

Mr Shane Love; Acting Speaker; Mr Simon Millman; Mr David Scaife; Deputy Speaker; Ms Meredith Hammat;
Mr Chris Tallentire; Mrs Lisa O'Malley; Ms Hannah Beazley; Ms Christine Tonkin; Ms Cassandra Rowe

DIRECTORS' LIABILITY REFORM BILL 2022

Second Reading

Resumed from 26 October.

MR R.S. LOVE (Moore — Deputy Leader of the Opposition) [10.03 am]: I am delighted to be able to speak on this bill, which has been in train since 2015, when it was first discussed in this place. Unfortunately, it had not progressed since then. I will be speaking on behalf of the opposition on this bill, and in doing so I say at the outset that we will be supporting this legislation. The bill, as it is drafted, will do what it is intended to do, in that it will limit and standardise provisions that impose personal liability on directors for corporate offending. In the media release put out on 26 October 2022, the Attorney General said that the bill will standardise and reduce the number of provisions that impose personal criminal liability on officers for offences committed by corporations across the Western Australian statute book. The media release goes on to say —

Under the proposed reforms, a company officer—which includes directors, secretaries, and other officers—will be held personally liable for certain specified offences committed by a body corporate if the officer failed to take all reasonable steps to prevent the body corporate committing the offence.

Currently in WA, more than 60 pieces of legislation contain provisions that make officers liable for offences committed by bodies corporate. The Bill removes derivative liability completely from 21 Acts.

Further on, it states —

The Bill does not affect the criminal liability of officers who have committed offences themselves, nor does it impose any new obligations on or create new offences in relation to officers.

Directors' liability reform was one of 27 deregulation priorities under the National Partnership Agreement to Deliver a Seamless National Economy —

That program name is quite a mouthful! It continues —

a now-concluded project which was overseen by the Council of Australian Governments' Reform Council.

As I said, the genesis of this bill goes back a long way to that COAG reform project. A similar bill was introduced and first and second read on 25 February 2015 before being referred to the Standing Committee on Uniform Legislation and Statutes Review. The committee's report on the bill was tabled on 21 April 2015. That bill did not progress, and this is the first opportunity we have had to discuss the issue of directors' liability reform since that time.

The COAG principles for this reform, which were outlined in that 2008 project, were —

1. Where a corporation contravenes a statutory requirement, the corporation should be held liable in the first instance.
2. Directors should not be liable for corporate fault as a matter of course or by blanket imposition of liability across an entire Act.
3. A “designated officer” approach to liability is not suitable for general application.
4. The imposition of personal criminal liability on a director for the misconduct of a corporation should be confined to situations where:
 - (a) there are compelling public policy reasons for doing so (for example, in terms of the potential for significant public harm that might be caused by the particular corporate offending);
 - (b) liability of the corporation is not likely on its own to sufficiently promote compliance; and
 - (c) it is reasonable in all the circumstances for the director to be liable having regard to factors including:
 - i. the obligation on the corporation, and in turn the director, is clear;
 - ii. the director has the capacity to influence the conduct of the corporation in relation to the offending; and
 - iii. there are steps that a reasonable director might take to ensure a corporation's compliance with the legislative obligation.
5. Where principle 4 is satisfied and directors' liability is appropriate, directors could be liable where they:
 - (a) have encouraged or assisted in the commission of the offence; or

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- (b) have been negligent or reckless in relation to the corporation's offending.
6. In addition, in some instances, it may be appropriate to put directors to proof that they have taken reasonable steps to prevent the corporation's offending if they are not to be personally liable.

The COAG principles also identified three types of director liability provisions. As noted in the second reading speech to the 2015 bill —

Under type 1, the director will be presumed to have taken all reasonable steps to prevent the body corporate committing the offence—and, therefore, not be liable—unless the prosecution proves that he or she failed to take all reasonable steps ... Type 2 provides that a director will be taken to have committed the offence committed by the body corporate unless he or she leads evidence that suggests —

Visitors — Warwick Senior High School

The ACTING SPEAKER (Ms M.M. Quirk): Member, can I just interrupt you for a second. As the students from Warwick Senior High School are on their way out, I want to welcome them to Parliament. They are in the member for Kingsley's electorate, but they were previously in my electorate. I hope you have enjoyed your visit. I am sorry, member; please proceed.

Debate Resumed

Mr R.S. LOVE: Welcome. I have lost my train of thought; I do not know where I got up to. I will have to start type 2 again!

The ACTING SPEAKER: Directors' liability, member.

Mr R.S. LOVE: I know we are on the Directors' Liability Reform Bill 2022. I was reading the three types of directors' liability provisions and I think I was halfway through type 2. I will pick it up from there. The director must ensure —

... he or she took all reasonable steps to prevent the commission of the offence by the body corporate. Once this evidence is adduced, the prosecution bears the onus of proving that the director did not take all reasonable steps ... Type 3 requires the director to prove on the balance of probabilities that he or she took all reasonable steps.

In his second reading speech, the Attorney General outlined some differences between the Directors' Liability Reform Bill 2015 and the current bill. The Directors' Liability Reform Bill 2022 is quite fat for a fairly simple piece of legislation, but it will make many consequential amendments to various pieces of legislation that are all listed, along with the areas in which the changes will occur. It is a little simpler than it first appears, given the actual weight of the matters to be considered. However, given that it has been the subject of so much study, I suppose that it is not as straightforward as I would think as a layperson.

The differences between the Directors' Liability Reform Bill 2015 and the current bill are simple things such as numbering. The government has repealed and replaced some provisions around what was then known as the Mines Safety and Inspection Act 1994. That is no longer required because those issues have been picked up in the Work Health and Safety Act 2020, which the fortieth Parliament passed. I ask the Attorney General to explain in his second reading reply whether the same provisions for liability that are being brought forward in the Directors' Liability Reform Bill 2022 will apply in the Work Health and Safety Act, given that that other amendment has been removed because it is no longer required. I wonder whether the bill's provisions reflect those in the Work Health and Safety Act 2020.

