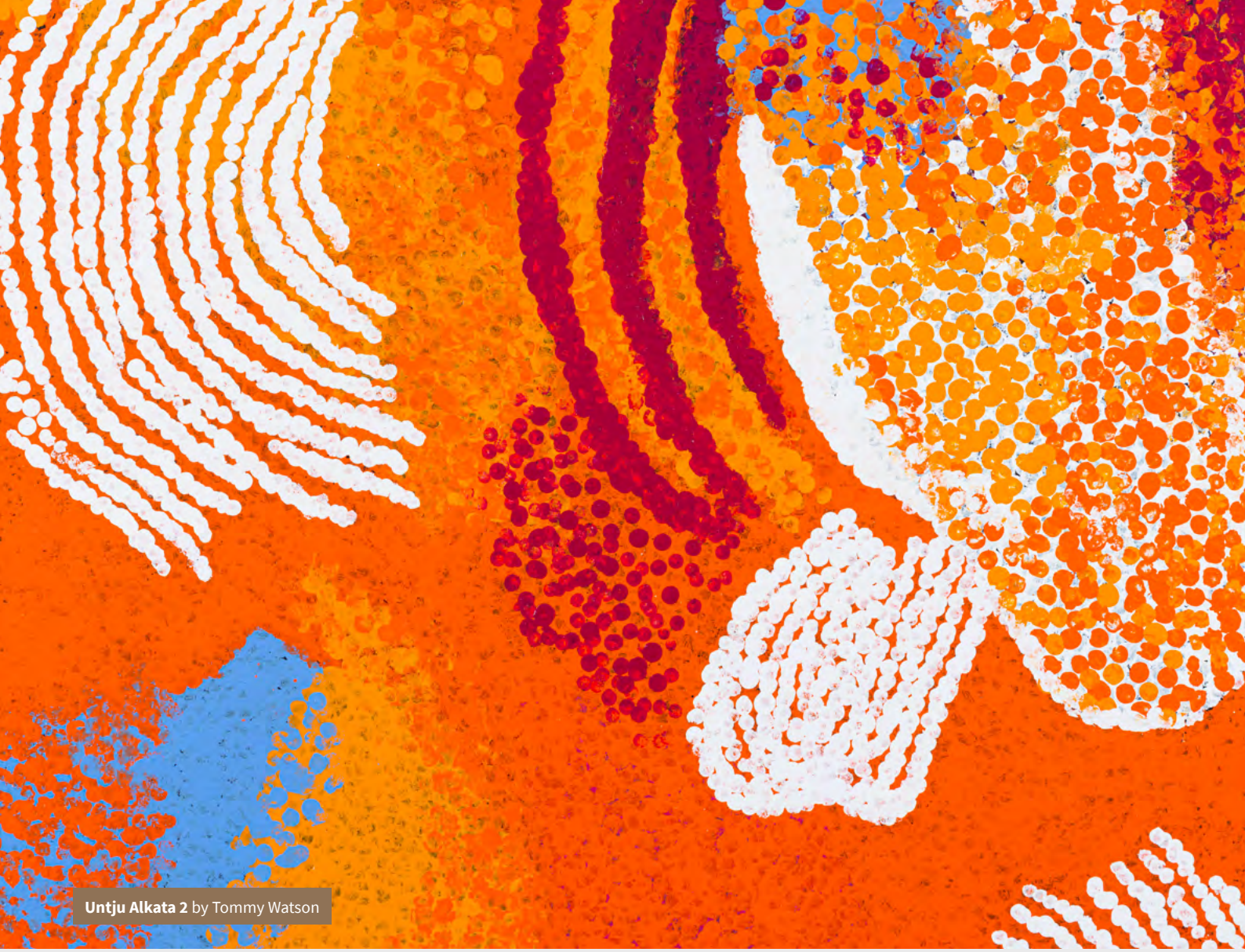

Untju Alkata 2 by Tommy Watson

THE REVIEW

CLASS ACTIONS IN AUSTRALIA 2024/2025

KING&WOOD MALLESONS
金杜律师事务所

CONTINUOUS DISCLOSURE AND HOW TO NAVIGATE CONSTRUCTIVE AWARENESS IN THE AGE OF TECHNOLOGY

Companies today are grappling with rapidly changing data systems and how these systems intersect with their continuous disclosure obligations. For instance:

- To what extent do the principles of constructive awareness of 'information' require data stored in company systems to be considered for the purpose of the continuous disclosure rules?
- What does good corporate governance look like from the perspective of ensuring information stored in data systems is escalated where that is necessary?

