Law Council
OF AUSTRALIA

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

Senate Economics Legislation Committee

3 March 2021

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2021 Executive as at 1 January 2021 are:

- Dr Jacoba Brasch QC, President
- Mr Tass Liveris, President-Elect
- Mr Ross Drinnan, Treasurer
- Mr Luke Murphy, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the expertise of the Corporations and Digital Commerce Committees of its Business Law Section, the Class Actions Committee of its Federal Litigation and Dispute Resolution Section and the Queensland Law Society in assisting to develop this submission.

Executive Summary

1. The Law Council welcomes the opportunity to provide a submission to the Senate Economics Legislation Committee (**Senate Committee**) in relation to its Inquiry into the Treasury Laws Amendment (2021 Measures No. 1) Bill 2021 (**the Bill**).

Schedule 1

2. Schedule 1 to the Bill seeks to ensure the continuation of a number of the important measures which were introduced temporarily during the COVID-19 pandemic in response to practical, regulatory and legal problems facing the corporate sphere as a result of novel social distancing requirements.

3. The Law Council has, on a number of occasions, expressed its strong support (with necessary safeguards) for the relevant changes to the *Corporations Act 2001* (Cth) (**Corporations Act**), which allowed for virtual meetings and the electronic communication and execution of documents.[1]

4. As time has passed, the successes of a number of these changes have become apparent. The Law Council has therefore advocated for the Australian Government to consider the continuation of the changes following the pandemic period.[2]

5. The Law Council notes with approval that the Bill responds to this advocacy in respect of many of the applicable provisions, although not on the permanent basis the Law Council would prefer. The proposed reforms are workable and the Law Council recognises that it is important to move swiftly to provide a framework for continued use of virtual meetings, electronic communications and document execution.

6. The Law Council makes a number of suggestions for improving or clarifying some of the proposed changes. With respect to virtual meetings, the Law Council recommends that:

    - the Bill requires that persons entitled to vote at company general meetings be given the opportunity to do so in real time and to record a vote in advance, if practicable, at the election of the voter irrespective of whether the corporation's constitution permits direct voting (while ensuring that a meeting or resolution is not invalidated due to any individual's technology disruptions);
    - default requirements for virtual meetings to vote by poll are limited to listed companies;[3]
    - procedural motions, and substantive motions from the floor which are not contemplated by a proxy form, are carved out from a default requirement for a poll and/or the Bill clarify that an appointed proxy has the right to vote on a procedural motion unless the proxy specifies otherwise;
    - the Bill authorises virtual meetings despite a lack of authority to do so, or provisions requiring physical meetings, in the company constitution. However, corporations should be able to modify their constitutions to opt out of or override the requirements of the virtual meeting regime regarding technology and format, where those corporations consider it appropriate; and

[1] See, eg, Law Council of Australia, Submission No 455 to Senate Select Committee on COVID-19, Parliament of Australia, *Inquiry into the Australian Government's response to the COVID-19 pandemic* (12 June 2020); Law Council of Australia, 'Law Council calls for electronic document processes to remain' (Media Release, 1 July 2020).
[2] Ibid.
[3] See Treasury Laws Amendment (2021 Measures No. 1) Bill 2021 (Cth) sch 1, cl 21.

- the Australian Government considers developing guidance to ensure that the ability of meeting attendees (including shareholders) to be heard or to ask questions is not stifled by features of the technology used to hold a virtual or hybrid meeting.

7. With respect to electronic document execution, the Law Council recommends that:

   - consideration should be given by the Australian Government as to the possibility of facilitating dialogue between the States and Territories with a view to harmonising, where possible, e-signature (and e-witnessing) processes across jurisdictions, not just in cases of emergency;
   - the Australian Government should encourage all Australian Government agencies to accept electronically executed documents (including deeds) and encourage the States and Territories to do the same;[4]
   - the Bill should clarify that the amendments to section 127 of the Corporations Act are effective to override requirements of common law and State legislation for valid execution of a deed; and
   - the Treasury and the Attorney-General's Department should:
     - consider whether there is constitutional power to expand the categories of signatories to documents capable of being executed under the Corporations Act or the *Electronic Transactions Act 1999* (Cth) (**ETA**);
     - consider the extent to which the Corporations Act could alternatively validate the execution of contracts by individuals, corporations and other entities, where a company is a counterparty to the contract (expanded jurisdiction); and
     - consider the extent to which the Corporations Act could recognise (at least as a matter of Australian law, where Australian law is the law of the contract) documents executed pursuant to that expanded jurisdiction under the Corporations Act. However, the Law Council recognises that this may require broader consideration and assessment than is practicable for the current Bill;
   - changes for electronic execution of documents be extended for more general application by inclusion of the relevant enabling provisions in the ETA, alongside the removal of many of the exclusionary regulations made under that Act; and
   - a concerted effort be made by the Australian Government to work with the States and Territories to harmonise their presently divergent implementations of the ETA.

8. With respect to the timeframe for the reforms, the Law Council recommends that the amendments made by the Bill (incorporating the Law Council's recommendations) regarding:

   - the use of technology in meetings should be made on a permanent basis and in advance of the run-up to the significant AGM season from September to November 2021, following an expedited pilot and/or stakeholder consultation process to further consider the shareholder and business benefits of virtual

[4] Law Council of Australia, Submission No 176 to Senate Select Committee on Financial Technology and Regulatory Technology, Parliament of Australia, *Inquiry into Financial Technology and Regulatory Technology* (25 June 2020) 5. See also Business Law Section, Law Council of Australia, Submission to the Treasury (Cth), *Making permanent reforms in respect of virtual meetings and electronic document execution* (6 November 2020).

meetings. Alternatively, the present extension should be until 15 December 2021; and

- electronic execution of documents should be made permanent under the current Bill.

Schedule 2

9. Schedule 2 of the Bill seeks to make permanent the amendments which were made to continuous disclosure obligations early in the COVID-19 pandemic. The Bill amends the Corporations Act to provide that companies and their officers are only liable for civil penalty proceedings in respect of continuous disclosure obligations where they have acted with 'knowledge, recklessness or negligence'.[5]

10. Additionally, Schedule 2 to the Bill seeks to ensure that entities and officers are not liable for misleading or deceptive conduct in circumstances where the continuous disclosure obligations have been contravened unless the requisite mental element (knowledge, recklessness or negligence) has been proven.

11. The Law Council notes that there are divided views among various parts of the legal profession in relation to reform of the continuous disclosure obligations (and the intersection with potential actions for misleading or deceptive conduct). Given the limited time available for submissions to this inquiry, the Law Council provides the views of both the Corporations Committee of its Business Law Section (**Corporations Committee**) and the Class Actions Committee of its Federal Litigation and Dispute Resolution Section (**Class Actions Committee**) for consideration by the Senate Committee.

