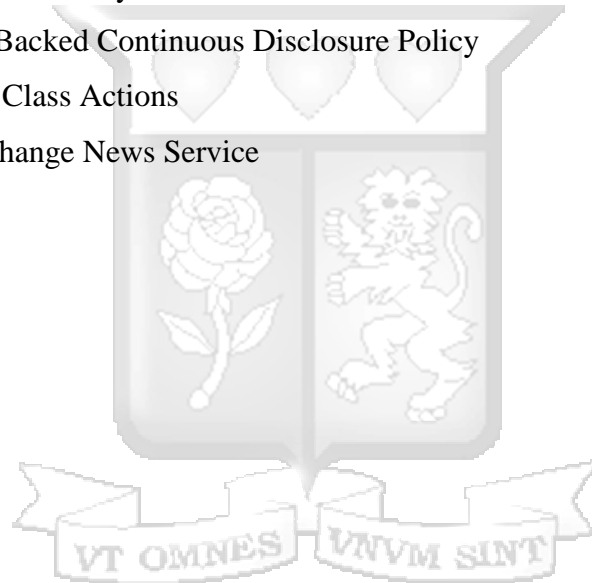
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LIST OF ACRONYMS

ASIC	Australian Securities and Investments Commission
ASX	Australian Stock Exchange
EMH	Efficient Market Hypothesis
FSB	Financial Services Board
FSCA	Financial Sector Conduct Authority
IOSCO	International Organization of Securities Commissions
IoDSA	Institute of Directors in South Africa
JSE	Johannesburg Stock Exchange
PA	Prudential Authority
SBCDP	Statutory Backed Continuous Disclosure Policy
SCAs	Securities Class Actions
SENS	Stock Exchange News Service



LIST OF STATUTES AND INTERNATIONAL INSTRUMENTS

International Instruments

IOSCO *Objectives and Principles of Securities Regulation* (May 2017).

IOSCO *Principles for Ongoing Disclosure and Material Development Reporting by Listed Entities*, October 2002.

South Africa

Companies Act 71 of 2008

Financial Markets Act No. 12 of 2012.

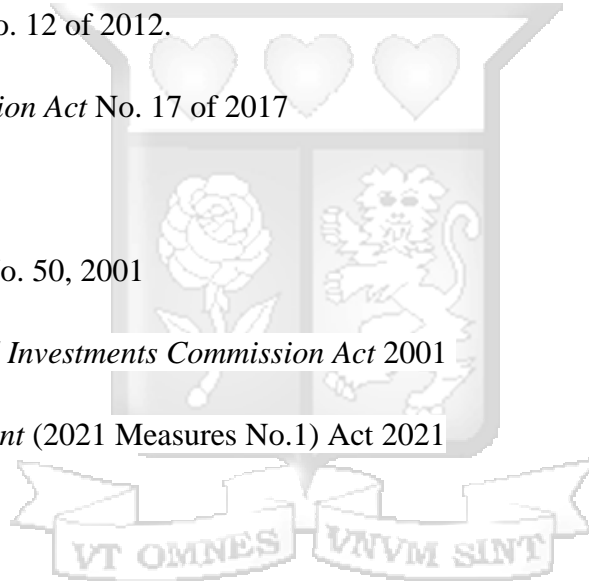
Financial Sector Regulation Act No. 17 of 2017

Australia

Corporations Act 2001 No. 50, 2001

Australian Securities and Investments Commission Act 2001

Treasury Laws Amendment (2021 Measures No.1) Act 2021



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ASIC v Hellicar (2012) HCA 17

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De Bruyn v Steinhoff International Holdings N.V. (29290/2018) [2020] ZAGPJHC 145; 2022 (1) SA 442 (GJ)

Dorajay Pty Ltd v Aristocrat Leisure Limited [2009] FCA 19

Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis 2020 (5) SA 419 (SCA)

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



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DEDICATION

This thesis is dedicated to the best lawyer Mr G.V. Mamvura whose demise came at a critical stage of my life. The sacrifices were not in vain.



Chapter One: Introduction

1.1. Background to the Problem

South Africa adopted a twin peaks type of financial regulation framework through the enactment of the Financial Sector Regulation Act No. 17 of 2017 (FSRA).¹ The Act introduces a new prudential regulator, which is the Prudential Authority, and the market conduct regulator, which is the Financial Sector Conduct Authority (FSCA).² The FSCA seeks to enhance and support the efficiency and integrity of financial markets, protect consumers and assist in maintaining financial stability.³ Section 33 of the FSRA stipulates that the function of the Prudential Authority is to enhance the safety and soundness of financial institutions that provide financial products and securities services. In terms of securities regulation, despite having enjoyed high rankings in the past decade, South Africa's ranking dropped in 2017-18.⁴ In terms of investor protection, South Africa scored a seven on the strength of the investor protection index which ranges countries from 0 (little to no investor protection) to 10 (greater investor protection).⁵

Securities regulation frameworks of countries such as South Africa are informed by the International Organization of Securities Commissions (IOSCO) Objectives and Principles of Securities Regulation.⁶ IOSCO Principles assert three objectives of securities regulation which are: (a) protection of investors; (b) ensuring that markets are fair, efficient and transparent; and (c) reduction of systemic risk.⁷ South Africa seeks to advance the IOSCO objectives in terms of the Financial Markets Act No. 12 of 2012 (hereinafter FMA).⁸ The principles and IOSCO's objectives are an international benchmark which informs securities regulation. Continuous disclosure is an aspect of securities regulation that entails prompt divulgence of material or price-sensitive

¹ https://www.up.ac.za/mercantile-law/news/post_2705235-twin-peaks-model-of-financial-regulation-for-south-africa-seeks-to-promote-and-maintain-financial-stability> Accessed 2 November 2021

² https://www.up.ac.za/mercantile-law/news/post_2705235-twin-peaks-model-of-financial-regulation-for-south-africa-seeks-to-promote-and-maintain-financial-stability> Accessed 2 November 2021

³ Section 57, FSRA

⁴ Chanetsa C K, *Securities and Capital Markets Regulation in South Africa: A Contemporary View*, Leiden, The Netherlands: Brill, (2019), 2

⁵ <https://tradingeconomics.com/country-list/strength-of-investor-protection-index-0-to-10-wb-data.html>> Accessed 31 December 2021

⁶ <https://www.elibrary.imf.org/view/journals/002/2015/057/article-A001-en.xml>> Accessed 4 November 2021

⁷ IOSCO *Objectives and Principles of Securities Regulation*, May 2017<
<https://www.iosco.org/library/pubdocs/pdf/IOSCOPD561.pdf>> Accessed 13 April 2021

⁸ Section 2, FMA

information concerning a listed issuer to market participants and investors.⁹ It ensures transparency, investor protection, fair play and the overall integrity of securities markets.¹⁰

IOSCO developed various principles that are fundamental in securities regulation. The organisation developed principles named the Principles for Ongoing Disclosure and Material Development Reporting by Listed Entities (hereinafter IOSCO's Ongoing Disclosure Principles).¹¹ The principles state that listed entities should have an ongoing disclosure obligation that requires disclosure of all information that would be material to an investor's investment decision.¹² IOSCO Principles for Issuers of securities also pay explicit attention to the promotion of continuous disclosure by requiring that there should be: (a) complete and timely disclosure of financial results, risk and material information to investors, (b) holders of securities in a company should be treated fairly and equitably and (c) use of international quality accounting standards by issuers to prepare financial statements.¹³ IOSCO Principles for the Enforcement of Securities Regulation state that the regulator should have (a) comprehensive inspection, investigation and surveillance powers, (b) comprehensive enforcement powers and (c) the regulatory system should ensure effective and credible use of inspection, investigation, surveillance and enforcement powers and implementation of an effective compliance program.¹⁴ All these principles inform the country's continuous disclosure framework.

Principles 10,11 and 12 of IOSCO Objectives and Principles for Securities Regulation deal with the enforcement of securities law.¹⁵ As stated above, Principle 11 states that regulators should have comprehensive enforcement powers.¹⁶ In its explanation of principle 11, the organization stated that such powers include administrative powers, imposition of sanctions and being able to institute or refer matters for criminal proceedings.¹⁷ However, such powers should not compromise the

⁹ Samamba L.T, *The Zambian continuous disclosure legal regime*, *International Journal of Research in Social Sciences*, Volume 8, Issue 6, (2018), 130

¹⁰ Samamba L.T, *The Zambian continuous disclosure legal regime*, *International Journal of Research in Social Sciences*, 128

¹¹ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD132.pdf>> Accessed 13 April 2021

¹² <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD132.pdf>> Accessed 21 February 2022

¹³ IOSCO *Principles on Issuers*, Part E, Principles 16-18

¹⁴ IOSCO *Objectives and Principles of Securities Regulation*, Part C

¹⁵ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD561.pdf>> Accessed 7 February 2022

¹⁶ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD561.pdf>> Accessed 7 February 2022

¹⁷ Methodology for Assessing Implementation of the IOSCO Objectives and principles of securities regulation, 2003, <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD155.pdf>> Accessed 7 February 2022

private enforcement rights of investors.¹⁸ Principle 11 is fundamental in this study in outlining the enforcement of South Africa's continuous disclosure framework. It signifies the importance of civil and criminal liability provisions as well as securities actions by investors. In South Africa's context, the question is whether the FMA makes provision for criminal and civil liability of issuers and their directors in the event of a breach of continuous disclosure obligations. Can investors seek their own remedies or institute Securities Class Actions (SCAs) in terms of the FMA? In Securities Regulation, investors invoke statutory liability provisions when utilising private enforcement mechanisms such as SCAs.¹⁹ There is no evidence, in the current literature, that the FMA promotes investors' private enforcement rights and civil and criminal liability of issuers and directors in the event of a breach of continuous disclosure obligations.

South Africa considers the FMA to be its primary legislation governing financial markets in the country. The Act, together with the JSE Listing Requirements, stresses the need for sedulous adherence to disclosure obligations. Continuous disclosure entails divulgence of price-sensitive information which is believed to assist in determining the exact price of the securities of an issuer, credit ratings of those securities, transparency and facilitates fair play in securities markets.²⁰ Financial markets seek to advance these objectives. The Johannesburg Stock Exchange is no exception. The JSE enjoyed being ranked the 17th largest exchange market in the world and the largest exchange market in Africa.²¹ At the time of this study, the JSE had proposed a course on; *inter alia*, financial reporting, price-sensitive information and cautionary announcements, which Directors, Chief Financial Officers and Company Secretaries can attend.²²

Prompt divulgence of new price-sensitive information that is non-public is the core business of continuous disclosure.²³ It is a core business highlighted in the JSE Listing Requirements. Apart from the FMA, FSRA and JSE Listing Requirements, other statutes and regulations govern

¹⁸ Methodology for Assessing Implementation of IOSCO principles, 2003, at 42

¹⁹ For example, in *TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Limited* [2019] FCA

²⁰ Samamba L.T, *The Zambian continuous disclosure legal regime*, *International Journal of Research in Social Sciences*, 128

²¹ <https://sseinitiative.org/stock-exchange/jse/>> Accessed 31 December 2021

²² <https://www.jse.co.za/events/continuing-obligations-and-price-sensitive-information-training>> Accessed 29 June 2021

²³ Samamba L.T, *The Zambian continuous disclosure legal regime*, *International Journal of Research in Social Sciences*, 130

continuous reporting by companies of any material information and the companies' financial positions in South Africa. These include the following statute, rules and practice notes:

- *Companies Act 71 of 2008*
- *JSE Rules.*
- *JSE Practice Note 2 of 2015*

Company directors are given the leverage to apply their discretion in determining what constitutes price-sensitive information in a particular context in terms of the JSE Practice Note 2 of 2015.²⁴

South Africa's case law highlights an acknowledgement of the importance of disclosure obligations. This is highlighted in the *Steinhoff* case where the applicant intended to hold Steinhoff, its directors and Deloitte for losses caused by misstatements in the company's financial statements.²⁵ The court in that case, acknowledged that it is in the public interests that transactions in the market should be informed by accurate information. However, it reluctantly opposed directors' liability as a result of a breach of disclosure obligations by stating that the risk of directors assuming huge liabilities to investors is likely to be so great that it would deter many from taking office in listed companies, adversely affecting companies, capital markets and the economy.²⁶

In a move that can facilitate civil liability in securities law, South Africa introduced compensation rights in the FSRA. Section 278 of the FSRA states that: *A person, including a financial sector regulator, who suffers loss because of a contravention of a financial sector law by another person may recover the amount of the loss by action in a court of competent jurisdiction against*

(a) the other person- and

(b) any person who was knowingly involved in the contravention.

The provision has not been invoked yet in continuous disclosure litigation, neither is there any criminal conviction or a securities class action based on continuous disclosure. Despite the

²⁴ Practice Note 2 of 2015 issued by the JSE

²⁵ *De Bruyn v Steinhoff International Holdings N.V. and Others* [2020] ZAGPJHC 145 (SA)

²⁶ *De Bruyn v Steinhoff International Holdings N.V., para 155*

promulgation of the FSRA, exchanges are required to formulate disclosure standards in terms of section 11(1) d of the FMA and enforce them as per section 11(1) of the same Act. Where there is a contravention of the Act, the exchange is expected to report to the FSCA in terms of section 10(2) d of the FMA. Directors and officers of a listed issuer are also required to meet certain standards of conduct in terms of section 11(1) c of the FMA. If issuers and their officers or directors breach their continuous disclosure obligations, the consequences are limited to penalties that exchanges can impose in terms of section 11(1) g of the FMA.

In light of the provisions of the FMA, section 278 of the FSRA, JSE Listing Requirements and case law, it is imperative to consider the rationale for continuous disclosure and whether South Africa's continuous disclosure regulatory framework exhibits enforcement concerns by failing to have a criminal conviction. Another area of concern is whether there is an adequate promotion of both public and private enforcement mechanisms of continuous disclosure obligations in South Africa considering that there are no enforcement matters on continuous disclosure by the FSB/FSCA since February 2013²⁷ and that there are no securities class actions that have been instituted from 1947 to 2018.²⁸ Whilst there is an acknowledgement that the country's securities law is still developing, such issues need proper ventilation.²⁹ These are concerns that do not promote or align with IOSCO Objectives, Principles for Issuers, Principles for Enforcement of Securities Regulation and Principles for Ongoing Disclosure. The IOSCO principles seek to ensure that securities are properly regulated, and markets are efficient. Civil and criminal liability provisions play an integral part in this goal.

1.2. Statement of the Problem

South Africa's FMA does not have statutory civil and criminal liability penalties for listed issuers, their officers and directors' breach of continuous disclosure obligations. The Act gives exchange markets the power to make and enforce continuous disclosure obligations. Exchange's listing

²⁷ <https://www.fsc.co.za/Enforcement-Matters/Pages/Enforcement-Actions.aspx>> Accessed 23 May 2022

²⁸ Aziza, O. R., *Securities Regulation, Enforcement and Market Integration in the Development of Sub-Saharan Africa's Capital Markets*, PhD Thesis, University of Oxford, (2021), 256-7
<https://ora.ox.ac.uk/objects/uuid:5a738d2a-4ea9-44bc-bf87-52f0608119df/files/d7w62f837c>>

²⁹ Chanetsa, *Securities and Capital Markets Regulation in South Africa: A Contemporary View*, 2

requirements primarily govern continuous disclosure in South Africa. The exchanges are expected to stipulate disclosure standards in listing requirements and enforce them in terms of the Act.

The framework highlights enforcement concerns in that despite the FSCA being the responsible authority for the Act that should deal with statutory contraventions of disclosure requirements, consequences are limited to penalties that exchanges may impose in terms of section 11(1) g of the FMA. The role of the FSCA in the enforcement of continuous disclosure is not clear in that regard. There are no enforcement matters by the FSB/FSCA on continuous disclosure since February 2013. In addition, investors do not have remedies in terms of the listing requirements, thereby undermining investors' private enforcement mechanisms such as Securities Class Actions. In Securities Regulation, civil and criminal liability provisions are utilised in strengthening both public and private enforcement of continuous disclosure obligations. A failure to have civil and criminal liability provisions undermines both public and private enforcement of continuous disclosure obligations. This study interrogates whether South Africa's continuous disclosure framework reflects a failure to adequately provide for the enforcement of continuous disclosure, shortcomings in advancing the rationale for continuous disclosure and a failure to advance IOSCO's Objectives, Principles for Issuers, Principles for Enforcement and Principles on Ongoing Disclosure.

1.3. Significance of the Study

Financial markets contribute immensely to world economies. National regulators should be tasked with producing a framework that seeks to strike a balance between the company's objectives of raising finance through financial markets and the goal of ensuring transparency, fair play, the integrity of securities markets and investor protection. There is generally scant literature on the enforcement of continuous disclosure obligations, private enforcement rights of investors, and civil and criminal liability of listed issuers and corporate managers for breach of continuous disclosure obligations in South Africa. This study seeks to address that gap. This study will highlight problems associated with South Africa's continuous disclosure framework and ways in which they can be addressed in line with IOSCO's principles and objectives. The findings and recommendations of this study are fundamental to policymakers, retail and institutional investors and financial regulators who should understand the rationale for continuous disclosure and how its enforcement should take shape in line with international standards and other developed

jurisdictions such as Australia. Financial regulators can largely benefit from the highlighted shortcomings in the framework and should consequently embrace proposed reforms on continuous disclosure laws to ensure stable markets, and support economic growth, development and improved livelihoods.

1.4. Research Objectives

The purpose of this research is to assess the rationale for having continuous disclosure frameworks, the enforcement of such frameworks in South Africa compared to Australia and to analyse South Africa's continuous disclosure framework using IOSCO Principles and Objectives as a yardstick against which securities regulation frameworks can be determined and assessed. The following objectives steer the research:

- (a) To analyse the extent of the adoption of IOSCO Objectives, Principles for Issuers, Principles for Enforcement of Securities Regulation and Principles for Ongoing Disclosure and Material Development Reporting by Listed Entities in South Africa's continuous disclosure framework.
- (b) To analyse South Africa's continuous disclosure framework and identify its shortcomings in promoting accurate, complete and timely disclosure of price-sensitive information to investors.
- (c) To compare the nature and scope of investor remedies, such as securities class actions, in the event of a listed issuer's breach of continuous disclosure obligations between South Africa's framework and Australia's framework.
- (d) To posit ways of improving South Africa's continuous disclosure framework.

1.5. Research Questions

- (a) What is the extent of the adoption of IOSCO Objectives, Principles for Issuers, Principles for Enforcement of Securities Regulation and Principles for Ongoing Disclosure and Material Development Reporting by Listed Entities in South Africa's continuous disclosure framework?
- (b) What are the weaknesses of South Africa's continuous disclosure regulatory framework?

- (c) What is the nature and scope of investor remedies, such as securities class actions, if a listed issuer breaches continuous disclosure obligations between South Africa's framework and Australia's framework?
- (d) What can be done to improve South Africa's continuous disclosure regulatory framework and ensure market efficiency?

1.6. Research Hypothesis

The study surmises that South Africa's current continuous disclosure regulatory framework fails to make provision for statutory civil and criminal liability provisions in the event of listed issuers, their directors' and officers' breach of continuous disclosure obligations thereby undermining the rationale for continuous disclosure, enforcement of continuous disclosure obligations and IOSCO's Objectives and Principles.

1.7. Theoretical Framework

There are theories that have been advanced by scholars that support the need for continuous disclosure and its enforcement. The Efficient Market Hypothesis (EMH) is a trite idea that Fama and Barnes advanced on for many years.³⁰ Barnes submits that the theory exhibits three variants: weak-form efficiency, semi-strong form efficiency and strong-form efficiency, all depending on the ability of a market to reflect security prices that are dependent on the currently available information.³¹ The Efficient Market Hypothesis (EMH) is the main theory behind informational efficiency.³² EMH stipulates that prices of financial assets should reflect all available information.³³ Informational efficiency refers to the degree of information reflected in the prices of financial assets.³⁴ Afego submits that in developed countries the theory implies that markets' informational efficiency is based on the ability to have prices of securities reflecting currently

³⁰ Barnes P, *Stock market efficiency, insider dealing and market abuse*, Routledge, New York, (2016), 45

³¹ Barnes P, *Stock market efficiency, insider dealing and market abuse*, (2016), 45

³² Aktan et al, *'Testing the Information Efficiency in Emerging Markets'*, (2017), in G. Kucukocaoglu, S. Gokten (eds.), *Financial Management from an Emerging Market Perspective*, IntechOpen, London, 2018<
<https://www.intechopen.com/chapters/56642>>

³³ Aktan et al, *'Testing the Information Efficiency in Emerging Markets'*, Section 2

³⁴ Aktan et al., *'Testing the Information Efficiency in Emerging Markets'*, Section 2

available information.³⁵ A market is considered more informational efficient when the prices of financial assets adapt quickly to the incoming information.³⁶

Where public announcements that do not contain new information are made, rational investors must ignore such announcements.³⁷ The EMH supports the notion that such announcements will not result in immediate changes in securities prices since the information is not new.³⁸ The theory, however, finds little favour if irrational investors trade in large numbers as compared to rational investors. The market is believed to then behave in a manner that is inconsistent with the EMH.³⁹ The theory is fundamental in this study in outlining the rationale for continuous disclosure in financial markets, why its enforcement is fundamental and the rationale behind IOSCO's emphasis on efficient markets as stipulated in its objectives and principles.

The upward or downward adjustment of prices to their fair market value based on the available information or in reaction to new information makes stock prices random and unpredictable.⁴⁰ This is termed the Random Walk Hypothesis (RWH).⁴¹ The RWH supports the EMH. These theories outline the significance of disclosure of price-sensitive information in determining the prices of financial assets. The facets of the hypotheses, together with the IOSCO Principles, underpin this study in outlining the rationale for continuous disclosure and the need for its enforcement in South Africa's securities regulation.