This section explores some of the challenges faced by companies against the backdrop of recent continuous disclosure judgments, and sets out some issues that should be considered by all officers of publicly listed companies.

CONTINUOUS DISCLOSURE OBLIGATIONS

Chapter 6CA of the *Corporations Act 2001* (Cth) (**Corporations Act**) and the ASX Listing Rules require publicly listed companies to disclose to the market information the company 'has' that is not generally available and which:

(a) a reasonable person would expect, if it were generally available, to have a material effect on the price or value of the company's shares,[25] or

(b) the company knows would have a material effect on the price or value of the company's shares (or is reckless or negligent with respect to whether this is the case).[26]

Securities class actions in Australia typically seek to recover losses said to be occasioned to group members by reason of a company's contravention of the continuous disclosure obligations and concomitant misleading or deceptive conduct. All published judgments have considered the form of the continuous disclosure provisions as they existed before amendments to the Corporations Act in 2021, being only the 'reasonable person' expectation in (a) above. For conduct occurring since those amendments, private litigants are now required to establish the higher threshold fault element in (b) above.

Two Full Federal Court decisions considering the continuous disclosure obligations in s674 were handed down during the review period (one of which was in the class action context).[27] This section of The Review analyses the current state of play on the question of when a company may be found to 'have' information through the principles of constructive awareness, and what this means for companies and company officers.

CONSTRUCTIVE AWARENESS OF INFORMATION

The question of when a company is taken to 'have' information turns on whether the company was 'aware' of the information.[28] A company may become 'aware' of information through the *actual* knowledge of an officer or the *constructive* knowledge of an officer who '*ought reasonably to have come into possession of the information in the course of the performance of their duties as an officer*'.[29]

The extension of the continuous disclosure obligations to information of which an officer is constructively aware is important because, without it, a company could avoid or delay its continuous disclosure obligations by simply failing to report or escalate market sensitive information to its Board or executive management.[30]

25 Corporations Act s674 and Listing Rule 3.1.
26 Corporations Act s674A.
27 *Zonia Holdings Pty Ltd v Commonwealth Bank of Australia Limited* [2025] FCAFC 63 (Zonia); *Australia and New Zealand Banking Group Limited v Australian Securities and Investments Commission* (2024) 305 FCR 383 (ANZ).
28 *ANZ* at [34] (Lee J, with whom Markovic and Button JJ agreed on ground 1); see also Listing Rules 3.1 and 19.12.
29 *Zonia* at [224] (Murphy, Moshinsky and Button JJ); *ANZ* at [34] (Lee J, with whom Markovic and Button JJ agreed on ground 1); see also Listing Rules 3.1 and 19.12.
30 Part 4.4 of ASX Guidance Note 8.

HOW DOES THE CONSTRUCTIVE AWARENESS TEST APPLY IN PRACTICE?

In 2022, the Full Federal Court in *Worley* shed some light on how the constructive awareness test applies in practice. The Full Court held that the continuous disclosure provisions deem a company to have information where:

> *'(a) the information in fact existed, (b) reasonable information systems or management procedures ought to have brought the information to the attention of a relevant company officer, and (c) acting reasonably the company officer ought to have discerned the significance of the information.'*[31]

The Full Court also held that a company may be aware of, and required to disclose, information in the nature of an *opinion* which a company officer ought reasonably to have formed on the facts known to them, regardless of whether they had in fact formed that opinion.[32] In doing so, the Court rejected the argument by Worley that where the information requiring disclosure is an opinion, continuous disclosure rules require only the disclosure of opinions actually held by company officers.

