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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TREASURY LAWS AMENDMENT (2021 MEASURES NO. 1) BILL 2021

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Treasurer, the Hon Josh Frydenberg MP)

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

Abbreviation	*Definition*
ASIC	Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001*
Bill	Treasury Laws Amendment (2021 Measures No. 1) Bill 2021
Corporations Act	*Corporations Act 2001*
Determination No. 2	*Corporations (Coronavirus Economic Response) Determination (No. 2) 2020*
Determination No. 3	*Corporations (Coronavirus Economic Response Determination (No. 3) 2020*
Determination No. 4	*Corporations (Coronavirus Economic Response) Determination (No. 4) 2020*
ETA 1999	*Electronic Transactions Act 1999*

General outline and financial impact

Schedule 1 – Virtual meetings and electronic communication of documents

Schedule 1 to the Bill makes temporary amendments to the rules relating to meetings of directors, shareholders of companies and members of registered schemes to facilitate the use of electronic technology. The new rules allow meetings to be held virtually, provided that the members as a whole have a reasonable opportunity to participate. They also allow documents relating to the meetings to be provided and signed electronically and minutes to be kept electronically.

Amendments are also made to allow the electronic execution of company documents. Documents executed without a company seal may be signed electronically and the signatories do not need to sign the same copy. Documents executed with a seal may also be executed electronically and the witness may use alternative technology to observe the fixing of the seal.

These amendments have effect until 16 September 2021.

Date of effect: Schedule 1 to the Bill commences on the day after this Bill receives Royal Assent.

Proposal announced: This Schedule partially implements the measure, JobMaker Plan – Digital Business Plan from the 2020-21 Budget.

Financial impact: Nil

Human rights implications: This Schedule does not raise any human rights issue. See *Statement of Compatibility with Human Rights* — Chapter 3.

Compliance cost impact: A Regulation Impact Statement was not prepared, as this Schedule falls under an exemption from regulatory impact analysis requirements as it extends an urgent and unforeseen measure made in response to COVID-19.

Schedule 2 – Continuous disclosure obligations

Schedule 2 to the Bill provides that all civil penalty proceedings commenced under the continuous disclosure and misleading and deceptive conduct provisions must prove that an entity or officer acted with 'knowledge, recklessness or negligence' in respect of an alleged contravention.

Date of effect: Schedule 2 to the Bill commences on the day after this Bill receives Royal Assent.

Proposal announced: Schedule 2 implements Recommendation 29 of the Parliamentary Joint Committee on Corporations and Financial Services Inquiry into Litigation Funding and the Regulation of the Class Action Industry.

Financial impact: Nil

Human rights implications: This Schedule does not raise any human rights issue. See *Statement of Compatibility with Human Rights* — Chapter 3.

Compliance cost impact: $912.5 million regulatory savings per annum.

Summary of regulation impact statement

Regulation impact on business

Impact: Entities and officers will face reduced regulatory costs in complying with the continuous disclosure regime. This will be because they do not face the same level of financial risk where they allegedly fail to comply with the continuous disclosure rules, unless they do so with 'knowledge, recklessness or negligence'. This will reduce the amount of time entities and officers must spend on assurance that they have complied, as well as the legal fees associated with assuring compliance. It will also lead to significant savings on the cost of directors and officers insurance.

Main points:

- On 25 May 2020 the Treasurer introduced a temporary instrument to amend the *Corporations Act 2001* so that entities and officers would only be liable for a breach of the continuous disclosure provisions if they did so with a 'fault' element of 'knowledge, recklessness or negligence'. On 23 September 2020

the Treasurer introduced another instrument that extended this until 22 March 2021. These were in response to the difficulty of assessing what information is material to the value of an entity's securities during the economic uncertainty caused by the coronavirus pandemic.

- On 21 December 2020 the Parliamentary Joint Committee on Corporations and Financial Services completed its report on litigation funding and the regulation of the class action industry (PJC Report). Recommendation 29 of the PJC Report is that the Government permanently legislate changes to the continuous disclosure rules as were temporarily introduced by the above instruments.
- The PJC Report has been certified as an independent review which involved a process and analysis equivalent to a Regulation Impact Statement.
- The PJC Report can be accessed at this address: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Litigationfunding/Report
- The scope of the certified review covers the scope of the policy proposal with the exception of two policy options. The first of these is retaining the existing ability for the regulator to issue infringement notices and undertake non-penalty proceedings against entities and officers without having to prove knowledge, recklessness or negligence. The second of these is introducing a fault element to private actions for misleading and deceptive conduct in relation to alleged failures to keep the market fully informed.
- To address the gap in analysis between the PJC's inquiry and the Government's consideration of options for continuous disclosure reform, supplementary analysis on the costs, benefits and risks associated with the mandatory code was prepared, consistent with the *Australian Government Guide to Regulatory Impact Analysis.*
- The supplementary analysis is included at Attachment A.

Chapter 1
Virtual meetings and electronic communication of documents

1.1 Schedule 1 to the Bill allows companies to execute documents, hold meetings, provide notices relating to meetings and keep minutes using electronic means or other alternative technologies until 16 September 2021. It extends, and expands upon, the changes in the Determination No. 3.

Context of amendments

1.2 The ETA 1999, which facilitates the use of electronic transactions, does not apply to the *Corporations Act 2001* (Corporations Act) or instruments made under that Act (section 6 and item 23 of the Schedule 1 to the *Electronic Transaction Regulations 2020*). Company documents must be executed by all parties physically signing the same static document and there are constraints on companies' ability to conduct meetings using alternative technologies.

1.3 During the Coronavirus pandemic, the temporary power in section 1362A of the Corporations Act was used to make temporary modifications to allow meetings to be held and documents to be executed using electronic means (see the *Corporations (Coronavirus Economic Response) Determination (No.1) 2020* and Determination No. 3). This power expired on 24 September 2020 and the temporary determination will expire on 21 March 2021.

Summary of new law

1.4 Schedule 1 to the Bill allows electronic means or alternative technologies to be used to meet the requirements in the Corporations Act relating to:

- executing company documents;
- holding meetings of directors of a company, meetings of shareholders of a company (including Annual General Meetings) and meetings of members of a registered scheme;
- executing documents relating to meetings;
- recording, keeping and providing minutes; and

- providing notice of a meeting and give other documents relating to meetings to the prospective attendees.

1.5 These amendments extend, and expand upon, the changes in Determination No. 3. They remain in force until 16 September 2021.

1.6 In response to the positive feedback from consultation, the Government proposes permanent reforms that will continue to allow companies to electronically sign company documents and send meeting related materials electronically. This will be in place when the temporary extension sunsets.

1.7 The Government also proposes to conduct an opt-in pilot for hybrid annual general meetings in which shareholders can choose whether to attend meetings in person or virtually. This pilot will commence when the extension to the temporary relief ends.

Comparison of key features of new law and current law

New law	*Current law*
Company documents executed both with and without a seal may be executed using electronic means. If the document is executed by fixing a company seal, electronic means may be used to witness the fixing of the seal. These changes remain in force until 16 September 2021.	To execute a company document, all persons must physically sign the same hard copy. Temporary relief from this requirement for documents executed without a company seal was granted in Determination No. 3.
Directors meetings, meetings of shareholders of a company and meetings of members of a registered scheme may be held using electronic means until 16 September 2021 provided that the persons entitled to attend the meeting, as a whole, have a reasonable opportunity to participate. If electronic means are used to hold the meeting, the notice of the meeting must include sufficient information to allow all attendees to participate and the quorum includes all persons participating virtually.	Meetings must be held at a physical location. While technology can be used to connect people at one or more other locations, wholly virtual meetings are not permitted. Temporary relief was granted in Determination No. 3 to allow meetings to be held virtually.

New law	*Current law*
Documents relating to a meeting may be given electronically until 16 September 2021 if it is reasonable to expect that the document would be readily accessible so as to be usable for subsequent reference at the time that it is given. Members have the right to opt in to receiving documents in hard copy.	Documents relating to a meeting must be posted unless the member has agreed to the document being sent via email or fax and the specific requirements in the Corporations Act are met. Some documents may only be provided via post. Temporary relief from this requirement was granted in Determination No. 3.
Documents relating to a meeting may be signed electronically by using a method to identify the signatory and indicate the signatory's intention until 16 September 2021.	Documents relating to a meeting must generally be signed in hard copy. Temporary relief from this requirement was granted in Determination No. 3.
The minutes for meetings of shareholders and members of registered schemes may be taken electronically and the minute book may be provided to shareholders and members and kept electronically. These changes sunset on 16 September 2021.	In general, minutes must be kept in hard copy.

Detailed explanation of new law

Execution of company documents

1.8 Amendments have been made to make the laws relating to the execution of company documents technology neutral and allow companies to execute company documents electronically. They also ensure that directors, secretaries and witnesses may sign a copy or counterpart of the document. ***[Schedule 1, items 1 to 7, subsections 127(2) to (5)]***

1.9 The new rules relating to the electronic execution of company documents are facilitative in nature. 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. For instance, one director may physically sign a paper version of the document while the second director could sign the document using electronic means.

Documents to which the changes apply

1.10 These changes apply to all documents executed by a company under section 127 of the existing law. This includes all:

- documents executed by a witness observing the fixing of a common seal to the document and signing the document (documents executed with a common seal); and
- documents executed by two directors, or a director and a secretary signing the document (documents executed without a common seal).