12. The Corporations Committee is strongly supportive of these reforms. In the view of the Corporations Committee, the reforms proposed in the Bill will not change the content of continuous disclosure, and if already in place, would not have impeded any of the proper prosecutions or claims for misleading or deceptive conduct in the course of continuous disclosure which have so far taken place in Australia. The reforms address a significant concern that has been raised by the Corporations Committee over many years and which was identified by the Australian Law Reform Commission (**ALRC**) as an area requiring further review.

13. The Corporations Committee suggests that the current misalignment of liability provisions within the Corporations Act has caused the escalation of insurance costs to an unacceptable extent and is out of step with international frameworks. In the view of the Corporations Committee, the reforms to continuous disclosure and its link to misleading or deceptive conduct are an essential first step to addressing that imbalance.

14. In the Corporations Committee's view, the inclusion of sensible fault elements in the continuous disclosure liability regimes will assist to prevent shareholders' investments being eroded (both through use of company funds and share price impacts) for extended periods due to 'no fault' liability regimes. The current regime can stifle growth and prevent corporate recovery and the cost of the regulatory imbalance is borne by continuing shareholders.

15. However, the Class Actions Committee supports the previous regime in place prior to the introduction of *Corporations (Coronavirus Economic Response) Determination*

[5] *Corporations (Coronavirus Economic Response) Determination (No. 2) 2020* (Cth). See also Hon Josh Frydenberg MP, Treasurer (Cth), 'Temporary changes to continuous disclosure provisions for companies and officers' (Media Release, 25 May 2020).

(No. 2) 2020 (Cth).[6] The Class Actions Committee is concerned that the Bill's impact on the continuous disclosure regime and the prohibitions on misleading and deceptive conduct goes too far in dampening the ability of the regulators and of shareholders to enforce corporate accountability for wrongdoing.

16. While the proposed reforms are considered appropriate by the Corporations Committee, the Corporations Committee considers that there are further matters to be addressed, which should be the subject of a broader review (and, if time permits, clarification in the explanatory materials for the Bill or the text of the Bill):

    - it should be clarified that any information released to the Australian Stock Exchange (**ASX**) (or other recognised exchange) is information to which the relevant fault elements apply (so, for instance, it does not matter whether it is disclosed under Listing Rule 3.1, Listing Rule 3.10 or ASX principles of avoiding selective disclosure);
    - it should also be clarified that where information has been released both to ASX and presented in another forum, the fault elements apply to that information (by itself – leaving aside any separate or additional information or conduct that is not made available via the stock exchange); and
    - the relevant fault elements should also apply to sections 1308 and 1309 of the Corporations Act, which form part of the disclosure liability regime framework.

17. It should be noted that the disclosure liability frameworks within the Corporations Act are contorted, and inconsistent, with multiple provisions applying to the same conduct, with different standards and elements of liability, defences and contributory conduct. In the Corporations Committee's view, it is unacceptable for core corporate legislation to be internally inconsistent in this way, and these issues should be addressed as a priority.

18. The Law Council would be supportive of a broader and more in-depth review of the disclosure liability provisions of the Corporations Act.

[6] Later replaced by *Corporations (Coronavirus Economic Response) Determination (No. 4) 2020* (Cth).

Schedule 1 – Virtual meetings and electronic communication of documents

Effect of the Schedule

19. In May 2020, in response to the COVID-19 pandemic, the Australian Government introduced temporary changes to the Corporations Act allowing companies to use technology to meet regulatory requirements to hold meetings (such as AGMs), distribute meeting-related materials and validly execute documents.[7]

20. These amendments were made through the Corporations (Coronavirus Economic Response) Determination (No. 1) 2020 (Cth) (**Emergency Determination No 1**) and later replaced by the Corporations (Coronavirus Economic Response) Determination (No. 3) 2020 (Cth) (**Emergency Determination No 3**). Emergency Determination No 3 is due to expire on 21 March 2021.

Company meetings

Corporations Act

21. The Corporations Act requires a meeting of a company's members to be held 'at a reasonable time and place'[8] and provides that 'any technology' may be used to hold a meeting of members provided it 'gives the members as a whole a reasonable opportunity to participate.'[9]

22. The Act also lists a number of possible ways in which notice of a meeting of members may be provided, including by 'sending [notice] to the…electronic address (if any) nominated by the member.'[10] Among other things, the notice must state the technology that will be used to facilitate the meeting, if any.[11]

Emergency Determination No 3 and the Bill

Conduct and format of meetings

23. Emergency Determination No 3 allows company meetings required under the Corporations Act and relevant legislative instruments[12] to be held virtually 'using one or more technologies that give all persons entitled to attend a reasonable opportunity to participate without being physically present in the same place.'[13]

24. Emergency Determination No 3 thereby clarifies the scope of the ability to hold meetings using technology as set out in the Corporations Act,[14] as well as the necessary safeguards, in more explicit and particular terms.[15]

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[7] *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020* (Cth). See also Hon Josh Frydenberg MP, Treasurer (Cth), 'Making it easier for business to operate during Covid-19' (Media Release, 5 May 2020).
[8] *Corporations Act 2001* (Cth) s 249R ('Corporations Act').
[9] Ibid s 249S.
[10] Ibid s 249J.
[11] Ibid s 249L.
[12] See, eg, the requirement for a public company to hold an AGM at least once annually: ibid s 250N.
[13] *Corporations (Coronavirus Economic Response) Determination (No. 3) 2020* (Cth) s 5(1)(a) ('Emergency Determination No 3').
[14] Ibid s 5(2).
[15] Ibid s 5(1)(a).

25. The Bill enriches the reference to 'participation' made in the Emergency Determination No 3 by clarifying that this includes the exercise of the right to speak, both orally and in writing.[16] However, the Bill also reverts to the requirement in the Corporations Act to afford 'the persons entitled to attend the meeting, as a whole'[17] a reasonable opportunity to participate in a meeting, rather than the more comprehensive requirement to afford this opportunity to 'all persons entitled to attend' as set out in the Emergency Determination.