Another fundamental theory is the stakeholder theory which states that entities have different stakeholders upon which the entity's future is reliant and that they need the approval of such stakeholders for the business' continued existence.⁴² Investors and market participants form part of that array of stakeholders and are fundamental to the continued existence of listed entities. Employees, consumers and the general public also fall within the category of stakeholders that

³⁵ Afego P, "Market Efficiency in Developing African Stock Markets: What do we know?" *The Journal of Developing Areas*, vol. 49, no. 1, 2015, pp. 243–266 www.jstor.org/stable/24241291 Accessed 3 July 2021

³⁶ Aktan et al., 'Testing the Information Efficiency in Emerging Markets', Section 2

³⁷ Born et al, 'Trump Tweets and the Efficient Market Hypothesis', (2017), 103 – 109
<https://content.iospress.com/articles/algorithmic-finance/af211> Accessed 20 July 2022

³⁸ Born et al, 'Trump Tweets and the Efficient Market Hypothesis', 103

³⁹ Born et al, 'Trump Tweets and the Efficient Market Hypothesis', 103

⁴⁰ Aktan et al, 'Testing the Information Efficiency in Emerging Markets', Section 2

⁴¹ Aktan et al, 'Testing the Information Efficiency in Emerging Markets', Section 2

⁴² Khumalo G and Pitt L, *The determinants of CSR disclosure of firms listed on the JSE: A focus on firms meeting the SRI index criteria*, Corporate Ownership & Control, (2015) Available at:<<https://www.researchgate.net/publication/281763079>> Accessed Jul 18 2021.

should be considered.⁴³ In certain instances, even competitors fall within this bracket of stakeholders.⁴⁴ They are, however, not of greater significance in continuous disclosure obligations. The stakeholder theory embraces the notion that the goal is not to make profits at all costs.

Investors are always keen to know the prospects of the entity they have invested in. The stakeholder theory is against the traditional view that entities are economic vehicles that should have an exclusive goal of making a profit for the benefit of shareholders without adequately considering the interests of other stakeholders.⁴⁵ The theory is premised on the need to have a shared vision between various stakeholders that can ensure the sustenance of an entity.⁴⁶ Such shared vision is attainable through disclosure obligations. Therefore, the theory is utilised in this study to explain and analyse the consequences of inadequate disclosure, failure to enforce continuous disclosure obligations and its concomitant signals to investor-entity relationship, market participants and effects on IOSCO objectives.

1.8. Research Methodology

The study uses doctrinal legal research in outlining the rationale for continuous disclosure and enforcement of South Africa's continuous disclosure framework. The study focuses on IOSCO Principles and Objectives as a yardstick against which continuous disclosure frameworks can be determined and assessed. An analysis of primary and secondary sources of law is applied. The study examines whether IOSCO Objectives and Principles were fully incorporated into South Africa's FMA. The study invokes IOSCO Principles and Objectives, as an international benchmark, in analysing the FMA, FSRA, JSE listing requirements and the JSE's Practice Note 2 of 2015.

The data collection technique utilised is reviewing documents and records, which are JSE Listing Requirements, case law, legislation, JSE rules and reports. The material is utilised in analysing the

⁴³ Elson and Goossen, "E. Merrick Dodd and the Rise and Fall of Corporate Stakeholder Theory." *The Business Lawyer* 72, no. 3 (2017): 735–54, <https://www.jstor.org/stable/26419161>.> Accessed 20 July 2022

⁴⁴ Freeman, R.E, *Stakeholder Theory*, In Wiley Encyclopedia of Management, (2015)< <https://doi.org/10.1002/9781118785317.weom020179>> Accessed 20 July 2022

⁴⁵ Alexander, F. H, "The Capital Markets and Benefit Corporations." *Business Law Today*, (2016), pp. 1–4, <https://www.jstor.org/stable/businesslawtoday.2016.07.06>.> Accessed 20 July 2022.

⁴⁶ Birwatkar, V. P, "Corporate Social Responsibility: All at Sea." *The Journal of Territorial and Maritime Studies* 4, no. 2 (2017): 66–86. <https://www.jstor.org/stable/26664154>.> Accessed 20 July 2022

rationale for continuous disclosure frameworks, enforcement of such frameworks and the importance of international instruments such as IOSCO Objectives and Principles of Securities Regulation. The material is also utilised in analysing decided cases and South Africa's position on criminal and civil liability for issuers and directors' breach of continuous disclosure obligations.

This research also employs a legal analysis of South Africa and Australia's continuous disclosure frameworks. Differences and similarities in the enforcement frameworks of continuous disclosure obligations by exchanges, national financial regulators as well as investor remedies in the two jurisdictions are outlined. A comparison of continuous disclosure statutory provisions in South Africa's FMA and Chapter 6CA of Australia's Corporations Act 2001, JSE and ASX's exchange rules and requirements, and the two jurisdictions' case law on SCAs is employed. South Africa's financial law reform reflects significant Australian influence, which includes the adoption of the twin peaks regulatory framework in 2017.⁴⁷ Australia is ranked highly as one of the largest economies in the Asia-Pacific region.⁴⁸ South Africa enjoys the same privilege in Africa.⁴⁹ The two jurisdictions highlight the co-regulation of financial markets between exchanges and national regulators. That is the ASX and ASIC in Australia and the JSE and the FSCA in South Africa. The comparative goals of the study include outlining (a) variances in the two jurisdictions in making provisions for statutory criminal and civil liability of issuers and their directors in the event of a breach of continuous disclosure obligations, (b) differences in enforcement of continuous disclosure laws by ASIC and the FSCA (c) similarities and differences in private enforcement of continuous disclosure in the two jurisdictions, (d) the problems with South Africa's framework and, lastly, (e) to proffer recommendations for future development. An analytical approach is adopted as a comparative research method.

Despite the two countries having the same structural regulatory framework, their continuous disclosure frameworks highlight differences that lead to distinct public and private enforcement mechanisms of continuous disclosure obligations, varying degrees of advancement of IOSCO Principles and Objectives, and varying levels of investor protection.

⁴⁷ Chanetsa, *Securities and Capital Markets Regulation in South Africa: A Contemporary View*, 17

⁴⁸ [https://www.hfw.com/A-Guide-to-the-Australian-Securities-Exchange-\(ASX\)-General-Admissions/](https://www.hfw.com/A-Guide-to-the-Australian-Securities-Exchange-(ASX)-General-Admissions/)

⁴⁹ <https://www.statista.com/statistics/1120999/gdp-of-african-countries-by-country/>

1.9. Literature Review

1.9.1. Introduction

Low-quality disclosures and corporate failures are evils that national regulators cannot ignore, and South Africa is no exception. Van Zijl submits that high-quality disclosure signals the ability to manage business risks, reduce information asymmetry and reduce equity costs.⁵⁰ Investor protection and market efficiency remain critical goals of regulators in preventing market failures. There is generally scant literature on South Africa's continuous disclosure framework and its enforcement. This study posits the importance of statutory criminal and civil liability provisions in securities law. The discussion, *infra*, pays explicit attention to the literature on the rationale for continuous disclosure, the enforcement regime in South Africa, enforcement in other developed countries such as Australia and its role in ensuring market efficiency.

1.9.2. Why Continuous Disclosure?

Park and Ho submit that disclosure obligations' scope is material or significant information.⁵¹ Companies should immediately disclose all price-sensitive information about the entity to minimise information asymmetry between investors and facilitate healthier informational efficiency.⁵² Bouattour and Martinez submit that in efficient markets prices promptly adjust to the latest information.⁵³ This emphasizes the importance of immediate disclosure of price-sensitive information. The phrase "immediate disclosure" carries significant meaning. It entails that a listed entity should promptly or without delay disclose material information to investors and market participants.⁵⁴ It should be stated upfront that the speed at which divulgence can occur varies on a

⁵⁰ Van Zijl et al, *South African Journal of Business Management*, 48(3), (2017), 73-85

⁵¹ Ho and Park, *ESG Disclosure in Comparative Perspective: Optimizing Private Ordering in Public Reporting*, 41 U. Pa. J. Int'l L. 249 (2019), 272

Available at: <https://scholarship.law.upenn.edu/jil/vol41/iss2/1> > Accessed 20 July 2022

⁵² Bouattour M and Martinez I, "Efficient market hypothesis: an experimental study with uncertainty and asymmetric information", *Finance Contrôle Stratégie* [Online], 22-4, (2019), <URL://journals.openedition.org/fcs/3821>; <DOI: <https://doi.org/10.4000/fcs.382>> Accessed 04 July 2021

⁵³ Bouattour M and Martinez I, "Efficient market hypothesis: an experimental study with uncertainty and asymmetric information", *Finance Contrôle Stratégie* [Online], 22-4

⁵⁴ https://aicd.companydirectors.com.au/-/media/cd2/resources/director-resources/director-tools/pdf/05446-2-5-director-tools-bp-continuous-disclosure-requirements_a4_web.ashx > Accessed 30 April 2022

case-to-case basis.⁵⁵ The Australian Institute of Company Directors (AICD) stipulated that various factors such as the complexity of the information, its source, the need to verify the accuracy of the information, the need to obtain board approval where it is needed and the need to comply with regulatory requirements may all affect the speed at which such information is disclosed.⁵⁶ Various reasons justify the need for continuous disclosure, such as the protection of investors, the reputation of the market, and investors equal and timely access to information.⁵⁷ Continuous disclosure ensures transparency, fair play, protection of investors and prevents undervalue or overvalue of stock. Dixon and Hill highlight that continuous disclosure is the bedrock of market integrity in Australia.⁵⁸ It is imperative to outline, in detail, some of the reasons or goals for continuous disclosure below.

1.9.2.1. Reduction of Information Asymmetry and Protection of Investors

Harford and Powell highlight that continuous disclosure is fundamental in reducing information asymmetry considering that investors do not have the same access to information about the growth prospects of an entity like company managers.⁵⁹ Mulyadi highlights that disclosure is essential in predicting the future value of an entity, which many investors are interested in, and it helps avoid financial scandals.⁶⁰ Low-quality disclosure or non-disclosure will, therefore, be an affront to the goal of investor protection. Bouattour and Martinez submit that with efficient markets, stock prices quickly adjust to available information, and the price will be a good estimation of the stock's fundamental value.⁶¹ In other words, continuous disclosure ensures that investors are not dealing

⁵⁵ https://aicd.companydirectors.com.au/-/media/cd2/resources/director-resources/director-tools/pdf/05446-2-5-director-tools-bp-continuous-disclosure-requirements_a4_web.ashx Accessed 30 April 2022

⁵⁶ https://aicd.companydirectors.com.au/-/media/cd2/resources/director-resources/director-tools/pdf/05446-2-5-director-tools-bp-continuous-disclosure-requirements_a4_web.ashx Accessed 30 April 2022

⁵⁷ https://aicd.companydirectors.com.au/-/media/cd2/resources/director-resources/director-tools/pdf/05446-2-5-director-tools-bp-continuous-disclosure-requirements_a4_web.ashx Accessed 30 April 2022

⁵⁸ Dixon O and Hill J, *The Protection of Investors and the Compensation for their Losses: Australia*, ECGI Working Paper (2018), https://ecgi.global/sites/default/files/working_papers/documents/dixonhillfinal.pdf Accessed 24 May 2022

⁵⁹ Harford, J. and Powell, R. G., *Measuring the Effectiveness of Australia's Statutory-Backed Continuous Disclosure Policy on 'Innovative' Investment Disclosures*, CIFR Paper No. 51/2015, (January 13, 2015), 2 <Available at SSRN: <https://ssrn.com/abstract=2549383> or <http://dx.doi.org/10.2139/ssrn.2549383>

⁶⁰ Mulyadi M.S, *Determinants of corporate governance practice and disclosure by corporations in Indonesia and Malaysia*, Bond Business School, PhD Thesis, (2018) <https://pure.bond.edu.au/ws/portalfiles/portal/36080889/Martin_Mulyad_Thesis.pdf Accessed 22 July 2021

⁶¹ Mondher B and Martinez I, "Efficient market hypothesis: an experimental study with uncertainty and asymmetric information", *Finance Contrôle Stratégie* [Online], 22-4, (2019)

with inflated securities' prices. Continuous disclosure is based on the notion that investors should have equal and timely access to information about a listed entity.⁶² Disclosure places material information in investors' hands and prevents the keeping of material information to the chest that should be disclosed by issuers.

1.9.2.2. Continuous Disclosure and Market Efficiency

Markets' informational efficiency implies that prices of securities should reflect currently available information.⁶³ When markets are efficient, the goal is to ensure that investors are not undervalued or overvalued when they pay for securities as they will pay no more than the unbiased estimated price.⁶⁴ Disclosure is, therefore, fundamental in ensuring that markets are efficient. Markets function better with sufficient access to material information about an entity that reflects its governance.⁶⁵ Central to the issue of strengthening market efficiency is the need to facilitate the extensive dissemination of price-sensitive information to a wide range of market participants.⁶⁶ Both investors and market participants utilise the disclosed information in the market.⁶⁷ Bhana submits that there is an observation of a mere following of the mandatory regulatory announcement requirements by managers of JSE listed companies.⁶⁸ Bhana's submission highlights a tendency by corporate managers to treat disclosure obligations as just a formality issue instead of a necessary market efficiency tool that should help investors and market participants.

1.9.2.3. Continuous Disclosure and Transparency

⁶² https://aicd.companydirectors.com.au/-/media/cd2/resources/director-resources/director-tools/pdf/05446-2-5-director-tools-bp-continuous-disclosure-requirements_a4_web.ashx

⁶³ Afego P, "Market Efficiency in Developing African Stock Markets: What do we know?" *The Journal of Developing Areas*, vol. 49, no. 1, 2015, pp. 243–266 <www.jstor.org/stable/24241291> Accessed 3 July 2021

⁶⁴ Armour et al, *Principles of Financial Regulation*, Oxford University Press, 1st Edition, (2016), 160

⁶⁵ https://unctad.org/system/files/official-document/diaaed2011d3_en.pdf

⁶⁶ Bhana N, *Market reaction to trading statements released by Johannesburg Stock Exchange listed companies*, *Journal of Contemporary Management*, Vol. 18, No. 1, Published Online: 1 January 2021 <<https://hdl.handle.net/10520/ejc-jcman-v18-n1-a2>> Accessed 6 July 2021

⁶⁷ Armour et al, *Principles of Financial Regulation*, 163

⁶⁸ Bhana N, *Market reaction to trading statements released by Johannesburg Stock Exchange listed companies*, *Journal of Contemporary Management*, Vol. 18, No. 1, Published Online: 1 January 2021 <<https://hdl.handle.net/10520/ejc-jcman-v18-n1-a2>> Accessed 6 July 2021

Chitimira stressed that transparency in financial markets entails the degree to which relevant non-public information concerning trading in the financial markets is promptly and accurately published to the financial markets by market participants and the regulatory authorities concerned.⁶⁹ The author stated that following the 2008 global financial crisis, transparency is now a priority to regulators.⁷⁰ Fung submits that continuous disclosure facilitates communication of information and builds trust between stakeholders.⁷¹ Latimer and Maume stated that where there is transparency, the market resists bad behaviour.⁷² The scholars likened the financial market to a sponge which absorbs everything it can and stated that prices fall with bad news and rise with good news.⁷³

Transparency is a goal that entities seek to achieve. Nel and Baard submit that in South Africa, despite the use of the Stock Exchange News Service (SENS), companies sometimes utilize corporate websites to communicate with other stakeholders.⁷⁴ However, there are certain instances in which continuous disclosure requirements do not apply even when issuers want transparency. These include cases where the information contains a trade secret, where disclosure will amount to a breach of the law, where the information is confidential and where a reasonable person does not expect disclosure of such information.⁷⁵ Some of these factors may be problematic when issuers want to comply with their disclosure obligations. This has resulted in exchanges issuing guidelines on determining material information and categories of information that should be disclosed.⁷⁶

⁶⁹ Chitimira, H, 'The gaps and flaws in the current South African anti-market abuse enforcement framework in relation to selected aspects of the financial markets', *Mediterranean Journal of Social Sciences* 5.4, (2014), 238 <<https://pdfs.semanticscholar.org/77be/c0f87451fe5f51bb4035bffb3c6dabcde2bf.pdf>> Accessed 20 July 2022

⁷⁰ Chitimira, H, 'The gaps and flaws in the current South African anti-market abuse enforcement framework in relation to selected aspects of the financial markets', 238

⁷¹ Fung B, 'The Demand and Need for Transparency and Disclosure in Corporate Governance', *Universal Journal of Management* 2(2): 72-80, (2014), 73 <<https://www.hrpub.org/download/20140105/UJM3-12101630.pdf>> Accessed 6 July 2021

⁷² Latimer P. and Maume P, *Promoting Information in the Marketplace for Financial Services: Financial Market Regulation and International Standards*, Springer, Switzerland, (2015), 22

⁷³ Latimer P. and Maume P, *Promoting Information in the Marketplace for Financial Services*, 22

⁷⁴ Nel G & Baard R, *Minimum corporate website disclosure levels and information asymmetry: Evidence from Johannesburg Stock Exchange small-cap companies*, *South African Journal of Accounting Research*, 33:3, 187-204, (2019), <DOI: 10.1080/10291954.2019.1662210>, Accessed 6 July 2021

⁷⁵ https://aicd.companydirectors.com.au/-/media/cd2/resources/director-resources/director-tools/pdf/05446-2-5-director-tools-bp-continuous-disclosure-requirements_a4_web.ashx

⁷⁶ E.g. JSE Practice Note 2 of 2015

1.9.3. Continuous Disclosure Block List: What it Seeks to Achieve.

As stated above, Fung, Bhana, Mulyadi and Chitimira’s analysis highlights that continuous disclosure frameworks seek to ensure that markets are efficient, investors are protected, information asymmetry is reduced, securities’ prices adjust to their fair market value in response to the new information and prevent inflated prices. A block list, *infra*, summarises the scholars’ submissions.



1.9.4. Civil and Criminal Liability Provisions for Breach of Continuous Disclosure

South Africa’s framework has been a subject of debate when it comes to the enforcement of securities law. Chitimira criticised the FMA’s inability to deal with enforcement of market abuse practices.⁷⁷ The author also highlighted another benefit of continuous disclosure by stating that it can curb market-abuse activities.⁷⁸ Chitimira highlights that civil liability provisions in securities law entail enforcement by independent financial regulators and criminal liability entails criminal actions taken by government agencies.⁷⁹ Welsh and Morabito submit that these civil and criminal liability statutory provisions are fundamental in having an effective enforcement mechanism for continuous disclosure obligations.⁸⁰ South Africa does not have such provisions. Australia is often given as an example of a jurisdiction that embraces the notion of having statutory civil and criminal liability provisions for continuous disclosure.⁸¹ This study seeks to contribute to the scant literature that highlights the importance of such provisions and why they should be of concern to the

⁷⁷ Chitimira, H, ‘*The gaps and flaws in the current South African anti-market abuse enforcement framework in relation to selected aspects of the financial markets*’, 250

⁷⁸ Chitimira, H, ‘*An analysis of the general enforcement approaches to combat market abuse (Part 2)*’, Sabinet African Journals, Vol. 34, No. 1 (2013), 71 <<https://journals.co.za/doi/epdf/10.10520/EJC137229>> Accessed 20 July 2022

⁷⁹ Chitimira, H, ‘*An analysis of the general enforcement approaches to combat market abuse (Part 2)*’, 71

⁸⁰ Welsh M. and Morabito V., ‘*Public V Private Enforcement of Securities Laws: An Australian Empirical Study*’, Journal of Corporate Law Studies, 14:1, 39-78, (2014), 40 <DOI: [10.5235/14735970.14.1.39](https://doi.org/10.5235/14735970.14.1.39)>

⁸¹ Welsh M. and Morabito V., ‘*Public V Private Enforcement of Securities Laws: An Australian Empirical Study*’, 40

country's financial regulators. The main reason is that the statutory liability provisions facilitate both public and private enforcement of continuous disclosure.⁸²

1.9.5. Public and Private Enforcement of Continuous Disclosure

Scholars have highlighted that developed jurisdictions such as Australia have adopted both private and public enforcement of securities law.⁸³ This extends to continuous disclosure as an aspect of securities law.⁸⁴ Welsh and Morabito submit that ASIC plays the public enforcement role in Australia through seeking criminal sanctions, civil penalties and compensation of investors.⁸⁵ In cases of financial losses incurred as a result of a contravention of financial laws, investors seek remedies through class actions.⁸⁶ SCAs are considered to be an integral part of the enforcement mechanisms. Such a proposition aligns with Principle 11 of the IOSCO Objectives and Principles which seek to ensure that private actions are not compromised. Welsh and Morabito's discussion highlights that public and private enforcement in securities law entails enforcement mechanisms by the national financial regulator and investors respectively.⁸⁷ In South Africa, no literature highlights the embracement of both public and private enforcement of continuous disclosure obligations. Aziza highlights the absence of a single securities class action in South Africa from 1947 to 2018.⁸⁸ This study seeks to discuss that concern by highlighting South Africa's continuous disclosure framework, its enforcement and how it fares against other jurisdictions such as Australia.