1.11 Section 127 of the existing law, including the amendments inserted by this Schedule, also apply to documents executed as a deed. This means that companies may execute company deeds by following the process outlined in section 127 and companies do not need to follow the established process for signing, sealing and delivering a deed under the common law. This is confirmed by subsection 127(3) of the existing law and the new note inserted under that section. ***[Schedule 1, item 6, note to subsections 127(3) of the Corporations Act]***

Secretary, director or witness may sign a copy

1.12 The director, secretary or witness may sign a copy or counterpart of the document. This reverses the effect of the court's decision in *Adelaide Bank v Pickard* [2019] SASC 13 where it was held that all persons needed to sign the same single, static document. ***[Schedule 1, item 5, paragraph 127(3A)(a) of the Corporations Act]***

1.13 The copy or counterpart must include the entire contents of the document. This does not mean that the person needs to physically print or sign every page. Rather it ensures that a document cannot be validly executed by signing a document that does not have the same content as the original document. It simply reflects the common law position that the signatories must agree to the same terms. ***[Schedule 1, item 5, paragraph 127(3A)(b) of the Corporations Act]***

1.14 The copy or counterpart does not need to include the signature of any other person (in the case of a document executed by two directors or a director and a secretary). Similarly, the witness does not need to sign the same document as the one to which the seal was affixed and therefore there can be a delay between the witnessing occurring and the document being signed. ***[Schedule 1, item 5, subsection 127(3C)) of the Corporations Act]***

Electronic witnessing of the fixing of a seal

1.15 If the company executes the document by fixing a common seal, the person witnessing the fixing of the seal may do so electronically. They may do this by:

- using electronic means such as videoconferencing to observe the person fixing the seal to the document (as opposed to watching a pre-recorded video);
- signing the document or a copy of the document (either physically or electronically); and
- annotating the document with a statement stating that they have observed the fixing of the seal by using electronic means.

[Schedule 1, item 3, subsection 127(2A) of the Corporations Act]

1.16 These changes expand upon the relief provided by Determination No. 3 and ensure that the rules relating to the execution of company documents using a common seal are not more restrictive than the rules relating to the execution of company documents without a common seal.

Secretary, director or witness may sign the document electronically

1.17 Further, the director or secretary may sign an electronic copy of the document if three conditions are satisfied.

1.18 First, the copy must include the entire contents of the document. As outlined at paragraph 1.13, this does not mean that the person needs to print or sign every page of the document. ***[Schedule 1, item 5, paragraph 127(3B)(b) of the Corporations Act]***

1.19 Second, a method must be used to identify the person and indicate their intention to sign the document. There are a variety of methods that could be used to do this, including:

- Using a stylus tool to sign a PDF document and then emailing the document back to the company.
- Using a platform such as DocuSign.

[Schedule 1, item 5, paragraph 127(3B)(a) of the Corporations Act]

1.20 The new law takes a technology neutral approach and does not mandate the use of any particular type of technology. This means the new law is sufficiently flexible to allow for the use of other technologies that may be developed in the future.

1.21 Third, the method must be as reliable as appropriate for the purposes for which the document was generated or proven in fact to have indicated the person's identity and intention. ***[Schedule 1, item 5, paragraph 127(3B)(c) of the Corporations Act]***

1.22 These conditions are modelled on the conditions for electronically signing a document in section 10 of the ETA 1999 and should apply in the same way as in that Act.

1.23 There are two other conditions in section 10 of the ETA 1999 that do not apply to the execution of company documents. Those conditions require the recipient to consent to the use of electronic communication and comply with any requirements of the Commonwealth agency that is receiving the information. These conditions are not applied as they would impose high regulatory costs on companies and are significantly more restrictive than the relief provided by Determination No. 3.

Extension of assumptions

1.24 The assumptions that people dealing with companies are entitled to make under section 129 of the existing law apply to documents that appear to be executed in accordance with the new rules. This is confirmed by the new notes inserted under section 129. ***[Schedule 1, items 8 and 9, notes to subsections 129(5) and (6) of the Corporations Act***

Virtual meetings

1.25 Amendments are made to the law to facilitate the use of electronic means to hold meetings. As a consequence, meetings may now be held by:

- using virtual meeting technology;
- inviting persons to physically attend at a designated location;
- inviting persons to physically attend at different locations and using virtual meeting technology to connect the different locations together; or
- using a combination of the above methods.

[Schedule 1, item 31, subsection 253Q(1) of the Corporations Act]

Types of meetings that may be held using technology

1.26 The new rules apply to meetings of:

- shareholders of companies (including Annual General Meetings);
- directors of companies; and
- members of registered schemes.

[Schedule 1, item 31, section 253P of the Corporations Act]

1.27 Similar amendments were made in Schedule 4 to the *Corporations Amendment (Corporate Insolvency Reforms) Act 2020*, and the associated delegated legislation, to facilitate the use of virtual meeting technology to hold meetings conducted in the context of external administration, including meetings of creditors and committees of inspection.

Place and time of a virtual meeting

1.28 For a meeting where all of the participants participate using electronic technology, the place of the meeting is taken to be the address of the registered office of the company or responsible entity of a registered scheme. The time for the meeting is the time at the address of the registered office. ***[Schedule 1, item 31, subsection 253QA(3) of the Corporations Act]***

1.29 If a meeting is a hybrid meeting where members have a choice to physically attending or use virtual meeting technology to participate, the place and time for the meeting are taken to be the place where the members physically attend and the time at that location. If there are two or more such locations, the place of the meeting is the main location (as set out in the notice for the meeting) and the time of the meeting is the time at the main location. This ensures that there is only one place and time for the meeting. ***[Schedule 1, item 31, subsection 253QA(2) of the Corporations Act]***

1.30 The meeting must be held at a time that is reasonable at the place where the meeting is taken to be held. It may not necessarily be a convenient time for all of the shareholders or members who are attending using technology, in the same way that face to face meetings may be held at a time that is not convenient for all shareholders or members. ***[Schedule 1, items 15 and 31, section 249R and subsections 252P(1) and 252P(2) of the Corporations Act]***

Content of notices of virtual meetings

1.31 When a meeting is to be held using technology, the notice of the meeting must include sufficient information to allow the persons entitled to attend the meeting to participate using the virtual meeting technology. This information could consist of dial in details or a link to the relevant website, as well as the date and time of the meeting. ***[Schedule 1, items 14 and 29, paragraphs 249L(1)(a) and paragraph 252J(a) of the Corporations Act]***

1.32 For a meeting where members may attend in person, the notice must also designate the location of the meeting. If there are two or more physical locations, the notice must state all of the locations and the main location. For instance, where the company directors are meeting in Sydney and venues in Melbourne and Perth are also made available to shareholders to join the AGM virtually, the notice must state that Sydney is the main location. ***[Schedule 1, items 14 and 24, paragraphs 249L(1)(a) and paragraph 252J(a) of the Corporations Act]***

1.33 These requirements also apply to a meeting that is adjourned because there is not a quorum present within 30 minutes of the time set out for the meeting in the notice. ***[Schedule 1, item 17, subsection 249T(3A) of the Corporations Act]***

1.34 The meeting notice for a meeting that is to be held using technology must also include sufficient information to allow members to

provide proxy documents by electronic means. ***[Schedule 1, item 19, subsection 250BA(1) of the Corporations Act]***

Conduct of virtual meetings

1.35 A company or registered scheme must ensure that the meeting is held in a manner that gives the members as a whole a reasonable opportunity to participate in the meeting. ***[Schedule 1, item 31, subsection 253Q(1) of the Corporations Act]***

1.36 The phrase 'members as a whole' ensures that the meeting cannot be invalidated merely because a member experienced technical issues and is unable to participate virtually. The intention is that the meeting should not be individualised so long as the vast majority of members can contribute and no member is intentionally excluded. Similar language is also used in the Corporations Act in the context of members' right to ask questions at an AGM (see existing sections 250SA and 250T).

1.37 Members also need to be given a reasonable opportunity to speak and verbally ask questions in situations where they have a right to speak and ask questions. ***[Schedule 1, item 31, subsection 253Q(2) of the Corporations Act]***

1.38 If the members as a whole are not given a reasonable opportunity to participate, speak or ask questions, the members may apply to the court to have the meeting invalidated. The Court will only invalidate the meeting if it is of the opinion that a substantial injustice has been caused and that injustice cannot be remedied in any other way. This mirrors the circumstances where an irregularity invalidates a physical meeting under the existing law. ***[Schedule 1, item 32 and 33, note to subsection 1322(3AA) and subsection 1322(3A) of the Corporations Act]***

1.39 The new law does not mandate a particular format for a virtual meeting. It recognises that the meeting rules apply to a broad range of companies, from small not-for-profit companies to large listed companies, and allows each company to select the format for the meeting that is most appropriate for that company. However, regardless of the format, the virtual meeting must give the members as a whole a reasonable opportunity to participate. ***[Schedule 1, item 31, subsection 253Q(1) of the Corporations Act]***

1.40 If a meeting is held using technology, all persons participating in the meeting (whether by being physically present or using electronic means) are taken to be 'present'. This means that all of those persons should be counted for the purposes of determining whether there is a quorum. ***[Schedule 1, item 31, subsection 253Q(3) of the Corporations Act]***

1.41 The default method of voting at a virtual meeting of shareholders or members (or a hybrid meeting) also differs from a meeting where all persons are physically attending. At a virtual meeting of shareholders, votes will be taken on a poll rather than a show of hands

unless the company or registered scheme determines otherwise in its constitution. In the context of companies, voting on a poll is effectively a replaceable rule, that is, companies are free to elect another default method of voting. ***[Schedule 1, items 21, 30 and 31 and subsections 250J(1), 253J(2) and 253Q(3) of the Corporations Act]***

1.42 The new law does not prescribe the method that should be used to conduct the poll and more than one method may be used. For instance, in the context of hybrid meetings, the Chair may elect to use a different method for conducting the poll for persons attending virtually and for persons physically present.

1.43 Also, all participants who are entitled to vote must be given the opportunity to vote at the meeting. The company may also give the participant the opportunity to record a vote in advance of the meeting, in which case, the participant will be able to elect to either vote in advance or at the meeting. It is not expected that companies would provide a method for voting in advance of the meeting for directors' meetings. ***[Schedule 1, item 31, subsection 253Q(4) of the Corporations Act]***

1.44 Documents may be tabled at a meeting by providing the documents to the person in advance of the meeting or making the documents accessible to persons attending the meeting in any way. For instance, the documents might be shared using a 'screen sharing' facility with virtual attendees or handed out in hard copy to physical attendees. ***[Schedule 1, item 31, subsection 253Q(5) of the Corporations Act]***

1.45 These requirements only apply when virtual meeting technology is used to hold the meeting. They do not apply if a company uses virtual meeting technology for another purpose relating to a meeting, such as to broadcast the meeting or make a recording of a meeting available to those members that choose not to attend.