26. The Explanatory Memorandum explains that the application of the requirement with respect to membership 'as a whole' is intended to stop a meeting being invalidated 'merely because a member experienced technical issues and is unable to participate virtually', and states that this phrasing is consistent with the existing right in the Corporations Act to ask questions at an AGM.[18] The Explanatory Memorandum further states that the meeting 'should not be individualised so long as the vast majority of members can contribute and no member is intentionally excluded.'[19]

27. The Law Council endorses the application of the requirement to provide reasonable opportunity to participate to membership 'as a whole,' and the removal of the requirement to include certain information about questions and comments in meeting minutes, which had been proposed in the Exposure Draft to the Corporations Amendment (Virtual Meetings and Electronic Communications) Bill 2020 (**Virtual Meetings Bill 2020**).[20]

28. These amendments both align with the submission made by the Corporations Committee on the Exposure Draft to the Virtual Meetings Bill 2020.[21] In that submission, the Corporations Committee noted that greater flexibility as to format of a meeting should not require Parliament to rewrite or prescribe basic principles of the law of meetings, in particular the duties and discretions of the Chair of the meeting, and the Law Council considers that this duty is well established and readily adaptable to different meeting formats.[22]

29. The Law Council does, however, reiterate the point raised by the Corporations Committee regarding concerns that have been expressed by shareholder interest groups, proxy advisers and activists that their ability to be heard or to ask questions may be stifled by features of the technology used to hold a virtual or hybrid meeting.[23] The Law Council repeats the Corporations Committee's recommendation that questions of transparency, and the possibility that some companies should consider broader forums for shareholder engagement (particularly where hundreds of questions are submitted), require separate consideration.

30. The Law Council considers that this is better addressed by guidance, in the first instance, as new meeting formats are explored and potential abuses of the format by either companies or shareholders become apparent.

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[16] Treasury Laws Amendment (2021 Measures No. 1) Bill 2021 (Cth) sch 1, cl 31 (see proposed s 253Q(2)).
[17] Ibid (see proposed s 253Q(1)).
[18] Explanatory Memorandum, Treasury Laws Amendment (2021 Measures No. 1) Bill 2021 (Cth) [1.36] ('*Explanatory Memornadum'*).
[19] Ibid.
[20] See, Exposure Draft of the Corporations Amendment (Virtual Meetings and Electronic Communications) Bill 2020 (Cth) ss 25, 36.
[21] Business Law Section, Law Council of Australia, Submission to the Treasury (Cth), *Making permanent reforms in respect of virtual meetings and electronic document execution* (6 November 2020) 1-2.
[22] Ibid 2.
[23] Ibid 3.

Vote taken on poll

31. Unlike the Corporations Act, Emergency Determination No 3 specifies how votes must be taken at virtual (or part virtual) meetings. Votes must be taken on a poll using applicable technologies to enable all attendees entitled to vote to do so 'in real time and, where practicable, by recording their vote in advance.'[24]

32. The Bill preserves the requirement for a poll to be used where a meeting is held partly by virtual technology and also includes the option for it to be used if demanded.[25] However, it slightly amends Emergency Determination No 3 by stating that all persons entitled to vote must be given the opportunity to do so in real time and *may* [emphasis added] be given the opportunity to record a vote in advance 'at the election of the voter.'[26]

33. The Law Council suggests the latter option should be amended to maintain the current effect of Emergency Determination No 3, so that it reads: 'must be given the opportunity to record a vote in advance of the meeting, if practicable, at the election of the voter.' This will ensure that members who are unable to reliably vote in real time, perhaps due to a poor internet connection, are able to vote.

34. The Law Council endorses the flexibility offered by this provision on the basis that a requirement to be able to record a vote prior to the meeting would require some means to authorise or empower such a vote. As the amendments do not provide such means, a company seeking to hold a vote by poll would need to make provision in its constitution to enable such a 'direct vote.' Not all constitutions permit direct voting and not all companies would choose this; it would be contrary to the principle set out at paragraphs 53 to 56 below.

35. However, the Law Council recommends that the 'default' requirement for a poll for virtual meetings[27] be confined only to listed companies. For those companies, the number of shareholders is likely to justify the expense and logistics of conducting a poll on all resolutions.

36. For other corporations, such as unlisted companies and companies limited by guarantee, a poll may incur needless expense and inconvenience, as even a virtual meeting format may support voting by show of hands. The technical requirement for a poll may lead to systemic issues of technical non-compliance, invalidating resolutions where there was no issue of substance.

37. Further, proxies do not always clarify whether the appointed proxy is authorised to vote on procedural motions. It would be rare in practice for a poll to be called for a procedural motion at a physical meeting, because these motions (for instance on an adjournment motion, or a motion that the meeting move on) are impromptu and difficult to predict, and they are dealt with swiftly in the room by show of hands. In a virtual or hybrid meeting, it may still be practicable to use a form of show of hands (physical and virtual, using the facilities provided by meeting technology) for procedural motions, so it may be preferable to carve out procedural motions from any default requirement for a poll. Similar issues arise with respect to substantive motions from the floor which are not contemplated by proxy forms.

[24] *Emergency Determination No 3* s 5(1)(c).
[25] Treasury Laws Amendment (2021 Measures No. 1) Bill 2021 (Cth) sch 1, cl 21 (see proposed s 250J(1)).
[26] Ibid sch 1, cl 31 (see proposed s 253Q(4)).
[27] Ibid sch 1, cl 21 (see proposed s 250J(1)).

38. Alternatively (or perhaps in addition), it is suggested that the Bill clarify that an appointed proxy has the right to vote on a procedural motion unless the proxy specifies otherwise.

39. However, the Law Council suggests that default requirements for virtual meetings to vote by poll would be more practicable if limited to listed companies.[28] For unlisted companies, not-for-profits, and associations, it may still be practicable to vote by show of hands in a virtual format without requiring one of the more expensive and sophisticated meeting tools to be used for the meetings. This default requirement would create a risk of systemic technical invalidity of resolutions.

40. Further, if there is a default requirement to vote by proxy, the Bill should state that a proxy appointment confers a right to vote on a procedural motion, unless it specifies otherwise. Otherwise, a procedural motion may be impossible to vote upon unless the proxy form has addressed this (and in the experience of the Law Council's members, many do not).

Deemed presence

41. Emergency Determination No 3 stipulates that all persons who participate in a virtual meeting are taken 'for all purposes' to be present while they do so.[29] The Bill preserves this provision.[30] The Law Council endorses this provision, which removes the risk that shareholders or proxies participating via a video-link or web-service will not be regarded as having 'attended' the meeting (although they may have had a practical sense of participation) which can in turn raise questions as to the validity of resolutions passed.

42. There is a practical question for companies to resolve where a member attends 'in person' (virtually or otherwise) who has also submitted a proxy, and whether or not the proxy is suspended by that attendance. A common practice for physical meetings is that physical attendance will suspend a proxy. For virtual meetings, it may be more practicable that virtual attendance does *not* suspend the proxy.

43. The virtual format makes it harder to reconcile proxies with virtual attendees, depending on the registration capability of the relevant technology. This is not necessarily a matter for legislation to resolve, but should be addressed in practical and policy guidance by regulators and industry bodies, and potentially in consequential constitution changes by companies.