⁸² Welsh M. and Morabito V., 'Public V Private Enforcement of Securities Laws: An Australian Empirical Study', 40

⁸³ Welsh M. and Morabito V., 'Public V Private Enforcement of Securities Laws: An Australian Empirical Study', 40

⁸⁴ Welsh M. and Morabito V., 'Public V Private Enforcement of Securities Laws: An Australian Empirical Study', 40

⁸⁵ Welsh M. and Morabito V., 'Public V Private Enforcement of Securities Laws: An Australian Empirical Study', 40

⁸⁶ Welsh M. and Morabito V., 'Public V Private Enforcement of Securities Laws: An Australian Empirical Study', 40

⁸⁷ Welsh M. and Morabito V., 'Public V Private Enforcement of Securities Laws: An Australian Empirical Study', 40

⁸⁸ Aziza, O. R., *Securities Regulation, Enforcement and Market Integration in the Development of Sub-Saharan Africa's Capital Markets*, PhD Thesis, University of Oxford, (2021), 256-7
<https://ora.ox.ac.uk/objects/uuid:5a738d2a-4ea9-44bc-bf87-52f0608119df/files/d7w62f837c> Accessed 12 June 2022

1.9.6. The Effectiveness of Enforcement: From Compensation to Deterrence

Scholars have highlighted the importance of the effectiveness of private and public enforcement in securities law. Discussions on the effectiveness of private and public enforcement in securities law can help us understand why certain enforcement mechanisms are needed in South Africa's continuous disclosure framework. Welsh and Morabito highlight the effectiveness of both public and private enforcement in Australia and unequivocally stated that securities class actions by investors have a paramount role to play in deterring future illegal conduct.⁸⁹ Such propositions highlight why private enforcement mechanisms are needed in enforcing continuous disclosure obligations. The scholars also stressed the importance of having a robust enforcement regime in securities law.

Varzaly uses the following variables to assess the effectiveness of enforcement of Australia's disclosure framework: (a) compensation for shareholder losses, (b) deterrence and (c) the signal effect.⁹⁰ Varzaly's variables highlight that an effective disclosure enforcement framework should:

- (a) make provision for compensation of investors in the event of losses as a result of a breach of continuous disclosure obligations,
- (b) be couched in such a way that it deters a listed issuer and its officers from breaching continuous disclosure obligations and
- (c) can give a signal on the prospects of a listed issuer.⁹¹

The scholar's submission shows that effective enforcement of continuous disclosure frameworks can have a deterrent effect. Listed issuers and their officers will be alive to the civil and criminal consequences of not fulfilling their continuous disclosure obligations. Compensation for investors' losses will entail that not all will be lost for investors in the event of a breach of continuous disclosure obligations by a listed issuer. A framework that embraces these variables is what the

⁸⁹ Welsh M. and Morabito V., 'Public V Private Enforcement of Securities Laws: An Australian Empirical Study', 78

⁹⁰ Varzaly J, 'The Effectiveness of Disclosure Law Enforcement in Australia, Journal of Corporate Law Studies', Volume 21, Issue 1 (2021), University of Cambridge Faculty of Law Research Paper No. 30/2020, (2020), Available at < <https://www.tandfonline.com/doi/full/10.1080/14735970.2020.1791534>> Accessed 22 July 2021

⁹¹ Varzaly J, 'The Effectiveness of Disclosure Law Enforcement in Australia, Journal of Corporate Law Studies', Volume 21, Issue 1 (2021), University of Cambridge Faculty of Law Research Paper No. 30/2020

scholar termed an effective disclosure enforcement framework. Such variables can play a role in assessing South Africa's continuous disclosure framework.

1.9.7. Reform of Continuous Disclosure Framework in South Africa?

The scholars' submissions, above, highlight some of the goals of continuous disclosure and the need for its enforcement. What remains critical is that such goals can only be achieved if continuous disclosure obligations are enforced through both public and private mechanisms. This study seeks to analyse the rationale for continuous disclosure frameworks and enforcement of the framework in South Africa as compared to other jurisdictions such as Australia. The study utilises IOSCO objectives and principles as a yardstick informing securities laws in countries such as Australia and South Africa. The goal is to accentuate any reforms the national regulator can implement in South Africa to change the status *quo*.

1.10. Chapter Breakdown

This thesis comprises five chapters that are structured as follows:

Chapter One covers the background, problem statement, significance of the study, research objectives, research questions, research hypothesis, theoretical framework, methodology and literature review.

Chapter Two is on IOSCO Objectives and Principles and their adoption in South Africa's framework. The Chapter discusses IOSCO Principles such as Principles for Ongoing Disclosure, Disclosure of Material Developments versus Periodic Disclosure, Principles for Issuers and Principles for Enforcement.

Chapter Three covers South Africa's Continuous Disclosure framework and its shortcomings in providing for adequate enforcement provisions. The Chapter pays explicit attention to the provisions of the FMA, section 3 of the JSE Listing Requirements, provisions of the FSRA, JSE Practice Note and relevant case law.

Chapter Four presents a comparative analysis of South Africa and Australia's continuous disclosure frameworks. The Chapter focuses on Australia's statutory continuous disclosure, provisions of South Africa's FMA, civil and criminal liability in Australia, SCAs, Australia's Treasury Laws Amendment (2021 Measures No.1) Act, the *Myer* case, Australia's Corporation Act 2001, ASX rules and the JSE Listing Requirements.

Chapter Five covers the findings of the study, conclusion, and recommendations.



Chapter Two: IOSCO Objectives and Principles for Securities Regulation

2.1. Introduction

IOSCO is considered to be a very important international forum and a standard-setter for securities regulation.⁹² Jordan stressed that it is not a regulator but an international forum consisting of financial organizations, market institutions and national regulators.⁹³ As of 15 November 2021, the body is believed to be playing an essential role in the regulation of more than 95% of the world's securities markets in 130 jurisdictions and continues to broaden its horizon.⁹⁴ IOSCO Objectives and Principles of Securities Regulation are considered to be the international benchmark that guides various jurisdictions on matters concerning securities regulation.⁹⁵ The objectives and principles were endorsed by IOSCO in 1998 and continue to be key international standards on securities regulation.⁹⁶ The organization periodically assesses the implementation of the 38 principles in various jurisdictions. When it comes to continuous disclosure, IOSCO formulated the Principles for Ongoing Disclosure and Material Development Reporting by Listed Entities.⁹⁷ South Africa is part of the IOSCO demonstrating its endeavour to align with global standards on securities regulation.⁹⁸ An analysis of the objectives and principles will help in understanding the rationale for continuous disclosure frameworks and what regulators should seek to achieve. IOSCO's Principles of securities regulation are based on the following three objectives:

- (i) protection of investors;
- (ii) ensuring that markets are fair, efficient and transparent; and
- (iii) reduction of systemic risk.⁹⁹

Section 2 of the FMA highlights that the three IOSCO objectives are the aims of South Africa's FMA.¹⁰⁰ These objectives influence continuous disclosure frameworks. This study posits that

⁹² <https://www.iosco.org/news/pdf/IOSCONEWS626.pdf>> Accessed 6 April 2022

⁹³ Jordan C, *The New Internationalism? IOSCO, International Standards and Capital Markets Regulation*, CIGI, (2018) <https://www.cigionline.org/articles/new-internationalism-iosco-international-standards-and-capital-markets-regulation/>

⁹⁴ <https://www.iosco.org/news/pdf/IOSCONEWS626.pdf>> Accessed 6 April 2022

⁹⁵ <http://financialmarketsjournal.co.za/oldsite/13thedition/iosco.htm>> Accessed 6 April 2022

⁹⁶ <http://financialmarketsjournal.co.za/oldsite/13thedition/iosco.htm>> Accessed 6 April 2022

⁹⁷ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD132.pdf>> Accessed 21 February 2022

⁹⁸ <https://www.iosco.org/about/?subsection=membership&memid=1>> Accessed 18 May 2022

⁹⁹ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD561.pdf>> Accessed 21 February 2022

¹⁰⁰ Section 2 (a), (c) and (d) of the FMA

regulation on continuous disclosure seeks to protect investors by reducing information asymmetry. It also seeks to ensure that markets are efficient by requiring that securities' prices are reflective of the available current information. Latimer and Maume believe that disclosure is influenced by the EMH which stipulates that securities prices are fully reflective of available information and are informationally efficient.¹⁰¹ The objectives should help us answer why there is a need to regulate continuous disclosure, who it seeks to protect and for what reasons?

The 38 IOSCO principles for securities regulation are based on the three objectives stipulated above.¹⁰² The organization divided the principles into various parts that range from Part A to J.¹⁰³ These are Part A- Principles Relating to the Regulator, Part B- Principles for Self-Regulation, Part C- Principles for the Enforcement of Securities Regulation, Part D- Principles for Cooperation in Regulation, Part E- Principles for Issuers, Part F- Principles for Auditors, CRAs, and other Information Providers, Part G-Principles for Collective Investment Schemes, Part H- Principles for Market Intermediaries, Part I- Principles for Secondary and Other Markets and Part J- Principles Relating to Clearing and Settlement.¹⁰⁴ This chapter will focus on Part C and Part E. Principles for the Enforcement of Securities Regulation, Principles for Issuers, and Principles for Ongoing Disclosure, highlight an acknowledgement of the significance of listed issuers' continuous disclosure obligations.

This chapter will postulate why the IOSCO Objectives, Part C and E of the 38 principles for securities regulation and principles for ongoing disclosure are paramount in South Africa's securities law. The chapter will also outline the adoption of the IOSCO Objectives and Principles in South Africa. The proposition is that the rationale for continuous disclosure is based on these principles and objectives. A clear dissection of the objectives and the three sets of principles stipulated above (Part C, Part E, and ongoing disclosure principles) should outline the rationale for continuous disclosure and how continuous disclosure obligations should be enforced. Enforcement of continuous disclosure obligations is not an exercise that should hang in the air- it should be based on stipulated objectives and principles.

¹⁰¹ Latimer P. and Maume P, *Promoting Information in the Marketplace for Financial Services*, 23

¹⁰² <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD561.pdf>> Accessed 21 February 2022

¹⁰³ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD561.pdf>> Accessed 21 February 2022

¹⁰⁴ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD561.pdf>> Accessed 21 February 2022

2.2. Objectives of Securities Regulation: A Case for Continuous Disclosure?

As stated above, the regulation of securities is based on three objectives. It follows that regulation of continuous disclosure should also be based on the same objectives as they transcend across any aspect of securities regulation. The objectives are crucial in the enactment of continuous disclosure frameworks. An analysis of the objectives points to the rationale for continuous disclosure. The first question is what benefits can investors get from continuous disclosure? Price-sensitive information is important to investors' decisions. Information is a self-protective tool for investors and it influences how they behave.¹⁰⁵ Investors assume financial risks when they invest in securities.¹⁰⁶ This highlights why, through continuous disclosure obligations, they should be informed of any price-sensitive information as their losses are often enormous. Investors can be expected to make informed decisions if they are acquainted with any material information that may affect the prices of securities. By stipulating the investor protection objective, IOSCO understood the importance of protecting investors as they are key players that drive the growth of securities markets forward. Protection of investors ought to be an incentive that attracts investment in securities and increases investor confidence. Retail investors, unlike institutional investors, do not possess the necessary skill and knowledge, cannot adequately assess investment products and are not familiar with certain legal aspects that apply to securities.¹⁰⁷ Therefore, they deserve more protection and should be treated as essential players in securities markets.

The second IOSCO objective of securities regulation is to ensure that markets are fair, efficient, and transparent. In efficient markets, prices are always intimately reflective of the available information, securities prices fluctuate randomly, prices are a good estimation of the stock value, securities prices react to disclosures by listed entities and the unpredictability of future information is prevalent.¹⁰⁸ Ensuring that markets are efficient is key in securities regulation. Continuous disclosure is also hinged on this objective. It seeks to facilitate such efficiency by ensuring that

¹⁰⁵ Ene Corina, "Current issues regarding the protection of retail investors on the capital market within the European Union" *The USV Annals of Economics and Public Administration* [Online], (2017), 36
<http://annals.seap.usv.ro/index.php/annals/article/view/1005/850> Accessed 24 February 2022

¹⁰⁶ Ene Corina, "Current issues regarding the protection of retail investors on the capital market within the European Union", 36

¹⁰⁷ Ene Corina, "Current issues regarding the protection of retail investors on the capital market within the European Union", 42

¹⁰⁸ Bouattour M and Martinez I, "Efficient market hypothesis: an experimental study with uncertainty and asymmetric information", *Finance Contrôle Stratégie* [Online], 22-4 (2019)

securities' prices react to disclosures by listed entities. However, evidence has shown that markets sometimes overreact to announcements and securities prices do not rapidly adjust to their fair price.¹⁰⁹ There is a proposition that markets are not always efficient although they can be efficient.¹¹⁰ Nevertheless, the goal of having efficient markets remains important. In stipulating the efficient requirement, IOSCO must have understood that trading in securities is not like a chess game- where the winning move is always capturing the opponent's king. It involves various factors at play and the market should be allowed to reflect those factors.

Disclosure of material information to investors and market participants will ensure that markets are fair and transparent. Fairness implies impartiality, honesty and fair dealing.¹¹¹ Where conduct involves deceit or manipulation, such conduct should be viewed as an affront to the objective of fairness and transparency. This objective seems to be linked to the investor protection goal stated above. Market abuse or conduct that involves deceit and unequal treatment of investors will undoubtedly lead to some investors being left in the ditch as far as access to information is concerned. This will put certain investors in an advantageous position and those with access to information will be at liberty to act upon it. The objective highlights the need for equal treatment of investors and market participants in securities markets. Market abuse practices should be frowned upon. Continuous disclosure obligations embrace the efficient, fair, and transparent objective by requiring prompt divulgence of material information to both investors and market participants. All these aspects contribute to preventing a systemic failure which is the last objective.

The three objectives are entrenched in section 2 of South Africa's FMA. Section 2 of the FMA stipulates the objects of the FMA. Aims 2 (a) to (e) highlight the ambitions of the Republic as far as regulation of financial markets is concerned. Aim 2 (a) is a reproduction of one of IOSCO's Objectives of Securities Regulation. The provision states that the Act aims to ensure that financial

¹⁰⁹ Cox et al, *Securities Regulation: Cases and Materials*, 10th Edition, Aspen Publishing, USA, (2021), 90

¹¹⁰ Naseer M. and Bin Tariq, *The Efficient Market Hypothesis: A Critical Review of the Literature* (January 13, 2016), *The IUP Journal of Financial Risk Management*, Vol. XII, No. 4, (2015), pp. 48-63, 13 Available at SSRN: <https://ssrn.com/abstract=2714844>

¹¹¹ Austin J, "What Exactly Is Market Integrity: An Analysis of One of the Core Objectives of Securities Regulation." *William and Mary Business Law Review*, vol. 8, no. 2, (2017), p. 215-240. Hein Online, <https://heinonline.org/HOL/P?h=hein.journals/wmaybur8&i=236>> Accessed 24 February 2022

markets are fair, efficient, and transparent.¹¹² Section 2 (b) highlights that the statute intends to increase confidence in South Africa’s financial markets by ensuring that Aim 2 (a) is advanced.¹¹³ One can only assume that the provision refers to public and investor confidence. The Act did not specify a group of people that should have confidence in these financial markets. Section 2 (c) then states that the statute seeks to promote the protection of investors, regulated persons, and clients.¹¹⁴ This cannot be considered a duplication of one of IOSCO’s Objectives of Securities Regulation, but it indeed embraces IOSCO’s objective of investor protection. The FMA provision increases the scope by including regulated persons and clients. Section 1 of the FMA defines what a regulated person is. The provision highlights that the phrase can include a licensed exchange, authorized user, nominee etc.¹¹⁵ The same provision defines a client as anyone to whom a regulated person provides securities services and includes an agent.¹¹⁶ The Act highlights that all these persons need protection. Section 2 (d) of the FMA entrenches IOSCO’s objective of reduction of systemic risk. Section 2 (e) stipulates the final aim, which is to ensure the competitiveness of the Republic’s financial markets at both domestic and international levels.¹¹⁷ South Africa tends to be doing well on the last aim considering its ranking in Africa and the world at large.

2.3. Principles for Ongoing Disclosure and Material Development Reporting by Listed Entities

IOSCO’s Principles for Ongoing Disclosure can be regarded as one of the most important developments in continuous disclosure requirements. The organization acknowledged the importance of International Ongoing Disclosure Standards (IODS).¹¹⁸ The Principles for Ongoing Disclosure were introduced as a companion to the International Disclosure Standards (IDS98) that IOSCO endorsed in 1998.¹¹⁹ The Principles for Ongoing Disclosure provide much-needed clarity on what continuous disclosure is and the distinction between continuous disclosure and periodic disclosure which can often be blurred in some writings. In its introductory statement in the

¹¹² https://www.gov.za/sites/default/files/gcis_document/201409/36121a.pdf> Accessed 7 April 2022> Section 2 of the FMA

¹¹³ https://www.gov.za/sites/default/files/gcis_document/201409/36121a.pdf> Accessed 7 April 2022

¹¹⁴ https://www.gov.za/sites/default/files/gcis_document/201409/36121a.pdf> Accessed 7 April 2022

¹¹⁵ https://www.gov.za/sites/default/files/gcis_document/201409/36121a.pdf> Accessed 7 April 2022

¹¹⁶ https://www.gov.za/sites/default/files/gcis_document/201409/36121a.pdf> Accessed 7 April 2022

¹¹⁷ https://www.gov.za/sites/default/files/gcis_document/201409/36121a.pdf> Accessed 7 April 2022

¹¹⁸ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD132.pdf>> Accessed 21 February 2022

¹¹⁹ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD132.pdf>> Accessed 21 February 2022

document, IOSCO's Technical Committee stated that it recognizes the importance of timely, reliable and readily accessible information to investors.¹²⁰ A proper interpretation of the introductory statement highlights that IOSCO emphasized the need for immediate disclosure of material information to investors and market participants. General Principle (iii) of the JSE Listing Requirements embraces the notion of prompt divulgence in South Africa.¹²¹ The principles highlight that information likely to influence an investor's decision ought to be promptly divulged to enable such an investor to make informed investment decisions. The integrity of the market is also enhanced. Disclosure of information to investors and market participants should comply with the law, international standards and listing rules as highlighted above. This implies that IOSCO appreciates that disclosure cannot be done willy-nilly, but ought to be regulated and done in an orderly fashion. Like how structured companies are, so should their businesses and legal obligations.

A curious feature of the Principles for Ongoing Disclosure is the distinction between continuous and periodic disclosure. The Technical Committee stated that, in the report, they used the word "ongoing" to refer to generally all current, continuous and periodic disclosures, apart from disclosures done at the IPO stage.¹²² However, the committee qualified that the term 'periodic' and stated that in the document it refers to disclosure done at specified intervals or dates.¹²³ The committee went further to state that 'continuous disclosure' implies disclosure regimes of certain jurisdictions which are done without reference to specified dates or timeframes but are based on the principle of materiality.¹²⁴ This is the definition that this study embraces. Continuous disclosure is not episodic like periodic disclosure.

In the same document, the Committee stipulated seven principles that apply to ongoing disclosure and material developments reporting obligations. These principles tend to be largely embraced in South Africa. It is important to outline all the seven ongoing disclosure and material reporting principles and explain their importance.

¹²⁰ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD132.pdf>> Accessed 21 February 2022

¹²¹ <https://www.jse.co.za/sites/default/files/media/documents/2019-04/JSE%20Listings%20Requirements.pdf>> Accessed 21 February 2022

¹²² <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD132.pdf>> Accessed 21 February 2022

¹²³ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD132.pdf>> Accessed 21 February 2022

¹²⁴ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD132.pdf>> Accessed 21 February 2022

2.3.1. What should be Disclosed?

The first principle is that listed entities should have an ongoing disclosure obligation that requires disclosure of all information that would be material to an investor's investment decision.¹²⁵ The word 'all' is fundamental in this principle. It highlights that a listed entity cannot keep to the chest information that is material, solely because it feels like doing so. The word also implies that a listed entity should not 'cherry-pick' material information but should disclose all material information and its aspects. What exactly is material information? That is not clearly defined in the document. However, a definition proffered in Integrated Reporting (1R) provides much-needed clarity on what exactly is material information. In IR it is defined as information that can '*substantively affect the organisation's ability to create value in the short, medium or long term*'.¹²⁶ The feasibility and cost effects of this principle of 'all' is a subject that other scholars and industry experts can analyse. What remains is that a listed entity should disclose both the good and bad.¹²⁷ Cherry-picking does not advance this principle.

The committee acknowledged that the principle is variably implemented, with some jurisdictions having a comprehensive list of prescribed items that should be disclosed based on a presumption that they are material, and other jurisdictions having a general obligation to disclose all information that may affect an investor's assessment of a listed entity's value and prospects.¹²⁸ Where a general obligation is utilized, there is an accompanying list of events that can be considered material.¹²⁹ This principle was adopted in South Africa's framework. General Principle (iii) of the JSE Listing Requirements requires full disclosure of price-sensitive information.¹³⁰

2.3.2. Timeliness: Immediate or Prescribed Days?

¹²⁵ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD132.pdf>> Accessed 21 February 2022

¹²⁶ Steenkamp N, 'Top ten South African companies' disclosure of materiality determination process and material issues in integrated reports', *Journal of Intellectual Capital*, (2018), 236
<https://www.emerald.com/insight/publication/issn/1469-1930>>

¹²⁷ Cox et al, *Securities Regulation: Cases and Materials*, 222

¹²⁸ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD132.pdf>> Accessed 21 February 2022

¹²⁹ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD132.pdf>> Accessed 21 February 2022

¹³⁰ <https://www.jse.co.za/sites/default/files/media/documents/2019-04/JSE%20Listings%20Requirements.pdf>>
Accessed 21 February 2022

The second principle is timeliness. The focus on timeliness implies that a listed entity must disclose ongoing information on a timely basis.¹³¹ South Africa embraced this principle in section 3.4 and General Principle (iii) of the JSE Listing Requirements which both require disclosure of price-sensitive information without delay and timeous public disclosure of activities that are price-sensitive to holders of securities and the public.¹³² Timely disclosure helps to protect investors.¹³³ The committee stated that this could require disclosure of material developments on an immediate basis.¹³⁴ In explaining the ‘immediate basis’ proposition, the organization highlighted that such a term could mean ‘as soon as possible’ or there can be prescribed days.¹³⁵ One of the curious fixtures of the principle is the organization’s submission that in respect of periodic disclosure, the disclosure obligation may require disclosure of relevant information immediately, even when it belongs to periodic reporting.¹³⁶

Timeliness is a fundamental principle that ensures that investors and market participants are promptly informed of any material developments. The worrying feature of this principle is whether a listed entity will not hurriedly disclose certain information without having enough time to analyse and give a detailed account to investors and market participants. Disclosed information should not be incomplete and misleading as that will affect investors.¹³⁷ The possibility of a rush is always prevalent since a listed entity will be undesirous of finding itself in a situation where it breaches its disclosure obligations by unduly delaying the disclosure of material information.