Electronic communication of documents relating to meetings

1.46 Documents relating to meetings may be given or signed using electronic means. This applies regardless of whether the meeting is held using electronic technology or in person.

Types of documents that may be given or signed electronically

1.47 Any document that relates to a meeting may be given electronically and signed electronically. These documents will generally fall into seven categories.

1.48 First, the rules cover documents in which a person makes a request in relation to a meeting. This includes putting forward a member's resolution or a member's statement for consideration at the meeting (e.g., under sections 249N or 252L). ***[Schedule 1, item 31, subparagraph 253R(a)(i) of the Corporations Act]***

1.49 Second, notices of meetings may be provided electronically. This covers notices provided under section 248C (directors' meetings), sections 249J and 249K (shareholders' meetings) and section 252G (meetings of members of a registered schemer). It would also cover documents that must accompany the notice, such as an explanatory statement provided under section 221. ***[Schedule 1, item 31, subparagraph 253R(a)(ii) of the Corporations Act]***

1.50 Third, notices of a resolution or a record of a resolution may be provided and signed electronically. ***[Schedule 1, item 31, subparagraph 253R(a)(iii) of the Corporations Act]***

1.51 Fourth, notices of a statement in relation to a meeting or a matter to be considered at a meeting may be provided and signed electronically. An example of a notice covered by this category is a members' statement distributed under sections 249P or 252N. ***[Schedule 1, item 31, subparagraph 253R(a)(iv) of the Corporations Act]***

1.52 Fifth, the new rules cover documents relating to a proxy, such as a document to appoint a proxy (provided under sections 250B or 252Z) or a list of persons who are willing to act as a proxy (provided under sections 249Z or 252X). ***[Schedule 1, item 31, subparagraph 253R(a)(v) of the Corporations Act]***

1.53 Sixth, questions for auditors and responses to those questions (including under sections 250PA or 250T) may be provided electronically. ***[Schedule 1, item 31, subparagraph 253R(a)(vi) of the Corporations Act]***

1.54 Seventh, the new rules apply to giving and signing minute books including under existing subsections 251A(2)-(4) and 253M(2) (signing minutes) and subsections 251B(3)-(4) and 253N(3)-(4) (providing copies of minutes). ***[Schedule 1, item 31, subparagraph 253R(a)(vii) of the Corporations Act]***

1.55 These seven categories are illustrative only and they are not exhaustive. Documents that relate to a meeting but do not fall clearly into one of the above categories are also covered by the new rules. For example, a remuneration report considered at a meeting under existing section 250R would be covered by the new rules. ***[Schedule 1, item 31, subsection 253R of the Corporations Act]***

1.56 The new rules also apply to resolutions made without a meeting and all documents that relate to the making of those resolutions as per Division 1 of Part 2G.1 (for directors' resolutions) or Division 1 of Part 2G.2 (for resolutions of proprietary companies). ***[Schedule 1, item 31, paragraphs 253R(b) and 253R(c) of the Corporations Act]***

How to give a document using electronic means

1.57 A document may be provided electronically either by:

- giving the document to the person by using electronic means (e.g., sending an email); or

- using electronic or traditional means to provide the person with details sufficient to allow them to view or download the document electronically (e.g., by giving them a card or sending them an email with a link to a website).

[Schedule 1, item 31, subsections 253R(2) and (3) of the Corporations Act]

1.58 A range of technologies can be used to provide a document electronically, including emails, SMS, apps or other technology that may be developed in the future.

When a document may be given electronically

1.59 There are two conditions that must be satisfied before a document can be given electronically.

1.60 First, it must be reasonable to expect that the document would be readily accessible so as to be useable for subsequent reference at the time that the document is given. This replicates the condition in paragraph 9(1)(a) of the ETA 1999 which relates to when electronic communications can be used to give information in writing. ***[Schedule 1, item 31, paragraph 253RA(3)(a) of the Corporations Act]***

1.61 The person providing the document does not need to satisfy the other conditions in section 9 of the ETA 1999. Those conditions require the recipient to consent to the use of electronic communication and comply with any requirements of the Commonwealth agency that is receiving the information. These conditions are not included as they impose high regulatory costs on companies and are more restrictive than the relief provided by Determination No. 3.

1.62 Second, a document relating to a meeting of the members of a company or registered scheme cannot be provided to a person electronically if they opt in to receiving hard copies, or the entity failed to notify the person of their right to opt in. There is no right to opt in to receiving documents relating to a directors' meeting in hard copy. ***[Schedule 1, item 31, paragraph 253RA(3)(b) of the Corporations Act]***

Opting into receiving hard copies

1.63 A member may elect to receive hard copies of documents relating to a meeting or a resolution considered without a meeting. ***[Schedule 1, item 31, subsection 253RB(1) and 253RC(1) of the Corporations Act]***

1.64 The below table sets out when the election applies.

Example 1.1: When an election to receive hard copies applies

Type of document	*When election applies*
Documents relating to a resolution considered without a meeting	Documents provided to the member after the election is 'given'* to the

	company or registered scheme
Documents relating to a meeting	Documents that do not need to be provided to the member within the 10 business days after the election is 'given'* to the company or registered scheme

*An election is taken to be given 3 days after it is posted or the business day after it is sent via electronic means.

[Schedule 1, item 31, subsections 253RB(2), (3) and (6) and subsections 253RC(2), (3) and (6) of the Corporations Act]

1.65 As shown in Example 1.1, if the document is a notice of a meeting or accompanies the notice of the meeting, the election does not apply to any documents that are required to be provided to the member within the next 10 business days. This recognises that it takes time for the company or registered scheme to print and post documents, and for the mail to reach the member. It avoids a situation where the company or registered scheme is placed in a position where it cannot comply with its obligation to notify members of a meeting within a stipulated timeframe because there is insufficient time for printing and postage. ***[Schedule 1, item 31, paragraphs 253RB(3)(a) and 253RC(3)(a) of the Corporations Act]***

Example 1.2: Commencement of opt-in

Listed companies are required to notify members of their AGM 28 days before the AGM under section 249HA of the existing law.

A listed company decides to hold its AGM on 28 April 2021. Accordingly, it must notify members of the AGM by 1 April 2021.

A member of the listed company opts into receiving documents in hard copy on 27 April 2021. This opt out does not apply to the notice of the meeting that is to be held on 1 April 2021. However, it will apply to the notice for the 2022 AGM and subsequent AGMs.

1.66 A member who had opted into receiving documents in hard copy may revoke their election in writing. Such a revocation applies from the day on which it is given to the company. This means that the company may send documents to the member electronically or in hard copy from that date. ***[Schedule 1, item 31, paragraphs 253RB(2)(b) and 253RC(2)(b) of the Corporations Act]***

1.67 A company or responsible entity must notify members of their right to opt in to receiving hard copies relating to a meeting or a resolution considered without a meeting. This notice may be provided in hard copy or electronically. It must be given within two months of the person becoming a member. ***[Schedule 1, item 31, subsections 253RB(4)-(5) and subsections 253RC(4)-(5) of the Corporations Act]***

1.68 A failure to notify a member of their right to make an election is a strict liability offence carrying a penalty of 30 penalty units. This is the

same as the penalty that applies if a company does not notify its members of their right to receive an electronic or hard copy of the annual report under existing section 314. ***[Schedule 1, item 31, subsections 253RB(7) and subsections 253RC(47) of the Corporations Act, table in Schedule 3]***

1.69 A strict liability offence is appropriate in this circumstance as it is necessary to strongly deter companies or registered schemes from failing to advise members of their right to elect to receive a hard copy. The imposition of a strict liability offence reduces non-compliance by ensuring that ASIC can efficiently and expeditiously deal with low-level offending, thereby bolstering the integrity of the regime.

1.70 The strict liability offences meet all the conditions listed in the Attorney-General's Department's *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. It does not exceed 300 penalty units for a body corporate and preserves the defence of honest and reasonable mistake of fact to be proved by the accused on the balance of probabilities.

Lodging documents with ASIC

1.71 The new rules do not alter the process for lodging documents with ASIC. ***[Schedule 1, item 31, subsection 253R(4) of the Corporations Act]***

Signing a document using electronic means

1.72 A document relating to a meeting or a resolution considered without a meeting may be signed electronically by using a method to identify the signatory and indicate the signatory's intention. Refer to paragraphs 1.47 to 1.55 for examples of the documents to which this new rule applies. ***[Schedule 1, item 31, subsection 253RD(1) of the Corporations Act]***

1.73 The method used to sign the document must satisfy the conditions in paragraphs 10(1)(a) and (b) of the ETA, that is, it must be:

- as reliable as appropriate for the purpose of the communication; and
- proven in fact to have identified the signatory and their intention (by itself or together with further evidence).

[Schedule 1, item 31, paragraph 253RD(c) of the Corporations Act]

1.74 These conditions are discussed further at paragraphs 1.17 to 1.23 (in relation to documents executed by a company electronically).