The Directors' Liability Reform Bill 2015 also proposed amendments to the Taxation Administration Act 2003. Those amendments are no longer required as that act provides for accessorial liability and there has been no agreement to remove or standardise that type of liability following the Council of Australian Governments' original director liability reform commitment. There is no longer an amendment to the Mining Act 1978 because it also addressed that type of liability.

The 2015 bill proposed amendments to remove derivative liability from the Emergency Management Act 2005, but that is no longer required following discussions with the Department of Fire and Emergency Services. Can the Attorney General detail why that has occurred and why DFES felt that it should be exempted from this amendment to the Emergency Management Act 2005? I also wonder whether he could reflect upon what that means for any changes that might have occurred to the duties of any person under the act, as it currently exists. I understand that that decision followed consultation with the Department of Fire and Emergency Services. I would also like to know who else the Attorney General consulted in producing this bill and whether he could outline why that information has not been provided. The shadow Attorney General has asked about the consultation process, so if the Attorney General could outline that, it would be greatly appreciated.

A review clause that was not in the 2015 bill has also been inserted into this bill.

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I will probably take the bill into consideration in detail because it will be good for the Attorney General to explain some of the provisions in detail. I will refrain from going into much more detail about the bill itself because we can talk about that in consideration in detail. I find it a bit confusing that the bill mentions that directors must take “reasonable steps”. It sometimes says “all reasonable steps” but other times it just says “reasonable steps”. Perhaps the Attorney General can explain what is intended by that. We can clarify those provisions as we go through some of the clauses of the Directors’ Liability Reform Bill 2022.

I assume that when this bill goes to the other place, it will be referred to the Standing Committee on Uniform Legislation and Statutes Review so that it can go through the bill in some detail, given the changes that have been made since 2015. With the proviso that the opposition expects that the bill will be referred to the uniform legislation committee, I commend the bill to the house and reiterate that the opposition is supportive of it. I understand that other people want to speak on the bill, so I will allow them to make their contributions. I look forward to interrogating these matters further in consideration in detail.

The ACTING SPEAKER: I give the call to the versatile member for Mount Lawley!

MR S.A. MILLMAN (Mount Lawley — Parliamentary Secretary) [10.16 am]: Thank you, Acting Speaker. I rise to make a contribution on the Directors’ Liability Reform Bill 2022. I thank the member for Moore for his contribution on behalf of the opposition. I note that the opposition supports the bill. That comes as no surprise because this is a sensible economic reform that will be undertaken by the McGowan Labor government and picks up on work that was commenced by the previous government. That work was generated by the Council of Australian Governments’ Business Regulation and Competition Working Group, which was tasked with implementing the National Partnership Agreement to Deliver a Seamless National Economy. That was a bit of a word mess, so I am going to unpack that a little and explain the situation.

This COAG agreement occurred back in late 2008. For members who do not remember, late 2007 to early 2008 was a golden era in the history of Australian politics.

Mr D.A.E. Scaife: Why was it great?

Mr S.A. MILLMAN: Because we had wall-to-wall Labor state governments and a Labor federal government. The existence of these Labor state governments, together with the Labor federal government, allowed COAG to operate efficiently and effectively. Given the commitment of the Labor state governments and the Labor federal government to micro-economic and macro-economic reform that would turbocharge the Australian economy and each of the state economies, COAG was able to enter into things like the National Partnership Agreement to Deliver a Seamless National Economy. I look forward with anticipation to the emergence of a similar golden era in the next few months. We only have to hope that Daniel Andrews, somebody who was described —

Mr P.J. Rundle: Australia’s worst Premier.

Mr S.A. MILLMAN: Was it you, member for Roe, who described him as Australia’s worst Premier?

Several members interjected.

Mr S.A. MILLMAN: I was trying to remember whether it was the member for Roe because I was going to sheet it home to the member for Cottesloe! I am glad that he has confessed because the state election is in less than two weeks and if the result is as anticipated, I will make sure to remind him of that comment.

Mr P.J. Rundle: The people of Victoria need to have a good, hard look at themselves.

Mr S.A. MILLMAN: If Dan Andrews can overcome the slings and arrows of outrageous fortune that have been fired at him by the member for Roe, persuasive and influential as he is in the Victorian democratic scene, and if Chris Minns, the well-travelled and extremely competent Leader of the Opposition in New South Wales, can overcome Dominic Perrottet to become Premier of New South Wales next March—my apologies to Tasmania—we will once again have wall-to-wall Labor governments.

Several members interjected.

Mr S.A. MILLMAN: There will be wall-to-wall mainland Labor governments! I look forward to once again having the sort of era of economic reforms for which Labor has become renowned over the last 30 to 40 years with the Hawke–Keating reforms and then the Gillard–Rudd reforms, with the state and federal governments working collaboratively towards harmonising our regulatory framework. That is what this bill does; the Directors’ Liability Reform Bill 2022 will help to harmonise our regulatory framework. It will reduce complexity for board directors and corporations and businesses carrying on their activities.

In late 2008, the Council of Australian Governments agreed to increase harmonisation across Australian jurisdictions regarding the imposition of personal criminal liability on directors for corporate fault. There was a drive to reduce

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provisions that impose personal criminal liability on directors for corporate offending and to harmonise those provisions using a principles-based approach. This is not the first time that this government has brought to this chamber for debate legislation that is designed to harmonise our laws and ease the transaction costs of doing business by reducing the regulation that governs the way in which businesses can operate. I thanked the member for Moore for his contribution. He went through some of the important principles that are outlined in this legislation and that will be necessary for streamlining that regulation. I want to focus on one of the corollary effects of having simplified and streamlined legislation: when directors do the wrong thing, the regulatory authorities responsible for ensuring compliance with the law will be well armed with the necessary elements to institute prosecutions. One of the reasons that I think that is important is from my previous experience working in asbestos litigation.