Other meeting processes

44. Emergency Determination No 3 also illuminates how virtual meetings can or must accommodate the requirement to allow opportunities for persons to speak and the use of proxies, as well as how notice and information may be provided and what the latter must contain.[31]

[28] Ibid.
[29] *Emergency Determination No 3* s 5(1)(b).
[30] Treasury Laws Amendment (2021 Measures No. 1) Bill 2021 (Cth) sch 1, cl 31 (see proposed s 253Q(3)).
[31] *Emergency Determination No 3* ss 5(1)(d)-(f), (3).

Opportunities for persons to speak

45. Emergency Determination No 3 provides that any requirement to allow attendees the opportunity to speak 'may be complied with by using one or more technologies that allow that opportunity.'[32] As stated at paragraph 25 above, this requirement is kept in the Bill and more detail is provided on how it may be satisfied. As the Explanatory Memorandum to the Bill states, the requirement's application with respect to 'the persons entitled to attend the meeting, as a whole' is consistent with the relevant provisions which create rights to speak.[33]

Use of proxies

46. Emergency Determination No 3 states that a proxy may be appointed using one or more technologies specified in the notice of the meeting[34] and that he or she must be treated in the same way as the appointer.[35] The Bill offers further detail on the use of proxies, including in relation to information which must be specified in a notice of meeting,[36] and a proxy's means of voting.[37] The Law Council welcomes these clarifications.

47. The Law Council notes the points raised at paragraphs 42 to 43 above in respect of the interaction of proxies and deemed 'presence,' and the points at paragraphs 35 to 38 in respect to vote taken on a poll.

Notice

48. The provision of notice using electronic means, as set out in Emergency Determination No 3, is echoed in the Bill with the inclusion of extra safeguards with respect to members. Namely, the Bill provides that the requirement to provide notice is satisfied if it is 'reasonable to expect that the document would be readily accessible so as to be useable for subsequent reference', and if a person has not elected to receive documents in hard copy only (having been notified of their right to do so).[38] The Law Council suggests that the reference to 'the document' at proposed section 253RA (and related sections) in the Bill be replaced by a reference to 'the information in the document' to retain consistency with the wording used in the ETA.[39]

49. A strict liability offence carrying 30 penalty units ($6,660) is imposed on a company or registered scheme if it does not advise a person of their right to elect to receive a document in hard copy within the requisite time.[40] The Explanatory Memorandum to the Bill states that this is necessary in order to 'strongly deter' failures to advise members of their right to receive a hard copy and a strict liability offence will reduce non-compliance.[41]

50. The Law Council considers there is a rebuttable presumption that, to establish guilt, fault must be proven for each physical element of an offence, and that this should only

[32] Ibid s 5(1)(d).
[33] See *Corporations Act* ss 250S, 250T; Treasury Laws Amendment (2021 Measures No. 1) Bill 2021 (Cth) sch 1, cl 21 (see proposed s 253Q(2)).
[34] *Emergency Determination No 3* s 5(1)(e).
[35] Ibid s 5(3)(c).
[36] Treasury Laws Amendment (2021 Measures No. 1) Bill 2021 (Cth) sch 1, cl 19 (see proposed s 250BA(1)).
[37] Ibid sch 1, cl 20 (see proposed s 250BB(1)(b)).
[38] Ibid sch 1, cl 31 (see proposed ss 253R, 253RA, 253RB).
[39] See, eg, *Electronic Transactions Act 1999* (Cth) ss 9(1)(a), 11(1)(b), 12(1)(a), 12(2)(b).
[40] Treasury Laws Amendment (2021 Measures No. 1) Bill 2021 (Cth) sch 1, cl 31 (see proposed ss 253RB(4)-(5), 253RC(4), (7)).
[41] *Explanatory Memornadum*, [1.69].

be overridden in rare instances.[42] It is also a key aspect to the rule of law that strict and absolute liability should only be applied to less serious offences and where such an approach is necessary for the success of the relevant regulatory regime.[43] Further, strict or absolute liability offences should be of a category where failure to comply is both obvious and deserves liability on a strict liability basis.[44]

51. In the case of the applicable provisions, the Law Council considers that on balance (and given the concomitant protections of members' rights) the following facts justify the imposition of strict liability:

- the offence is objectively 'less serious' than many other criminal offences (in terms of culpability and penalty);
- strict liability may well be necessary – or at least helpful – for the success of the regulatory regime (in terms of providing a concrete incentive for companies and registered schemes to provide the requisite notice, which is necessary so that members can elect to receive documentation in hard copy where they may otherwise miss it if sent electronically); and
- failure to comply will be 'obvious' (in the sense that proof of compliance is simple to obtain through business records that the notice was sent or postal/electronic receipts).[45]

52. The Law Council further notes that similar strict liability offences are already contained in the Corporations Act, for example in relation to the failure to allow a reasonable opportunity for members as a whole to ask questions or make comments.[46]

Flexibility to set format

53. Many companies' constitutions will not contemplate virtual meetings or will contain inadequate provisions for virtual meetings. Accordingly, it is important that the Bill authorises virtual meetings notwithstanding an absence of authorisation or a requirement for physical meetings in a company constitution.

54. However, the Law Council also considers that as a matter of principle, permanent virtual meeting reforms should permit company boards the flexibility to adopt the technology and format for company meetings that are most appropriate to the circumstances. Directors' duties are sufficient to hold boards to account for their choices.

55. Accordingly:

- where possible, the Bill should not be too prescriptive or detailed as to technology or format of company meetings, to allow boards flexibility to adopt the format that best suits the context and secondly; and

[42] See Law Council of Australia, Submission No 140 to Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (March 2015) ('*ALRC Submission'*); *Criminal Code Act 1995* (Cth) sch 1, pt 2.1, div 2, ch 2 (see in particular section 5.6) ('Traditional Rights and Freedoms Submission').
[43] See Law Council of Australia, Traditional Rights and Freedoms Submission; Law Council of Australia, *Rule of Law Principles* (Policy Statement, March 2011).
[44] See Law Council of Australia, Traditional Rights and Freedoms Submission.
[45] See Ibid 36-37: the factors which the Law Council considers relevant to the justification of a strict liability offence.
[46] See *Corporations Act* s 250S.

- it should be possible for a company constitution to specifically override or opt out of details of the legislative regime where a company has made that choice.

56. There is a significant risk that prescriptive legislative 'one-size-fits-all' requirements are rapidly overtaken by developments in technology and create a systemic risk of invalidity of meetings and resolutions due to technical non-compliance.

57. Accordingly, the Bill should clarify that the provisions regarding use of technology in meetings do not override provisions in company constitutions that already provide for the technology and format for company meetings.