1.75 Akin to the new rules that apply to documents executed by a company, it is not necessary for all signatories to sign the same document. ***[Schedule 1, item 31, subsections 253RD(1) and (2) of the Corporations Act]***

1.76 Documents lodged with ASIC may also be signed electronically. In situations where ASIC is required to make the document publicly

available, the person may wish to remove any personal identifiers (such as their ISPN). ***[Schedule 1, item 31, subsection 253RD(3) of the Corporations Act]***

Minute books

Electronic recording and storage of minute books

1.77 Information may be recorded electronically in a minute book if at the time of recording the information it is reasonable to expect that the information would be readily accessible so as to be usable for subsequent reference. ***[Schedule 1, item 31, subsection 253S(1) of the Corporations Act]***

1.78 The minute book may also be kept electronically if the method used to keep the minute book provides a reliable means of maintaining the integrity of the information and it was, at the time of generating the electronic minute book, reasonable to expect that the information would be readily accessible so as to be usable for subsequent reference. ***[Schedule 1, item 31, subsections 253S(2) and (3) of the Corporations Act]***

1.79 These rules mirror the requirements for when information can be recorded or stored electronically in subsections 12(1) to (3) of the ETA 1999 and are intended to apply in the same way as the relevant ETA provisions.

1.80 If the minute book is stored electronically, it must be open for inspection at the same place where a hard copy would have been required to be retained under sections 251A or 253M of the Act (generally the registered office, principal place of business or another place approved by ASIC). ***[Schedule 1, item 31, paragraph 253S(2)(a) of the Corporations Act]***

New rules apply as mandatory rules

1.81 The new rules relating to electronic execution and virtual meetings (apart from the rules relating to time and place, and the method of voting) apply as mandatory rules rather than replaceable rules. In other words, a company's constitution cannot displace or modify the rules.

1.82 This ensures that all companies have the power to hold meetings virtually and execute company documents electronically if they elect to do so. Further, as the rules are facilitative in nature, they do not preclude companies from conducting meetings or executing documents using traditional means.

1.83 Mandatory rules also ensure that all companies that elect to use technology comply with the minimum requirements. For example, meetings can only be held virtually if the members as a whole have a reasonable opportunity to participate. This ensures that companies cannot opt out of the consumer protection safeguards by adopting a different rule in their constitution.

1.84 It is also consistent with the approach taken in the context of meetings of registered schemes, given that there are no replaceable rules that apply to registered schemes.

Consequential amendments

Amendments to the meetings rules

1.85 Existing provisions which include bespoke rules that provide for the use of electronic communication or alternative technology are repealed to ensure a single consistent approach. ***[Schedule 1, items 11, 13, 16, 18, 19, 21, 22 and 27, section 248D, subsections 249J (3A) to (5), section 249S, subsection 250B(3), subsection 250BA(1) and section 252Q of the Corporations Act]***

1.86 Amendments are also made to provisions which set out how and when notices relating to meetings are provided to ensure that these do not preclude the giving of notices electronically and that they are not inconsistent with the default rules relating to time and place. ***[Schedule 1, items 12, 13, 22 to 23 and 29, sections 249J, 252G, 252J and subsections 252Z(3A) and (4) of the Corporations Act]***

1.87 Similarly, provisions relating to the automatic adjournment of meetings when a quorum is not present are amended to ensure that they operate appropriately for virtual meetings and that members are given sufficient information to allow them to participate in the adjourned virtual meeting. ***[Schedule 1, items 17 and 28, sections 249T and 252R of the Corporations Act]***

1.88 Sections that require meetings to be accessible to members are amended to ensure that if the meeting is held using electronic communication, it is conducted in accordance with the standard rules. ***[Schedule 1, items 15 and 26, sections 249R and 252P of the Corporations Act]***

1.89 Finally, the list of replaceable rules in section 141 is updated to reflect changes in subsection numbers due to the above amendments. ***[Schedule 1, item 10, table item 22 and 22A in section 141 of the Corporations Act]***

Application and transitional provisions

1.90 The amendments to the meeting rules apply to meetings held on or after the commencement of this Schedule and any document that is required or permitted to be given on after that day. ***[Schedule 1, item 31, sections 1679 and 1679A of the Corporations Act]***

1.91 Companies and responsible entities of registered schemes are required to notify members of their right to opt in to receiving documents in hard copy within 2 months of the day of commencement of this Schedule. Failure to provide this notice is a strict liability offence with a

penalty of 30 penalty units. ***[Schedule 1, item 31, section 1679B of the Corporations Act, Schedule 3]***

1.92 A strict liability offence is appropriate in this circumstance as it is necessary to strongly deter companies or registered schemes from failing to advise members of their right to elect to receive a hard copy. The imposition of a strict liability offence reduces non-compliance by ensuring that ASIC can efficiently and expeditiously deal with low-level offending, thereby bolstering the integrity of the regime.

1.93 The strict liability offences meet all the conditions listed in the Attorney-General's Department's *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. It does not exceed 300 penalty units for a body corporate and preserves the defence of honest and reasonable mistake of fact to be proved by the accused on the balance of probabilities

1.94 The new rules relating to the electronic keeping and retention of minute books apply to minute books kept before, on or after the day of commencement. The new rules that allow companies to give minute books electronically do not have a special application provision and commence and apply from the day after Royal Assent. ***[Schedule 1, item 31, section 1679C of the Corporations Act]***

1.95 The amendments to the requirements for companies to execute a document under section 127 apply from the day that the Act commences. ***[Schedule 1, item 31, section 1679D]***

1.96 The rules in Determination No. 3 for holding meetings using alternative technology do not apply to any meetings or documents covered by the new rules. This ensures that there is no confusion about the rules that apply to meetings convened under Chapter 2G and documents executed under section 127. ***[Schedule 1, item 31, section 1679E]***

Sunset date

1.97 The amendments do not apply on and after 16 September 2021. This reflects the fact that they are designed to provide companies with additional flexibility during the Coronavirus pandemic. The Government is intending to make permanent the changes relating to electronic communication and to conduct an opt-in pilot for hybrid annual general meetings in which shareholders can attend meetings in person or virtually. These changes will be in place when the temporary extension sunsets. ***[Schedule 1, item 34, section 1679F of the Corporations Act]***

Chapter 2
Continuous disclosure obligations

Outline of chapter

2.1 Schedule 2 to the Bill amends the corporations law to ensure that, in determining whether a listed disclosing entity contravenes its existing continuous disclosure obligations, its state of mind is taken into account (for both civil contraventions and criminal contraventions). However, ASIC continues to be able to issue an infringement notice regardless of the state of mind of the entity.

2.2 Similarly, entities and officers are not liable for misleading and deceptive conduct in circumstances where the continuous disclosure obligations have been contravened unless the requisite mental element has been proven.

Context of amendments

2.3 In May 2020, the Australian Government temporarily amended continuous disclosure obligations to enable companies and their officers to more confidently provide guidance to the market during the coronavirus pandemic.

2.4 The continuous disclosure obligations in Chapter 6CA of the Corporations Act require disclosing entities to disclose price-sensitive information on a continuous basis. If they are listed on a listing market whose rules require it, then they make those disclosures to the market operator, or if they are an unlisted disclosing entity, they must lodge that information with ASIC. An entity contravenes these obligations if the entity has information that is not generally available, the information is such that a reasonable person would expect it to have a material effect on the price or value of the entity's enhanced disclosure securities if it were generally available, and the entity fails to notify the market operator or ASIC of the information.

2.5 The temporary Determination No. 2 temporarily modified the Corporations Act to ensure that, in determining whether a listed disclosing entity contravenes its existing continuous disclosure obligations, its state of mind is taken into account (for both civil contraventions and criminal contraventions). The effect is that persons must prove the entity had knowledge of, or was recklessness or negligent with respect to whether information they did not disclose would have had a material effect on the

price or value of that entity's securities. These temporary changes were subsequently extended by Determination No. 4.

2.6 On 21 December 2020, the Parliamentary Joint Committee on Corporations and Financial Services (the Committee) handed down the report of its inquiry into litigation funding and the regulation of the class action industry.

2.7 The report of the Committee provides that securities class actions are frequently brought in Australia alleging contraventions of the continuous disclosure obligations and that this has a significant financial and compliance impact on the entities and officers subject to these actions.

2.8 The Committee recommended a permanent change to the Corporations Act to ensure that, in determining whether a listed disclosing entity contravenes its existing continuous disclosure obligations, its state of mind is taken into account. The Committee's view was that this change would address an imbalance between the benefits to the market of continuous disclosure obligations and the costs imposed on entities and officers. This would bring Australia's continuous disclosure regime closer to the regimes in comparable jurisdictions such as the United States and United Kingdom.

2.9 Civil penalty proceedings concerning contraventions of continuous disclosure obligations are often brought in conjunction with allegations of misleading and deceptive conduct under section 1041I of the Corporations Act. This is because the same conduct (i.e. failure to disclose price-sensitive information in a timely manner) can trigger both the continuous disclosure obligations and the misleading and deceptive conduct prohibition.

2.10 Schedule 2 to the Bill amends continuous disclosure obligations to ensure that, in determining whether a listed disclosing entity contravenes its existing continuous disclosure obligations, its state of mind is taken into account. Schedule 2 to the Bill further provides that entities and officers are not liable for misleading and deceptive conduct in circumstances where the continuous disclosure obligations have been contravened unless the requisite mental element has been proven.

Summary of new law

2.11 Schedule 2 to the Bill amends the corporations law to ensure that, in determining whether a listed disclosing entity contravenes its existing continuous disclosure obligations, its state of mind is taken into account (for both civil contraventions and criminal contraventions). However, ASIC continues to be able to issue an infringement notice regardless of the state of mind of the entity.

2.12 Similarly, entities and officers are not liable for misleading and deceptive conduct in circumstances where the continuous disclosure obligations have been contravened unless the requisite mental element has been proven.

Comparison of key features of new law and current law

New law	*Current law*
The temporary modification is made permanent.	The temporary Determination No. 4 modifies the Corporations Act to ensure that, in determining whether a listed disclosing entity contravenes its existing continuous disclosure obligations, its state of mind is taken into account. Without the temporary modification, the Corporations Act does not require ASIC or private plaintiffs to prove an entity's knowledge, recklessness or negligence in establishing a civil contravention of the continuous disclosure obligations.
Entities and officers are not liable for misleading and deceptive conduct in circumstances where the continuous disclosure obligations have been contravened unless the requisite mental element has been proven.	Misleading and deceptive conduct provisions prohibit a person from engaging in conduct in relation to a financial service (including issuing of shares and publishing information in relation to shares) that is misleading or deceptive or likely to mislead or deceive. Failure to comply is not an offence, but may lead to civil liability under section 1041I.

