

16 May 2022

Department of the Prime Minister and Cabinet
PO Box 6500
Canberra ACT 2600

Via: deregulation@pmc.gov.au

Dear PM&C,

Supporting economic resilience through regulatory responsiveness – lessons from COVID-19 and other shocks

Thank you for the opportunity to comment on the Department of the Prime Minister and Cabinet's (PM&C) consultation on lessons from the COVID-19 pandemic and other shocks.

The Australian Institute of Company Directors' (AICD) mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership reflects the diversity of Australia's director community, with 48,000 members drawn from directors and leaders of not-for-profits (NFPs), large and small businesses and the government sector.

The AICD welcomes PM&C's consultation. The AICD strongly advocated for urgent regulatory relief and flexibility required to support boards and organisations throughout the COVID-19 pandemic, in particular to enable virtual operations and accommodate the impact of public health and community safety measures. The AICD applauds the collaborative approach between Government, regulatory agencies and industry that has delivered the positive outcomes seen to date.

As Australia is now charting a path to a COVID-normal economy, this PM&C consultation presents a valuable opportunity to consider opportunities to improve regulation and policy settings to support business, particularly in the event of future crises.

1. Executive summary

This submission focuses on regulatory responses and policy areas that concern the governance of Australian organisations, including the obligations and regulatory expectations directors face. We provide comments in the following key areas:

- **Australian Government regulatory responses to COVID-19** – decisive steps were taken by the Government and regulators during the height of the COVID-19 pandemic to create greater flexibility for directors and organisations to meet their governance obligations while navigating public health restrictions. Effective examples include temporary changes to annual general meeting (AGM) and electronic documents requirements, financial reporting deadlines, continuous disclosure laws and a moratorium on insolvent trading liability.

The AICD appreciates the heightened level of engagement by Treasury, the Australian Securities and Investments Commission (ASIC) and the Australian Charities and Not-for-profits Commission (ACNC), in particular, during this time. Their initiative to introduce certain temporary measures

during COVID-19 have resulted in a number of permanent reforms which have been strongly welcomed by the AICD.

- **Commonwealth-state regulatory responses** – there was an opportunity for greater collaboration between the Commonwealth, State/Territory governments and regulators to streamline regulatory responses during COVID-19, particularly in respect of employers' work health and safety (**WHS**) obligations and evolving pandemic conditions; and
- **Existing laws and regulations** – in most cases, the existing legal and regulatory infrastructure enabled the Australian Government and certain regulators to provide effective relief in the wake of the COVID-19 pandemic. There were examples of discretionary emergency powers utilised by Government and regulators that provided more effective responses than mechanisms such as 'no action' positions. The AICD would encourage embedding these types of emergency powers in the design of any future legislative or regulatory reform.

2. Australian Government regulatory responses to COVID-19

The AICD recognises that there have been a number of effective regulatory responses to COVID-19. As the PM&C discussion paper notes, the Australian Taxation Office (**ATO**), Therapeutic Goods Administration (**TGA**) and Fair Work Ombudsman (**FWO**) implemented a range of regulatory initiatives to reduce the risk of adverse social and economic outcomes.

However, the following section limits itself to key areas of governance of particular relevance for our members. We discuss the Government's response to these below.

a) Virtual AGMs and electronic signatures

At the outset of COVID-19 in 2020, ASIC was swift to respond to calls by the AICD and other key industry stakeholders to address challenges faced by companies in convening member/shareholder meetings, where restrictions on large gatherings were in place.

Until recently, the *Corporations Act 2001* (Cth) (**Corporations Act**) did not contemplate an ability for companies to hold a virtual (wholly online) annual general meeting (**AGM**). To facilitate companies continuing to convene AGMs during the pandemic, ASIC issued a 'no action' regulatory position on non-compliance with provisions of the Corporations Act which provided companies:¹

- a two-month extension to convene their AGM following the end of the financial year; and
- an ability to use technology to hold a hybrid or virtual AGMs.

ASIC did not however have a power to formally amend technical AGM requirements under the Corporations Act or individual company constitutions, nor did it have a power to enable the electronic execution of documents. While the 'no action' position was a pragmatic solution that ASIC could facilitate without legislative amendment, in practice, it did not remove the risk of legal action for non-compliance from third parties or a challenge to the validity of a resolution passed at a virtual meeting.