The IOSCO’s Technical Committee qualified this principle by stating that a delay is probable in certain jurisdictions and may be granted by competent authorities if the subject information is confidential in terms of certain or applicable statutes.¹³⁸ The qualification of the principle of timeliness based on confidentiality presupposes that determining what is confidential information is always a straightforward exercise. In reality, the process may require a distinct inquiry that seeks

¹³¹ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD132.pdf>> Accessed 21 February 2022

¹³² <https://www.jse.co.za/sites/default/files/media/documents/2019-04/JSE%20Listings%20Requirements.pdf>> Accessed 21 February 2022

¹³³ https://aicd.companydirectors.com.au/-/media/cd2/resources/director-resources/director-tools/pdf/05446-2-5-director-tools-bp-continuous-disclosure-requirements_a4_web.ashx>

¹³⁴ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD132.pdf>> Accessed 21 February 2022

¹³⁵ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD132.pdf>> Accessed 21 February 2022

¹³⁶ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD132.pdf>> Accessed 21 February 2022

¹³⁷ Wasim, R., “Corporate (Non)Disclosure Of Climate Change Information” *Columbia Law Review*, vol. 119, no. 5, (2019), pp. 1311–54, 1312, <https://www.jstor.org/stable/26650740>.> Accessed 22 July 2022

¹³⁸ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD132.pdf>> Accessed 21 February 2022

to establish if the information is confidential in certain instances or where competing rights exist. Delay is also probable if the information contains trade secrets that a listed entity might wish to protect.¹³⁹

2.3.4. Simultaneous and Identical Disclosure

The third principle is simultaneous and identical disclosure. This principle applies to entities that are listed in more than one jurisdiction.¹⁴⁰ Information released in one jurisdiction should be released simultaneously and on an identical basis in all the other jurisdictions that an entity is listed.¹⁴¹ This ensures that investors and market participants in all jurisdictions the entity is listed are informed of the price-sensitive information. It avoids a piecemeal type of disclosure. In South Africa, section 3.81 of the JSE Listing Requirements tend to embrace this principle. The provision requires a listed issuer to ensure that equivalent information is simultaneously made available to the market of each exchange on which the issuer's securities are listed.

2.4. Other Ongoing Disclosure Principles

The technical committee highlighted four other ongoing disclosure principles which are:

- (i) that a listed entity should ensure that full information is promptly disclosed to the market by using efficient, effective, and timely means of dissemination.
- (ii) the disclosure criteria require a fair presentation, not deception or omission of material information.
- (iii) there should be equal treatment of investors and
- (iv) a listed entity is the one responsible for ongoing disclosure or, in some jurisdictions, certain specified persons.¹⁴²

The four abovementioned principles complete a set of seven ongoing disclosure principles highlighted by the technical committee. The equal treatment principle is embraced in the JSE Listing Requirements. General Principle (vi) of the JSE Listing Requirements states that all holders of securities should be afforded fair and equal treatment. This entails that there should be no

¹³⁹ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD132.pdf>> Accessed 21 February 2022

¹⁴⁰ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD132.pdf>> Accessed 21 February 2022

¹⁴¹ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD132.pdf>> Accessed 21 February 2022

¹⁴² <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD132.pdf>> Accessed 21 February 2022

selective disclosure as that can undermine the integrity of the market and investor confidence.¹⁴³ The responsibility principle is embraced in JSE's Practice Note No. 2 of 2015. The note stipulates that the issuers and their directors are responsible for price-sensitive disclosure. The note also stipulates that it is the directors of the issuer's duty to determine what constitutes price-sensitive information. The principles tend to be largely incorporated into South Africa's framework. The principles highlight that ongoing disclosure seeks to protect investors and ensure that markets are efficient.

2.5. Disclosure of Material Developments versus Periodic Disclosure

Eight years later, in 2010, IOSCO acknowledged that disclosure on an *ad hoc* basis would not suffice as far as investors' investment decisions are concerned.¹⁴⁴ The organization introduced the Principles for Periodic Disclosure by Listed Entities.¹⁴⁵ It was a clear recognition that investors do not make decisions based on ad hoc disclosure of material developments only. It is not, in any way, a disregard for the importance of continuous disclosure. Instead, it is an appreciation that periodic disclosure is complementary to the efforts of investor protection. The organization stated that reports such as annual and interim reports facilitate market monitoring and assist investors in comparing the performance of different entities, comparing the performance of the company over regular intervals, and making their overall investment decisions.¹⁴⁶

IOSCO showed consistency through the introduction of the 2010 periodic disclosure principles. In 2002 it intimated that it was outside the scope of the report on ongoing disclosure to make provision for guidelines on periodic disclosure.¹⁴⁷ The organization stated that the aim was simply to define that periodic disclosure and reports are fundamental avenues of disclosing information.¹⁴⁸ One wonders if this was the case in the 2002 Ongoing Disclosure Principles. A clear analysis of the timeliness principle (principle No. 2) indicates the contrary. In explaining the principle, the Technical Committee stated that information disclosed periodically, such as quarterly and annual

¹⁴³ Soltes E., "What Can Managers Privately Disclose to Investors." *Yale Journal on Regulation Bulletin*, 36, 2018-2019, pp. 148-169, 149 <https://heinonline.org/HOL/P?h=hein.journals/jregb36&i=149>. Accessed 22 July 2022

¹⁴⁴ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD317.pdf>> Accessed 1 March 2022

¹⁴⁵ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD317.pdf>> Accessed 1 March 2022

¹⁴⁶ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD317.pdf>> Accessed 1 March 2022

¹⁴⁷ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD132.pdf>> Accessed 21 February 2022

¹⁴⁸ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD132.pdf>> Accessed 21 February 2022

reports, should include management’s discussions and analysis.¹⁴⁹ Which goes beyond the scope of defining. One can consider that to be a guideline. It is imperative to look at other principles that influence continuous disclosure, such as the Principles for Issuers stipulated in Part E of the 38 IOSCO principles of securities regulation.

2.6. Principles for Issuers

In relation to disclosure, IOSCO Principles for Issuers of securities require that there should be: (a) complete and timely disclosure of financial results, risk and material information to investors (b) holders of securities in a company should be treated fairly and equitably and (c) use of international quality accounting standards by issuers to prepare financial statements.¹⁵⁰ The three principles are stipulated in part E of the revised IOSCO principles as principles 16, 17 and 18 respectively.¹⁵¹ Latimer and Maume submitted that the philosophy or rationale of disclosure of securities information is reviewed in the principles.¹⁵² Principle 16 tends to be more important as far as continuous disclosure is concerned. It goes to the heart of continuous disclosure. The principle shows that timely disclosure is an indispensable obligation of an issuer of securities. Prompt divulgence is not enough since the principle also highlights that there should be complete disclosure. The two are inseparable- stated jointly for a reason. Timely disclosure of material information will not serve any purpose to investors if they are not adequately or fully informed. The organization used the word “should” for a reason. It shows that complete and timely disclosure is not discretionary but rather mandatory.

Sections 3.4 and 3.12 of the JSE Listing Requirements and Practice Note 2 of 2015 show that South Africa embraces IOSCO’s Principles for Issuers. Section 3.4 of the Listing Requirements stipulates that issuers should disclose price-sensitive information without delay.¹⁵³ Section 3.12 then states that where a decision to not make distribution payments is deemed to constitute price-sensitive information, such a decision should be communicated immediately after being taken.¹⁵⁴

¹⁴⁹ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD132.pdf>> Accessed 21 February 2022

¹⁵⁰ IOSCO *Principles on Issuers*, Part E

¹⁵¹ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD561.pdf>> Accessed 14 March 2022

¹⁵² Latimer, P. and Maume, P, *Promoting Information in the Marketplace for Financial Services*, 22

¹⁵³ <https://www.jse.co.za/sites/default/files/media/documents/2019-04/JSE%20Listings%20Requirements.pdf>> Accessed 21 February 2022

¹⁵⁴ <https://www.jse.co.za/sites/default/files/media/documents/2019-04/JSE%20Listings%20Requirements.pdf>> Accessed 21 February 2022

Section 3.27 of the JSE Listing Requirements mandates issuers to treat holders of any class of securities, that are in the same position, fairly and equally. Annual financial statements must also be disclosed in terms of section 3 of the Listing Requirements.¹⁵⁵ Section 8.65 of the Listing Requirements highlights that the exchange has constituted a panel that ensures that issuers comply with international quality accounting standards in preparing financial statements.¹⁵⁶ Therefore, the three principles for issuers in Part E are entrenched in South Africa's framework.

In the Methodology for Assessing Implementation of the Principles, IOSCO highlighted that the three principles in Part E are interrelated.¹⁵⁷ The organization unequivocally stated that the objective of these principles is investor protection.¹⁵⁸ The submission outlines one of the main reasons for continuous disclosure obligations. The analysis by IOSCO in the methodology shows that investors are central in disclosure obligations. One can submit that they are the core business of continuous disclosure obligations.

2.7. Principles for the Enforcement of Securities Regulation

The importance of Principles for the Enforcement of Securities Regulation cannot be understated. Varzaly unequivocally stated that disclosure laws intend to protect investors but their success is premised on enforcement.¹⁵⁹ This makes the Principles for the Enforcement of Securities Regulation an essential set of international standards. The author highlighted that enforcement could be public or private. It is imperative to first outline IOSCO's Principles for the Enforcement of Securities Regulation and highlight why they are important in the enforcement of continuous disclosure frameworks.

The principles are stated in Part C (principles 10, 11 and 12) of the IOSCO Objectives and Principles for Securities Regulation.¹⁶⁰ Principle 10 focuses on the need for the regulator to have comprehensive inspection, investigation and surveillance powers, principle 11 states that the

¹⁵⁵ Sections 3.19 to 3.22

¹⁵⁶ <https://www.jse.co.za/sites/default/files/media/documents/2019-04/JSE%20Listings%20Requirements.pdf>> Accessed 21 February 2022

¹⁵⁷ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD562.pdf>> Accessed 14 March 2022

¹⁵⁸ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD562.pdf>> Accessed 14 March 2022

¹⁵⁹ Varzaly J, *The Effectiveness of Disclosure Law Enforcement in Australia* (September 1, 2020), *Journal of Corporate Law Studies*, Volume 21, Issue 1 (2021), University of Cambridge Faculty of Law Research Paper No. 30/2020, <http://dx.doi.org/10.2139/ssrn.3696309>> Accessed 14 March 2022

¹⁶⁰ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD561.pdf>> Accessed 14 March 2022

regulator should have comprehensive enforcement powers and principle 12 focuses on the regulatory system having an effective and credible use of inspection, investigation, surveillance and enforcement powers and implementation of an effective compliance program.¹⁶¹ This study does not seek to discuss the subjects listed in principles 10 and 12. Its primary focus is principle 11 and the explanation for comprehensive enforcement powers that IOSCO proffered in its Methodology for Assessing Implementation of the Principles.

The organization stated that comprehensive enforcement powers stipulated in principle 11 include the regulator or other competent authority being able to commence legal actions against persons who have breached securities law and/or seeking orders from courts or tribunals and/or referring matters for civil or criminal actions.¹⁶² The principle outlines why securities statutes should have civil and criminal liability provisions. IOSCO stipulated that enforcement of securities regulation needs not to be vested in one regulatory body.¹⁶³ This implies that stock exchanges and national financial regulators can all enforce securities laws.

The other crucial feature of principle 11 is the organization's explanation of private enforcement rights. The organization stated that enforcement powers should not compromise private rights of action.¹⁶⁴ In other words, where a listed entity breaches securities law, investors should be able to seek remedies such as compensation or specific performance.¹⁶⁵ This study is concerned with the earlier remedy. SCAs seek to compensate investors where there is a breach of securities law. The proposition is that investors should be able to seek remedies where there is a breach of continuous disclosure obligations. Principle 11 is, therefore, fundamental as far as enforcement of continuous disclosure is concerned. Not only does it emphasize the need for civil and criminal consequences, but it also highlights that enforcement includes actions commenced by private individuals. It is only fair for private individuals to be compensated for losses incurred due to a listed issuer's breach of continuous disclosure obligations. Failure to do so will be an affront to the goal of investor protection.

¹⁶¹ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD561.pdf>> Accessed 14 March 2022

¹⁶² <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD562.pdf>> Accessed 14 March 2022

¹⁶³ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD562.pdf>> Accessed 14 March 2022

¹⁶⁴ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD562.pdf>> Accessed 14 March 2022

¹⁶⁵ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD562.pdf>> Accessed 14 March 2022

IOSCO stated that one of the key questions, based on principle 11, is whether private persons can seek their own remedies for misconduct relating to the securities laws?¹⁶⁶. The explanation of private enforcement rights proffered by IOSCO is that private enforcement rights actions need not be taken directly under the securities laws, but could be under provisions within the general law.¹⁶⁷ This highlights flexibility but can be problematic when investors pursue class actions. While it is generally accepted that private rights actions can be based on other provisions within the general law, a provision in the securities statutes that explicitly state that investors should be compensated can lessen the burden for investors even when they want to pursue SCAs. In some jurisdictions such as the United States of America, SCAs are instituted based on civil court rules.¹⁶⁸ A statutory provision stipulating civil liability or compensation rights will make it easier for investors to prove their claim. A good example is the Federal Court of Australia's case of *TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Limited*.¹⁶⁹ In that case, the applicant invoked a statutory provision in a continuous disclosure claim.¹⁷⁰ In South Africa's context, section 278 of the FSRA tends to be a catch-all provision that provides for compensation rights where there is a contravention of a financial sector law.¹⁷¹

Private enforcement rights may also enhance investor confidence. This proposition is supported by Grace who stated that US-style class actions may help in restoring investor confidence.¹⁷² No literature highlights that South Africa embraces or is ready to embrace US-style class actions. SCAs can present investors with many benefits. The submission is that where legal recourse is at one's disposal, an investor will be motivated to invest in securities knowing that not all will be lost because a listed issuer breached securities law. Compensation rights are likely to put investors' confidence in the system.

¹⁶⁶ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD562.pdf>> Accessed 14 March 2022

¹⁶⁷ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD562.pdf>> Accessed 14 March 2022

¹⁶⁸ <https://www.investor.gov/introduction-investing/investing-basics/glossary/class-actions>> Accessed 22 March 2022

¹⁶⁹ [2019] FCA 1747

¹⁷⁰ Para 1121

¹⁷¹ <http://www.treasury.gov.za/legislation/acts/2017/Act%209%20of%202017%20FinanSectorRegulation.pdf>> Accessed 7 April 2022

¹⁷² Grace, Stefano, "Strengthening Investor Confidence in Europe: U.S.-Style Securities Class Actions and the Acquis Communautaire." *Journal of Transnational Law & Policy*, vol. 15, no. 2, Spring (2006), pp. 281-304, <https://heinonline.org/HOL/P?h=hein.journals/jtrmlwp15&i=286>> Accessed 20 March 2022

SCAs are yet to be embraced in South Africa despite literature highlighting that they offer protection and legal recourse to investors. They remain a special type of class action that the jurisdiction tends to be very cautious with. One of the reasons is that if there is issuers' liability to prospective investors who buy stock on exchanges because of distorted prices, why is there no issuers' liability to prospective investors who fail to buy on the same basis.¹⁷³ This argument by the South African court is misplaced since it does not consider the causation and loss analysis which is applied in SCAs in other jurisdictions.¹⁷⁴ Such investors are required to provide evidence that shows the loss incurred.¹⁷⁵

2.8. Conclusion

Latimer and Maume stipulated that disclosure benefits not only the investors but employees, the general public and creditors.¹⁷⁶ The scholars submitted that disclosure needs to be proactive.¹⁷⁷ Continuous disclosure obligations are necessary if we are to protect investors and ensure efficient markets. These are some of IOSCO's Objectives of Securities Regulation. Their benefits are not limited to the capital markets but extend to national economies. The efficiency of markets and protection of investors tend to be central goals in continuous disclosure discussions. Principles for Ongoing Disclosure highlight an acknowledgement that information asymmetry can be investors' number one enemy. Latimer and Maume first acknowledged that disclosure reduces information asymmetry and stated that it gives information to both sophisticated and unsophisticated investors.¹⁷⁸ Disclosure of material information minimises the unintended and intended consequences that might flow from information asymmetry. Investors mainly rely on information availed by the issuer in making their investment decisions. Implementation of IOSCO Principles should be fundamental in continuous disclosure regulation. As discussed above, many of the IOSCO Objectives and Principles have been embraced in South Africa in the JSE Listing Requirements, Practice Note No. 2 of 2015, and partly in the FMA. The problem is with investor

¹⁷³ *De Bruyn* case, para 154

¹⁷⁴ *Myer* case, para 1500

¹⁷⁵ *Myer* case, para 1719

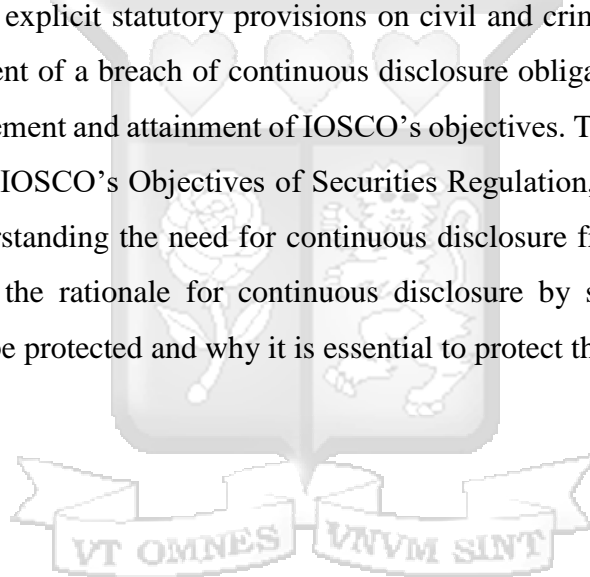
¹⁷⁶ Latimer P. and Maume P, *Promoting Information in the Marketplace for Financial Services*, 23

¹⁷⁷ Latimer P. and Maume, P, *Promoting Information in the Marketplace for Financial Services*, 23

¹⁷⁸ Latimer P. and Maume P, *Promoting Information in the Marketplace for Financial Services*, 23

protection rights and the enforcement of continuous disclosure obligations, which all fall under the Principles for Enforcement.

Scholars such as Rana consider immaculateness in securities law to be quixotic.¹⁷⁹ However, implementing IOSCO Objectives and Principles should be the goal that can lead regulators to such perfection. IOSCO is a global standard-setter in securities regulation.¹⁸⁰ Despite Cally Jordan's criticism that IOSCO Principles are being implemented irrespective of their suitability to local circumstances, the scholar was at pains to admit there is no answer to the question of whether there is an alternative to IOSCO's standard setting.¹⁸¹ The organization's objectives and principles remain paramount in informing all aspects of securities regulation, including continuous disclosure frameworks. The lack of explicit statutory provisions on civil and criminal liability of an issuer and its officers in the event of a breach of continuous disclosure obligations is a severe problem that can affect the enforcement and attainment of IOSCO's objectives. Three categories of IOSCO Principles, together with IOSCO's Objectives of Securities Regulation, discussed in this chapter are fundamental in understanding the need for continuous disclosure frameworks. They provide much-needed clarity on the rationale for continuous disclosure by stating what needs to be protected, who needs to be protected and why it is essential to protect them.



¹⁷⁹ Rana A, *Scope and Objective of IOSCO Principles and Effectiveness in Pakistan* (August 30, 2020). Available at SSRN: <https://ssrn.com/abstract=3683464>

¹⁸⁰ Jordan C, *The New Internationalism? IOSCO, International Standards and Capital Markets Regulation*, para 5

¹⁸¹ Jordan C, *The New Internationalism? IOSCO, International Standards and Capital Markets Regulation*, para 16

Chapter Three: South Africa's Continuous Disclosure Framework

3.1. Introduction

The Financial Markets Act No.19 of 2012 (FMA), the Financial Sector Regulation Act No. 9 of 2017 (FSRA), the JSE Listing Requirements and the Practice Note 2 of 2015 are key legal instruments in analysing South Africa's continuous disclosure framework. The Companies Act 71 of 2008 also plays a vital role in disclosure as it imposes certain obligations on issuers of securities and directors. It regulates financial reporting and various aspects that affect listed issuers, such as issuing of a prospectus. The statutes stipulated above do not have civil or criminal liability penalties for breach of continuous disclosure requirements. Section 11(1) d of the FMA contains a provision that enables exchanges to formulate disclosure standards. This implies that continuous disclosure obligations of listed issuers in South Africa are mainly contained in exchanges' listing requirements. Criminal or civil consequences for failure to apprise investors with price-sensitive information are not outlined in the FMA. This chapter pays explicit attention to the various instruments regulating financial markets in South Africa. The aim is to critically analyse the provisions that govern or enable continuous disclosure and its enforcement in South Africa. The chapter will stipulate the strengths and weaknesses of South Africa's continuous disclosure framework.