I want to refer members to a book called *Killer Company* by Matt Peacock. I congratulate Mr Peacock who, next year, will be celebrating 50 years of a journalistic career, having commenced with the ABC in 1973. For the purposes of *Hansard*, the book is called *Killer Company: James Hardie Exposed* and it was first published in Australia by HarperCollins Publishers in 2009. It goes through a lot of the history of asbestos litigation and exposure to asbestos in Australia. Members have heard me speak before about this issue, most often in connection with CSR and its liability for exposure of workers to asbestos at the Wittenoom mine. This book concentrates entirely on James Hardie Industries and its negligence in exposing workers, such as factory workers and tradesmen, and home handymen and family members to deadly asbestos dust and fibres that were contained in James Hardie's building products. Chapter 9, "Plotting from the War Room", is a pertinent chapter from Mr Peacock's book. If members will allow me, I want to briefly read an extract.

The year was 1998 and the board of James Hardie Industries Limited had given the go-ahead to a plan to relocate headquarters to the Netherlands, where it hoped to pay less tax on dividends it would receive from a new company to be formed to run its burgeoning US business.

A key element of the plan —

This is pertinent to today's discussion —

was to shed its asbestos liabilities by hiving off Hardie's two former asbestos subsidiaries—the now defunct brake-lining company Jsekarb ('brakes' spelt backwards), and the much larger manufacturer of fibro cement, James Hardie & Coy (called 'Coy' for short)—from their parent.

The James Hardie spinners began to meet secretly after work in the basement of the old Asbestos House, the company's Sydney headquarters. They would leave their offices casually at five o'clock as though they were going home and then quietly regroup downstairs in the 'war room'. The room was behind an unmarked door where nobody was likely to notice their frenetic activity.

Those in the PR team were the only ones in the company who knew of the relocation plan, —

It was a secret plan to avoid their liability —

other than the board and a handful of senior executives. If word leaked out, they believed the move would be doomed before it began because of the anticipated outrage from asbestos victims and their representatives. Their job was to craft a communications strategy to help it succeed. So sensitive was their task that Hardie's new general manager of corporate affairs, Greg Baxter, did not even mention asbestos in his brief for the board, where he referred to asbestos by the codename 'Apple':

This is a quote from his memo to the board —

The separation of operating businesses from contingent liabilities could arouse suspicion, criticism and opposition. Critics will have numerous public forums, such as a willing media, in which to air their concerns, particularly in relation to Apple and tax.

Baxter, a tough, phlegmatic media-minder, was part of a new management team installed when Hardie began to move into the huge US market. Other key figures in the team included Peter Macdonald, —

I am going to come back to Mr Macdonald —

then head of US operations—a reformed smoker who joined conference calls from his Californian home while on the exercise treadmill—and Hardie's general counsel, Peter Shafron, an extremely bright, affable lawyer —

As we all are —

recruited from Allens.

This secret team met in a clandestine operation in the basement of Asbestos House in Sydney to devise their strategy to shift their operations off to the Netherlands and evade their Australian taxation liabilities and avoid their liabilities

Extract from Hansard

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to victims of their deadly asbestos products. The problem for James Hardie was that because it was a publicly listed company on the Australian Securities Exchange, it had to provide information to the ASX about its proposal to shift its operations offshore. The extract I just read from *Killer Company* was about 1998. I want to skip forward to 2002. Although other companies were involved in similar asbestos-related activities, most notably CSR, which I have already mentioned, more than 50 per cent of the claims in the Dust Diseases Tribunal of New South Wales in 2002 were brought against companies in the James Hardie group.

I am now going to move on to talk about the Medical Research and Compensation Foundation and James Hardie's move to the Netherlands. James Hardie had been structured as a parent company operating through subsidiaries. All asbestos operations, including the provision of compensation, were undertaken by James Hardie's subsidiaries. Between 1995 and 2000, James Hardie, the parent company, began to remove the assets of the subsidiaries whilst leaving them with most of the asbestos liabilities of the James Hardie group. The company has assets and legal proceedings were brought against it. The plaintiff succeeded in demonstrating that James Hardie had been negligent, as regularly happens and happened when I was doing this work. The company needed to meet the liability using its assets—assets pay for liabilities—except that the parent company was now stripping all the assets out of the companies that had the liability. They were left with the liabilities but without the capacity to pay the compensation. In 2001, the two companies were separated from James Hardie and acquired by the Medical Research and Compensation Foundation—MRCF—which was essentially created in order to act as an administrator for Hardie's asbestos liabilities. Then CEO of James Hardie, Peter Macdonald, whom I mentioned before when talking about *Killer Company*, made public announcements emphasising that the MRCF had sufficient funds to meet all future claims and that James Hardie would not give it any further substantial funds. Indeed, the net assets of the MRCF were \$293 million, mostly in real estate and loans, and that exceeded the “best estimate” of \$286 million in liabilities that had been estimated in an actuarial report. The problem with the actuarial report was that it had been commissioned by James Hardie and it made a number of very optimistic assumptions. The Jackson report, which was the report commissioned by the New South Wales government, found that this best estimate was “wildly optimistic” and that the estimates of future liabilities was far too low.

After this separation, James Hardie moved offshore to the Netherlands for what it claimed were significant tax advantages for the company and its shareholders. To make this move, the company had to assure Australian courts, as it was listed on the Australian Securities Exchange, that the MRCF would be able to meet future liabilities.

The courts were assured of this, and that more money would be made available to the company's Australian asbestos victims through the issue of partly paid shares to the MRCF, obliging the new Dutch parent company to meet a call for funds if they were needed. The value of the call at the time was \$1.9 billion. The move to the Netherlands therefore proceeded. However, the tax benefits that James Hardie expected to receive as a result of its move did not eventuate following the revision of tax laws in the United States and the United States signing a new trade agreement with the Netherlands in 2006.

I refer to the funding shortfall. Shortly after the move, an actuarial report found that James Hardie's asbestos liabilities were likely to reach \$574 million. Remember that under its own report, it was thought that its liabilities would reach about \$280 million. The new independent report found that the liabilities were more likely to reach \$574 million. The MRCF sought extra funding from James Hardie and was offered \$18 million in assets, which the MRCF rejected. The estimate of asbestos liabilities was then revised up to \$752 million in 2002, and \$1.58 billion in 2003. In 2004, the funding shortfall became an increasing concern as it became clear that eligible victims would miss out on receiving compensation after it was found that James Hardie had cancelled the partly paid shares. In discussing the shortfall, James Hardie refused to accept further responsibility for the liabilities on the basis that MRCF and James Hardie were now separate legal entities.