Instead, much needed certainty was provided by the Treasurer's temporary relief introduced in 2020 via legislative instrument, the *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020*, followed by an extension of this relief in 2021 via the *Treasury Laws Amendment Bill (2021 Measures No.1)*

¹ AICD, *ASIC announces temporary measures for AGMs amid spread of COVID-19*, 20 March 2020: available [here](#).

Act 2021. This legislative relief temporarily amended specific provisions of the Corporations Act to enable companies to use technology to:²

- convene virtual AGMs irrespective of a company's constitutional requirements for in-person meetings;
- distribute meeting related materials to shareholders and members electronically; and
- validly execute documents electronically under section 127 of the Corporations Act.

Permanent reforms

The effectiveness of this relief during the pandemic highlighted the need to permanently modernise the Corporations Act requirements relating to company meetings, shareholder communications and document execution requirements.

Accordingly, the AICD was a strong advocate for the reforms that were legislated in February this year, making permanent those temporary measures under the *Corporations Amendment (Meetings and Documents) Act 2022 (Electronic Governance Reforms)*.³ Importantly, these permanent changes to the Corporations Act have provided much-needed flexibility and technological neutrality so that organisations can adopt the best member/shareholder meeting format for their circumstances, as well as reduced costs and improved efficiencies via the electronic communication of documents.

b) Financial reporting

Under ordinary circumstances, disclosing entities and registered managed investment schemes must lodge audited financial reports with ASIC within three months after their financial year end. All other entities that are required to lodge financial reports with ASIC must ordinarily do so within four months of their financial year end.

Early in the COVID-19 period, ASIC announced a one-month extension to the deadline for unlisted entities to lodge financial reports with ASIC and send them to members under the Corporations Act. This was later extended to provide blanket relief for all Australian reporting entities.

In addition, ASIC released guidance on *COVID-19 implications for financial reporting and audit* to help entities navigate their obligations under pandemic conditions.⁴ ASIC also provided input to the AICD's joint guidance with professional accounting bodies, Chartered Accountants Australia & New Zealand and CPA Australia, on the *Impacts of COVID-19 on annual report disclosures*.⁵

To accommodate the relaxing of these requirements under the Corporations Act, the Australian Securities Exchange (**ASX**) extended reporting and lodgement deadlines for listed entities to mirror the extension provided by ASIC. Similarly, the ACNC Commissioner exercised their discretion to provide a blanket extension for when NFPs had to submit their Annual Information Statements.

These were examples of particularly effective regulatory responses and coordination between regulators.

² AICD, *Important continuous disclosure reform and virtual AGM relief*, 10 August 2021: available [here](#).

³ AICD media release, *AICD welcomes permanent virtual AGM and electronic communications reforms*, 11 February 2022: available [here](#).

⁴ ASIC guidance, *COVID-19 implications for financial reporting and audit*, available [here](#).

⁵ AICD, CA ANZ & CPA Australia, *Impacts of COVID-19 on annual report disclosures*, July 2020, available [here](#).

c) Continuous disclosure

The COVID-19 crisis caused extreme market volatility and ongoing uncertainty. In the early stages of the pandemic, this posed particular challenges for ASX listed companies and their boards required to comply with continuous disclosure and misleading and deceptive conduct laws that are amongst the strictest in the world. It also created a materially heightened risk of opportunistic securities class actions instigated by litigation funders.

To support greater market disclosure, the Treasurer announced a temporary amendment to the Corporations Act so that companies and officers would only be liable for civil penalties under continuous disclosure laws if there had been "knowledge, recklessness or negligence with respect to updates on price sensitive information to the market". This relief was granted for an initial six-month period and extended for a further six months.

In the AICD's view, this was a better policy outcome than simply advising all companies to withdraw all guidance from the market, as investors and other stakeholders were searching for the best information available under volatile conditions. The legislative relief ensured that good faith efforts from companies and their officers to inform the market were appropriately protected from subsequent securities class actions.

Permanent reforms

Prior to COVID-19, the AICD had long-standing concerns that Australia's continuous disclosure settings were out of step with the rest of the world, making us a lucrative market for litigation funders and were driving adverse consequences for businesses, shareholders and the economy generally.