Detailed explanation of new law

2.13 Schedule 2 to the Bill amends the corporations law to ensure that, in determining whether a listed disclosing entity contravenes its existing continuous disclosure obligations, its state of mind is taken into account (for both civil contraventions and criminal contraventions).

2.14 However, ASIC continues to be able to issue an infringement notice regardless of the state of mind of the entity.

2.15 Similarly, entities and officers are not liable for misleading and deceptive conduct in circumstances where the continuous disclosure obligations have been contravened unless the requisite mental element has been proven.

Continuous disclosure – criminal offences

Criminal offences

2.16 The existing criminal offences for failing to comply with the continuous disclosure obligations set out in sections 674(2) and 675(2) of the Corporations Act continue to apply.

2.17 However, sections 674(2) and 675(2) are no longer civil penalty provisions (including in the list of civil penalty provisions in section 1317E of the Corporations Act). These are replaced with new civil penalty provisions are included in the new law (which require a mental element to be proven in order to establish a contravention). These new civil penalty provisions are discussed further below. ***[Schedule 2, items 2, 3, 4, 6, 8, 9 10 and 11, sections 674, 674(2)(c), note 2 to section 674(2), sections 675, 675(2)(a) and (b), note 2 to section 675(2) and note 2 to section 674(5) of the Corporations Act 2001]***

2.18 The operation of these provisions are otherwise unchanged. In particular, the content of the obligation remains unchanged. The existing objective test for whether a person would expect the information, if it were generally available, to have a material impact on the price or value of the securities, is retained.

2.19 The civil accessorial liability provisions (and their corresponding defences) are repealed. ***[Schedule 2, items5, and 12, sections 674(2A), 674(2B), 675(2A) and 675(2B) of the Corporations Act 2001]***

Continuous disclosure – new civil penalty provisions

Listed disclosing entities bound by listing rules of a listing market

2.20 As noted above, there is a new civil penalty provision for listed disclosing entities bound by a continuous disclosure requirement in market listing rules that replaces the existing civil penalty provision. The rule applies to a listed disclosing entity if section 674 applies to that entity. ***[Schedule 2, items 7 and 22, sections 674A(1)and (2) and 1317E(3) of the Corporations Act 2001]***

2.21 If a listed disclosing entity has information that the listing rules of a listing market require the disclosing entity to notify to the market operator, and the information is not generally available, and the entity knows or is reckless or negligent with respect to whether the information would have a material effect on the price or value of the entity's enhanced disclosure securities, the entity must notify the market operator of that

information in accordance with its listing rules. ***[Schedule 2, item 7, section 674A(2) of the Corporations Act 2001]***

2.22 The new civil penalty provision is identical to the criminal offence in section 674, except where the criminal offence contains an objective test as to the effect of the information on the price or value of the entity's enhanced disclosure securities, the new civil penalty provision contains a test of the entity's knowledge, recklessness, or negligence with respect to the effect of that information on the price. ***[Schedule 2, item 7, note 1 to section 674A(2) of the Corporations Act 2001]***

2.23 The new civil penalty provision is a financial services civil penalty provision under section 1317E. The existing rules regarding financial services civil penalty provisions in Part 9.4B of the Corporations Act apply (including the orders that are available for contravening a civil penalty provision). These consequences are appropriate given the nature of the offending conduct – which involves the non-disclosure of price sensitive information to the market by large corporate actors. These consequences are also consistent with the existing law – which includes a civil penalty provision for the same conduct (but without the requirement to establish a mental element). ***[Schedule 2, items 7 and 21, note 2 to section 674A(2) and section 1317E(3) of the Corporations Act 2001]***

2.24 There is a corresponding accessorial liability provision. A person contravenes the new accessorial liability provision if they are involved in a listed disclosing entity's contravention of the new civil penalty provision. The accessorial liability provision is a financial services civil penalty provision and is identical to the previous accessorial liability provision that was included on the former civil penalty provision. ***[Schedule 2, item 7, section 674A(3) of the Corporations Act 2001]***

2.25 As above, the existing rules regarding financial services civil penalty provisions in Part 9.4B of the Corporations Act apply. These consequences are appropriate as it ensures that other persons, involved in the relevant conduct are incentivised to ensure compliance. These consequences are also appropriate for consistency with the existing law (which, as noted above, applied accessorial liability for the same conduct but without the requirement to establish a mental element). ***[Schedule 2, item 7, section 674A(3) of the Corporations Act 2001]***

2.26 A defence to the accessorial liability provision is available. A person does not contravene the accessorial liability provision if they take all steps (if any) that were reasonable in the circumstances to ensure that the listed disclosing entity complied with its obligations under the new civil penalty provision, and after doing so, believed on reasonable grounds that the listed disclosing entity was complying with its obligations. ***[Schedule 2, item 7, section 674A(4) of the Corporations Act 2001]***

2.27 It is appropriate that a contravention-specific defence to the new civil penalty provision is available, which may have the effect of requiring

a defendant to bear the evidential burden in relation to the defence. In accordance with the Attorney-General's Department's guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (the Guide), it is appropriate for the defendant to bear the evidential burden in relation to whether they took the required action. These matters are peculiarly within the knowledge of the defendant. It would be significantly more costly and difficult for the regulator to disprove than for the defendant to establish the matter, as the defendant would be better positioned to readily adduce evidence as to the steps they took and their beliefs after so doing.

2.28 Analogous rules for the responsible entities of registered schemes and operators of notified foreign passport funds to those in existing sections 674(3) and (3A) also apply in relation to the new civil penalty provision. ***[Schedule 2, item 7, section 674A(5) of the Corporations Act 2001]***

2.29 The new civil penalty provision is not intended to affect or limit the situations in which action can be taken in respect of a failure to comply with listing rules of a listing market. ***[Schedule 2, item 7, section 674A(6) of the Corporations Act 2001].***

2.30 The new law clarifies that section 1317QB(1) does not apply to the new civil penalty provision or its corresponding accessorial liability provision because in proceedings for a declaration of contravention of the new civil penalty provision and accessorial liability provision, it is necessary to prove the person's knowledge, recklessness or negligence as appropriate. That is, an entity or person's state of mind is relevant.***[Schedule 2, item 7, section 674A(7) of the Corporations Act 2001]***

Other disclosing entities

2.31 Similarly there is a new civil penalty provision for disclosing entities listed on markets whose listing rules do not contain continuous disclosure provisions, and unlisted disclosing entities. ***[Schedule 2, item 13, section 675A(1) of the Corporations Act 2001]***

2.32 If the disclosing entity becomes aware of information that is not generally available, and the entity knows, or is reckless or negligent with respect to whether the information would have a material effect on the price or value of the entity's enhanced disclosure securities if it were generally available, the entity must lodge a document with ASIC as soon as practicable containing the information. ***[Schedule 2, item 13, section 675A(2) of the Corporations Act 2001]***

2.33 The new civil penalty provision is a financial services civil penalty provision under section 1317E. As discussed above, the existing rules in Part 9.4B of the Corporations Act apply regarding the consequences for contravening civil penalty provisions. These consequences are appropriate given the nature of the offending conduct – which involves the non-disclosure of price sensitive information to the

market. These consequences are also consistent with the existing law – which includes a civil penalty provision for the same conduct (but without the requirement to establish a mental element) ***[Schedule 2, item 13, note 2 to section 675A(2) of the Corporations Act 2001]***

2.34 There is a corresponding accessorial liability provision. A person will contravene the accessorial liability provision if they are involved in a disclosing entity's contravention of the new civil penalty provision. These consequences are appropriate as it ensures that other persons, involved in the relevant conduct are incentivised to ensure compliance. These consequences are also appropriate for consistency with the existing law (which, as noted above, applied accessorial liability for the same conduct but without the requirement to establish a mental element). ***[Schedule 2, item 13, section 675A(3) of the Corporations Act 2001]***

2.35 A defence to the accessorial liability provision is available. A person does not contravene the accessorial liability provision if they take all reasonable steps in the circumstances to ensure that the listed disclosing entity complied with its obligations under the new civil penalty provision, and after doing so, believed on reasonable grounds that the listed disclosing entity was complying with its obligations. It is appropriate that a contravention-specific defence to the new civil penalty provision is available, which may have the effect of requiring a defendant to bear the evidential burden in relation to the defence. In accordance with the Attorney-General's Department's guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (the Guide), it is appropriate for the defendant to bear the evidential burden in relation to whether they took all reasonable steps in the circumstances to ensure the entity complied with its obligations and believed on reasonable grounds that the entity had complied. These matters are peculiarly within the knowledge of the defendant. It would be significantly more costly and difficult for the regulator to disprove than for the defendant to establish the matter, as the defendant would be better positioned to readily adduce evidence as to the steps they took and their beliefs after so doing. ***[Schedule 2, item 13, section 675A(4) of the Corporations Act 2001].***

2.36 The regulations may also provide for circumstances in which disclosure under the new civil penalty provision is not required. The regulation making power is appropriate and necessary for the proper administration of the new civil penalty provision. It provides an efficient means to reduce undue regulatory burden (on regulated parties) and unreasonable diversion of resources (from the regulator) in circumstances where disclosure by way of lodging a document with ASIC is unnecessary. In this way the regulation-making power provides for efficient administration of the regime, rather than setting out a defence in subordinate legislation. ***[Schedule 2, item 13, section 675A(2)(d) of the Corporations Act 2001]***

2.37 Analogous rules for the responsible entities of registered schemes and operators of notified passport funds to those in sections 674(3) and (3A) also apply in relation to the new civil penalty provision. ***[Schedule 2, item 13, section 675A(5) of the Corporations Act 2001]***