Recommendations

- **The Bill should require that persons entitled to vote at company general meetings be given the opportunity to do so in real time and to record a vote in advance, if practicable, at the election of the voter irrespective of whether the corporation's constitution permits direct voting (while ensuring that a meeting or resolution is not invalidated due to any individual's technology disruptions).**
- **Default requirements for virtual meetings to vote by poll should be limited to listed companies.**
- **Procedural motions, and substantive motions from the floor which are not contemplated by a proxy form, should be carved out from a default requirement for a poll and/or the Bill should clarify that an appointed proxy has the right to vote on a procedural motion unless the proxy specifies otherwise.**
- **The virtual meetings provisions of the Bill should apply as a default despite the company constitution. However, it should be possible for a constitution to specifically opt out of some or all requirements.**
- **The Bill should adhere to the general principle that permanent virtual meeting reforms permit company boards the flexibility to adopt the technology and format for company meetings that are most appropriate to the circumstances.**
- **The Australian Government should consider developing guidance to ensure that the ability of meeting attendees (including shareholders) to be heard or to ask questions is not stifled by features of the technology used to hold a virtual or hybrid meeting.**

Electronic communication of documents

58. In June 2020, the Law Council commended the temporary measures introduced in the Emergency Determination No. 1 to assist persons and companies to meet their obligations under the Corporations Act to execute documents by allowing documents to be in electronic form and to be executed using electronic means (or e-signatures).[47] While doing so, the Law Council made the following recommendations:

[47] See Law Council of Australia, Submission No 176 to Senate Select Committee on Financial Technology and Regulatory Technology, Parliament of Australia, *Inquiry into Financial Technology and Regulatory Technology* (25 June 2020). See also *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020* (Cth) ss 6-7.

(a) improving the ability to sign and execute documents (including deeds) electronically, where appropriate and with the necessary dialogue and consultation (including with the legal profession), should remain a priority law reform area;

(b) consideration should be given to withdrawing requirements for witnessing execution of documents, or improving the ability to witness and attest to witnessing the execution of documents electronically, where modern technology provides forensically effective and secure replacements for those rituals;

(c) consideration should be given as to the possibility of harmonising, where possible, e-signature (and e-witnessing) processes across the states and territories, not just in cases of emergency, given that commercial and personal transactions regularly cross jurisdictional boundaries;

(d) section 127 of the Corporations Act should be amended to make it clear that electronic execution of company documents is contemplated by this provision, including when a company executes a deed; and

(e) the Australian Government should encourage all government agencies to accept electronically executed documents (including deeds) and encourage the states and territories to do the same.[48]

59. The Law Council commends the Bill in effectively addressing some of the above recommendations, as follows:

- recommendation (a): by demonstrating the Government's commitment to this law reform area;
- recommendation (b): by improving the ability to witness and attest to witnessing the execution of documents electronically;[49] and
- recommendation (d): by amending section 127 of the Corporations Act to clarify that company documents can be executed electronically, and how.[50]

60. The Law Council repeats the recommendations set out at sub-paragraphs (c) and (e) above, acknowledging their implementation will require continued stakeholder consultation and engagement.

61. Additionally, the Law Council notes that there have been differences of opinion in the legal community as to whether Emergency Determination 3 was effective to override requirements of common law and State legislation for valid execution of a deed – in particular, requirements for a paper copy of a deed (the paper, parchment or vellum requirement) to be signed by hand in 'wet ink', and for witnesses to a deed to attest

[48] Law Council of Australia, Submission No 176 to Senate Select Committee on Financial Technology and Regulatory Technology, Parliament of Australia, *Inquiry into Financial Technology and Regulatory Technology* (25 June 2020) 5. See also Business Law Section, Law Council of Australia, Submission to the Treasury (Cth), *Making permanent reforms in respect of virtual meetings and electronic document execution* (6 November 2020).

[49] See the proposed amendments to s 127 of the *Corporations Act*: Treasury Laws Amendment (2021 Measures No. 1) Bill 2021 (Cth) sch 1, cl 1-9. It is noted that the Law Council has also stated that it is in favour of removing the requirement for valid execution of a deed by an individual that execution be witnessed, provided that what is required instead is an equally effective method of validating an individual's identity using an electronic platform. See Law Council of Australia, Supplementary Submission No 176.1 to Senate Select Committee on Financial Technology and Regulatory Technology, Parliament of Australia, *Inquiry into Financial Technology and Regulatory Technology* (24 July 2020) ('*Supplementary Submission*'); Evidence to the Senate Select Committee on Financial Technology and Regulatory Technology, Parliament of Australia, Canberra, 1 July 2020, 27 (Shannon Finch).

[50] Ibid.

to witnessing signatures on a paper copy, in 'wet ink'. This has led to some firms declining to issue 'due execution' opinions on electronically executed documents, and requiring deeds to be physically signed and witnessed on paper.

62. There is also some confusion as to what constitutes 'delivery' of a deed executed by a company under the Corporations Act, which is necessary for a deed to become binding under some State laws.

63. While the Law Council and its Corporations Committee have regarded the Determinations as sufficient, it is essential that the matter be put beyond doubt. As such, the Law Council commends the note in the Explanatory Memorandum that:

> A company may continue to execute documents in the traditional manner by applying wet signatures to the physical paper document. The new law also permits a combination of different methods to be used to execute a company document... companies do not need to follow the established process for signing, sealing and delivering a deed under the common law. [51]

64. However, the Law Council considers that to avoid all doubt, clarifications should still be explicitly made with respect to the points raised at paragraphs 61 and 62 above.

65. Further, the Law Council endorses the express acknowledgement in the Bill that officers of a corporation who are signing a corporate document in that capacity may electronically sign an electronic copy of that document.[52]

66. In addition, the Law Council repeats the Corporations Committee's note that where the counterparty to a contract signed under section 127 is a natural person, or is a corporation that is not a company, or a foreign entity, the ability to execute the contract electronically becomes a matter of State, Territory or foreign law. Within Australia, there is no common position amongst all States and Territories, which impacts ease of doing business. As such, the Law Council recommends that to facilitate ease of doing business, Treasury and the Attorney General's Department should:

- consider whether there is constitutional power to expand the categories of signatories to documents capable of being executed under the Corporations Act or the ETA – for example, the 'post and telegraphs' telecommunications power[53] would in the Law Council's view support a law validating the execution of documents exchanged by such means;
- consider the extent to which the Corporations Act could alternatively validate the execution of contracts by individuals, corporations and other entities, where a company is a counterparty to the contract (expanded jurisdiction); and
- consider the extent to which the Corporations Act could recognise (at least as a matter of Australian law, where Australian law is the law of the contract) documents executed pursuant to that expanded jurisdiction under the Corporations Act. However, the Law Council recognises that this may require broader consideration and assessment than is practicable for the current Bill.

[51] *Explanatory Memornadum* [1.1], [1.9].
[52] Treasury Laws Amendment (2021 Measures No. 1) Bill 2021 (Cth) sch 1, cl 8.
[53] See *Commonwealth of Australia Constitution Act* (1900) s 51(v), which allows the Parliament to make laws for the peace, order, and good government of the Commonwealth with respect to postal, telegraphic, telephonic, and other like services.