There has been no evidence presented that company disclosures during COVID-19 decreased following the Treasurer's temporary relief, and in our view, market integrity was sustained as evidenced by strong capital raisings. Accordingly, the AICD was a strong advocate for the reforms legislated in August 2021, making permanent changes to re-insert a fault element ("knowledge, recklessness or negligence") into the continuous disclosure and misleading and deceptive conduct laws. This represented an important step for the Australian market and will bring us closer into line with jurisdictions such as the United Kingdom and United States.

Critically, under the permanent reforms, disclosure obligations remain untouched with no changes to what needs to be disclosed, or by when. In our view, these changes will improve the effectiveness of the current securities class action regime whilst discouraging opportunistic or speculative claims – putting our corporations law settings on a more sensible and sustainable footing.

d) Insolvent trading

Under insolvent trading provisions of the Corporations Act, a director of a company can be personally liable for debts incurred by a company if the company trades while insolvent. This can lead to directors feeling under pressure to make quick decisions to enter into an insolvency process if there is any risk that the company will experience periods where it will be trading while insolvent.

To ensure that companies had confidence to continue to trade through the COVID-19 pandemic until the situation had stabilised, the Government was again swift to respond to these challenges via a temporary moratorium on directors' insolvent trading liability. Under the temporary moratorium, effected in March 2020 via the *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020*, directors were relieved of their duty to prevent insolvent trading with respect to any debts incurred in the

ordinary course of the company's business for a six-month period. This relief was extended for a further six months until 31 December 2020 to prevent a further wave of business failures before companies had the opportunity to recover.

In 2020, the AICD conducted a survey of members to understand the governance of impact of COVID-19. The results indicated that for 12 per cent of directors (16 per cent of small and medium sized enterprises) the temporary moratorium on insolvent trading liability had greatly influenced their board's decision-making on whether to continue trading through COVID-19.⁶ The depth of reliance on this relief suggests that the Treasurer's emergency measures achieved its policy objective – providing a safety net for directors at a time of great uncertainty when many may have otherwise felt compelled to pursue an insolvency process.

For completeness, we note that this temporary relief was distinct from the permanent insolvency safe harbour under 588GA of the Corporations Act (**Insolvency Safe Harbour**).

Uncertainty for charities under ACNC Governance Standards

The ACNC was swift to align its interpretation of the ACNC Governance Standard duties (which includes a duty "not to allow the charity to operate while it is insolvent") for all charities with the temporary moratorium. The effect of this was that a charitable company would not be in breach of the ACNC Governance Standards if it traded insolvent, provided it informed its members and the ACNC if it was trading while insolvent.

However, at the time, the AICD had concerns with the ACNC's requirement that a charity which is trading while insolvent was still required to notify its members and the ACNC of that occurrence. In particular, we considered that the continued application of that obligation ran counter to the policy objectives of the temporary moratorium changes to the Corporations Act which were designed to encourage organisations to trade through the crisis.

The implications of a charity notifying its members would be significant, particularly given the extent to which charities depend on member support to ensure their continued viability. If it became commonly known that a charity was trading while insolvent, its prospects of continuing its operations with the support of stakeholders (e.g. members, suppliers, clients, lenders, donors) support would be severely limited. The AICD suggested that the obligation to notify members and the ACNC be removed, however, this clarification was not provided.

The uncertainty regarding the interpretation of ACNC Governance Standard 5 and its insolvency provisions, including the notification requirements, remains today with respect to charity directors utilising the permanent Insolvency Safe Harbour. The Insolvency Safe Harbour review final report tabled in Parliament in March 2022 confirmed that the Safe Harbour is available to NFP directors.⁷ The AICD continues to encourage the ACNC to provide some much-needed clarity around the obligations under ACNC Governance Standard 5 and their interaction with the permanent Insolvency Safe Harbour – including application to directors of associations incorporated under State or Territory legislation.

⁶ AICD COVID-19 Member Survey, June 2020, available [here](#).

⁷ Review of the insolvent trading safe harbour - Final report, page 75, November 2021 available [here](#).