What happened next was that in 2004, the New South Wales government held a judicial inquiry. The findings were very critical of James Hardie. Following the results of the inquiry, James Hardie entered into negotiations with governments and trade unions in an effort to establish some kind of compensation system. I will not go through all the detail of those efforts, but eventually they were successful. Immense pressure was put on the federal government by state governments, union leaders and victims to remove the problem. The final step in giving the voluntary fund a legal structure was approval of the scheme by James Hardie shareholders, and, in February 2007, 99.6 per cent of the shareholders voted in favour of the scheme. It began operating days later and, as I understand, it, continues to operate.

The point I want to make is this. Between 1995 and 2007, the James Hardie directors engaged in conduct that was all specifically designed to try to avoid the company's asbestos liabilities. In February 2007, every member of the 2001 board and some members of the senior management were charged by the Australian Securities and Investments Commission with a range of breaches of the Corporations Act—I have that here—including breaches of directors' duties for failing to act with care and diligence. In 2009, the Supreme Court of New South Wales found that the directors had misled the Australian Securities Exchange about James Hardie's ability to fund claims, and they were

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banned from serving as board members for five years. Former chief executive Peter Macdonald, who was mentioned in the clandestine group that I quoted in Matt Peacock's book and was the CEO at the time, was banned for 15 years and fined \$350 000 for his role in informing the MRCF and publicising it. All the former directors except for Macdonald—he took his penalty—appealed, and the New South Wales Court of Appeal overturned the ruling against those directors. The Australian Securities and Investments Commission appealed that ruling in the High Court. In May 2012, the High Court upheld the 2009 New South Wales court decision and found that seven former James Hardie non-executive directors had misled the stock exchange over the asbestos victims' compensation fund.

This is why it is important that we hold directors liable. That was the High Court decision in *Australian Securities and Investments Commission v Hellicar*. People who were around at the time will remember Meredith Hellicar. For *Hansard*, the citation is [2012] HCA 17. I am not going to need an extension.

The ACTING SPEAKER: Extension granted.

[Member's time extended.]

Mr S.A. MILLMAN: Okay, sure—thank you! I am almost done. Where was I? Macdonald accepted his fate, probably appropriately, given the way he had conducted himself between 1995 and 2004. He accepted his fine of \$350 000 and his suspension from being a director for 15 years. The other directors, including Hellicar, appealed to the New South Wales Court of Appeal, and their appeal was upheld. The Australian Securities and Investments Commission appealed that decision to the High Court, and the High Court sided with ASIC in *Australian Securities and Investments Commission v Hellicar* [2012] HCA 17. The High Court allowed ASIC's appeal and held that each director had breached his or her duties as a director of the company by approving the company's release of a misleading announcement to the Australian Securities Exchange. The media release stated that the company had fully funded its asbestos diseases liabilities; in fact, there was a funding shortfall of more than \$1 billion. The High Court allowed ASIC's appeal and held that inaccuracies in the February board meeting minutes did not counter their probative value as a contemporaneous and formally adopted record of what was done in the February meeting. The High Court decided that the board did approve the announcement and that the announcement was misleading.

These directors wanted to reduce their tax liability. Despite having benefited from decades of operating in the Australian market and being an Australian corporation, these directors wanted to diminish their liability for Australian tax and insulate their company from its civil liabilities as a result of negligently exposing workers and their wives, do-it-yourself home handymen and thousands of others to deadly asbestos fibres. They wanted to evade their company's liabilities for that negligence. They sought to relocate their corporation offshore and, in doing so, deliberately misled the Australian public and the Australian Securities and Investments Commission, and they were held liable.

I come back to the point that I made at the start. This important macro-economic reform is being undertaken in concert with other jurisdictions by a government that understands the important role of reforms like this in streamlining our economic environment. But it also creates a context in which regulatory authorities have a clear understanding of the sorts of conduct that will give rise to breaches, thereby creating an environment in which successful prosecutions are more likely. This legislation will create a simplified structure that will benefit all the good directors who are doing the right thing, but also allow for those who have done the wrong thing to be clearly and unambiguously the subject of prosecution.

I want to touch on another point, and I will finish on this, because I raised this point earlier, as well. This is not the first time we have seen legislation introduced into this place to assist with giving effect to the program of streamlining the national and state economies. One example was given in the member for Moore's contribution when he spoke to the Attorney General about the Work Health and Safety Bill 2019 and the imposition of liabilities on directors under the Work Health and Safety Bill, which I spoke in favour of when this chamber passed that legislation. In modernising not only this statute but also other statutes, harmonising them and bringing them into the twenty-first century, we are creating a legislative regulatory framework under which our market-based economy can operate efficiently, effectively and seamlessly with other states and the national economy. We need to do that because we are facing significant headwinds in the international economy. We have done an incredible job of maintaining the prosperity of Western Australia, despite the ravages of the global pandemic, but we need to remain diligent, assiduous and focused on the task at hand of making sure that businesses in Western Australia have the best possible opportunity to succeed. We are creating a regulatory environment in which businesses will know what they are doing and understand their duties, obligations, rights and responsibilities. That is exactly the sort of thing a responsible government should be doing to allow that market to operate efficiently and effectively. It is for all those reasons and all the reasons that I have outlined, including the capricious behaviour of the directors of James Hardie, that I commend the Attorney General for bringing this legislation before the house and I commend the bill to the house.

MR D.A.E. SCAIFE (Cockburn) [10.38 am]: I rise today to speak on the Directors' Liability Reform Bill 2022. The member for Moore asked me whether I was also going to read from a book in my contribution. I can assure the

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chamber that I will not be doing so. I cannot say that will make my contribution any more interesting. I do not have the member for Mount Lawley's reservoir of knowledge on issues like asbestos and the history of asbestos litigation in Australia. I was never personally involved in any asbestos litigation, unlike the member for Mount Lawley.