3.2. The Primary Statute Regulating Financial Markets

The FMA was enacted in times of significant changes in global financial markets.¹⁸² Major changes have happened since the promulgation of the FMA in South Africa. One of the changes was the promulgation of the FSRA which introduced the twin peaks regulation model. The Act highlights, in the preamble, that South Africa seeks to align its financial market laws with international standards. This is not surprising since South Africa's FSCA is an ordinary member of IOSCO, the Prudential Authority is an associate member and the JSE is an affiliate member.¹⁸³ As far as continuous disclosure is concerned, it is important to analyse the provisions of the FMA and determine if they align with what South Africa strives to achieve as stated in the preamble.

¹⁸² http://www.treasury.gov.za/comm_media/press/2020/FINANCIAL%20MARKETS%20ACT%20REVIEW.pdf
Accessed 7 April 2022

¹⁸³ <https://www.iosco.org/about/?subsection=membership&memid=1> > Accessed 18 May 2022

3.2.1. The Objects of the FMA

As stated in Chapter 2, the FMA's objects lay a foundation for the aspirations of South Africa as a country in respect of the regulation of financial markets. As stated in the preceding chapter, Section 2 states that the Act aims to ensure that financial markets are fair, efficient, and transparent and intends to increase confidence in South Africa's financial markets. A continuous disclosure framework is expected to also advance these objects. Investor protection and ensuring that markets are efficient are continuous disclosure goals.¹⁸⁴ It is imperative to discuss section 11 (1) d of the FMA which is the most relevant statutory provision of the FMA that deals with disclosure by listed issuers.

3.2.2. Disclosure Standards: Section 11(1) d of the FMA

Section 11(1) d of the FMA is a central provision when discussing South Africa's continuous disclosure regime. The provision states that:

*An exchange must, to the extent applicable to the exchange in question, make listing requirements which prescribe: (d) the standards of disclosure and corporate governance that issuers of listed securities and their directors must meet.*¹⁸⁵

The JSE has done so in terms of section 3 of the JSE Listing Requirements. Where there is a contravention of the listing requirements, the exchanges can reprimand, disqualify a person, suspend trading, impose a fine or any other penalty appropriate in the circumstances in terms of section 11(g) of the FMA. Exchanges are required to report any contravention of the FMA to the FSCA in terms of section 10(2) d of the FMA. The problem is there are no civil or criminal statutory penalties for issuers, their officers, and directors for a breach of continuous disclosure obligations. Blatantly put, a breach of continuous disclosure obligations is simply a contravention of the listing requirements, not the FMA. Consequences are limited to penalties that exchanges may impose in terms of section 11(1) g of the FMA. Investors do not have remedies in terms of

¹⁸⁴ Payne J, *Disclosure of Inside Information*, ECGI- Law Working Paper No. 422/2018, Oxford Legal Studies Research Paper No. 8/2019, 20-21 Available at SSRN <https://ssrn.com/abstract=3244401>

¹⁸⁵ https://www.gov.za/sites/default/files/gcis_document/201409/36121a.pdf> Accessed 7 April 2022

the listing requirements. This undermines investors' private enforcement mechanisms such as SCAs and public enforcement of continuous disclosure.

It is difficult for investors to utilise statutory causes of action considering section 11 of the FMA. They must rely on the JSE's enforcement of continuous disclosure obligations or any common law relief that they can invoke. The failure by the FSB or FSCA to have any enforcement matter on continuous disclosure since February 2013, tends to support the proposition that it is the exchanges that are primarily enforcing continuous disclosure. Having statutory liability provisions can ensure that investors have statutory causes of action and the FSCA plays an integral role in public enforcement of continuous disclosure.

Continuous disclosure is closely linked to the issue of false statements by issuers.¹⁸⁶ It is important to discuss how the issue of false statements is pertinent in continuous disclosure.

3.2.3. False, Misleading or Deceptive Statements, Promises and Forecast

The issue of false or misleading statements is closely related to the issue of disclosure. Section 81 (1) of the FMA regulates that aspect and states that:

“No person may, directly or indirectly, make or publish in respect of securities traded on a regulated market, or in respect of the past or future performance of a company whose securities are listed on a regulated market—

- (a) any statement, promise or forecast which is, at the time and in the light of the circumstances in which it is made, false or misleading or deceptive in respect of any material fact and which the person knows, or ought reasonably to know, is false, misleading or deceptive; or*
- (b) any statement, promise or forecast which is, by reason of the omission of a material fact, rendered false, misleading or deceptive and which the person knows, or ought reasonably to know, is rendered false, misleading or deceptive by reason of the omission of that fact.”¹⁸⁷*

¹⁸⁶ Mendelsohn B and Brush J, *The Duties to Correct and Update: A Web of Conflicting Case Law and Principles* 39, Securities Regulation Law Journal, (2015), 67 < <https://www.akingump.com/a/web/35779/Duties-to-Correct-and-Update-Mendelsohn-Brush.pdf> > Accessed 31 July 2022

¹⁸⁷ https://www.gov.za/sites/default/files/gcis_document/201409/36121a.pdf > Accessed 7 April 2022

There is a close link between continuous disclosure obligations and section 81 of the FMA. Where a listed entity makes certain disclosures that are subsequently established to be incorrect, it is obliged to immediately correct such disclosures in terms of section 81 (2) of the FMA.¹⁸⁸ Section 81 (3) of the FMA makes it an offence to publish false, misleading or deceptive statements, promises and forecast about traded securities or past or future performance of those listed securities.¹⁸⁹ This implies that where disclosure is made about securities or their performance, in compliance with continuous disclosure obligations stated in the JSE Listing Requirements, a listed issuer is expected to immediately publish the correct information when it becomes aware that the statement is false, misleading or deceptive. Failure to do so amounts to an offence in terms of section 81 (3) of the FMA. These are called the duties to correct and update in other jurisdictions.¹⁹⁰ They are not yet clearly embraced in South Africa's jurisprudence. Where there is no disclosure in the form of a statement, promise, or forecast, section 81 is, therefore, not applicable. This highlights the limited scope of an offence created in terms of section 81 of the FMA. It does not apply where there is no disclosure at all or delayed disclosure. It can apply where there is partial disclosure.

One of the contentious issues is whether an investor can institute civil proceedings for loss that might be occasioned by the disclosure of incorrect information or contravention of section 81 of the FMA. Section 81 of the FMA and section 278 of the FSRA can assist an investor. A good example is an administrative fine of R50 million which the FSCA imposed on Viceroy Research Partnership, Aiden Lau, Fraser John Perring and Gabriel Bernade.¹⁹¹ The Respondents contravened section 81 of the FMA, in January 2018, by publishing false statements about Capitec which caused the financial institution's share price to decline by 23.12%.¹⁹² Such conduct can cause enormous losses to investors. Can investors who bought Capitec's shares during that period institute civil proceedings against the Respondents? Investors can institute civil proceedings based on section 81 of the FMA and section 278 of the FSRA. The problem comes when it is a listed

¹⁸⁸ The Australian case of *TPT Patrol* supports this proposition > <https://jade.io/article/672160>> Accessed 7 April 2022

¹⁸⁹ Section 81 of the FMA < https://www.gov.za/sites/default/files/gcis_document/201409/36121a.pdf>

¹⁹⁰ Mendelsohn B and Brush J, *The Duties to Correct and Update: A Web of Conflicting Case Law and Principles*, 67

¹⁹¹ <https://www.fsca.co.za/Enforcement-Matters/Documents/Penalty%20Order-DMA403.pdf?csf=1&e=6TXqCH>> Accessed 23 May 2022

¹⁹² <https://www.fsca.co.za/Enforcement-Matters/Documents/Penalty%20Order-DMA403.pdf?csf=1&e=6TXqCH>> Accessed 23 May 2022

issuer that has published incorrect information in a bid to comply with its continuous disclosure obligations. Investors will be forced to institute proceedings based on section 81 of the FMA. This issue can be adequately addressed by having statutory liability provisions on continuous disclosure.¹⁹³ Therefore, it is not surprising that the FMA has been criticised for its failure to address some financial market regulation aspects.

3.2.4. Problems with the FMA

The National Treasury's recent discussion paper on reforms in the financial markets highlights that the FMA might not subsist for long.¹⁹⁴ The concerns raised about the FMA include its failure to regulate all financial markets, being too narrow, heavy reliance on market infrastructures when it comes to regulation of market activity and its general exclusive style instead of being inclusive.¹⁹⁵ Therefore, it is not surprising that the Act does not have statutory liability provisions on continuous disclosure. The wording of section 11(1) d of the FMA supports the proposition of its heavy reliance on market infrastructures. Market infrastructure is defined in section 1 of the Act as including a licensed exchange. Licensed exchanges are expected to stipulate disclosure standards for issuers and their directors in terms of section 11(1) d of the FMA. The FMA does not deal with the liability for a breach of continuous disclosure. Therefore, the licensed exchanges must stipulate and enforce disclosure standards. The introduction of compensation rights by the FSRA will not yield results in the absence of a civil liability provision. It is important to discuss this issue in detail.

3.3. Introduction of Compensation Rights by the FSRA

Section 278 of the FSRA makes provision for compensation for loss suffered as a result of a contravention of a financial sector law by another person.¹⁹⁶ The provision is worded as follows:

“A person, including a financial sector regulator, who suffers loss because of a contravention of a financial sector law by another person, may recover the amount of the loss by action in a court

¹⁹³ For example, In Australia's Corporations Act

¹⁹⁴ http://www.treasury.gov.za/comm_media/press/2020/FINANCIAL%20MARKETS%20ACT%20REVIEW.pdf>
Accessed 7 April 2022

¹⁹⁵ http://www.treasury.gov.za/comm_media/press/2020/FINANCIAL%20MARKETS%20ACT%20REVIEW.pdf>
Accessed 7 April 2022

¹⁹⁶ Section 278, FSRA

*of competent jurisdiction against— (a) the other person; and (b) any person who was knowingly involved in the contravention.”*¹⁹⁷

The Act defines “*a person*” in section 1. The provision states that a person means: “*a natural person or a juristic person, and includes an organ of state*”. This provision is germane to the continuous disclosure obligations of listed issuers. The word “person” can apply to both listed issuers and their officers.

The phrase ‘*financial sector laws*’ is qualified in the FSRA. The Act lists financial sector laws in schedule 1. The FMA is one of the statutes listed in the schedule. However, the problem is whether an investor can institute a claim in terms of the FMA and section 278 of the FSRA. The obvious hurdle is whether an investor can allege contravention of the FMA in a continuous disclosure SCA. The goal will be to seek compensation for loss in terms of section 278 of the FSRA. The FMA simply states that an exchange must stipulate standards of disclosure in its listing requirements. No FMA provision can assist an investor in that regard.

There are also other essential provisions in the FSRA. The FSCA qualifies as the Responsible Authority of the FMA in terms of section 5 and schedule 2 of the FSRA. Section 152 suggests that the FSCA can institute proceedings in the High Court and seek an order for compliance with the financial sector laws. The question is whether the FSCA can seek such an order in terms of section 11 of the FMA. Section 11 of FMA leaves the issue of disclosure in the exchanges’ hands. It remains to be seen whether a case that invokes these provisions will see the light of day. Whilst the FSRA remains key, the JSE Listing Requirements tend to be the most critical development that brought continuous disclosure obligations of listed issuers to the fore.

3.4. Exchange Requirements

Section 11(1) d of the FMA states that an exchange must make listing requirements that provide for the standards of disclosure and corporate governance that an issuer of listed securities and its directors must meet.¹⁹⁸ The JSE Listing Requirements were made in light of this provision. Exchange rules and requirements are considered contractual terms that listed entities accept upon

¹⁹⁷ <http://www.treasury.gov.za/legislation/acts/2017/Act%20of%202017%20FinanSectorRegulation.pdf>>
Accessed 7 April 2022

¹⁹⁸ Section 11 (1) d of the FMA, https://www.gov.za/sites/default/files/gcis_document/201409/36121a.pdf>
Accessed 7 April 2022

listing.¹⁹⁹ The JSE listing requirements are divided into two broad categories: general principles and the main body. The main body consists of provisions on specific subjects such as ongoing obligations of issuers, whereas the general principles can be equated to a preamble in a statute. The principles stipulate goals such as protecting investors and ensuring timeous disclosure of price-sensitive information.²⁰⁰

Section 1 of the Listing Requirements defines price-sensitive information as “*unpublished information that is specific or precise, which if it were made public, would have a material effect on the price of the issuer’s securities.*”²⁰¹ Section 3.4 of the JSE Listing requires disclosure of price-sensitive information without delay except when the information is kept confidential for a restricted period. This is in line with General Principle (iii) of the Listing Requirements which requires the timeous public disclosure of price-sensitive activities to holders of securities and the public. Section 3.4 states that Practice Note No.2 of 2015 must be applied when giving effect to the provision. The Practice Note, as discussed below, guides issuers and their directors on what constitutes price-sensitive information. However, section 3.10 highlights that an issuer may be exempted from making a section 3.4 disclosure of information to the public where such disclosure would prejudice the issuer’s legitimate interests.

Another provision that highlights the continuous disclosure obligations of issuers is section 3.1. The provision states that where a decision not to make distribution payments is deemed to constitute price-sensitive information, that decision should be communicated immediately after being taken. In addition, section 1.11 of the Listing Requirements highlights that even when a listed issuer’s securities are suspended, its continuing obligations are not suspended.²⁰² By implication, this includes continuous disclosure obligations stated in section 3.

Section 3.59 of the Listing Requirements highlights that an issuer is expected to announce any changes to the board of directors. The provision states that an issuer is expected to notify the

¹⁹⁹ Chapple, L. and Truong, T.P., *Continuous disclosure compliance: does corporate governance matter?* Account Finance, 55: 965-988., (2015) <https://doi.org/10.1111/acfi.12071>> Accessed 20 July 2022

²⁰⁰ <https://www.jse.co.za/sites/default/files/media/documents/2019-04/JSE%20Listings%20Requirements.pdf>> Accessed 21 February 2022

²⁰¹ <https://www.jse.co.za/sites/default/files/media/documents/2019-04/JSE%20Listings%20Requirements.pdf>> Accessed 21 February 2022

²⁰² <https://www.jse.co.za/sites/default/files/media/documents/2019-04/JSE%20Listings%20Requirements.pdf>> Accessed 21 February 2022

bourse, without delay, of any appointment, retirement, removal or death of a director or company secretary. The same applies to the changes in the executive's responsibilities and functions.

3.4.1. Simultaneous Disclosure

Section 3.81 of the JSE Listing Requirements embraces the concept of simultaneous disclosure. The concept is fundamental in continuous disclosure. As stated in Chapter 2, the provision requires a listed issuer to ensure that equivalent information is simultaneously made available to the market of each exchange on which the issuer's securities are listed unless prohibited by or in terms of the rules or requirements of any other stock exchange.²⁰³

3.4.2. Other Notifiable Events

There are other Listing Requirements provisions that highlight continuing obligations of issuers. Section 3.75 of the Listing Requirements states that a listed issuer must notify the bourse of any changes to the auditor.²⁰⁴ This includes termination and resignation. Such notification must be done without delay. Section 3.85 of the Listing Requirements requires an issuer to immediately notify the bourse in the event of being placed, or making an application to be placed, into liquidation, whether voluntary or compulsory, provisional or final.²⁰⁵ The same applies to business rescue proceedings where a resolution is adopted to place the issuer under business rescue proceedings or an application is made to the court.²⁰⁶ The Listing Requirements are complemented by Practice Note 2 of 2015.

3.5. Practice Note 2 of 2015

The Practice Note highlights that directors of a listed issuer should use their discretion to ascertain what constitutes price-sensitive information in fulfilling the issuer's continuous disclosure

²⁰³ <https://www.jse.co.za/sites/default/files/media/documents/2019-04/JSE%20Listings%20Requirements.pdf>
Accessed 21 February 2022

²⁰⁴ <https://www.jse.co.za/sites/default/files/media/documents/2019-04/JSE%20Listings%20Requirements.pdf>
Accessed 21 February 2022

²⁰⁵ <https://www.jse.co.za/sites/default/files/media/documents/2019-04/JSE%20Listings%20Requirements.pdf>
Accessed 21 February 2022

²⁰⁶ <https://www.jse.co.za/sites/default/files/media/documents/2019-04/JSE%20Listings%20Requirements.pdf>
Accessed 21 February 2022

obligations.²⁰⁷ Two principles are of paramount importance in this determination. There should be: (i) specific and precise information and, (ii) material information.²⁰⁸ The principles imply that the directors should first determine whether the information is specific or precise. The Practice Note adopted the European Court of Justice’s definition of precise information. The definition stipulates that precise information is: “*information that indicates a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to occur*”.²⁰⁹ Precise information is defined as information that is adequate to enable inferences to be drawn on the possible effects of that event or set of circumstances on share prices.²¹⁰ After confirming the first principle, directors of an issuer are expected to embark on an assessment of the material effect of the specific or precise information on the price of that issuer’s securities.²¹¹ The Practice Note states that the assessment must be done both qualitatively and quantitatively.²¹² Issuers are advised to put in place a policy that guides directors in complying with the provisions of the Practice Note.

The JSE highlights in the Note that issuers should consider whether the information in question might influence investors’ economic decisions. The question is to what extent can issuers rely on their judgment on what to disclose?²¹³ The Practice Note provides a non-exhaustive list of information that falls within this category. This includes information with an effect on the financial position of the issuer, its assets and liabilities, its course of business, the issuer’s performance or expected performance, and previously disclosed information.²¹⁴ These factors will determine whether investors will hold on to their securities or will be tempted to opt for other investments. We cannot expect investors to maintain their relationship with an issuer when contemplating loss.

²⁰⁷https://clientportal.jse.co.za/_layouts/15/DownloadHandler.ashx?FileName=/Issuer_Regulations/Announcements/2015/31.Practice%20Note%202%20of%202015.pdf> Accessed 5 May 2022

²⁰⁸https://clientportal.jse.co.za/_layouts/15/DownloadHandler.ashx?FileName=/Issuer_Regulations/Announcements/2015/31.Practice%20Note%202%20of%202015.pdf> Accessed 5 May 2022

²⁰⁹https://clientportal.jse.co.za/_layouts/15/DownloadHandler.ashx?FileName=/Issuer_Regulations/Announcements/2015/31.Practice%20Note%202%20of%202015.pdf> Accessed 5 May 2022

²¹⁰https://clientportal.jse.co.za/_layouts/15/DownloadHandler.ashx?FileName=/Issuer_Regulations/Announcements/2015/31.Practice%20Note%202%20of%202015.pdf> Accessed 5 May 2022

²¹¹https://clientportal.jse.co.za/_layouts/15/DownloadHandler.ashx?FileName=/Issuer_Regulations/Announcements/2015/31.Practice%20Note%202%20of%202015.pdf> Accessed 5 May 2022

²¹²https://clientportal.jse.co.za/_layouts/15/DownloadHandler.ashx?FileName=/Issuer_Regulations/Announcements/2015/31.Practice%20Note%202%20of%202015.pdf> Accessed 5 May 2022

²¹³ Latimer P. and Maume P, *Promoting Information in the Marketplace for Financial Services*, 34

²¹⁴https://clientportal.jse.co.za/_layouts/15/DownloadHandler.ashx?FileName=/Issuer_Regulations/Announcements/2015/31.Practice%20Note%202%20of%202015.pdf> Accessed 5 May 2022

Price-sensitive information is fundamental in determining whether an investor can acquire or dispose of the securities in question.²¹⁵ Investor protection can be enhanced by criminal liability provisions which can deter issuers and their directors from breaching their continuous disclosure obligations.²¹⁶

3.6. Criminal Liability for Breach of Continuous Disclosure

Since the 13th of February 2013, when the FMA was gazetted, there has been no single criminal action or any other enforcement matter taken by the responsible authority in terms of contravention of continuous disclosure obligations. There are no statutory provisions in South Africa that outline the criminal liability of listed issuer and their directors or officers in the event of a breach of continuous disclosure obligations. It is not unusual to have a criminal backstop in securities law.²¹⁷ Criminal liability statutory provisions are desired depending on the seriousness and strength of the case. Criminal actions in continuous disclosure fall under public enforcement of securities law.²¹⁸ Public enforcement is deemed to be critical in securities regulation.²¹⁹ There is no reason for not having such a critical enforcement mechanism in South Africa's continuous disclosure framework considering that the FMA already criminalises market abuse conduct.²²⁰ Whilst there is a notion that criminal proceedings are rarely utilized in some jurisdictions,²²¹ there is no reason for not having such a provision when section 81 of the FMA already criminalises deceptive and misleading statements. There is also a tendency to shun criminal liability provisions based on the notion that criminal actions are fraught with difficulties of successfully mounting a criminal prosecution.²²² Evidence from other jurisdictions with criminal provisions on continuous disclosure, as discussed in Chapter 4, does not support such a proposition. Not only is the

²¹⁵ Myer case, para 1199

²¹⁶ Varzaly, *The Effectiveness of Disclosure Law Enforcement in Australia*, 35

²¹⁷ Tjio H., "Enforcing Corporate Disclosure" *Singapore Journal of Legal Studies*, 2009, pp. 332–64, 333
<http://www.jstor.org/stable/24870522>.> Accessed 25 July 2022.