Electronic Transactions Act

67. The Law Council recommends that the changes made in the more confined context of corporations also be given more general application, founded on the 'post and telegraph' telecommunications power, by inclusion of the relevant enabling provisions in the ETA combined with the removal of many of the exclusionary regulations made under that Act.

68. The Law Council also suggests that a concerted effort be made between the Commonwealth and the States and Territories to harmonise their presently divergent implementations of the ETA. There is no longer any rational basis for retaining State idiosyncratic variations to what should be a globally harmonised approach (as was intended by the UNCITRAL Model Laws[54] on which the regime was originally based).

[54] See United Nations Commission on International Trade Law, *Model Law on Electronic Commerce* (1996); United Nations Commission on International Trade Law, *Model Law on Electronic Signatures* (2001).

Recommendations

- **Consideration should be given by the Australian Government as to the possibility of facilitating dialogue between the States and Territories with a view to harmonising, where possible, e-signature (and e-witnessing) processes across, not just in cases of emergency.**
- **The Australian Government should encourage all Federal Government agencies to accept electronically executed documents (including deeds) and encourage the States and Territories to do the same.**
- **The Bill should clarify that the amendments to section 127 of the Corporations Act are effective to override requirements of common law and State legislation for valid execution of a deed.**
- **The Department of Treasury and the Attorney-General's Department should:**
  - **consider whether there is constitutional power to expand the categories of signatories to documents capable of being executed under the Corporations Act or the ETA;**
  - **consider the extent to which the Corporations Act could alternatively validate the execution of contracts by individuals, corporations and other entities, where a company is a counterparty to the contract (expanded jurisdiction); and**
  - **consider the extent to which the Corporations Act could recognise (at least as a matter of Australian law, where Australian law is the law of the contract) documents executed pursuant to that expanded jurisdiction under the Corporations Act. However, the Law Council recognises that this may require broader consideration and assessment than is practicable for the current Bill.**
- **Changes for electronic execution of documents should be extended for more general application by inclusion of the relevant enabling provisions in the ETA, alongside the removal of many of the exclusionary regulations made under that Act.**
- **The Australian Government should make a concerted effort to work with the States and Territories to harmonise their presently divergent implementations of the ETA.**

Timeframe for reforms

69. In May 2020, following the making of Emergency Determination No 1, the Australian Securities and Investments Commission (**ASIC**) advised that it was conducting an ongoing project of observing hybrid and virtual meetings with a view to providing further guidance if required. The Law Council is not aware of any materials ASIC has published on the project and suggests that any relevant materials should be provided to stakeholders for their consideration.

70. In February 2021, the Government announced that it would extend the expiration date of the temporary amendments with respect to 'relief allowing companies to use technology to meet regulatory requirements to hold meetings, such as AGMs,

distribute meeting-related materials and validly execute documents' from 21 March 2021 to 15 September 2021.[55]

71. The Government stated that after that date, the requirements for member meetings will revert to pre-COVID-19 laws requiring an-in person meeting to be held. [56] However, the Government also stated (and set out in the Explanatory Memorandum to the Bill) that it will conduct a 12-month 'opt-in pilot' for companies to hold 'hybrid' AGMs to enable an assessment of the shareholder benefits of virtual meetings.[57]

72. It is essential that there is swift implementation of extended arrangements for virtual meetings, as the Law Council is aware of meetings being called as at the date of this submission which will depend upon those arrangements. These meetings include both AGMs for corporations with a 31 December financial year end, and extraordinary meetings being called for other purposes (including transactions with shareholder approval requirements). The recommended changes are of acute importance to corporations in this context, given the current uncertainty as to the permitted meeting format. It would be preferable to have the processes well settled in advance of the run up to the significant AGM season from September to November.

73. The Law Council strongly supports the proposed measures in the Bill being passed as a matter of urgency.

74. The Law Council also supports the Government's further consideration of the shareholder and business benefits of virtual meetings if it feels it necessary to address the perspectives of different stakeholder groups. The regime proposed in the Bill will offer a good opportunity to ascertain whether there is likelihood of abuse of these arrangements. Anecdotal evidence from some of the Law Council's members suggests that most corporations made sensible and balanced use of the authorisations under the Emergency Determinations.

75. However, given the amendments with respect to virtual AGMs as outlined in the Bill are set to expire on 15 September 2021, which coincides with the beginning of the 2021 corporate reporting cycle, the Law Council suggests a shorter-term pilot and/or stakeholder consultation process be undertaken so that the amendments can be made permanent if deemed appropriate. This would avoid the disruption and confusion that would be caused to the September to November AGM season by any interim return to the pre-COVID-19 rules, only for the foreshadowed pilot to lead to the conclusion that the amendments should be continued. Alternatively, the present extension should be until 15 December 2021 rather than 15 September, there being no appreciable risk by the additional three months' validity of the interim measures.

76. With respect to the electronic execution of documents, the Government has announced that it will finalise permanent changes to allow electronically signing and sending documents prior to the expiry of these temporary arrangements on 15 September 2021.[58] The Law Council considers that sufficient evidence already exists, and consultation has already taken place, to support the proposed changes

[55] *Corporations (Coronavirus Economic Response) Determination (No. 3) 2020* (Cth). See also Hon Josh Frydenberg MP, Treasurer (Cth), 'Continuing to make it easier for business to operate during COVID-19' (Media Release, 31 July 2020).
[56] Hon Josh Frydenberg MP, Treasurer (Cth), 'Extension of measures relating to virtual AGMs and signing and sending electronic documents' (Media Release, 31 July 2020).
[57] See, eg, *Explanatory Memornadum* [1.7]; Hon Josh Frydenberg MP, Treasurer (Cth), 'Extension of measures relating to virtual AGMs and signing and sending electronic documents' (Media Release, 31 July 2020).
[58] Hon Josh Frydenberg MP, Treasurer (Cth), 'Extension of measures relating to virtual AGMs and signing and sending electronic documents' (Media Release, 31 July 2020).

(incorporating the comments set out above, including the recommended changes and additions) being made permanent under the current Bill.

Recommendations

- **The amendments made by the Bill (incorporating the Law Council's recommendations) regarding the use of technology in meetings should be made on a permanent basis and in advance of the run-up to the significant AGM season from September to November 2021, following an expedited pilot and/or stakeholder consultation process to further consider the shareholder and business benefits of virtual meetings. Alternatively, the present extension should be until 15 December 2021.**
- **The amendments made by the Bill (incorporating the Law Council's recommendations) regarding electronic execution of documents should be made permanent under the current Bill.**

Schedule 2 – Continuous disclosure obligations

77. In May 2020, the Australian Government amended, on a temporary basis, the Corporations Act to provide that companies and their officers would only be liable for civil penalty proceedings in respect of continuous disclosure obligations where they have acted with 'knowledge, recklessness or negligence' (referred to as the **mental elements** or **fault elements**).[59]

78. The continuous disclosure obligations were introduced early in the COVID-19 pandemic period to respond to difficulties in providing 'reliable forward-looking guidance to the market' as a result of the pandemic.[60] In September 2020, the Government extended the expiration date of these temporary amendments until 23 March 2021.[61] The Government is now seeking to make the amendments permanent through Schedule 2 of the Bill.