Mrs L.A. Munday: You've got your own great style, member for Cockburn.

Mr D.A.E. SCAIFE: Thank you, member for Dawesville.

My background was purely in industrial relations whereas the member for Mount Lawley moonlighted in workers' compensation and asbestos litigation. He was a jack-of-all-trades. I want to speak on this bill for a few reasons, but the one I want to note at the outset is that I had the great fortune of being a company director immediately before I was elected to this place. I was a particular type of director called a legal practitioner director. People might hear about a law firm in the sense of it being a partnership, and about people becoming a partner at a law firm. Traditionally, throughout the world and in Australia, law firms were exclusively partnerships and in parts of the world still are. The reason is that a lawyer's fundamental paramount duty is to the court and their secondary duty is to the client. For many years, the view was that there could not be an incorporated legal practice because an incorporated legal practice's first duty must be to its shareholders and a lawyer's first duty has to be to the court and their second to the client. We moved past that model of law firms several years ago and now allow for incorporated legal practices, but a condition of forming an incorporated legal practice is that at least one of the directors must be what is known as a legal practitioner director. They must be an admitted lawyer who personally owes those obligations that all lawyers owe, which is the paramount duty to the court and the secondary duty to the client.

I was a legal practitioner director of Eureka Lawyers from 2016 until my election in 2021. I was in a position in which I had to make considered decisions about the financial operation of the business. I had to satisfy myself that the business was not trading while insolvent. I had to satisfy my duties not only to the court and clients, but also as a director of the company. It is a very weighty responsibility put on directors, because directors are stewards of assets that are relied upon by shareholders, lenders and consumers. For example, in the case of the law firm of which I was a director, if it had become insolvent while we had carriage of a client's case, we would no longer be able to run that client's case and the client would have to find new lawyers and start all over again at great expense. The stability and financial viability of companies, and the responsibility directors take for those matters, are important. The point is that they are important from not purely a commercial perspective, but also a social justice perspective. Good, well-managed and well-governed companies are essential for providing goods and services to consumers. They are essential to ensure that employees are well treated, have secure jobs and do not face the problems that come with insolvency.

I am sure that many members of this place who have had experience representing workers know that when a company goes insolvent, that has all sorts of consequences for employees. Employees often have significant accrued entitlements such as long service leave, annual leave and perhaps redundancy entitlements. When a company goes insolvent and is unable to satisfy those debts that it owes to its employees, those employees could miss out and may have to rely on what is known as the fair entitlements guarantee, which is a federal government guarantee that pays out a minimum amount of entitlements for people when a company goes insolvent and the entitlements cannot be recovered. However, entitlements under the fair entitlements guarantee are often not worth as much as the entitlements would be if they had been paid out in the ordinary course of events by the company. I know that sometimes people come to legislation like this and see it as being very dry and focused only on commercial matters that do not have a relation to the day-to-day challenges that people face, but making sure that companies run well and that they are governed responsibly by directors is a fundamentally important thing for consumers, workers and the public at large.

This bill is important because a number of economic benefits flow from it. The first is that it preserves the concept of the corporate veil, which is that a corporation is a distinct legal entity from the shareholders who run it. Obviously, in some cases, directors are not shareholders, but in many cases, directors are also shareholders of the company and so I think the corporate veil is relevant in that regard. The corporate veil is important for a number of reasons. Sometimes the corporate veil can be seen as a bit of a trick that protects, say, wealthy directors or wealthy shareholders from the consequences of their actions. It is true that the corporate veil is a shield. It is a shield that means that a company has limited liability and so the company is liable only for the mistakes or the misadventures of the company itself. That is an important principle because it is one of the many economic principles that effectively democratised the market economy for people.

If a person of relatively limited means wants to be a bit of an entrepreneur and start a business to innovate and capitalise on a new great idea, they might take out a loan for several million dollars in their own name in order to finance that and perhaps secure it against a property such as the family home. If their business goes poorly, they are personally on the hook for the loan and they could stand to lose their assets and their family home. It deters people of lesser means from taking their ideas forward, investing in them and being entrepreneurs, because the only people who have the means to take the higher risk of being responsible if things go badly are wealthy people who could

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take a hit of \$1 million because they might have other assets worth \$50 million. The corporate veil allows working people and people of lesser means to set up vehicles that allow them to attract capital through the vehicle of the corporation and go on to be entrepreneurs. But, of course, we cannot do that without regulating the responsibilities of those responsible for directing, managing and governing the company because otherwise people could just go out there, use the corporate veil as a shield from liability, and engage in fairly reckless conduct. That would be damaging for the economy as well. That is one of the reasons that we generally accept a corporation as a separate legal entity. That is a good thing, economically and generally speaking, for society but it is also a good thing for people of lesser economic means.

Another aspect of this bill is that it will harmonise the approach to directors' derivative liability across the whole of Australia. As the member for Mount Lawley has said, that is because this bill is part of a national approach. That is important because we want Australia to be a place in which it is easy to do business. We do not want Australia to be a place, and I certainly do not want Australia to be a place, in which it is easy to do business for the reason that there are extremely low corporate tax rates or a very lax regulatory environment. One of the ways in which we can make Australia an attractive place to do business, without sacrificing the protections given to workers or to the environment, is by making our regulatory system as streamlined as possible. That does not mean that we make the regulations weaker; it means that we make them easier to navigate.

I am sure that members of this chamber who have looked at the United States over the last few years would have seen the patchwork of laws on a lot of different issues. One example is policing. The laws in the United States vary not only from state to state, but also from county to county, or essentially from one local government area to another local government area. That makes things extraordinarily complicated. A person in one part of the country could move a few hundred kilometres away and completely different laws and rules would apply on criminal liability and all sorts of other things. That creates a disincentive for companies in the United States that want to do business in the national market, because they will have to become aware of the laws and requirements in each of the different jurisdictions and change their business practices accordingly. That is particularly challenging in the United States, with 50 states and, therefore, 50 different sets of laws. It is not quite so challenging in Australia, given that we have only six states and two territories. However, it would still be challenging if a business that wanted to operate across Australia had different obligations depending on whether it was conducting its business in New South Wales or Western Australia.