²¹⁸ Welsh M. and Morabito V., 'Public V Private Enforcement of Securities Laws: An Australian Empirical Study', 40

²¹⁹ Chen et al, *The Effect of Sanctions on Continuous Disclosure Under the Responsive Enforcement Strategy: Evidence from Australia*, SSRN, (2018), 1 Available at <<https://ssrn.com/abstract=3221640>> Accessed 31 July 2022

²²⁰ Chapter X of the FMA

²²¹ Ramsay I, *Enforcement of Continuous Disclosure Laws by the ASIC*, 4, Available at SSRN: <https://ssrn.com/abstract=2601877>

²²² Coffey J. "Enforcement of continuous disclosure in the Australian stock market." *Australian Journal of Corporate Law* 20.3 (2007): 301-15, 7
http://138.25.65.91/professional/papers/conference2007/2007JC_ECDASM.pdf> Accessed 26 July 2022

proposition contradictory, but it suggests that it is only in securities law where difficulties in mounting a criminal prosecution are encountered. That suggestion is far from the truth. In any event, Chapter X of the FMA embraces criminal liability when it comes to market misconduct. It is difficult to contemplate a situation where it will only be difficult to prove criminal liability when it comes to continuous disclosure but not in respect of section 81 of the FMA. There is a deterrent effect that can come with criminal liability provisions.²²³

3.7. Civil Liability for Breach of Continuous Disclosure

There are no civil liability provisions on continuous disclosure in the FMA. Civil liability provisions can ensure that the responsible authority (the FSCA) can utilise civil actions to enforce continuous disclosure obligations.²²⁴ However, their most important use is enabling investors to seek compensation which is currently lacking in South Africa. Their role in private enforcement of continuous disclosure cannot be understated.

A civil liability provision will ensure that an investor can invoke section 278 of the FSRA in seeking compensation for any loss incurred. This will be termed a statutory cause of action.²²⁵ An investor invoking section 278 of the FSRA should first prove that a financial sector law was contravened by an issuer and its directors. The first step is to argue contravention of financial sector law that falls within the ambit of Schedule 1 of the FSRA. The FMA is listed in the schedule. The second step will be to prove that the investor suffered a loss due to that financial sector law contravention. This test is of utmost importance as it will provide a precedent for the test that South African courts will use in asserting whether an investor incurred a loss due to a financial sector law contravention. Evidence of contravention is not enough to allege that an investor incurred a loss. Some contraventions may not result in a loss being incurred by the alleging party. The causation-loss analysis is, therefore, fundamental.²²⁶ South African literature evinced the lack of this test in the country's jurisprudence on continuous disclosure. The FMA should have civil

²²³ Varzaly J, *The Effectiveness of Disclosure Law Enforcement in Australia*, 1

²²⁴ For example, ASIC civil actions stated in Ramsay I, *Enforcement of Continuous Disclosure Laws by the Australian Securities and Investments Commission*, 201

²²⁵ For example, section 674A of Australia's CA

²²⁶ Utilized in Australia in the *TPT Patrol* case < <https://jade.io/article/672160> >

liability provisions for a breach of continuous disclosure obligations. The gaps in the enforcement framework are discernible.

3.8. Gaps in the Enforcement Framework

Enforcement matters highlighted by the FSCA, which range from 18 February 2013 to date, highlight that many were based on Chapter X of the FMA which deals with insider trading, market manipulation and publication of deceptive and misleading statements.²²⁷ The FSCA imposes various administrative penalties in terms of section 167 of the FSRA. The provision highlights that the responsible authority may impose an appropriate administrative penalty, that is paid to the financial sector regulator, on the person that contravenes a financial sector law.²²⁸

The enactment of statutory civil liability provisions on continuous disclosure will ensure that the FSCA will take appropriate action in line with its functions outlined in Chapter 4 of the FSRA. This will also ensure the compensation of investors and will facilitate listed issuers and their directors' compliance with continuous disclosure obligations. The current framework shows that the JSE is primarily tasked with ensuring that listed issuers comply with their continuous disclosure obligations in terms of the JSE Listing Requirements. However, the bourse does not have prosecuting authority, nor does it deal with statutory contraventions by listed entities. It is a licensed exchange in terms of Chapter III of the FMA. The FSCA is tasked with dealing with statutory contraventions as the responsible authority of the FMA.²²⁹

Whilst public enforcement is fundamental, certain issues are better addressed by private enforcement.²³⁰ No case highlights that investors have private enforcement rights to enforce section 3 of the JSE Listing Requirements, nor is there any class action on continuous disclosure that highlights that investors can institute SCAs based on the FMA. This requires a focus on South Africa's position on class actions.

3.9. Securities Class Actions: Private Enforcement Rights

²²⁷ <https://www.fsca.co.za/Enforcement-Matters/Pages/Enforcement-Actions.aspx>> Accessed 23 May 2022

²²⁸ https://www.gov.za/sites/default/files/gcis_document/201708/4106022-8act9of2017finansectorregulationa.pdf> Accessed 7 April 2022

²²⁹ Schedule 2 of the FSRA

²³⁰ Dixon and Hill, *The Protection of Investors and the Compensation for their Losses: Australia*, 25

Class Actions are already part of South African law as stipulated in *Children's Resource Centre Trust v Pioneer Food*.²³¹ SCAs are believed to contribute immensely to the regulation of financial markets and financial development.²³² The United States of America tends to be the jurisdiction with a strong class actions system.²³³ Australia, with its regulatory framework similar to South Africa, largely embraces SCAs and is continuously developing its legal framework.²³⁴ South Africa is yet to witness its major SCA. Aziza highlighted the absence of a class action on securities regulation in South Africa from 1947 to 2018.²³⁵ Section 278 of the FSRA presents investors with an opportunity to seek compensation in an SCA. The provision comes with hurdles as investors must first prove a contravention of a financial sector law.

The court's approach in *De Bruyn v Steinhoff International Holdings*²³⁶ provides a snippet of how the South African courts are likely to approach SCAs. The first process will be the certification of the SCA. This shows a cautious approach that South Africa adopted when it comes to SCAs. The *De Bruyn* case highlights some of the hurdles investors will face in instituting SCAs. These hurdles include highlighting the existence of a class and a triable claim.²³⁷ This study posits that South Africa should embrace SCAs. The Republic presents the largest and most sophisticated market exchange in Africa. It is the first country in Africa that can be expected to embrace SCAs. However, SCAs are fraught with many challenges South Africa cannot afford to ignore. Such challenges include litigation costs, the possibility of having dispersed investors in an action, and possible abuse of SCAs where there is no case or a triable claim.²³⁸ SCAs can offer legal redress to investors and can also act as a deterrent to issuers who are tempted to breach their continuous disclosure obligations. It is imperative to discuss the *De Bruyn* case in detail.

²³¹ [2013] 1 All SA 648 (SCA), para 14

²³² Hopkins J, *Private Enforcement of Securities Laws and Financial Reporting Choices*, University of North Carolina, (2012), 5 < https://www.stern.nyu.edu/sites/default/files/assets/documents/con_033937.pdf > Accessed 9 May 2022

²³³ Fitzpatrick B. T, *Can the Class Action Be Made Business Friendly?* (June 3, 2020). 24 New Zealand Bus. L. Q. 169 (2018), Vanderbilt Law Research Paper No. 20-32, Available at SSRN: <https://ssrn.com/abstract=3617936>

²³⁴ For example, the development highlighted in Johnston et al, *The Class Actions Law Review: Australia*, In: Sanger C, *The Class Actions Law Review*, Slaughter and May, 6th Edition, (2022) <https://thelawreviews.co.uk/title/the-class-actions-law-review/australia> > Accessed 9 May 2022

²³⁵ Aziza, O. R., *Securities Regulation, Enforcement and Market Integration in the Development of Sub-Saharan Africa's Capital Markets*, 256-7

²³⁶ 2022 (1) SA 442 (GJ)

²³⁷ *De Bruyn* case, para 11

²³⁸ Hopkins J, *Private Enforcement of Securities Laws and Financial Reporting Choices*, 3

In *De Bruyn*, the Applicant, Ms De Bruyn, intended to hold Steinhoff, its directors and Deloitte for losses caused by misstatements in the company's financial statements.²³⁹ The Applicant purchased shares in Steinhoff International Holdings NV and Steinhoff International Holdings (Pty) Ltd (SIHL) between 2013 and 2016. The companies were cited as the First and Second Respondents respectively. The Applicant's investment amounted to R80 000. The shares were listed on the JSE. The Applicant and many other investors lost a massive chunk of their investments when Steinhoff NV's shares on both the JSE and the Frankfurt Stock Exchange (FSE) plummeted on the 5th of December 2017 when the news of accounting irregularities was announced. The Applicant then sought to institute a class action representing three classes of shareholders. Two classes were people who purchased the shares on the JSE, and the other one was those who purchased on the FSE during the material times stated by the Applicant.²⁴⁰ The Applicant argued that the class action was a way of seeking legal redress for many retail investors that suffered a loss due to the accounting irregularities and would not be able to bring their matter to court.

The Applicant alleges that, because of financial irregularities that later caused the share prices to drop, Steinhoff NV and SIHL assets, income and profits of SIHL and Steinhoff NV were overstated and their liabilities and expenses were understated.²⁴¹ This would consequently mean inflated trading prices. However, the provisions of the Companies Act took centre stage in the *De Bruyn* case. The Listing Requirements and the FMA did not get the attention they deserve judging by the circumstances of the case. The Applicant pleaded that SIHL, Steinhoff NV and the Steinhoff directors breached their duty to disclose impugned transactions in their financial statements.²⁴² In light of this submission, the court was tasked with determining whether the directors owed the fiduciary duties to existing and potential shareholders.²⁴³ The court stated that, at common law, fiduciary duties are owed to the company, not to its members and there is no duty to prospective shareholders.²⁴⁴ The Applicant's case was therefore held to not establish wrongfulness.²⁴⁵ The Applicant's statutory claims, such as a breach of directors' duties in terms of section 76 of the

²³⁹ *De Bruyn* case, para 1 < <http://www.saflii.org/za/cases/ZAGPJHC/2020/145.html>> Accessed 10 May 2022

²⁴⁰ *De Bruyn* case, para 6

²⁴¹ *De Bruyn* case, para 147 < <http://www.saflii.org/za/cases/ZAGPJHC/2020/145.html>> Accessed 10 May 2022

²⁴² *De Bruyn* case, para 147

²⁴³ *De Bruyn* case, para 146

²⁴⁴ *De Bruyn* case, para 146

²⁴⁵ *De Bruyn* case, para 146

Companies Act, suffered the same fate. The court held that common law guides section 77 of the Companies Act liability and the statutory duties are owed to the company, not the shareholders, save where there is a special relationship.²⁴⁶

The case acknowledges the causation-loss analysis but does not delve into the issue.²⁴⁷ There were submissions that members of the class action are expected to prove that they relied on Steinhoff's misstatements which caused the economic loss.²⁴⁸ This is in line with other jurisdictions such as Australia, which require that an investor must show that there is a loss occasioned by a breach of continuous disclosure obligations.²⁴⁹ In the case, the question was whether they can prove that as a class or individually. The purpose of the enquiry was to determine the commonality of the claim. The court held that the facts of the case were sufficient to support the claim of commonality.²⁵⁰

The court made a curious observation by stating that the risk of directors assuming huge liabilities to investors is likely to deter many from assuming office in listed companies, adversely affecting companies, capital markets and the economy. This study posits that the business judgment rule seeks to address that risk and directors should surely be held accountable where they have breached their obligations. It is difficult to comprehend why the court did not appreciate the role of the business judgment rule, which is already codified in section 76 (4) of South Africa's Companies Act since a listed issuer is also a company.

The court held that the Applicant's particulars did not disclose any triable issue and the certification was unsuccessful.²⁵¹ The court's reasoning on disclosure and directors' duties cannot be faulted. The case highlights overreliance on fiduciary duties and the Companies Act. It was incumbent upon the Applicant to plead the case correctly. The subsequent fining of Steinhoff by the JSE for breaching the Listing Requirements and publishing false and misleading information highlights that the case was not properly pleaded.²⁵² The FSCA stated in its 2019 order that

²⁴⁶ *De Bruyn* case, para 204

²⁴⁷ *De Bruyn* case, para 266-7

²⁴⁸ *De Bruyn* case, para 266

²⁴⁹ For example, in the *Myer* case

²⁵⁰ *De Bruyn* case, para 274

²⁵¹ *De Bruyn* case, para 256

²⁵² The 2020 Fine by the JSE < <https://www.reuters.com/article/steinhoff-jse-idUSL8N2HB28K> > Accessed 9 May 2022

Steinhoff breached section 81 of the FMA.²⁵³ Section 81 of the FMA states that publishing false and deceptive statements is an offence. Plaintiffs can invoke both sections 81 of the FMA and 278 of the FSRA in seeking compensation for the loss caused as a result of the publication of false and deceptive statements. That in itself should have been a basis for seeking compensation in the *De Bruyn* case. The question of whether Steinhoff's directors owe current or future shareholders a duty was neither here nor there. The statements were not made in a prospectus which will entail that only subscribers will have a claim.²⁵⁴ Compensation rights stated in section 278 of the FSRA extend beyond shareholders. What is needed is to prove loss occasioned by the contravention of a financial sector law. What was required was for the Applicants to prove that they suffered a loss due to Steinhoff's misstatements and contravention of its continuous disclosure obligations. That liability will not be based on directors' fiduciary duties but on the issuer's statutory duties in terms of section 81 of the FMA and its disclosure obligations in section 3 of the JSE Listing Requirements. Holders of securities who bought Steinhoff's shares on the JSE should have been notified of any material development or price-sensitive information in terms of section 3 of the JSE Listing Requirements.

Steinhoff breached its continuous disclosure obligations by failing to disclose its 2015 disposal of Steinhoff Global Investments.²⁵⁵ That issue was not canvassed in the case. This highlights a breach of the Listing Requirements.²⁵⁶ This highlights a *locus classicus* case of breach of continuous disclosure obligations. The 2015 disposal qualifies to be called precise and material information in terms of the JSE's Practice Note No. 2 of 2015. The disposal affects the issuer's assets and financial position. The Applicant's pleadings in the *De Bruyn* case should have included all these issues. The only hurdle for Applicants was to prove that they suffered a loss occasioned by the issuer's breach of section 81 of the FMA and its disclosure requirements. The case highlights that whilst it was an uphill task to prove a case against Deloitte, there was a case against Steinhoff and its directors. A claim against Deloitte was not going to be successful considering the Supreme

²⁵³ [https://www.fsca.co.za/Enforcement-Matters/Documents/Order%20\(Signed Steinhoff 2019 09-12.pdf](https://www.fsca.co.za/Enforcement-Matters/Documents/Order%20(Signed%20Steinhoff%202019-09-12.pdf)>
Accessed 23 May 2022

²⁵⁴ Samamba, *The Zambian Continuous Disclosure Legal Regime—Adequate to Ensure Efficient Disclosure?* 144 <
https://www.ijmra.us/project%20doc/2018/IJRSS_JUNE2018/IJMRA-13826.pdf>

²⁵⁵ <https://www.timeslive.co.za/sunday-times/business/2020-10-21-jse-hits-steinhoff-with-its-highest-fine-ever-for-faulty-financials/>> Accessed 9 May 2022

²⁵⁶ <https://www.timeslive.co.za/sunday-times/business/2020-10-21-jse-hits-steinhoff-with-its-highest-fine-ever-for-faulty-financials/>> Accessed 9 May 2022

Court of Appeal's reasoning in *Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis*.²⁵⁷ The court in *Hlumisa* highlighted that auditors owe a duty primarily to the company and the proper plaintiff is the company where there is a wrong done.²⁵⁸ Whilst the *De Bruyn* case highlights South Africa's cautious approach to class actions, it remains a missed opportunity in South Africa to institute an SCA that outlines a continuous disclosure claim and the breach of section 81 of the FMA.

3.10. Conclusion

The JSE Listing Requirements and the Practice Note 2 of 2015 are, therefore, key instruments as far as South Africa's continuous disclosure framework is concerned. The instruments outline issuers' continuous disclosure obligations. This entails that continuous disclosure obligations of listed issuers in South Africa are mainly outlined by exchanges. The FMA does not contain civil or criminal liability provisions for failure to comply with continuous disclosure obligations stipulated by exchanges. Enacting these provisions in the FMA will ensure public and private enforcement of continuous disclosure in South Africa. The National Treasury's discussion paper on reforms in the regulatory framework for financial markets attests to the shortcomings of the Act. South Africa should also embrace SCAs to promote the protection of investors and financial development. The enactment of statutory liability provisions will provide investors with an array of remedies as they will have statutory causes of action when instituting SCAs. The *De Bruyn* case provides a foundation for future SCAs. Factors such as funding of litigation, the financial environment since South Africa is a developing African country, and the possibility of abuse of SCAs should all be adequately explored for South Africa to have a robust SCA system. Enforcement of continuous disclosure obligations remains critical, and South Africa's framework should give effect to the objects of the FMA and IOSCO Principles and Objectives of Securities Regulation.

²⁵⁷ [2020] ZASCA 83

²⁵⁸ *Hlumisa* case, para 73

Chapter Four: An Analysis of Australia's Continuous Disclosure Framework

4.1. Introduction

Australia's continuous disclosure framework comprises the Corporations Act 2001, Australian Securities and Investments Commission Act 2001, Treasury Laws Amendment (2021 Measures No. 1) Act 2021, ASX Listing Rules and ASX's Guidance Note 8. Like South Africa's continuous disclosure framework, Australia's framework is also made up of listing rules and statutes. Its significant difference from South Africa's framework is the provision of dedicated parts on continuous disclosure obligations in statutes and wider options for enforcement. Australia's framework outlines the criminal and civil penalties of listed issuers and their directors for failure to comply with their continuous disclosure obligations. Regarding enforcement, Australia embraces both private and public enforcement of continuous disclosure obligations. This entails that ASIC, the ASX and investors can all play a role in enforcing continuous disclosure. Investors' role is limited to the use of private enforcement mechanisms such as Securities Class Actions (SCAs). Unlike in South Africa, Australia presents the main statute, the Corporations Act, that comprehensively deals with continuous disclosure obligations. The jurisdiction presents a robust statutory continuous disclosure regime. In contrast to South Africa, Australia tends to embrace SCAs and their significance in providing legal redress to investors. Despite the two countries having the same twin peaks regulatory model, Australia is more determined to enforce continuous disclosure obligations. It presents a whole statute that defines the enforcement role of ASIC in securities law. Continuous disclosure is described as the bedrock of market integrity in Australia.²⁵⁹

Australia presents an excellent example of litigation funding by third parties, the importance of in-court enforcement to investors, how SCAs can improve disclosure standards, the causation and loss analysis in SCAs and the formidable existence of both private and public enforcement mechanisms in one jurisdiction. It presents a good case study for South Africa, considering the same regulatory framework and how the two countries enjoy the privilege of being some of the

²⁵⁹ Dixon and Hill, *The Protection of Investors and the Compensation for their Losses: Australia*, 17

largest economies in their respective regions. This chapter posits the similarities and differences in the framework and enforcement of continuous disclosure laws in Australia and South Africa.

4.2. Statutory Provisions on Continuous Disclosure

The Corporations Act (hereinafter CA) is Australia's principal statute on continuous disclosure. A curious feature of the Act is its merging of securities and corporate law.²⁶⁰ Unlike South Africa's FMA, the Act consists of a dedicated chapter on continuous disclosure obligations of listed entities. Ramsay analysed Australia's framework and submits that the Corporations Act provides backing to the Listing Rules.²⁶¹ Budhiraja submits that the introduction of a Statutory-Backed Continuous Disclosure Policy (SBCDP) by Australia in 1994, and subsequent amendments, fortified the Australian Securities Exchange's powers in policing its continuous disclosure rules.²⁶² Harford and Powell have highlighted that the adoption of an SBCDP in Australia if judiciously enforced, improves the costs of nondisclosure as a result of penalties by the ASX, and managers are inclined to consider the net position by weighing the benefits of competition against the costs of non-disclosure.²⁶³ The scholars' submission highlights that a continuous disclosure framework that is explicitly statutory backed, like that of Australia, fortifies the enforcement of continuous disclosure rules by both the national regulator and exchanges. It is imperative to first highlight the provisions of the Corporations Act that support the above proposition.