2.38 The new law clarifies that section 1317QB(1) does not apply to the new civil penalty provision or its corresponding accessorial liability provision because in proceedings for a declaration of contravention of the new civil penalty provision and accessorial liability provision, it is necessary to prove the person's knowledge, recklessness or negligence as appropriate. That is, an entity or person's state of mind is relevant. ***[Schedule 2, item 13, section 675A(6) of the Corporations Act 2001]***

2.39 Section 676 of the Corporations Act, dealing with when information is considered to be generally available for the purposes of the continuous disclosure provisions, has been amended to apply to the new civil penalty provisions as well as the original provisions. ***[Schedule 2, items 14 and 15, section 676 (heading) and 676(1) of the Corporations Act 2001]***

2.40 For the purposes of the new civil penalty provisions, an entity knows information would have a material effect on the price or value of its enhanced disclosure securities if it knows the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the enhanced disclosure securities. ***[Schedule 2, items 16, 17 and 18, section 677 (heading) and 677(2)(a) of the Corporations Act 2001]***

2.41 Similarly an entity is reckless or negligent with respect to whether the information would have a material effect on the price or value of its enhanced disclosure securities if it is reckless or negligent with respect to whether the information would or would be likely to influence persons who commonly invest in securities in deciding whether to acquire or dispose of the enhanced disclosure securities. ***[Schedule 2, item 18, section 677(2)(b) of the Corporations Act 2001]***

Misleading and deceptive conduct

2.42 Schedule 2 to 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 and deceptive conduct.

The effect of the change is that entities and officers are not liable for misleading and deceptive conduct in circumstances where the continuous disclosure obligations have been contravened unless the requisite mental element in the continuous disclosure obligation has been proven.

2.43 Firstly, minor drafting amendments are made to section 1041H(3) to clarify that the carve-out from the prohibition on misleading and deceptive conduct in section 1041H(1) applies to persons

engaging in conduct that would contravene the provisions listed in section 1041H(4)(a)-(b). ***[Schedule 2, items 19 and 20, section 1041H of the Corporations Act]***

2.44 Secondly, Schedule 2 inserts a new provision into section 1041H. The new provision operates to carve-out certain conduct in relation to breaches of the continuous disclosure provisions from the prohibition on misleading and deceptive conduct in section 1041H(1). ***[Schedule 2, item 21, section 1041H(4)-(5) of the Corporations Act]***

2.45 Conduct of a disclosing entity that does not contravene one of the new civil penalty provisions, but would contravene that obligation if it contained the relevant objective test in section 674 or 675 instead of the test of knowledge, recklessness or negligence, does not contravene the prohibition on misleading and deceptive conduct in section 1041H(1). ***[Schedule 2, item 20, section 1041H(4) of the Corporations Act 2001]***

2.46 This means that conduct that triggers the continuous disclosure provisions will not automatically also constitute misleading and deceptive conduct for the purposes of section 1041H(1). In particular, conduct that contravenes the continuous disclosure obligations that contain the objective test will not contravene section 1041H(1). ***[Schedule 2, item 20, section 1041H(4)(a) and (b) of the Corporations Act 2001]***

2.47 If a contravention of section 1041H(1) in connection with a contravention of a continuous disclosure obligation is alleged, the new requirement to prove knowledge, recklessness or negligence with respect to the effect of the information on the price or value of the disclosing entity's enhanced disclosure securities will also apply commencing civil penalty proceedings concerning a contravention of section 1041H(1).

2.48 The effect of the new carve-out is that if a person seeks a remedy against a disclosing entity under section 1041I of the Corporations Act for an alleged contravention of section 1041H(1), and that contravention is connected to an alleged failure to comply with a continuous disclosure obligation, the person will need to establish the contravention of the relevant new continuous disclosure civil penalty provision, including the fault element of knowledge, recklessness, or negligence, in order to establish that the disclosing entity has contravened section 1041H(1).

2.49 Schedule 2 inserts an analogous provision into section 12DA of the ASIC Act. The effect of this provision is also to limit the circumstances in which proceedings seeking compensation for loss or damage as a result of a contravention of section 12DA can be brought in connection with alleged continuous disclosure contraventions, in the same terms as for section 1041H(1) of the Corporations Act. ***[Schedule 2, item 1, section 12DA of the Australian Securities and Investments Commission Act 2001]***

Infringement notices under Part 9.4AA of the Corporations Act

2.50 Schedule 2 amends the infringement notices regime in Part 9.4AA of the Corporations Act, which applies in relation to the continuous disclosure provisions in Chapter 6CA.

2.51 ASIC may issue an infringement notice if it has reasonable grounds to believe a disclosing entity has contravened sections 674(2) or 675(2). For the purposes of issuing an infringement notice under Part 9.4AA of the Act, the offences created by sections 674(2) and 675(2) are to be treated as offences of strict liability. ***[Schedule 2, item 47, section 1317DAA(4) of the Corporations Act 2001]***

2.52 The Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers was considered in determining whether to treat the offences in sections 674(2) and 675(2) as offences of strict liability for the purposes of issuing an infringement notice. The Guide notes that strict liability offences are appropriate where they are likely to enhance the effectiveness of the enforcement regime and where there are legitimate grounds to penalise persons lacking in fault. The strict liability offence creates a lower penalty for engaging in the prohibited conduct. For lower levels of offending, the strict liability offence is appropriate to deter future unlawful behaviour. In complex cases where it is particularly difficult to find adequate evidence of fault elements, the strict liability offence allows the regulator to still take appropriate enforcement action ensuring contraventions can still be brought to account. Issuing the infringement notice has a wider deterrent effect; it places regulated persons on notice to guard against the possibility of future contraventions.

2.53 There are no criminal consequences that flow merely from the failure to comply with an infringement notice. Infringement notices may not be issued as an alternative to proceedings for civil penalties under Part 9.4B of the Corporations Act. ***[Schedule 2, item 48, section 1317DAB(1) of the Corporations Act 2001]***

2.54 The infringement notice is not required to state the maximum penalty a Court could impose under Part 9.4B in relation to the alleged contravention, as sections 674(2) and 675(2) are no longer civil penalty provisions (so this information is no longer relevant). ***[Schedule 2, item 49, section 1317DAE(1)(f) of the Corporations Act 2001]***

2.55 For a Tier 3 entity, the penalty specified in the infringement notice for an alleged contravention of section 674(2) is $66,000 if a civil penalty order under Part 9.4B had at any time been made in relation to the disclosing entity for the continuous disclosure provisions as they were before being amended by Schedule 2 to the Bill. ***[Schedule 2, item 50, section 1317DAE(3)(d) of the Corporations Act 2001]***

2.56 If a civil penalty order under Part 9.4B had at any time been made in relation to the disclosing entity for a contravention of the continuous disclosure provisions as they were before being amended by Schedule 2 to the Bill, the penalty specified in the infringement notice for an alleged contravention of section 675(2) is $66,000. ***[Schedule 2, item 51, section 1317DAE(5)(b) of the Corporations Act 2001]***

2.57 Schedule 2 repeals section 1317DAG(2). This means that ASIC may not commence any action (such as commence civil penalty proceedings under Part 9.4B or seek disclosure orders under section 1324B), if an entity either fails to pay the penalty specified in the infringement notice, or notify the relevant market operator, or lodge any document with ASIC containing the information specified in the infringement notice. ***[Schedule 2, item 52, section 1317DAG(2) of the Corporations Act 2001]***

2.58 Whilst an infringement notice has not been withdrawn, no proceedings may be started or continued against the disclosing entity in relation to the alleged contravention specified in the infringement notice, or an offence constituted by the same conduct that constituted the alleged contravention. ***[Schedule 2, item 53, section 1317DAG(3) of the Corporations Act 2001]***

2.59 When ASIC withdraws an infringement notice, the withdrawal notice is not required to state that civil proceedings under Part 9.4B may be brought against the disclosing entity for a contravention of the provision specified in the infringement notice. This is because sections 674(2) and 675(2) are not civil penalty provisions. ***[Schedule 2, item 54, section 1317DAI(6)(d) of the Corporations Act 2001]***

2.60 Schedule 2 makes consequential amendments in Part 9.4AA to remove deeming provisions that refer to civil penalty proceedings under Part 9.4B for the purposes of applying Part 9.4AA to registered schemes and notified foreign passport funds. These provisions were removed because sections 674(2) and 675(2) are not civil penalty provisions. ***[Schedule 2, items 45 and 46, sections 1317DAA(2)(e) and 1317DAA(3)(e) of the Corporations Act 2001]***

Consequential amendments

2.61 Consequential amendments are made to various provisions in the Corporations Act to update cross-references to provisions of Chapter 6CA. Provisions that formerly referred only to sections 674 and/or 675 of the Corporations Act have been updated, where appropriate, to refer also to relevant new civil penalty provisions. ***[Schedule 2, items 25--42, sections 9, 111AP(1), 111AR(1)(d), 708AA(3)(c), 708AA(7)(c)(ii), 708A(2)(c), 708A(6)(d)(ii), 713(6)(aa), 713A(23)(c), 1012DAA(3)(b), 1012DAA(3)(ba), 1012DAA(7)(d)(ii), 1012DAA(7)(da)(ii), 1012DA(2)(b), 1012DA(6)(e), 1013F(2)(d)(ii), 1013FA(3)(a)(ii) of the Corporations Act 2001]***

2.62 Similarly section 127(2D)(b)(ii) of the ASIC Act has been updated to refer to the new civil penalty provisions as well as existing sections 674 and 675. ***[Schedule 2, item 24, section 127(2D)(b)(ii) of the Australian Securities and Investments Commission Act 2001]***

2.63 A reference to "sections 674-677" in the first note to section 1017B(2) has been removed to clarify that the new civil penalty provisions are included in the reference to Chapter 6CA. ***[Schedule 2, item 43, note 1 to section 1017B(2) of the Corporations Act 2001]***

2.64 Section 1200K is amended to give the new civil penalty provision (proposed section 675A(2)) an extended operation in relation to disclosing entities that have made recognised offers of securities under Chapter 8 of the Corporations Act. ***[Schedule 2, item 44, section 1200K of the Corporations Act 2001]***

Application and transitional provisions

2.65 The amendments in Parts 1 and 2 to Schedule 2 apply in relation to conduct that is engaged in on or after the day they commence. ***[Schedule 2, item 55, sections 1683 and 1683A of the Corporations Act 2001]***

Contingent amendments

2.66 Part 4 of Schedule 2 makes contingent amendments to the new civil penalty provisions requiring certain information to be lodged with ASIC.