I believe that, by and large, the harmonisation of laws across Australia will be a good thing. My attitude to harmonisation is that it should be based on the best practice that we can find in the various jurisdictions. We do not want it to be based on the lowest common denominator, because that will weaken the laws in jurisdictions that already have very good laws. That is what this bill will do. This bill will take good, high standards of governance in directors' duties and harmonise those across each state and territory.

As the member for Mount Lawley said, this bill arises from a Council of Australian Governments process that dates all the way back to 2008. The member for Mount Lawley also made the point that that was during the heyday of Labor governments in Australia. I remember the election material that the Liberal Party ran at the 2007 federal election. It had bunting on the polling booths that said "Don't let Labor have wall-to-wall power across Australia"—in other words, do not let Labor have Labor governments all across Australia. Of course the people of Australia decided that they liked the idea of having wall-to-wall Labor governments and elected the Rudd Labor government, which was then able to undertake some very important reforms. Unfortunately, the jurisdiction that first dropped the ball was Western Australia when the Carpenter Labor government lost the 2008 state election. That government was the first domino to fall from the "red wall" in those days. As the member for Mount Lawley said, we have slowly reassembled the wall, and we are now able to deliver the important macro-economic reforms that the Labor Party is well known for.

The member for Mount Lawley also mentioned the reforms of the Hawke and Keating governments. Those reforms are certainly important. However, the Labor Party has been the party of economic reform since it was founded, with things like the widow pension and the disabled and invalid pension, which were introduced by Labor governments both pre and post-war. Those were some of the major economic reforms that established the modern welfare state. It is good that we are able to continue that work, albeit in a slightly drier but, in my opinion, no less important way.

I touched at the beginning of my contribution on the importance of limiting the liability of corporations. However, there have always been exceptions to the principle of limited liability. There have always been principles that allow what we call piercing of the corporate veil. These provisions exist for a variety of reasons. They exist as a matter of preserving fairness. They exist also for when a corporation has been used as a facade or sham, such as when a shareholder has engaged in dodgy activity in operating the business and has been using the company structure as a shield.

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Another exception has traditionally been the prohibition on trading while insolvent. Directors have always been liable for their actions if they are aware, or ought to have been aware, that the company was trading while insolvent.

[Member's time extended.]

Mr D.A.E. SCAIFE: The reason for that prohibition is obvious. If a director is aware, or ought to have been aware, that the company was trading while insolvent, the director would be making decisions and directing the company to take actions knowing that the company could not satisfy the consequences of those actions if they were to go wrong. Therefore, the director should be held personally liable because they engaged in conduct in circumstances in which the business could not satisfy the consequences of misconduct and they used the corporate limited liability as a shield.

I note that this bill does not cover a type of derivative liability known as accessorial liability. Directors' derivative liability, as the term is used in this bill, refers to a circumstance in which a director is carrying out their duties as a director of a company, or doing their ordinary work in the management and governance of the company, but a determination has been made that because of the circumstances of the company, the director should be held liable for the conduct of the company. Accessorial liability is different, because it refers to a circumstance in which the director of a company was directly involved in unlawful conduct in the company. In the work that I used to do in the industrial relations field, a classic example was a director who was knowingly involved in underpayment or other unlawful behaviour in the workplace. That was unfortunately something that I came across from time to time. I believe that most company directors do the right thing. In the line of work that I was doing at the time, generally speaking, clients did not come to see me when the company or the director was doing the right thing by them, so, unfortunately, I tended to see the worst types of behaviour. I am sure that is true of a number of members in this place who represented workers as union officials or advocates. Working in our field sometimes gives a person a jaded view of the workplace because we do not see when things are going well; we only see when things are going badly. I would like to think that I had a balanced experience by virtue of being both an industrial relations lawyer for workers and being the workplace boss at the firm of which I was a director. One of my responsibilities was to process and pay the wages every fortnight. I was always keenly aware of the complexities of running a business. The truth is that I saw some pretty bad behaviour. I have spoken before about some of that behaviour and I would like to mention again a couple of the cases that I worked on.

I worked on a case for a young man called Alastair Enkel. He worked for a car dealership and was paid on a commission basis for selling car finance products, but he worked in excess of full-time hours. The commission that he made off sales as a very junior employee was not nearly sufficient to cover his minimum wage under the relevant finance industry award. In that case, the director had knowingly done a number of things. Firstly, the director had knowingly given and signed off on the terms of employment that provided for commission-only payments. Secondly, that contract of employment specified that Alastair's terms of employment were governed by the finance industry award, so the director knew that minimum standards applied to Alastair's employment, but nonetheless went ahead and engaged in a business model —

Several members interjected.

Point of Order

Mr R.S. LOVE: I am very interested in the contribution of the member, but I cannot hear it for the loud interjections.

The DEPUTY SPEAKER: Yes, thank you, member. I agree with you. Ministers and Attorney General, can you keep it down, please.

Debate Resumed

Mr D.A.E. SCAIFE: In that case, the director of the firm had signed off on the conditions of employment that were below the award conditions. The contract also specified that the award applied. In drawing up the contract, the director actually knew that the award applied to Alastair's employment, but nonetheless offered him terms of employment that were below the terms of the award. Even more disturbingly, when Alastair—who was a very young worker at 21 years of age or thereabouts who did not have a lot of confidence or experience in the workplace—got up the confidence to say, “I've actually gone to the Fair Work Ombudsman. I have taken advice and done some of my own research and been told that the award in my contract applies to me and I haven't been earning that much money”, he was met with emails that can only be charitably described as obfuscation. The director denied any kind of problem. Later on, the director accepted that there was a problem, but essentially pleaded—I do not quite know the words to use—the defence that Alastair should be grateful that he had been given a job in the first place. The excuse was that Alastair should have been thankful to the director for all the opportunities that had been given to him, notwithstanding, essentially, the director's acceptance that he had done the wrong thing and refused to pay the difference.