Chapter 6CA of the Act deals extensively with the liability of issuers and their directors in the event of a breach of continuous disclosure obligations. Sections 674 to 678, together with the applicable notes, make up Chapter 6CA of the CA. Some of the provisions of Chapter 6CA of the CA were amended by the Treasury Laws Amendment (2021 Measures No.1) Act 2021 (hereinafter TLAA). The amendment introduced significant changes. Section 674(1) of the Act stipulates that the provision applies to listed issuers bound by a disclosure requirement in market rules.²⁶⁴ Section 674 (1) states that:

²⁶⁰ Dixon and Hill, *The Protection of Investors and the Compensation for their Losses: Australia*, 3

²⁶¹ Ramsay I, Enforcement of Continuous Disclosure Laws by the ASIC, *Company and Securities Law Journal*, 196

²⁶² Budhiraja, S., *Measuring the Effectiveness of Continuous Disclosure Policy an Insight into Australia's Statutory-Backed Continuous Disclosure Policy and Its Effect on Equity*, 9

²⁶³ Harford, J. and Powell, R. G., *Measuring the Effectiveness of Australia's Statutory-Backed Continuous Disclosure Policy on 'Innovative' Investment Disclosures*, CIFR Paper No. 51/2015, (January 13, 2015), 3

²⁶⁴ https://www.legislation.gov.au/Details/C2017C00328/Html/Volume_3 > Section 674 of the CA

‘Subsection (2) applies to a listed disclosing entity if provisions of the listing rules of a listing market in relation to that entity require the entity to notify the market operator of information about specified events or matters as they arise for the purpose of the operator making that information available to participants in the market.’²⁶⁵

Section 674(2) of the CA was amended by the TLAA and now reads as follows:

If: (a) this subsection applies to a listed disclosing entity; and (b) the entity has information that those provisions require the entity to notify to the market operator; and (c) the information is not generally available; and (d) a reasonable person would expect the information if it were generally available, to have a material effect on the price or value of ED securities of the entity; the entity must notify the market operator of that information in accordance with those provisions.’²⁶⁶

Note 1 of the provision creates an offence. It states that:

Failure to comply with this subsection is an offence.’²⁶⁷

Note 3 of the same provision states that an infringement notice must be issued if the subsection is contravened. The responsible authority, ASIC, must issue such a notice. The Note distinguishes Australia’s CA from South Africa’s FMA. The provision clearly states the role of ASIC where there is a contravention by a listed disclosing entity. In South Africa’s case, there is no statutory provision that highlights the procedure that the FSCA will take when a disclosing entity breaches its continuous disclosure obligations. The Australian provision most importantly highlights that the consequences are not limited to a criminal offence created in Note 1.

The TLAA inserted section 674A. Section 674A (1) and (2) are identical to section 674 stipulated above except for the headings and paragraph (d) of section 674A (2). Section 674A introduces the fault requirement. Section 674A (2) states that: *If: (a) this subsection applies to a listed disclosing entity; (b) the entity has information that those provisions require the entity to notify to the market operator; and (c) the information is not generally available; and (d) the entity knows, or is reckless or negligent with respect to whether, the information would, if it were generally available,*

²⁶⁵ https://www.legislation.gov.au/Details/C2017C00328/Html/Volume_3> Section 674 of the CA

²⁶⁶ https://www.legislation.gov.au/Details/C2017C00328/Html/Volume_3> Section 674(2) of the CA amended as per the TLAA <<https://www.legislation.gov.au/Details/C2021A00082>> Accessed 15 May 2022

²⁶⁷ https://www.legislation.gov.au/Details/C2017C00328/Html/Volume_3> Accessed 15 May 2022

*have a material effect on the price or value of ED securities of the entity; the entity must notify the market operator of that information in accordance with those provisions.*²⁶⁸

Note 2 of section 674A (2) states that the subsection is a financial service civil penalty provision and, as a result, compensation orders are available for contraventions of section 674A (2).²⁶⁹ The provision is also listed as a civil penalty provision in section 1317E of the CA. This highlights a significant distinction from South Africa's statutes which fail to make provision for civil penalties for a breach of continuous disclosure obligations.

Section 674A of the CA highlights that an entity will only be liable for a breach of continuous disclosure obligations if the listed entity knows, or is reckless or negligent concerning whether a reasonable person would expect the information to have a material effect on the share price or value.²⁷⁰ This amendment of the CA by the TLAA in 2021 meant the introduction of the fault requirement into the equation when it comes to private actions and civil penalties. However, the amendment did not introduce the reasonable person test because section 674, before the amendments, still required it. The significant changes are that investors must now prove knowledge, recklessness, or negligence on the part of a listed entity. This introduces the fault requirement which is believed to dent opportunistic SCAs.²⁷¹ The introduction of a fault element in Australia's continuous disclosure framework has made the framework more closely aligned to jurisdictions such as the United Kingdom and the United States of America.²⁷² The move is believed to strike a balance between promoting companies to confidently make forecasts and the need to make sure that markets are informed.²⁷³ Section 674A cannot be equated to any provision in South Africa's FMA and the FRSA.

Section 674A (3) of the CA is another interesting provision. The provision deals with the liability of persons involved in a listed disclosing entity's breach of section 674A (2). It states that a person

²⁶⁸ <https://www.legislation.gov.au/Details/C2021A00082>> Accessed 24 May 2022

²⁶⁹ <https://www.legislation.gov.au/Details/C2021A00082>> Accessed 24 May 2022

²⁷⁰ <https://jws.com.au/en/insights/articles/2021-articles/the-new-fault-element-in-continuous-disclosure>> Accessed 24 May 2022

²⁷¹ <https://www.gadens.com/legal-insights/easing-of-continuous-disclosure-obligations-made-permanent-by-the-federal-government/>> Accessed 24 May 2022

²⁷² <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/reforms-australias-continuous-disclosure-laws-pass>> Accessed 15 May 2022

²⁷³ <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/reforms-australias-continuous-disclosure-laws-pass>> Accessed 15 May 2022

who is involved in such an act contravenes section 674A (3). The same civil consequences, including compensation orders that apply to a listed entity, also apply to that person in terms of Note 1 of section 674A (3). In other words, a listed entity's directors and officers can be held liable for their involvement in that listed entity's contravention of disclosure obligations. Directors and officers of a listed issuer can only invoke a section 674A (4) defence when faced with such a dilemma. Section 674A (4) highlights that such person will not be liable if they can show that they: *(a) took all steps that were reasonable in the circumstances to ensure that the listed disclosing entity complied with its obligations under subsection (2); and (b) after doing so, believed on reasonable grounds that the listed disclosing entity was complying with its obligations under that subsection.*²⁷⁴

This provision cannot be equated to any provision in South Africa's FMA and the FSRA. The two statutes do not deal with the involvement of directors, listed issuer's officers, or any person's involvement in breaching continuous disclosure obligations.

Section 677 of the CA is important in so far as it defines what material or price-sensitive information entails. The provision highlights that it is information that would have a material effect on the price or value of enhanced disclosure securities of the entity if the entity knows the information would, or would likely, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the securities.²⁷⁵ The proviso can be equated to JSE's Practice Note No. 2 of 2015 which seeks to guide listed issuer on what price-sensitive information is.

Section 678 of the CA is imperative since it deals with criminal consequences for breach of continuous disclosure. The provision highlights that Australia's Criminal Code applies to offences stipulated in subsections 674(2) and (5). Section 1311 of the CA stressed this proposition. In other words, the general criminal law principles apply to such an offence. It is a continuous disclosure criminal offence provision that cannot be equated to any provision in South Africa's FMA or the FSRA.

Sections 1041E and 1041H deal with misleading statements and misleading conduct respectively. Section 1041E, just like section 81 of South Africa's FMA, creates an offence. The significant

²⁷⁴ <https://www.legislation.gov.au/Details/C2021A00082>> Accessed 24 May 2022

²⁷⁵ <https://www.legislation.gov.au/Details/C2021A00082>> Accessed 24 May 2022

difference between the provisions and section 81 of the FMA is that only misleading statements can attract a criminal sanction in terms of section 1041E. Misleading conduct does not attract criminal sanctions in terms of section 1041H of the CA. However, both provisions attract civil liability in terms of section 1041I of the CA. The provision for civil action for loss or damage differentiates the provision from section 81 of South Africa's FMA. The positive development in South Africa is that section 278 of the FSRA tends to have addressed that lacuna by making a provision for compensation rights in the event of loss occasioned by another person's contravention of a financial sector law.

Section 1325(2) of the CA is another interesting provision when it comes to continuous disclosure in Australia. The provision highlights that a person who has suffered or is likely to suffer a loss due to a contravention of Chapter 6CA, can apply to the court or ASIC can apply on that person's behalf. This entails that ASIC can institute civil actions on behalf of investors in the event of a contravention of Chapter 6CA of the CA. Section 1325(3) of the CA highlights that ASIC will require the consent of such persons before lodging the application. This highlights a more significant role of ASIC in ensuring compliance with continuous disclosure obligations unlike in FSCA's instance.

The Corporations Act signifies Australia's efforts to enforce continuous disclosure obligations. This ranges from sections 674(4), 678 and 1311 dealing with criminal offences, sections 674A (2), 674A (3), 675A (2), 675A (3) and 1317E dealing with civil penalty provisions on continuous disclosure and the role of ASIC in enforcing continuous disclosure as reflected in section 1325(2) of the CA. It is an Act that reflects significant differences from South Africa's FMA or FSRA as far as the regulation and enforcement of continuous disclosure obligations are concerned. The TLAA made considerable changes to the Act.

4.2. ASIC v FSCA: Differences in Roles

Another important statute in Australia is the ASIC Act. Section 8 of the Act states that the commission is a body corporate that can sue and be sued in its own name. In contrast to South Africa, the FSCA is also a juristic person in terms of section 56 of the FSRA. Section 11 of the ASIC Act highlights that its powers are derived from statutes. That includes the powers to enforce statutory continuous disclosure provisions of the Corporations Act as outlined in the preceding

paragraph. Some of the provisions of the ASIC Act that are important in executing this role include sections 49 and 50. ASIC can initiate criminal proceedings in terms of section 49 of the Act. Section 50 of the Act gives the Commission the power to institute civil proceedings on behalf of investors. Whilst South Africa's FSCA can also refer matters for prosecution, the difference is that ASIC can utilize criminal statutory provisions on continuous disclosure which create such offences. The FMA does not have such provisions, nor is there a provision highlighting that the FSCA can institute actions on behalf of investors. ASIC's functions tend to be broader in scope and clearly defined by statutes as far as continuous disclosure is concerned.

4.3. The Listing Rules

ASX is the primary securities exchange in Australia.²⁷⁶ The exchange oversees compliance with its listing and operating rules.²⁷⁷ Like the JSE, the exchange does not have prosecutorial powers, and neither can it impose penalties for statutory contraventions by listed entities. In terms of section 17.3 of the ASX Listing Rules, it can suspend trading where there is a breach of its Listing Rules, just like the JSE. Its Listing Rules, like the JSE Listing Requirements, are fundamental in market supervision. Similar to section 3 of JSE Listing Requirements, Chapter 3 of the ASX Listing Rules requires the immediate disclosure of price-sensitive information to the ASX. Listing Rule 3.1 states that it should be any information that a reasonable person would expect to have a material effect on the value or price of securities.²⁷⁸ Chapter 6CA, particularly section 674, of the CA provides statutory backing to this provision.²⁷⁹

Listing Rule 3.1A provides exceptions to Listing Rule 3.1 of the ASX Listing Rules. Unlike section 3.10 of the JSE Listing Requirements, the provision is broader in scope and provides situations in which Listing Rule 3.1 will not apply. ASX Listing Rule 3.1A.1 states five exceptions which are: *(a) where the information consists of an incomplete negotiation, (b) where it will amount to a breach of the law if such information is disclosed, (c) where it constitutes a trade secret, (d) where it constitutes matters of supposition to warrant disclosure and, (e) where it is generated for internal management of the company.*²⁸⁰ In contrast, section 3.10 of the JSE Listing Requirements

²⁷⁶ Dixon and Hill, *The Protection of Investors and the Compensation for their Losses: Australia*, 4

²⁷⁷ <https://www2.asx.com.au/about>> Accessed 24 May 2022

²⁷⁸ <https://www.asx.com.au/documents/rules/Chapter03.pdf>> Accessed 17 May 2022

²⁷⁹ Dixon and Hill, *The Protection of Investors and the Compensation for their Losses: Australia*, 17

²⁸⁰ <https://www.asx.com.au/documents/rules/Chapter03.pdf>> Accessed 17 May 2022

highlights that an issuer may not only disclose in terms of section 3.4 of the JSE Listing Requirements where directors of that issuer are of the view that such disclosure will affect the legitimate interests of the issuer.²⁸¹ The JSE must grant such an exemption. Another distinct exception listed in Listing Rule 3.1A.2 of the ASX Listing Rules is the confidentiality exception which can be equated to section 3.10 of the JSE Listing Requirements. However, Rule 3.1A.2 qualifies the exception and states that only when the ASX has not formed the view that the information has ceased to be confidential.²⁸² Listing Rule 3.1A.3 then provides another exception. The provision states the reasonable person test, where a reasonable person would not expect the disclosure of the information in question.²⁸³ Chapter 3 of the ASX Listing requirements is not as detailed as ASX's Guidance Note 8 when it comes to continuous disclosure. In South Africa's instance, the JSE Listing Requirements are more detailed than the Practice Note No. 2 of 2015. Practice Notes are complementary in South Africa. It is imperative to discuss the two notes.

4.4. Exchanges' Notes

Guidance Note 8 (hereinafter Guidance Note) can be equated to South Africa's Practice Note No.2 of 2015. However, ASX Guidance Note 8 is more detailed than JSE's Practice Note. The Guidance Note covers various issues to the extent of providing examples of principles covered in the document and makes provision for the use of trading halts and voluntary suspensions in respect of disclosure issues.²⁸⁴ The Guidance Note states that its purpose is to assist entities in understanding and complying with their continuous disclosure obligations.²⁸⁵ The Guidance Note outlines information likely to affect the prices or value of securities that entities should disclose.²⁸⁶ Unlike JSE's Practice Note, the Guidance Note provides a non-exhaustive list of information that could be price-sensitive. Such information includes a credit rating of an entity or its securities, granting or withdrawal of a material licence and receiving or giving of a notice of intention to make a takeover.²⁸⁷ One of the curious features of the Guidance Note is its definition of "immediately". The preceding chapter highlights that section 3.4 of the JSE Listing Requirements requires the

²⁸¹ <https://www.jse.co.za/sites/default/files/media/documents/2019-04/JSE%20Listings%20Requirements.pdf>>

²⁸² <https://www.asx.com.au/documents/rules/Chapter03.pdf>> Accessed 17 May 2022

²⁸³ <https://www.asx.com.au/documents/rules/Chapter03.pdf>> Accessed 17 May 2022

²⁸⁴ https://www.asx.com.au/documents/rules/gn08_continuous_disclosure.pdf> Accessed 17 May 2022

²⁸⁵ https://www.asx.com.au/documents/rules/gn08_continuous_disclosure.pdf> Accessed 17 May 2022

²⁸⁶ https://www.asx.com.au/documents/rules/gn08_continuous_disclosure.pdf> Accessed 17 May 2022

²⁸⁷ https://www.asx.com.au/documents/rules/gn08_continuous_disclosure.pdf> Accessed 17 May 2022

disclosure of price-sensitive information without delay. ASX's Listing Rule 3.1 also requires the disclosure of price-sensitive information to the bourse immediately. ASX's Guidance Note states that "immediately" does not mean "instantaneously" but rather promptly or without delay.²⁸⁸ In other words, the bourse acknowledged that the complexity of information that should be disclosed might differ with each case. Therefore, a hurried disclosure will not serve the objects of continuous disclosure obligations.

On trading and voluntary suspension, Guidance Note 8 highlights that listed entities should consider whether these measures are necessary between the time they become obliged to comply with their continuous disclosure obligations and before they can make an announcement.²⁸⁹ The Guidance Note stipulates that these measures are beneficial to both the market and the entity as they will prevent the trading of the securities on an uninformed basis and can insulate an issuer and its officers from legal and financial consequences that might flow from trading on an uninformed basis.²⁹⁰ Unlike JSE's Practice Note, the Guidance Note covers many other aspects fundamental to issuers and their officers. It lives up to its name of being a guide.

4.5. Public and Private Enforcement

Australia's continuous disclosure regime consists of both private and public enforcement actions which seek to protect investors.²⁹¹ Like South Africa's FSCA, ASIC is the responsible authority in terms of the CA and the ASIC Act. Varzaly stressed that in 2010 the authority took over the task to supervise the trading on licensed markets from ASX and other markets.²⁹² The authority enforces the CA and the ASIC Act. Like South Africa's FSCA, ASIC has an array of enforcement measures at its disposal. The authority can utilize civil penalties, criminal proceedings, infringement notices, enforceable undertakings, and restrict an entity from making a reduced-content prospectus.²⁹³ Studies have shown its high success rate of 90 percent when it pursued criminal actions in 2016-17.²⁹⁴ The same percentage was attained in 2019-20.²⁹⁵ ASIC also

²⁸⁸ https://www.asx.com.au/documents/rules/gn08_continuous_disclosure.pdf> Accessed 17 May 2022

²⁸⁹ https://www.asx.com.au/documents/rules/gn08_continuous_disclosure.pdf> Accessed 17 May 2022

²⁹⁰ https://www.asx.com.au/documents/rules/gn08_continuous_disclosure.pdf> Accessed 17 May 2022

²⁹¹ Dixon and Hill, *The Protection of Investors and the Compensation for their Losses: Australia*, 32

²⁹² Varzaly, *The Effectiveness of Disclosure Law Enforcement in Australia*, 12

²⁹³ Varzaly, *The Effectiveness of Disclosure Law Enforcement in Australia*, 30

²⁹⁴ Dixon and Hill, *The Protection of Investors and the Compensation for their Losses: Australia*, 11

²⁹⁵ <https://download.asic.gov.au/media/2aaomxuz/asic-annual-report-2020-21-full-1.pdf>> Accessed 24 May 2022

pursued criminal litigation in 2020-21 in which it completed 29 cases that recorded a 100 percent success rate.²⁹⁶ One of the significant convictions for a breach of continuous disclosure obligations was the conviction of Waratah Resources' former executive chairman Mr. Kirkpatrick who was convicted for aiding and abetting Waratah to breach its continuous disclosure obligations.²⁹⁷ The former executive chairman was sentenced to 12 months imprisonment.²⁹⁸ Varzaly submits that this was the first criminal conviction in respect of an entity's breach of continuous disclosure obligations.²⁹⁹ Without a criminal penalty provision in the FMA, South Africa will have to wait a little longer to witness its first continuous disclosure criminal conviction.

One of the outstanding powers of ASIC is its power to institute civil proceedings on behalf of investors although it prefers that they take private actions.³⁰⁰ Section 1317E of the CA shows that ASIC is responsible for enforcing civil penalty provisions. This includes provisions on continuous disclosure obligations. This does not take away the investors' right to seek compensation, most commonly through SCAs.³⁰¹ Compared to South Africa, the absence of civil penalty provisions concerning continuous disclosure in the FMA highlights a shortfall of the Act to ensure that the FSCA is more involved in enforcing continuous disclosure as the responsible authority of the FMA.

The inclusion of directors as defendants in SCAs and ASIC actions is one of the distinct features of Australia's disclosure enforcement.³⁰² Other noticeable features include the institution of parallel ASIC and private enforcement actions, the reliance on administrative actions when it comes to public enforcement and a focus on issuers by ASIC.³⁰³

²⁹⁶ <https://download.asic.gov.au/media/2aaoxuz/asic-annual-report-2020-21-full-1.pdf>> Accessed 24 May 2022

²⁹⁷ <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2017-releases/17-018mr-waratah-resources-former-executive-chairman-convicted-and-sentenced-for-misleading-the-market/>> Accessed 27 May 2022

²⁹⁸ <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2017-releases/17-018mr-waratah-resources-former-executive-chairman-convicted-and-sentenced-for-misleading-the-market/>> Accessed 27 May 2022

²⁹⁹ Varzaly, *The Effectiveness of Disclosure Law Enforcement in Australia*, 30

³⁰⁰ Dixon and Hill, *The Protection of Investors and the Compensation for their Losses: Australia*, 25

³⁰¹ Dixon and Hill, *The Protection of Investors and the Compensation for their Losses: Australia*, 25

³⁰² Varzaly J, *The Effectiveness of Disclosure Law Enforcement in Australia*, pg. 6

³⁰³ Varzaly J, *The Effectiveness of Disclosure Law Enforcement in Australia*, pg. 6-7

Another significant feature of ASIC's enforcement powers is its public enforcement of directors' duties.³⁰⁴ This was highlighted in the case of *ASIC v Hellicar*³⁰⁵, in which the authority stated that the directors, in that case, breached their statutory duties by publishing misleading announcements to ASX. This reflects a distinct feature from the powers of South Africa's FSCA. South African literature highlights that sections 75 and 76 of South Africa's Companies Act 71 of 2008 reflect that enforcement of directors' duties is mainly by the company itself or by the shareholders through derivative actions.³⁰⁶ The FSCA does not deal with public enforcement of directors' duties. In contrast to Australia, in terms of section 674A(3) of the CA, a listed issuer's directors and officers can be held liable if they are involved in the listed issuer's breach of continuous disclosure obligations.³⁰⁷ South Africa does not have an equivalent provision.

In respect of directors' liability, section 79 of Australia's CA defines the word 'involved' and states that it means acts such as aiding, abetting, inducing the contravention and conspiring to contravene.³⁰⁸ However, directors can invoke a section 674A(4) defence. The provision states that a person will not be liable in terms of section 674A (3) if it can be shown that they took reasonable steps to ensure a listed issuer's compliance with continuous disclosure obligations and believed on reasonable grounds that the issuer was complying with such obligations.³⁰⁹ All these provisions and cases highlight the differences in the use of public and private enforcement mechanisms between the two jurisdictions. Australia embraces parallel actions where it is not unusual to have ASIC actions and private enforcement mechanisms emanating from the same case.³¹⁰ The use of SCAs as a private enforcement mechanism is an aspect that needs proper ventilation.