2.67 The amendments will commence on the later of:

- Immediately after the commencement of Parts 1, 2 and 3 in Schedule 2 to the Bill; or
- Immediately after the commencement of items 1061 and 1062 in Schedule 1 to the *Treasury Laws Amendment Registries Modernisation and Other Measures) Act 2020*.

However, the contingent amendments will not commence at all if items 1061 and 1062 in Schedule 1 to the *Treasury Laws Amendment (Registries Modernisation and Other Measures) Act 2020* do not commence.

2.68 If the contingent amendments do commence, the disclosing entity will be required to lodge the information with the Registrar, rather than with ASIC. ***[Schedule 2, items 56 and 57, sections 675A(2)(c)(ii) and 675A(2) of the Corporations Act 2001]***

Chapter 3
Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Schedule 1 - Virtual meetings and electronic communication of documents

3.1 This Schedule is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

3.2 Schedule 1 to the Bill allows companies to execute documents, hold meetings, provide notices relating to meetings and keep minutes using electronic means or other alternative technologies.

Human rights implications

3.3 This Schedule does not engage any of the applicable rights or freedoms.

Conclusion

3.4 This Schedule is compatible with human rights as it does not raise any human rights issues.

Schedule 2 - Continuous disclosure obligations

3.5 Schedule 2 to the Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

3.6 Schedule 2 to the Bill amends the corporations law to ensure that, in determining whether a listed disclosing entity contravenes its existing continuous disclosure obligations, its state of mind is taken into account (for both civil contraventions and criminal contraventions).

However, ASIC continues to be able to issue an infringement notice regardless of state of mind of the entity.

3.7 Similarly, entities and officers are not liable for misleading and deceptive conduct in circumstances where the continuous disclosure obligations have been contravened unless the requisite mental element has been proven.

Human rights implications

3.8 Schedule 2 engages, or may engage, the right to a fair trial under Article 14 of the International Covenant on Civil and Political Rights (ICCPR).

3.9 In assessing the impact on human rights, consideration has been given to the Parliamentary Joint Committee on Human Rights' *Guidance Note 2: Offence provisions, civil penalties and human rights* (Guidance Note 2), and to the Guide to Framing Commonwealth Offences.

3.10 The civil penalties contained in Schedule 2 are not criminal offences under Australian law. They do not impose a criminal penalty, nor do they carry a penalty of imprisonment.

3.11 Despite this, Guidance Note 2 observes that civil penalty provisions may engage criminal process rights under Article 14 of the ICCPR, regardless of the distinction between criminal and civil penalties in domestic law. Accordingly, the new accessorial liability civil penalties in Schedule 2, which are capable of regulating the conduct of natural persons, have been assessed to determine whether they amount to 'criminal' penalties for the purposes of international human rights law. This assessment took into account the nature, purpose and severity of the penalties.

3.12 The new civil penalties that only regulate the conduct of disclosing entities were not assessed, as it is not possible for these penalties to infringe the criminal process rights of natural persons.

3.13 The accessorial liability provisions carry a significant maximum pecuniary penalty whose purpose is simultaneously to punish and deter contravening conduct. Cumulatively, the nature and purpose of the penalties would appear to be 'criminal' for the purposes of international human rights law.

3.14 The accessorial liability provisions contain a contravention-specific defence, which may constitute a reversed evidential burden in relation to that defence. This engages the right to be presumed innocent until proven guilty according to law under Article 14 of the ICCPR. However, to the extent that it may engage the protection afforded by Article 14, it is reasonable, necessary and appropriate as the reversal of

the evidential burden is limited to matters peculiarly within the knowledge of the defendant.

3.15 In accordance with the Attorney-General's Department's guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (the Guide), it is appropriate for the defendant to bear the evidential burden in relation to whether they took all reasonable steps in the circumstances to ensure the entity complied with its obligations and believed on reasonable grounds that the entity had complied. These matters are peculiarly within the knowledge of the defendant. It would be significantly more costly and difficult for the regulator to disprove than for the defendant to establish the matter, as the defendant would be better positioned to readily adduce evidence as to the steps they took and their beliefs after so doing.

3.16 To the extent that Schedule 2 does engage the protections under Article 14 of the ICCPR, it is compatible with human rights because the reversal of the evidential burden is limited to matters that are peculiarly within the knowledge of the defendant, of which they are better positioned to readily adduce evidence.

Conclusion

3.17 Schedule 2 is compatible with human rights as it does not raise any human rights issues.

ATTACHMENT A

Supplementary analysis on options for introducing a fault element to continuous disclosure

Background

On 25 May 2020, the Treasurer, under the temporary *Corporations (Coronavirus Economic Response) Determination (No. 2) 2020* (Determination No. 2), amended the continuous disclosure provisions for a period of six months. The temporary amendment meant that companies and officers would be liable for a breach of the provisions only if they had acted with knowledge, recklessness or negligence – a 'fault element' – in failing to update the market with price sensitive information.

These changes were made so that firms would be able to release forward-looking guidance to the market during a period of heightened economic uncertainty due to the COVID-19 crisis. The potential for a firm to be subject to a class action seeking up to hundreds of millions of dollars, in circumstances where they had acted without knowledge, recklessness or negligence, would otherwise act as a deterrent to put out forecasts that are valuable for investors.

Due to ongoing economic uncertainty expected to continue into 2021, the Treasurer extended these amendments until 22 March 2021 through *Corporations (Coronavirus Economic Response) Determination (No. 4) 2020* (Determination No. 4).

On 13 May 2020, the House referred to the Parliamentary Joint Committee on Corporations and Financial Services an inquiry into 'Litigation Funding and the Regulation of the Class Action Industry' (the PJC Report). The PJC Report examined the market for class actions and litigation funders, and included an extensive discussion of the continuous disclosure regime, culminating in a recommendation that "the Australian Government permanently legislate changes to continuous disclosure laws in Determination (No. 2)".

The PJC Report analysed continuous disclosure in the broader context of class action litigation. Evidence to the committee focused on the 'ease with which shareholder class actions may be triggered by an alleged breach of Australia's continuous disclosure provisions'. The committee found that 'reform is required to continuous disclosure laws' due to their increasing prevalence in shareholder class actions.

This analysis is intended to supplement the analysis in the PJC Report for the purpose of consistency with the *Australian Government Guide to Regulatory Impact Analysis*. It considers the impacts of two policy options that were not recommended by the PJC report:

- Retaining the existing ability for the regulator to issue infringement notices and undertake non-penalty proceedings against entities and officers without having to prove knowledge, recklessness or negligence; and
- Introducing a fault element to private actions for misleading and deceptive conduct in relation to alleged failures to keep the market fully informed.

Impact analysis

Option 1: ASIC's use of infringement notices and non-financial enforcement action will remain as is

Most of the focus on the effectiveness of continuous disclosure laws by the PJC Report, and the prior Australian Law Reform Commission's Inquiry into class actions and third-party litigation funders, was centred on class actions funded by third parties. The Australian Securities and Investments Commission also brings actions under the *Corporations Act (2001)* continuous disclosure rules.

ASIC's civil actions include those seeking penalties through the courts, which can be for up to the greater of $10.5 million or ten per cent of the entity's annual turnover. It also includes civil actions that do not seek financial remedies, such as seeking a court order for an entity to disclose information it should have disclosed under the continuous disclosure regime. Lastly, ASIC also has available administrative penalties via the infringement notices regime, which are capped at $100,000 for entities with market capitalisation of over $1 billion, and capped at lower amounts for smaller entities. This option considers imposing a fault element for ASIC's civil penalty proceedings (those with financial impact), but not requiring fault for the use of non-financial enforcement or administrative penalties.

Many of the arguments made by the PJC Report in favour of making permanent reforms to continuous disclosure were made in regards to the cited negative impacts of class actions. Some of the negative effects of shareholder class actions that were highlighted in the PJC Report which are not applicable to infringement notices and non-financial enforcement are:

- The circularity of shareholder class actions – where the incidence of an action brought by shareholders will often be borne by a group of shareholders with whom there is significant overlap, given the action will negatively affect the value of the securities they hold.

- The reliance on litigation funders in almost all continuous disclosure class actions means that shareholders relinquish a significant amount of the settlement to the third party funders, in addition to the amount being paid in legal fees.
- The effect on the price of directors and officers insurance. Submissions to the PJC Report regarding the effect of class actions on the cost of directors and officers insurance costs attribute the increase to the increased prevalence of class actions. This can be attributed to the increased frequency of these actions and the amount that they settle for.

ASIC has different considerations when choosing whether to pursue infringement notices or non-financial enforcement action in relation to breach of these laws than do private actors or litigation funders that finance them. ASIC considers the nature and seriousness of misconduct, the behaviour of the offender, the expected level of public benefits of pursuing enforcement, any mitigating factors, and the strength of the case and evidence available.

Retaining the 'no-fault' standard for infringement notices will allow ASIC to utilise them for more minor infractions. ASIC will retain the ability to seek more significant penalties in circumstances where they can demonstrate the entity or officer acted with 'knowledge, recklessness or negligence'. ASIC tends to use infringement notices for less serious breaches as a fast and effective regulatory response that is proportionate and proximate in time to the alleged breach.

According to ASIC Enforcement Report records, they have had enforcement outcomes on sixteen infringement notices in the last five years.