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In that case, Alastair came to see me and we ran the case, at first instance, in the Industrial Magistrates Court. Alastair was successful in getting most of the orders he sought against the company, but we had also sought orders against the director on the basis that the director was liable as an accessory because the director was directly involved in authorising the conduct that was unlawful. We failed on that claim at first instance. The industrial magistrate concluded that there was not sufficient evidence that the director was knowingly involved in the unlawful behaviour of the company. I have to say that this is a lesson in terms of how to litigate matters. I told Alastair that although I thought the decision of the industrial magistrate was wrong, he had got most of what he wanted and should basically quit while he was ahead and not run an appeal on the finding that the director was not liable.

Unfortunately, for the director, he obviously had some quite poor advisers because he then appealed the judgement. I advised Alastair, “If it’s on, then it’s on” and that we would lodge a cross-appeal. Later, the director, without any negotiations, discontinued his appeal without getting anything for it and then essentially asked Alastair whether he was willing to discontinue his cross-appeal, to which Alastair said no because he had already gone to all the expense of getting it up. We were successful on three out of our four grounds on the cross-appeal, which would never have happened if the employer had not appealed. The Federal Court of Australia found that the director was knowingly involved as an accessory in the misconduct of the unlawful behaviour of the company and remitted the case back to the industrial magistrate for redetermination. I cannot remember the precise figures, but the company was ordered to pay the entitlements and, on top of that, it was ordered to pay a penalty of something like \$40 000 or \$50 000 to Alastair as the wronged party. The director was also ordered to pay a fine of something like \$15 000 to Alastair.

That is a lesson in litigation strategy for some people and how sometimes one should not appeal because it invites the potential consequences of a cross-appeal. It is also a lesson in accessorial liability and how accessorial liability is distinct from the type of derivative liability found in the Directors’ Liability Reform Bill because it envisages a director who is directly involved in the unlawful behaviour. Generally speaking, that really only happens in small and medium-sized businesses. In most cases, in large listed companies the company director is not going to be engaged in decisions about whether to terminate an employee from the business or in setting the terms and conditions of employment. The person doing that is likely to be a middle manager of the company, but the accessorial liabilities in the Fair Work Act apply equally to people who are not directors of companies. A person could be a human resources manager or a recruitment specialist at a company and fall foul of the accessorial liability provisions. That is a different type of liability. It is important that accessorial liability is retained, but it is also important that it be distinguished from derivative liability generally as it is dealt with in this bill, which is a type of liability whereby the director may not have been directly involved in the unlawful behaviour of the company, but there is a reason for affixing responsibility to the director—for example, they were negligent, they were reckless, they did not know something they ought to have known et cetera.

This bill does not propose to amend the Work Health and Safety Act 2020 or affect derivative liability in this area. In 2010, when the Council of Australian Governments considered directors’ liability reform, it was acknowledged that the model work health and safety laws, which is the model harmonised legislation, contained provisions that specifically dealt with the liability of officers and provided for its own process when directors or a person conducting a business or undertaking are found to be liable for their conduct. In 2008, it was agreed that these reforms would not affect the provisions in the model work health and safety laws.

I would like to reiterate that for all the aforementioned reasons, the Directors’ Liability Reform Bill 2022 is a very good bill in terms of economic reforms and ensuring good governance of companies, which, in turn, affects the rights of consumers and workers. I commend the bill to the house.

MS M.J. HAMMAT (Mirrabooka) [11.09 am]: I also rise to make a contribution to the debate on the Directors’ Liability Reform Bill 2022. I feel that I should say at the outset that I am not a lawyer. We have had two quite good and substantial contributions from people who have been lawyers. They made quite good contributions about some of the issues canvassed in the bill, so I feel that I should say that as a disclaimer at the outset. I have, however, in the past been a director of a variety of different organisations, including at one stage a superannuation fund. I was for a time a director on the state government’s MyLeave board, which is the construction industry’s long service leave fund, which I know you will be familiar with, Deputy Speaker. I also served as a director on the not-for-profit incorporated board of Triathlon WA for some four years. I have also done various other things. It is really from that perspective that I intend to make my contribution today—not as someone who has been a lawyer, but as someone who has, at different times, sat on boards and been mindful of obligations that directors of any kind have. I should say that much of my knowledge was gained not from studying law, but from completing the very well regarded course run by the Australian Institute of Company Directors. I understand that its one-week company directorship course is still considered to be the gold standard, although it was some years ago that I completed it. Again, I feel as though people should not accept my submissions as any kind of legal advice today.

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What I want to reflect on, perhaps by way of introduction, is how this bill comes before us, and I think others have covered it. It is part of a process of achieving harmonisation across the country in relation to directors' liabilities. It arises from a COAG agreement in November 2008 to ensure that we have consistent provisions for personal criminal liabilities for directors in relation to corporate fault. The COAG process is very important in ensuring consistency, and that COAG agreement has had quite a journey to arrive in this house for the second reading of this bill.

What is interesting to me about this bill is how the expectations of the community at large about the duties imposed on company directors have really evolved fairly substantially over a period. The bill comes before us today as another step in a fairly long journey to recognise an increasing community expectation around good governance and transparency and ensuring that companies and directors on company boards maintain high standards in their corporate behaviour. One of the things that is also interesting is that we often do not see how corporations behave, how decisions are made and how individual directors approach their task until things go wrong. Mostly, corporations' directors go about their day-to-day business in a way that is not seen by the community at large, but when things go wrong, and they can go wrong badly, there are often inquiries. Those inquiries allow us to see the detail of how individuals behave, how directors make decisions and how a whole company approaches tasks based on its governance and corporation requirements. It is that aspect that I am going to dwell on somewhat today—what we have learnt from some of those events. The member for Mount Lawley talked substantially about James Hardie and its behaviour in providing compensation to people who have been exposed to asbestos over the years.

It is worth noting that the commonwealth Corporations Act sets out and largely codifies common-law provisions around directors' responsibilities and duties. It is about understanding that a director's obligation is to act in the best interests of the company, not in their own personal interests. Because directors have a fiduciary duty, that means that they are required to give their undivided loyalty to the company—that is, to act honestly, in good faith and to the best of their abilities in the company's interests.