3. Commonwealth-state regulatory responses

In the AICD's view, there was room for greater collaboration between the Commonwealth and the State/Territory governments, as well as regulatory agencies, to streamline regulatory responses during COVID-19.

Going forward, we also see an opportunity for harmonisation across the States and Territories in other key areas, such as fundraising and privacy laws. We discuss these examples below.

a) Work health and safety

COVID-19 presented unprecedented WHS issues for employers – ranging from how to protect workers from contracting the virus to whether to impose mandatory vaccinations in the workplace or allow 'close contacts' to return to work to alleviate widespread staff shortages.

Safe Work Australia was effective in providing rapid guidance for employers on their WHS obligations at the outset of COVID-19. However, as the conditions surrounding the pandemic evolved, navigating the changing public health restrictions mandated by Government and established WHS laws became increasingly challenging for organisations.

Notably, the AICD's latest Director Sentiment Index for the first half of 2022 indicated that complying with employment and WHS laws was the most significant regulatory challenge for organisations during COVID-19.⁸

Lack of guidance during Omicron outbreak

In particular, AICD members, across sectors, highlighted a lack of guidance from the WHS regulators during the Omicron wave in late 2021-early 2022. Directors were concerned that the widespread staff shortages, frequently revised definitions of 'close contacts' and lack of access to 'rapid antigen tests' left their organisations exposed to significant WHS risks including the prospect of workers' compensation claims and/or regulatory action in the event of workplace transmission. An additional challenge for certain sectors (e.g. aged care and other health providers) was that 'essential workers' were exempted under public health orders to re-enter the workplace despite being a close contact. Although this exemption alleviated the issue of staff shortages, directors were left confused as to how to ensure a safe working environment for their staff, at the same time as continuing to provide an essential service to the community.

As a result, our members turned to WHS and employment law practitioners, sometimes at considerable expense, during this time for guidance on how to navigate these issues. As a result, in many cases significant costs were incurred, while in others the lack of guidance led to widely varying risk management practices. In our view, there was an opportunity for Safe Work Australia, and each of the State and Territory WHS regulators, to work more collaboratively with the State and Territory governments to issue timely and targeted advice for employers as conditions and public health orders changed.

b) Electronic document execution

As discussed above, the temporary measures to enable electronic signatures for certain documents under section 127 of the Corporations Act provided much-needed relief for organisations and their

⁸ AICD Director Sentiment Index (April 2022), available [here](#). This ranked ahead of navigating industry specific regulation; managing financial reporting obligations, holding an AGM and complying with continuous disclosure obligations.

officers during COVID-19. However, for the purposes of signing and witnessing statutory declarations and deeds, temporary relief measures were provided in some jurisdictions, but not in others.

This added significant complexity for those transacting across States and Territories. For example, electronic signatures and/or documents witnessed via audio visual links would be valid in one State, but not recognised in another.

Accordingly, the AICD welcomed PM&C's Deregulation Taskforce 2021 consultation on reforms to permanently modernise document execution, focussing on statutory declarations and deeds. We strongly support options to modernise and harmonise document execution requirements across Commonwealth, State and Territory legislation. Post the federal election, we encourage the Government to progress these reforms as a matter of priority, particularly to provide certainty and consistency for those transacting across jurisdictions in the event of future economic shocks.

c) NFP Fundraising laws

Further to previous comments made to PM&C, the AICD reiterates our view that urgent action is needed to create a national framework that harmonises NFP fundraising laws; as well as regulation, audit and reporting requirements.⁹ Harmonisation has the potential to free NFPs from unnecessary red tape, allowing them to dedicate more resources to pursuing their purpose.

We welcomed the Assistant Treasurer's announcement in December 2021 on the establishment of Commonwealth Victorian working group to develop a national fundraising framework. The AICD urges the Government to maintain momentum on this important reform area when the new Parliament is formed.

d) Privacy laws

In a recent submission to the Attorney-General's Department concerning the review of the *Privacy Act 1988 (Privacy Act)*, the AICD noted the complexity, cost and inefficiencies inherent in existing regulatory and legislative privacy settings in Australia.¹⁰ Currently, obligations can span a range of industry specific and economy wide legislation, hampering the overall objective of a comprehensive and fit-for-purpose set of privacy obligations.