The accompaniment of ASIC using infringement notices on the 'no-fault' standard, plus the threat of more significant financial penalties or class actions where an entity or officer has acted with fault, creates a complementary regime where the actions brought and potential outcomes are more proportionate to the behaviour of that entity or officer.

We anticipate officers and entities will be more confident issuing forward guidance while still being subject to regulatory discipline. The success of this approach will be evaluated with respect to the degree to which this is achieved.

Option 1:	
Benefits	**Costs**
It is clear to companies and officers that there has been no change in the standard that they are expected to uphold, as ASIC will still continue to issue administrative penalties and have available non-financial enforcement tools on a 'no-fault'	Entities and officers may be concerned that they can still face action in circumstances where they have acted with no fault. However, they will only face administrative action with penalties that are proportionate to their infringement.

Option 1:	
Benefits	**Costs**
standard. ASIC administrative action does not have the same effect of driving up directors and officers insurance for companies as the penalties available through this regime are significantly smaller than other actions seeking financial penalties or remedies. ASIC can still use infringement notices to penalise entities and officers for minor infractions of the continuous disclosure rules, without having to undertake lengthy proceedings.	

Option 2: The fault element also applies for misleading and deceptive conduct

Stakeholders who favoured introducing a fault element to the continuous disclosure regime commonly cited a desire for an at-fault element to apply to misleading and deceptive conduct. This was expressed in submissions to the PJC Report, as well as in feedback to the Government on the effectiveness of the temporary instruments.

Stakeholders raised concerns with issues related to misleading and deceptive conduct rules on two grounds. The first of these is that entities and officers can be found to have misled or deceived the market through their statements without proof that they did so with knowledge, recklessness or negligence. This is a separate policy issue to continuous disclosure and not considered through this supplementary analysis. The second is that actions for continuous disclosure are usually accompanied by actions for misleading and deceptive conduct on the same factual circumstances. Litigants can claim an entity or officer misled or deceived the market by failing to disclose information, which is very similar to the continuous disclosure requirement. The concern is that introducing a fault element to continuous disclosure will be ineffective without also introducing this requirement to misleading and deceptive conduct, as there will remain an alternate action available to litigants without a fault standard.

Misleading and deceptive conduct is one of the key provisions of the *Corporations Act 2001* that is used in a range of circumstances that go beyond those under which

continuous disclosure arises, so the introduction of a fault element is limited to those circumstances in order to avoid unintended flow-on effects.

In the Australian Law Reform Commission (ALRC) Inquiry the committee looked at continuous disclosure and misleading and deceptive conduct hand-in-hand in the final chapter, culminating in a recommendation that "the 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…". The PJC Report also noted the submissions relating to misleading and deceptive conduct, but declined to present a view on whether there should be any changes, stating at 17.121 "the committee does not have information on what proportion of shareholder class actions rely on continuous disclosure versus misleading or deceptive conduct laws, and whether there were any differences in the outcomes of those cases".

It is evident in the 2019 Federal Court decision in *TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Ltd* that continuous disclosure and misleading and deceptive conduct were considered and adjudicated on very similar bases, and again in the 2020 decision in *Crowley v Worley Ltd*. It is clear from reviewing a number of continuous disclosure actions that the two are commonly brought together. Given that there have only been two judgements in class actions for continuous disclosure, it is not yet conclusively established whether or how the courts may apply different standards to the two. However, it is clear that changing the standard for both continuous disclosure and misleading and deceptive conduct circumstances related to continuous disclosure will achieve the policy intent of amending the continuous disclosure provisions as recommended by the PJC.

Identified risks from proposed options

Risk
Entities and officers do not meet the same standards of disclosure.

Under Option 1 there remain a number of enforcement possibilities for private actors and ASIC. Both private litigants and ASIC can seek civil financial penalties – principally in the form of compensatory damages for private litigants – for breaches of the continuous disclosure rules by entities and their officers. However, they will only be able to do so by proving that the entity acted with knowledge, recklessness or negligence. ASIC will be able to utilise infringement notices and non-financial enforcement proceedings, such as obtaining a court order requiring an entity to disclose information, without having to prove knowledge, recklessness or negligence. Private litigants may also seek injunctions without proving fault.

Infringement notices are an enforcement tool with a cap on the penalty that can be administered. If the party that is receiving the infringement notice does not challenge it, then it does not need to go through the court system. This makes it suitable for a quick regulatory response that does not warrant harsher enforcement measures and which the party receiving the notice is unlikely to challenge.

There are other enforcement options at ASIC's disposal that do not require proof of knowledge, recklessness or negligence, such as seeking an order from the court that an entity must disclose information. This will continue to be part of ASIC's regulatory options to encourage compliance with the continuous disclosure obligations.

When combined with the existing threat of class actions and more punitive enforcement measures by ASIC where an entity or officer has acted with 'knowledge, recklessness or negligence', entities will remain sufficiently deterred from seeking to flagrantly breach their continuous disclosure obligations. Any serious misconduct will still be subject to the threat of class actions or significant civil penalty proceedings brought by ASIC where there is a suggestion that the entity acted with knowledge, recklessness or negligence. The risk of a deliberate change by an entity to be more disposed to disregarding their continuous disclosure obligations is therefore considered to be low.

Risk
That the application of a fault element to misleading and deceptive conduct is unnecessary or does not achieve the intended outcomes from adding a fault element to it and the continuous disclosure rules.

The option to extend a fault element to misleading and deceptive conduct is based on two Federal Court judgments, as well as the opinions of stakeholders expressed in targeted consultation on the temporary instruments.

Treasury undertook targeted consultation with key stakeholders on the effectiveness of the first temporary instrument in August 2020. Among the stakeholders that supported the instrument, the biggest concern expressed was that it would not be effective in materially lowering the threat of class actions because it did not also apply to misleading and deceptive conduct.

The recent *Myer* and *Worley* cases support this proposition, as the findings on misleading and deceptive conduct (in so far as they relate to allegations that the defendant misled or deceived the claimant by failure to update the market with price-sensitive information) were considered closely with the findings on continuous disclosure. While there will not be a definitive verdict on the extent of the distinction between the two provisions unless there is a specific set of facts before the court that

highlights that distinction, it is clear enough that if a fault element is not added to misleading and deceptive conduct alongside the fault element added to continuous disclosure that there is a significant risk that the fault element added to continuous disclosure will not serve its intended purpose.

The ALRC did not have the benefit of either Federal Court decision above when preparing their recommendation on continuous disclosure. The PJC had the *Myer* judgment available, but submissions had closed when the *Worley* judgment was handed down. This new jurisprudential evidence provides a basis for extending the application of the fault element to misleading and deceptive conduct in limited circumstances as outlined above.

Regulatory Burden Estimate

This regulatory burden estimate covers the policy settings for continuous disclosure recommended by the PJC Report and both options 1 and 2. This means that private litigants and ASIC must prove a fault element in civil penalty proceedings under continuous disclosure, that ASIC retains the ability to issue infringement notices and undertake non-financial civil enforcement without proving fault, and that there is a fault element for misleading and deceptive conduct where it is alleged an entity failed to disclose price-sensitive information to the market.

Directors and officers insurance

The main impact we anticipate is in relation to premiums for directors and officers insurance.

Many businesses take out directors and officers insurance to insure against the risk of adverse findings or settlements under the continuous disclosure regime. This cost has risen significantly in recent years and, for those companies that take out insurance rather than face the risk of paying out of company resources for a loss on a case, is the biggest cost for businesses associated with the regime.

Based on evidence presented to the PJC by providers of the insurance, the cost of this insurance has risen dramatically over recent years. According to Marsh Australia, for their ASX200 clients, the cost of premiums rose by 250 per cent from 2011 to 2018, and an additional 118 per cent in 2019. This does not include the increased excess that the company must cover or any restriction in the coverage offered by the insurance.

The extreme volatility over the past decade means there is no reliable historic average to apply when establishing a benchmark cost of insurance going forward. For the purposes of illustrating the limitations of using the past decade as an indication, if

it is assumed that premiums over the next decade mirror the rises for ASX 200 companies from 2011 to 2018 per the information above, the savings attributable to the decline in directors and officers insurance would be in the magnitude of $9 billion per year. This is likely to be a dramatic overestimate as these premium increases do not account for the rebalancing of the premium pool that is likely to occur in the coming years.

Therefore, to arrive at an estimate of the regulatory benefit owing to decline in directors and officers insurance premiums, we have made an illustrative assumption of an average of ten per cent growth in premiums without the continuous disclosure reforms, and five per cent growth in premiums if the reforms take place.

Directors and officers insurance covers a range of circumstances other than legal action for alleged continuous disclosure breaches. Insurers have not revealed commercially sensitive information on how the breakdown of each risk factor contributes to the price of premiums, however, submissions to the ALRC and PJC have been consistent that is has been the single biggest contributing factor to its increase in price. On this basis, the illustrative example is that the annual increase in premiums will be five percentage points higher each year versus what it would have been in the absence of this policy change.

For the purpose of our example, we have made assumptions on the coverage of directors and officers insurance and the cost of premiums based on insurer submissions to the ALRC and PJC Inquiries and their publically available materials, included those issued to business about the state of the market. On the basis of these, it is assumed that all companies with market capitalisation over $10 billion have directors and officers insurance, with decreasing coverage on a sliding scale down to companies with market capitalisation of less than $100 million, where it is held by 30 per cent of companies. The premium for large caps has been estimated at $5 million, down to $625,000 for micro caps.

The costing only accounts for premiums. It does not account for excess in case of a settlement or action against the company.

In this example, it is estimated that the average annual regulatory save as a result of the decreased expenditure on directors and officers insurance will be $912.5 million.

Average annual regulatory saving (from business as usual)				
Change in costs ($m)	**Business**	**Community organisations**	**Individuals**	**Total change in cost**
Total, by sector	$912.5	Nil	Nil	$912.5