79. Additionally, Schedule 2 the Bill amends section 1041H of the Corporations Act to limit the circumstances in which a contravention of a continuous disclosure obligation will constitute misleading or deceptive conduct.[62] The effect of the amendments is that entities and officers are not liable for misleading or deceptive conduct in circumstances where the continuous disclosure obligations have been contravened unless the requisite mental element (knowledge, recklessness or negligence) in the continuous disclosure obligation has been proven.[63]

80. The Attachment A of the Explanatory Memorandum to the Bill explains that this additional change has been included in the Bill to help to 'achieve the policy intent of amending the continuous disclosure provisions as recommended by the Parliamentary Joint Committee for Corporations and Financial Services (**Joint**

[59] *Corporations (Coronavirus Economic Response) Determination (No. 2) 2020* (Cth). See also Hon Josh Frydenberg MP, Treasurer (Cth), 'Temporary changes to continuous disclosure provisions for companies and officers' (Media Release, 25 May 2020).
[60] Hon Josh Frydenberg MP, Treasurer (Cth), 'Temporary changes to continuous disclosure provisions for companies and officers' (Media Release, 25 May 2020).
[61] *Corporations (Coronavirus Economic Response) Determination (No. 4) 2020* (Cth).
[62] Treasury Laws Amendment (2021 Measures No. 1) Bill 2021 sch 2, cl 21.
[63] The Bill also amends s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) with similar effect – limiting the circumstances in which proceedings seeking compensation for loss or damage because of a contravention of section 12DA can be brought in connection with alleged continuous disclosure contraventions: ibid sch 2, c 1.

Committee). This is in the context that actions relating to continuous disclosure and misleading and deceptive conduct may be brought together and recent jurisprudence, although limited, indicates that these actions will be considered in similar ways.

81. Given that claims for a breach of continuous disclosure laws have underpinned a number of 'shareholder' class actions,[64] continuous disclosure obligations have recently been considered in the context of class actions and litigation funding.

82. The ALRC recommended in its 2019 report Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders that:

> *The Australian Government should commission a review of the legal and economic impact of the operation, enforcement, and effects of continuous disclosure obligations and those relating to misleading and deceptive conduct contained in the Corporations Act 2001 (Cth) and the Australian Securities and Investments Commission Act 2001 (Cth).*[65]

83. The Joint Committee in the Final Report of its 2020 Inquiry into litigation funding and the regulation of the class action industry, recommended that:

> *… the Australian Government permanently legislate changes to continuous disclosure laws in the Corporations (Coronavirus Economic Response) Determination (No. 2) 2020.*[66]

84. Mixed views were received by the ALRC and the Joint Committee in relation to amending the continuous disclosure obligations.[67] Those in favour generally submitted that as currently constituted, the obligations are an economically inefficient mechanism for remedying civil wrongdoing and are driving up the cost and limiting the availability of Directors and Officers insurance, disincentivising people to take directors and officers roles and encouraging overly risk-adverse decision making. Whereas those opposed to reform of the obligations were generally of the view that the obligations protect investors, prevent corporate misconduct and contribute to market integrity, efficiency and confidence.

85. The Law Council notes that there are divided views among members of the profession in relation to reform of the continuous disclosure obligations (and the intersection with potential actions for misleading or deceptive conduct). Given the limited time available for submissions to this inquiry, the Law Council provides the views of both the Corporations Committee and the Class Actions Committee for consideration by the Senate Committee.

Corporations Committee support for the reforms

86. The Corporations Committee has expressed concern for some time in relation to the effect of the continuous disclosure and misleading or deceptive conduct liability regime, and it is strongly supportive of the proposed reforms.

87. In the Corporations Committee's view, the potential for a corporation to have risk of liability in the absence of any knowledge, intention or other fault element:

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[64] Parliamentary Joint Committee on Corporations and Financial Services (Cth), *Litigation funding and the regulation of the class action* industry (Report, December 2020) 30 ('Joint Committee Report').
[65] Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) rec 24 ('ALRC Report').
[66] Joint Committee Report, rec 29.
[67] See ALRC Report 264-84; Joint Committee Report, 315-48.

- is out of line with comparable international regimes;
- does not guide corporate conduct by setting a culpability standard to which corporations must adhere; and
- places a liability burden on the company (and necessarily on its continuing shareholders – both via the absorption of company funds and impact on share prices) that is out of balance with the interests of theoretical protection of other groups of shareholders against 'no fault' contraventions.

88. The Corporations Committee notes that the culpability standard proposed by the reforms is a 'negligence' standard. This is a relatively low standard and is, to some extent, at odds with the more 'subjective' intent of the Treasurer's statements regarding the proposed reforms, as a negligence standard is an 'objective, reasonable third party' standard. In any event, it is unlikely that any of the meaningful continuous disclosure cases of non-compliance that have been successfully prosecuted would not have breached this standard of conduct.

89. The Corporations Committee suggests that these reforms will not lead to a lower standard of conduct, more limited disclosure or an inability to successfully prosecute cases of significant concern. However, the Corporations Committee suggests that these reforms may redress the technical imbalance in continuous disclosure laws that has contributed to inflated insurance.

90. As noted at paragraph 84, in the course of the recent debate around these issues, a concern is often expressed that any change to the regime will reduce 'investor protection'. The Law Council strongly supports principles of investor protection and effective enforcement. However, the Corporations Committee advises that the proposed reforms do not significantly or unreasonably reduce investor protection. They do not remove a shareholder right of action for continuous disclosure breaches, except in the most limited cases where the company is not at fault.

91. The Corporations Committee notes, however, that it is also important not to overlook the fact that the current regime is having an adverse effect on the value of the investments of other ongoing shareholders of affected corporations, in circumstances where the company is not at fault. Nor is it in the interests of investors that corporate insurance is becoming unaffordable. In the Corporations Committee's view, the proposed reforms strike an appropriate balance.