The judgment of the Full Court on this point is particularly notable because the Federal Court has not taken a straight path to arrive at this view. In 2015, Perram J expressed the *obiter* view in *Babcock & Brown* that such a scenario was *not* captured by the continuous disclosure obligations and noted that this conclusion was consistent with the '*structure of the reasoning*' employed in the 2009 Western Australian case, *Jubilee Mines NL v Riley*.[33] The reasoning of Perram J was then adopted by Beach J in 2019 in *Myer*, who added that '*officers are not required to form an opinion based upon information they know or ought to know of and then disclose that information to the market*'. [34] However, Lee J did not agree with the reasoning of Perram J and Beach J respectively in *GetSwift*[35] in 2021, and Perram J, sitting on the Full Federal Court in *Worley* the following year, considered that his *obiter* comments years earlier were incorrect.[36]

Post *Worley*, it is clear that a company may be constructively aware of an opinion which an officer ought reasonably to have formed from known facts. During the review period, the Full Court reiterated this principle in *ANZ*, stating that the information of which an officer ought reasonably to have come into possession '*includes opinions the officer ought to have held by reason of facts known to the officer*'.[37]

One question which remained, however, was how this principle applies in the context of large and complex company information systems today. For instance, where factual data is stored in a company database, in what circumstances will the company be aware of the implications of this data because an officer ought reasonably have formed the opinion as to its significance?

Fortunately, *Zonia* has gone some way to answering this question (noting, however, in September 2025 the appellants sought special leave to appeal to the High Court on questions of causation and loss).

CONSTRUCTIVE AWARENESS OF THE SIGNIFICANCE OF DATA STORED IN COMPANY SYSTEMS

In *Zonia*, the Full Federal Court considered an appeal against the judgment of Yates J dismissing a class action brought by shareholders of CBA on the basis that CBA had breached its continuous disclosure obligations concerning its compliance with anti-money laundering and counter-terrorism laws.

Among other things, the appellants argued that CBA should have been aware that it had failed to submit on time approximately 80% - 95% of threshold transaction reports for transactions of $10,000 or more that were processed through intelligent deposit machines, because these percentage figures *could have* been calculated from information held in CBA's data warehouse.

One of the issues raised on appeal was whether the primary judge erred in his finding that CBA was not aware of the percentage figures, for the purposes of its continuous disclosure obligations.

31 *Crowley v Worley Ltd* (2022) 293 FCR 438 (Worley) at [178] (Jagot and Murphy JJ, with whom Perram J agreed at [1]).
32 Ibid at [166]–[182].
33 *Grant-Taylor and Others v Babcock & Brown Ltd (in liq) and Another* (2015) 322 ALR 723 at [156]–[160]. In *Jubilee Mines NL v Riley* (2009) 40 WAR 299, Martin CJ considered the similar issue of whether information that a company ought to have had can extend to '*information arising from business decisions*' that the company has not yet made.
34 *TPT Patrol Pty Ltd (atf Amies Superannuation Fund) v Myer Holdings Ltd* (2019) 293 FCR 29; [2019] FCA 1747 at [1174].
35 *ASIC v GetSwift Ltd (Liability Hearing)* [2021] FCA 1384 at [1082]–[1083].
36 *Worley* at [3]-[4] (Perram J).
37 *ANZ* at [38] (Lee J; Button J at [117] and Markovic J at [2(1)] agreed with Lee J on ground 1).

The Full Court held that CBA was not aware of the percentage figures because, whilst they could be calculated from information stored in CBA's data warehouse, '*those percentage figures are the result of a calculation based on information that no person within the Bank knew*'.