We reiterate this view and strongly encourage consideration of options to enable greater cooperation amongst regulators and the establishment of a working group to harmonise privacy laws across the Commonwealth and States and Territories.

4. Existing laws and regulations

As the examples discussed in section one above demonstrate, in most cases the existing legal and regulatory infrastructure enabled the Australian Government and certain regulators to provide effective relief in the wake of the COVID-19 pandemic. Many of these temporary measures highlighted the need to permanently modernise Australia's corporations law settings (for example, virtual AGMs and electronic signatures), or otherwise prompted reforms to address long-running issues and place policy on a more sensible footing (e.g. continuous disclosure liability provisions).

⁹ AICD Submission, *Harmonisation of State and Territory fundraising laws – streamlining overlapping regulations*, August 2021, available [here](#).

¹⁰ AICD submission, *Review of the Privacy Act 1988*, January 2022, available [here](#).

In terms of the mechanics of the temporary relief, some mechanisms are more effective than others. For example, ASIC's ability to issue 'no action' positions allows relief, effective immediately, in respect of certain obligations without the need for Parliament to pass legislation. However, at the same time, there are limitations to 'no action' positions - such as not precluding actions by third parties or the regulator in the future for infringements of the legislation. Ideally, no action positions are unnecessary because the underlying legislation should provide regulators with sufficient flexibility to provide relief in clearly articulated circumstances.

Discretionary emergency powers

In the AICD's view, a more effective regulatory response during the pandemic was the ability for Government and regulators to utilise a discretionary emergency power to provide temporary relief – whether that be economy wide or in specific sectors that are facing emergency conditions.

A key example was the introduction of a permanent discretionary emergency power for ASIC as part of the Electronic Governance Reforms to the Corporations Act (discussed above).¹¹ This power now enables ASIC to grant individual or class relief for up to 12 months to allow companies to hold wholly virtual AGMs if it considers it may be unreasonable to expect the holding of meetings at one or more venues because of a situation beyond their control (for example, in the event of future lockdowns). Earlier this year, ASIC invoked the use of this power to grant companies additional time to hold their AGMs due to the impact of the Omicron wave and the varied states of lockdown across Australian city centres.¹²

These mechanisms are able to facilitate a rapid regulatory response under emergency conditions or periods of disruption. We would encourage PM&C to consider embedding these types of emergency powers in the design of any future legislative or regulatory reform and to take a stocktake of the flexibility (or lack thereof) built into existing laws.

5. Responding to other types of shock and market disruption

The discussion paper seeks feedback on how Government and regulators are assessing the risk of future shocks and any mitigation strategies in place to deal with them, including any special 'emergency' or temporary discretionary powers.

In our view, there is little disclosure currently by Government of what work is being done to assess and manage the risk of future shocks. Insights into these processes would however be beneficial in the interests of public transparency and, in turn, for industry to make their own plans to build operational resilience and business continuity.

For completeness, we note that the AICD together with the Governance Institute of Australia published a report in 2020, *Governance Through a Crisis*, exploring the impact of COVID-19 on board practices and lessons from the crisis.¹³ Drawing on insights and experiences of directors and company secretaries during the first year of the pandemic, our joint report also detailed recommendations to help boards future-proof their governance practices in the event of disruption.

We look forward to the insights PM&C can share from its engagement with regulators and industry on best practice responses and mitigation strategies observed during the COVID-19 period.

¹¹ Section 253TA of the Corporations Act, via the *Treasury Laws Amendment Bill (2021 Measures No.1) Act 2021*.

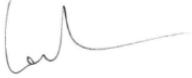
¹² ASIC media release, *ASIC allows additional time for holding virtual-only meetings*, 3 March 2022: available [here](#).

¹³ AICD and Governance Institute of Australia, *Governance Through a Crisis: Learning from COVID-19 – lessons for now and beyond*, September 2020, available [here](#).

6. Next steps

We hope our comments will be of assistance to PM&C. If you would like to discuss any aspects further, please contact Laura Bacon, Senior Policy Adviser, at lbacon@aicd.com.au, or Christian Gergis, Head of Policy, at cgergis@aicd.com.au.

Yours sincerely,



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