4.6. Securities Class Actions: The Role of Statutory Causes of Action

As highlighted in the preceding paragraph, Australia embraces both public and private enforcement of continuous disclosure. ASIC encourages the institution of private actions instead

³⁰⁴ https://ecgi.global/sites/default/files/working_papers/documents/dixonhillfinal.pdf> Accessed 24 May 2022

³⁰⁵ (2012) HCA 17

³⁰⁶ For example, in *Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis* [2020] ZASCA 83

³⁰⁷ Section 674A (3) of the CA

³⁰⁸ Section 79 of the CA <https://www.legislation.gov.au/Details/C2018C00031>>

³⁰⁹ <https://www.legislation.gov.au/Details/C2021A00082>> Accessed 17 May 2022

³¹⁰ Varzaly, *The Effectiveness of Disclosure Law Enforcement in Australia*, 46

of the national regulator seeking compensation on behalf of the affected parties.³¹¹ SCAs are embraced in Australia but tend to not be welcomed with great enthusiasm in South Africa. The *Dorajay Pty Ltd v Aristocrat leisure case*³¹² is considered the first successful shareholder class action in Australia against a listed entity that was settled in 2008 for a staggering \$144.5 million.³¹³ The *Myer* case highlights that in continuous disclosure SCAs, investors rely on statutory provisions that stipulate civil liability of listed issuers in the event of a breach of statutory continuous disclosure obligations.³¹⁴

In South Africa, no SCAs have been instituted based on a listed issuer's breach of continuous disclosure obligations. Aziza presents a complementary view by stating that there is no SCA instituted in South Africa from 1947 to 2018.³¹⁵ Investors in South Africa attempted to institute a securities class action in the case of *De Bruyn v Steinhoff International Holdings N.V. and Others*.³¹⁶ However, the inspiration to institute SCAs was short-lived as the claim was not successful. It was the first SCA brought for certification before South African courts.³¹⁷

Dixon and Hill stressed that the institution of SCAs in Australia is straightforward considering that the country does not have a certification requirement.³¹⁸ That is not the case in South Africa's instance. South Africa requires class action certification as outlined in the *De Bruyn* case. This exhibits the two jurisdictions' differences not only in the use of private enforcement mechanisms for continuous disclosure but in the processes as well. Australia uses adverse cost orders in dealing with the issue of opportunistic SCAs. It has embraced third-party litigation funding in class actions, which saw insurance companies playing a role in funding class actions.³¹⁹

Certification of class actions distinguishes the two jurisdictions. The South African court in the *Pioneer Foods* case stated that there are many advantages of the certification of class actions.³²⁰

³¹¹ Dixon and Hill, *The Protection of Investors and the Compensation for their Losses: Australia*, 25

³¹² *Dorajay Pty Ltd v Aristocrat Leisure Limited* [2009] FCA 19

³¹³ Budhiraja, S., *Measuring the Effectiveness of Continuous Disclosure Policy an Insight into Australia's Statutory-Backed Continuous Disclosure Policy and Its Effect on Equity*, 9

³¹⁴ *TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Limited*, para 1122

³¹⁵ Aziza, *Securities Regulation, Enforcement and Market Integration in the Development of Sub-Saharan Africa's Capital Markets*, 256-7, <https://ora.ox.ac.uk/objects/uuid:5a738d2a-4ea9-44bc-bf87-52f0608119df/files/d7w62f837c>>

³¹⁶ *De Bruyn v Steinhoff International Holdings N.V. and Others* (29290/2018) [2020] ZAGPJHC 145 (SA)

³¹⁷ *De Bruyn v Steinhoff International Holdings N.V. and Others*, para 5

³¹⁸ Dixon and Hill, *The Protection of Investors and the Compensation for their Losses: Australia*, 25

³¹⁹ Dixon and Hill, *The Protection of Investors and the Compensation for their Losses: Australia*, 26

³²⁰ *Children's Resource Centre Trust v Pioneer Food*, para 24

The court stated that they include the court ensuring the protection of the interests of those who will be impacted by the action at the outset, allowing the defendant to show at an early stage why the action should not proceed and to avoid the use of litigation to induce settlements despite the case lacking merit.³²¹ The court criticised Australia's experience and intimated that it is largely unsatisfactory, made up of various interlocutory applications, delays and significant costs.³²² The case highlights that South Africa uses the certification process to limit opportunistic class actions or to help the court dispose of a matter without the burden of a prolonged trial where there is no triable issue. Whether the certification process will work in SCAs in South Africa remains to be seen. There is no reason to believe that certification will not serve its purpose when applied in SCAs.

Despite not embracing the certification process, Australia's framework tends to promote the private enforcement rights of investors. Statutory causes of action are to the advantage of investors in which they utilize private enforcement measures such as SCAs to enforce a breach of continuous disclosure obligations. The *Myer* case demonstrates that where an investor can show that a listed entity breached section 674 of the CA, what follows is a claim for compensation where there is a loss occasioned by that breach. This denotes the significance of statutory liability provisions for a breach of continuous disclosure obligations. It is imperative to discuss, in detail, one of the SCAs that intimate statutory causes of action.

In a *locus classicus* case of *TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Limited*³²³, Beach J dealt with a continuous disclosure claim brought by the Applicant against Myer Holdings Limited in Australia. The Applicant TPT Patrol brought the proceedings in its representative capacity, representing all persons who acquired Myer's ED Securities after 11 September 2014 and were holders of those securities at the commencement of trading in March 2015.³²⁴ The Applicant alleged that Myer breached its continuous disclosure obligations in terms of section 674 of the Corporations Act. The proposition was that the breach resulted in trading in inflated prices.³²⁵ The Applicant alleged that it would not have acquired the securities in question if not because of Myer's disclosure failures and misleading or deceptive conduct. In respect of

³²¹ *Pioneer Food case*, para 24

³²² *Pioneer Food case*, para 24

³²³ [2019] FCA 1747

³²⁴ *Myer case*, para 1 <https://jade.io/article/672160/section/61314?sr.t=THE+PLEADED+CASE&sr.x=1>

³²⁵ *Myer case*, para 1662

continuous disclosure, one of the aspects was that Myer was required to disclose, by no later than 21 November 2014, that its likely net-profit-after-tax for the financial year 2015 was not likely to be materially above the financial year 2014 net-profit-after-tax as previously intimated.³²⁶ The entity failed to disclose such material information thereby breaching the Corporations Act and ASX Listing Rules. The court held that Myer breached sections 674 and 1041H of the Corporations Act but the Applicant failed to prove that there was damage or loss occasioned by the breach.³²⁷

Myer's case is fundamental for a variety of reasons. First, it signifies the embracement of SCAs in Australia, the importance of statutory liability provisions on continuous disclosure, the need for a causation-loss analysis and a nexus between provisions on misleading statements and continuous disclosure obligations. It is not the only continuous disclosure case. The *Southcorp* case, discussed below, introduced the comprehensive scheme proposition.

4.7. A Comprehensive Scheme

*ASIC v Southcorp*³²⁸ is the first Australian case to be brought before a court in which a civil penalty was sought for a breach of continuous disclosure obligations.³²⁹ In the case, the Defendant admitted to having contravened section 674(2) of the CA by sending selective emails to analysts and failing to inform the market of the material information contained in the emails.³³⁰ The case is fundamental in highlighting that statutory-based continuous disclosure was introduced in Australia to enhance continuous disclosure obligations and to provide a comprehensive scheme.³³¹ The court highlighted that Australian's Corporations Law did not have a comprehensive scheme for the full and accurate disclosure of market-sensitive information on a timely basis.³³² The regime intends to assist equity and debt holders, advisors, directors and holders of charges.³³³ The court highlighted that a well-informed market facilitates investor confidence and consequently a will to

³²⁶ *Myer case*, para 1195

³²⁷ *Myer case*, para 1719

³²⁸ (No.2) [2003] FCA 1369 < <https://jade.io/article/107978>>

³²⁹ *Southcorp case*, para 1

³³⁰ *Southcorp case*, para 4 & 5

³³¹ *Southcorp case*, para 9

³³² *Southcorp case*, para 9

³³³ *Southcorp case*, para 9

invest in Australia's markets.³³⁴ It is a goal that cannot be understated and South Africa should reflect on that goal.

4.8. Continued Development: A Goal Towards Perfection

The continued development of Australia's continuous disclosure framework signifies the acknowledgement by the regulators that the framework is not at its perfection stage. Varzaly also submits that besides both private and public enforcement mechanisms being employed by Australia, investors are not fully compensated.³³⁵ The author, however, submits that the targeted citation of entities' directors and officers as defendants in private enforcement mechanisms has increased the deterrent effect of the enforcement mechanisms in Australia.³³⁶ However, many SCAs in Australia are believed to be resulting in substantial settlement rather than concluded litigation.³³⁷ The author also believes that there is a little deterrent effect on directors flowing from public enforcement mechanisms, such as infringement notices since they are targeted at entities.³³⁸ On the other hand, public enforcement mechanisms can also signal the seriousness of responsible authorities in tackling breaches of continuous disclosure obligations. It is an initiative that market participants, investors and the public will be interested in.

4.9. Conclusion

Despite some of the challenges Australia faces, it presents a good case study for South Africa which is a country with developing securities law despite enjoying a higher ranking in securities regulation.³³⁹ South Africa can learn that having statutory criminal liability provisions can enhance enforcement of continuous disclosure frameworks and deter issuers and their directors from breaching their continuous disclosure obligations. Civil liability provisions can also play an integral role in the enforcement of continuous disclosure. They can be invoked as statutory causes

³³⁴ *Southcorp case*, para 10

³³⁵ Varzaly, *The Effectiveness of Disclosure Law Enforcement in Australia*, 34

³³⁶ Varzaly, *The Effectiveness of Disclosure Law Enforcement in Australia*, 35

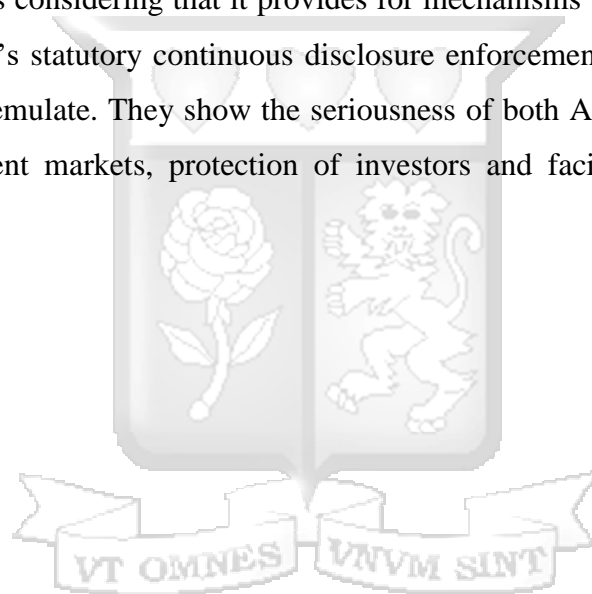
³³⁷ Dixon and Hill, *The Protection of Investors and the Compensation for their Losses: Australia*, 35

³³⁸ Varzaly, *The Effectiveness of Disclosure Law Enforcement in Australia*, 35

³³⁹ Ranked 3rd in 2016-17 by WEF < <https://www.jse.co.za/regulation/companies-issuer-regulation> > Accessed 15 May 2022

of action when investors institute SCAs. This entails that investors will be compensated. Such a provision will advance the objects of section 278 of the FSRA.

The statutory liability provisions also ensure that the FSCA plays an integral role in enforcing continuous disclosure obligations. The authority deals with statutory contraventions. Without these provisions, the FSCA cannot allege contravention of statutory provisions on continuous disclosure. Its lack of a single enforcement matter on continuous disclosure since the promulgation of the FMA is a cause of concern. The criminal and civil liability provisions can present many advantages to investors, market participants and the public. Dixon and Hill submit that a continuous disclosure regime can also benefit insiders by allowing them to trade in securities without fear of contravening insider trading provisions considering that it provides for mechanisms to disclose price-sensitive information.³⁴⁰ Australia's statutory continuous disclosure enforcement mechanisms enunciated above are something to emulate. They show the seriousness of both ASX and ASIC's efforts in ensuring fair and efficient markets, protection of investors and facilitation of confidence in Australia's markets.



³⁴⁰ Dixon and Hill, *The Protection of Investors and the Compensation for their Losses: Australia*, 17

Chapter Five: Findings, Conclusion and Recommendations

5.1. Introduction

This chapter gives a precis of the findings of the study. Inferences are drawn from the findings and recommendations are advanced based on the conclusions. The findings of this study are based on the literature analysed, South Africa and Australia's continuous disclosure frameworks, international instruments proffered by IOSCO and case law in the compared jurisdictions.

5.2. Findings

Chapter one first highlights the adoption of the twin-peaks regulatory model in South Africa. The researcher found that South Africa's continuous disclosure framework does not have statutory civil and criminal liability provisions that can assist regulators and investors in enforcing continuous disclosure obligations. There are equally no liability provisions for directors and officers involved in a listed issuer's breach of continuous disclosure obligations. Private enforcement rights of investors are not utilized, and there has been no enforcement matter on continuous disclosure by the national regulator since the promulgation of the Financial Markets Act in February 2013. The researcher highlighted the rationale for continuous disclosure, which includes ensuring that markets are fair, efficient, and transparent, reduction of information asymmetry and protecting investors. The researcher found that South Africa's securities law is still developing and is guided by international instruments such as IOSCO Objectives and Principles.

Chapter two primarily reflects the significant adoption of IOSCO's Objectives and Principles in South Africa's framework. The most notable adoption is the adoption of IOSCO's Ongoing Disclosure and Material Development Reporting by Listed Entities Principles. The researcher found that the principles and objectives are fundamental in understanding the rationale for continuous disclosure. Despite the adoption of IOSCO principles, the researcher found that there is still a problem with principles for enforcement of securities regulation. Investor protection rights are not reflected since there are no private enforcement cases reported to date.

Chapter three reflects essentially the instruments that regulate disclosure obligations in South Africa. The researcher found that there are no statutory criminal and civil liability provisions in the event of listed issuers and their directors' and officers' breach of continuous disclosure

obligations. The JSE Listing Requirements are the main instrument regulating disclosure obligations. The researcher found that the FMA and the FSRA fall short as far as statutory civil and criminal liability provisions are concerned. The researcher found the overreliance of the FMA on market infrastructure. Gaps in the enforcement of continuous disclosure were also stated with the FSCA, or previously the FSB, not having a single enforcement matter on breach of continuous disclosure obligations since the promulgation of the FMA. The researcher found that section 278 of the FSRA seeks to give investors compensation rights. However, no single case reflects the private enforcement rights of investors through securities class actions in South Africa. The researcher found that the Applicant in the *De Bruyn* case attempted to institute an SCA but failed to plead the case properly. The researcher found that the certification of class actions in South Africa reflects the country's cautious approach to class actions.

An analysis of South Africa and Australia's continuous disclosure frameworks is done in Chapter four. The researcher found that Australia's Corporations Act contains statutory criminal and civil liability provisions in the event of a listed entity and its directors' failure to comply with continuous disclosure obligations. The researcher found that, unlike in South Africa, there is both private and public enforcement of continuous disclosure obligations in Australia. Chapter four highlights that Australia's ASIC plays an integral role in enforcing continuous disclosure obligations than South Africa's FSCA. Another distinctive feature of the enforcement process in Australia is the use of private enforcement mechanisms such as SCAs. The researcher found that the *Myer* case presents an excellent example of SCAs that can be instituted based on statutory causes of action. The chapter also highlights that both jurisdictions give exchanges regulatory powers, and their regulatory framework model is the same.

In a nutshell, the researcher found that South Africa's continuous disclosure enforcement framework is inadequate and there is less use of private enforcement mechanisms by investors.

5.3. Recommendations

5.3.1. Civil and Criminal Liability Statutory Provisions on Continuous Disclosure

Chapter four of this research stipulated various public and private enforcement mechanisms utilised by ASIC, ASX and investors in Australia. The researcher concluded that there should be

statutory civil and criminal liability provisions to enforce continuous disclosure obligations in South Africa. This will advance the rationale for continuous disclosure frameworks which includes ensuring that markets are fair, efficient, and transparent, reduction of information asymmetry and protecting investors. This study proposes that this should be done by amending the FMA. The Act should make provision for civil and criminal liability penalties that will apply in the event of an issuer, its officers and directors' breach of continuous disclosure obligations. South Africa can take a leaf from Chapter 6CA of Australia's Corporations Act. The amendment will facilitate enforcement and advance the goals of securities regulation outlined by IOSCO.

5.3.2. Embrace Securities Class Actions and Third-party Funding

Chapter four of this study outlines that, in South Africa, there are no securities class actions that investors have instituted in their quest to ensure enforcement of continuous disclosure obligations. This highlights a limited scope of investors' remedies in South Africa. Statutory liability provisions on continuous disclosure will ensure investors' statutory causes of action and that section 278 of the FSRA, which provides for compensation rights, will be given effect. Considering the exorbitant legal fees that can come which SCAs, South Africa should embrace third-party litigation funding where insurance companies can play a role. Considering the success rate of class actions that have been instituted in South Africa in other areas of law despite the certification process, South Africa can retain the mechanism to safeguard against opportunistic SCAs. There is no need to have a separate process for SCAs considering that there is no SCA instituted that can highlight that it is the certification process that is hampering SCAs. Statutory causes of action will facilitate the embracement of SCAs. The adoption of the Australian mechanism of adverse costs will be an alternative if the certification process is deemed to be hampering SCAs.

5.3.3. Liability of Issuer's Officers and Directors

Paragraph 5.4.1 recommends that the proposed statutory liability provisions should not be limited to issuers but should extend to their officers and directors where they are involved in a breach of continuous disclosure obligations. This will facilitate deterrence and enforcement of continuous disclosure obligations. Australia's framework can be the *ne plus ultra* in this regard.

5.4. Conclusion

The main objective of the research was to assess the rationale for having continuous disclosure frameworks, enforcement of such frameworks in South Africa compared to jurisdictions such as Australia and to critically analyse South Africa's continuous disclosure framework using IOSCO Principles and Objectives. This was executed by discussing the literature on continuous disclosure, stipulating theories that underpin continuous disclosure, assessing the statutory provisions that deal with disclosure obligations in South Africa, assessing Australia's continuous disclosure regime, interrogating the continuous disclosure enforcement powers of the FSCA in South Africa compared to ASIC's enforcement and an assessment of the use of class actions in the two jurisdictions. The researcher concluded that in South Africa there are no statutory criminal and civil liability provisions that deal with listed issuers and their directors' breach of continuous disclosure obligations, which is a different situation in Australia. The research concluded that there is a gap in the enforcement as there are no enforcement matters on continuous disclosure by the FSB/FSCA since 2013, which highlights less public enforcement of continuous disclosure obligations.

Despite the commendable incorporation of IOSCO principles, continuous disclosure is not receiving enough attention in South Africa. Statutory civil and criminal liability provisions are critical in ensuring public and private enforcement of continuous disclosure obligations, transparency, fair play, efficient markets, protection of investors and the integrity of the securities market. The researcher found that private enforcement mechanisms such as securities class actions, which are not yet embraced in South Africa, ensure that investors have a remedy and play an essential role in enforcing continuous disclosure laws. The researcher found that there is no reason to not continue with the certification process if SCAs are embraced in South Africa. If other scholars find that the certification process limits SCAs, the researcher recommends the adoption of the Australian-type of securities class actions. The researcher, therefore, concluded that private and public enforcement of continuous disclosure in South Africa can be enhanced by the enactment of statutory civil and criminal liability provisions in the FMA.

The findings and recommendations of this research are important to retail and institutional investors and financial regulators who should understand the rationale for continuous disclosure and how its enforcement should take shape in line with international standards and other developed

jurisdictions such as Australia. The research contributes to generally scant literature on South Africa's continuous disclosure framework. National regulators should note the shortcomings highlighted in the framework and embrace proposed reforms on continuous disclosure laws to ensure stable markets, support economic growth, development and improved livelihoods.



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APPENDICES

Appendix I: Ethical Clearance



11th April 2022

Mr Mamvura Enodias,
enodias.mamvura@strathmore.edu

Dear Mr Mamvura,

RE: The Rationale for and Enforcement of Continuous Disclosure Frameworks in Securities Regulation in South Africa

This is to inform you that SU-IERC has reviewed and **approved** your above **SU Masters'** research proposal. Your application reference number is **SU-IERC1326/22**. The approval period is **11th April 2022 to 10th April 2023**.

This approval is subject to compliance with the following requirements:

- i. Only approved documents including (informed consents, study instruments, MTA) will be used
- ii. All changes including (amendments, deviations, and violations) are submitted for review and approval by SU-IERC.
- iii. Death and life-threatening problems and serious adverse events or unexpected adverse events whether related or unrelated to the study must be reported to SU-IERC within 48 hours of notification
- iv. Any changes, anticipated or otherwise that may increase the risks or affected safety or welfare of study participants and others or affect the integrity of the research must be reported to SU-IERC within 48 hours
- v. Clearance for export of biological specimens must be obtained from relevant institutions.
- vi. Submission of a request for renewal of approval at least 60 days prior to expiry of the approval period. Attach a comprehensive progress report to support the renewal.
- vii. Submission of an executive summary report within 90 days upon completion of the study to SU-IERC.

Prior to commencing your study, you will be expected to obtain a research license from National Commission for Science, Technology, and Innovation (NACOSTI) <https://research-portal.nacosti.go.ke/> and obtain other clearances needed.

Yours sincerely,


for: **Dr Ben Ngoye,**
Secretary; SU-IERC

Cc: Prof Fred Were,
Chairperson; SU-IERC



Appendix II: Plagiarism Report



Document Information

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Submitted by	
Submitter email	Enodias.Mamvura@strathmore.edu
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By
Enodias Mamvura Student No. 133861
Supervisor: Professor Winifred Tarinyeba Kiyabwire Submitted in Partial Fulfilment of the Requirements for the Degree of Master of Laws (International Financial Law and Regulation) at Strathmore University
Strathmore Law School
Strathmore University
Nairobi, Kenya
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