Class Actions Committee support for the previous status quo

92. The Class Actions Committee, on the other hand, sees much value in the continuous disclosure regime as constituted before the introduction of *Corporations (Coronavirus Economic Response) Determination (No. 2) 2020* (Cth) and the proscription against misleading or deceptive conduct in section 1041H of the Corporations Act and section 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth). The Class Actions Committee supports this previous regime as, in its view, it establishes a norm that listed companies must observe and obey. Given that Australian households have one of the highest levels of share ownership in the world,[68] and given the current significant level of Australian superannuation money invested in listed companies, the need for proper and responsive corporate governance is self-evident. Regulatory enforcement and class

[68] Australian Securities and Investments Commission, *Assessment of ASX Limited's listing standards for equities* (Report 480, June 2016) [24].

actions (private enforcement) occurs when companies fail to comply with the regulatory regime – this is not opportunistic.

93. In the view of the Class Actions Committee, the Bill's impact on the continuous disclosure regime and the prohibitions on misleading and deceptive conduct will dampen the ability of the regulators and of shareholders to enforce corporate accountability for wrongdoing.

94. The Class Actions Committee is concerned that proposed new standard, being 'the entity knows, or is reckless or negligent with respect to whether, the information would, if it were generally available, have a material effect on the price or value of [enhanced disclosure] securities of the entity',[69] will have a direct impact on accountability concerning published reports. As an example, if auditors sign off on misleading accounts that are published as part of a company's continuous disclosure obligations, the company will be able to hide behind the audit as 'reasonable reliance' while the auditor can avoid responsibility because its liability is accessorial and knowledge must be proved. Those who were misled and suffered loss will have no avenue of redress.

95. As well, the proposed section 674A requires the *entity* to be negligent which introduces a mental element to the continuous disclosure regime. A company will be vicariously liable for the negligent *acts* of its employees or agents but the attribution of a *state of mind* to a corporation is often limited to its Board and senior executives. Boards and senior executives will be able to say they were not negligent *with respect to* the information that should have been disclosed if they did not have it, whether or not they ought to have had it, thereby limiting accountability even further.

96. Material misstatements in financial statements that cause inflated share prices that result in the loss of value when the truth is revealed will be unassailable unless one can prove that the company actively mislead its auditors and the market.

97. In the opinion of the Class Actions Committee, the proposed reforms go too far and are an over-reaction to the success of the class actions regime, success that is enabled only by corporate misconduct and not through any improper conduct by lawyers.

98. Reference is made to comparable jurisdictions with fault-based liability for private disclosure claims, namely, the United Kingdom (**UK**) and United States of America (**US**). However, the three other jurisdictions considered by the Joint Committee, Canada, Hong Kong and South Africa, have strict lability regimes.

99. Further, whilst the UK and US have no-strict liability for private claims, regulators can still take enforcement action without establishing fault. The proposed amendments also remove the Australian regulator's ability to seek penalties for strict liability disclosure breaches.

100. The Australian financial system is one on which the Australian and international communities can rely for its integrity and when the rare incidents of wrongdoing are exposed, the wrongdoers can be called to account. This is how it should be and how it should remain. In the Class Actions Committee's view, the proposed reforms are inimical to this reliability.

[69] Treasury Laws Amendment (2021 Measures No. 1) Bill 2021 sch 2, cl 7 (see proposed s 674A(2)(d)).

Areas for improvement / ongoing review

101. While the Corporations Committee is supportive of the proposed reforms, there are some points of interpretation of the proposed reforms that should be clarified (whether in the legislation, or in the explanatory memorandum). In particular, it should be clear that:

    - any information released to the relevant stock exchange falls within 'continuous disclosure'. There should be no difference in treatment, for instance, between information released under ASX Listing Rule 3.1 and ASX Listing Rule 3.10, a meeting document required for the purposes of Listing Rule 7.4 or an investor presentation released as part of a rights issue or a results presentation, or AGM. So far as practicable, the liability framework for market releases should be consistent; and
    - where the information released to market has been presented also in a different forum – for example, a dispatch of the meeting materials or a rights issue booklet to shareholders, the presentation of an investor presentation directly to investors and analysts – then, to the extent that it is the same as the information released to the market, it should also come within the same regime with the 'fault elements' applying. This also goes to the principle of consistency of liability frameworks.

102. It should be noted that the disclosure liability frameworks within the Corporations Act are contorted, and inconsistent – the same act of disclosure (or non-disclosure) triggers a range of different liability provisions under the Corporations Act, with different positions on:

    - elements of liability;
    - standards of culpability;
    - available defences (or lack of defences);
    - elements of defences;
    - whether honesty is a mitigant (or not);
    - causation principles; and
    - whether contributory negligence or misconduct by a claimant is relevant, and the extent to which liability affects individuals as well as the corporation.

103. For instance, sections 1308 and 1309 of the Corporations Act also apply to continuous disclosure, as do sections 1041E, 1041F, 1041G (and, like section 1041H, they link to section 1041I). They are all different, and (similar to observations made by Commissioner Hayne in relation to tangled financial services laws) it tends to obscure the key principles.[70] The position was made worse with the recent penalties reform, which effectively removed some defences to regulatory disclosure liability for prospectuses and takeovers documents without specific consultation on that issue.[71]

104. The inconsistencies and overlap in disclosure regulation is a matter that the Law Council intends to raise with the ALRC as part of its review of corporate and financial services regulation. However, reform of these issues need not wait for the conclusion of the ALRC review, and it is something that should be addressed as a matter of

[70] See Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report (1 February 2019) <https://www.royalcommission.gov.au/sites/default/files/2019-02/fsrc-volume-1-final-report.pdf> 494-496.
[71] See Shannon Finch et al, 'Australian IPOs and Takeovers: Liability Has Increased, Defences Are Eroded' *Lexology* (2 October 2019) <https://www.lexology.com/library/detail.aspx?g=270bb944-0c4a-4d72-8a48-54b7021113e0>.

priority. The proposed reforms are a sensible first step. It is not difficult to resolve these inconsistencies so that there is a structured, graduated framework that is consistent across the Corporations Act and where consequences are aligned to culpability. In the Corporations Committee's view, this policy setting and approach would be more effective in shaping corporate conduct than the current legislation, without threatening investor protection or the ability to enforce the law in appropriate cases.

105. The Law Council also notes that there is some continued support,[72] including from the Queensland Law Society, for a review of the legal and economic impact of the operation, enforcement and effects of continuous disclosure obligations and those relating to misleading and deceptive conduct, as recommended by the ALRC. The Law Council is supportive of a broader review.

Recommendations

- **The following matters should be subject to a broader review and, if time permits, clarified in the Bill or in the Explanatory Memorandum:**
  - **any information released to the relevant stock exchange is information to which the relevant fault elements apply; and**
  - **where the information released to market has also been presented in a different forum then, to the extent that it is the same as the information released to the market, the 'fault elements' should apply to that information; and**
  - **the relevant fault elements should also apply to sections 1308 and 1309 of the Corporations Act, which form part of the disclosure liability regime framework.**

[72] Joint Committee Report, 343-4.