In coming to this decision, the Full Court drew out the following relevant principles:[38]

1. The continuous disclosure regime applies to opinions or inferences that ought to have been formed by a company officer from *known facts*. These facts are confined to those that the officer ought to have come into possession of in the course of their duties as an officer.
2. The Full Court stated in *Worley* that a company is aware of information where '*reasonable information systems or management procedures ought to have brought the information to the attention of a relevant company officer*'. It is not a principle of general application that a fact capable of discovery by interrogating a database and then performing calculations constitutes information of which an entity is aware just because it would be 'reasonable' for those enquiries to be made.
3. The continuous disclosure regime does not impose a wide-ranging obligation on listed entities to scrutinise their data just because someone *could* then derive a market-sensitive piece of information from that data. Neither the terms of, nor the policy objectives pursued by, the continuous disclosure regime require disclosure of information constituted by a calculation based on data simply because that data *could be* extracted from a database.
4. Constructive awareness does not extend to unknown facts that are merely capable of discovery through a process of further investigation into their existence, still less to facts that are capable of discovery with the benefit of hindsight.

LEARNINGS FOR COMPANIES AND COMPANY OFFICERS

The Full Court in *Zonia* expressly stated that the dismissal of this ground of appeal should not be misunderstood as suggesting that an entity can never breach its continuous disclosure obligations where the material information is constituted by, or may be drawn from, information on a company's databases. The question of whether there has been such a breach is one which is to be determined in each case against the specific factual circumstances.

So what then are the learnings for companies and company officers? We set out below some matters for companies to consider when approaching the establishment and oversight of data systems.

38 *Zonia* at [269]-[285].

ISSUE	CORPORATE GOVERNANCE CONSIDERATIONS	QUESTIONS TO CONSIDER
Policies and procedures	Officers should assume that their duty of care and diligence extends to ensuring that appropriate systems and processes are put in place to escalate facts that are known within the company from information stored in company databases. This means implementing policies and procedures which are effective to ensure that information known by staff 'that *should* be escalated to officers *is* so escalated'.[39] The company's corporate culture, for which the Board is responsible, should be conducive to personnel following the company's policies and procedures.	• Are there effective policies and procedures in place to ensure that information known by staff responsible for particular data systems is escalated to company officers when it should be? • Are staff provided with general training or internal policies regarding the company's disclosure obligations? • Do staff feel comfortable raising matters with supervisors and that policies are not just given lip service?
Reporting and escalation systems	Listed companies should ensure they have robust reporting systems to ensure relevant information is brought to the attention of continuous disclosure committees and ultimately the Board. Given the oversight of data systems will frequently rest with specialist staff, there should be clear reporting lines from these staff to ensure that any facts known to them arising from company data are escalated where necessary to do so.	• Are staff provided with opportunities to raise concerns regarding data systems with their superiors, or to present at subject-specific committees where such concerns may be formally raised? • What are the reporting lines between technical staff, or subject-specific committees, and the Board?
Officers' consideration of escalated facts	• Officers should turn their minds to the *importance* of the facts that have been escalated. • This is particularly important given the Full Court's confirmation that a company may be constructively aware of an opinion which an officer ought reasonably to have formed from known facts.	• Do directors and officers understand the company's continuous disclosure obligations and what amounts to 'constructive awareness'? • Does the Board have a culture of asking probing questions – both of themselves and of management? Are potential consequences of known facts being routinely considered?
Auditing	• Companies should adopt regular and thorough auditing processes of key data systems to ensure that facts that ought reasonably to have come into the possession of an officer are identified.	• Does the company undertake regular internal and external auditing of its data systems? • How are these audits recorded and reported? • How are the findings of these audits considered for the purposes of identifying facts that may give rise to material information?

39 Ibid at [290].

ABOUT KING & WOOD MALLESONS

A firm born in Asia, underpinned by world class capability. With over 3,700 lawyers in 26 global locations, we draw from our Eastern and Western perspectives to deliver incisive counsel.

We help our clients manage their risk and enable their growth. Our full-service offering combines un-matched top tier local capability complemented with an international platform. We work with our clients to cut through the cultural, regulatory and technical barriers and get deals done in new markets.