The Corporations Act sets out some fundamental duties for directors, which are at the heart of our understanding of how directors should go about their job. They are required to act with care and diligence. The standard for that, which I will talk a bit more about, is that expected from a reasonable person in undertaking that care and diligence. They are also required to act in good faith in the best interests of the company and for a proper purpose. This is an obligation that recognises that boards operate in very complex environments and that the role of a director is to exercise their judgement. It is a role that requires the exercise of good judgement about the best interests of the corporation. Again, I will talk a little more about that as I go on.

Directors are required to manage conflicts of interest by identifying and disclosing those conflicts, and taking active steps to manage them, and making sure that they do not improperly use any information or their position. Of course, they are also required to ensure that the organisation does not trade while insolvent. If they fail in their obligation to do that, directors may be personally liable for the debts that they incur while trading while insolvent. This often attracts a lot of attention, because clearly those kinds of debts can be significant, and many directors are very mindful of that. All the duties that I have outlined are equally important in ensuring that companies are well run and well governed.

As I said at the outset, our understanding and expectations of how directors go about their jobs have evolved over time. For many years, the case that set the standard was the 1925 case of *Re City Equitable Fire Insurance Co Ltd*. It set out that a director was required to exhibit the degree of skill that might reasonably be expected from a person of their knowledge and experience. It was a requirement that they go about the business based on what would be expected from them—what would be a reasonable degree of skill to accept from someone with their knowledge and experience. That set the standard for many years and, as I have said, a lot of the requirements have been codified in the Corporations Act.

In more recent times, as corporations grew in both their complexity and the substantial resources that they were responsible for, courts have had a closer look at this. I want to make reference to one of the cases in which the dial was not so much shifted, but in which the courts sought to clarify how that responsibility should be addressed. I will refer to an Australian judgement that is referred to as the *Centro* case. It went to the question of how directors go about that responsibility and what the required level of skill should look like. To give the background to that case, in the 2007 financial statements signed off and submitted by the company directors of the Centro Properties Group, they failed to properly disclose \$US1.5 billion worth of short-term liabilities. It was a very complex company structure. The accounts had been through an audit committee and when they finally went to the board, it signed off on those liabilities not as short-term liabilities, but as non-current liabilities, and they were the financial accounts that were submitted to the market. The difference between a non-current liability and a short-term liability is significant. Unfortunately for the Centro group, those liabilities fell due as the world was grappling with the financial

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crisis. People will recall that that made it very difficult for the company and individuals to access finance, and, as a result, the company fell into substantial difficulties.

Some of the things that the court looked at in that case were the responsibilities of the directors, because these accounts—again, it was a very complex set of companies—had come up through management and had also been to an audit committee before they were finally signed off on by the board. Indeed, they were very complex board papers, running to many hundreds of pages. The court considered what is reasonable, and it found that the director was responsible. Even though it had been through the stages of management and through the audit process, the director was ultimately responsible for the material the company put out. It found the director should at least have a rudimentary understanding of the business of the corporation. They should be familiar with the fundamentals and they should keep themselves informed about the activities of the corporation. Although they do not necessarily need to have an understanding of the day-to-day operations, understanding the difference between a non-current liability and a short-term liability is significant, and it is something that the group of directors, at the board level, should have turned their minds to. It is not good enough to say, “I didn’t know. The papers were complex. Someone else sent a recommendation up, and I signed off on it.” The buck stops with the directors, and it is their responsibility to take that obligation seriously. They are responsible for exercising a duty of care and skill. Although there needs to be a reasonable level of care and skill, saying that the papers were complex and the issue is complex does not remove their responsibility to inform themselves and to actively oversee the company.

The good member for Mount Lawley spoke about the James Hardie case, which also goes to the question of what the responsibilities of the directors are. I think he gave a very detailed overview of that case and the circumstances arising from it. James Hardie set about restructuring. It moved companies with significant asbestos-related liabilities to the Netherlands and established the James Hardie Medical Research Compensation Foundation in Australia to fund its obligations to those seeking compensation as result of working with or around asbestos products. The key issue was the statement outlining the proposal that was sent to the Australian stock exchange after it had been approved by the board of directors. As we know now, that announcement contained misleading statements about the sufficiency of the funds. The member for Mount Lawley laid bare the substantial shortfall of funds that case.

The matter was considered initially in the New South Wales Supreme Court and then further courts. Again, it goes to the responsibilities of directors and their obligation to do their duty, and the court did not let them off. It is their duty to read and understand the contents of reports that they approve or adopt, including financial statements and, in this case, a statement to the Australian stock exchange. It does not matter whether those papers are dense or run to hundreds and hundreds of pages; the obligation remains the same. Directors are also required to have an inquiring mind and to consider whether such statements are consistent with their own knowledge of the company’s financial position. Rather than blindly accepting information, they should question it, based on their own knowledge and their own understanding, and, if necessary, make inquiries to the managers who are putting the information forward. They also need to have sufficient financial skills to perform those tasks. Although it is not necessary for people to be accountants or to have the same level of understanding, a working knowledge of the company and its obligations and liabilities is incredibly important.

The James Hardie case is very interesting. Not only did it point to the failure of the directors in relation to the accuracy of the statement that was made about the sufficiency of funds; it is clear that their actions caused the company significant reputational damage. One of the obligations that all company directors have is to put the best interests of the company, the corporation, first and to act in a way that sees to those interests. This case highlights the fact that the obligation is to take a very long-term view of the interests of the company, not to just consider the short-term interests.

Because it is such a substantial piece of work, I want to refer to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, undertaken by the federal government. The very substantial report—over a thousand pages, with 76 recommendations looking at a whole range of different case studies—examined the behaviour of the financial sector in Australia, not just banks but also the superannuation industry. I think people will recall a number of the very shocking stories that emerged from that royal commission. I hasten to add that those stories came from the banking sector rather than the industry superannuation sector, which demonstrated fairly high levels of governance. The final report talked about a number of things, including governance and corporate culture, especially the role of boards and their decision-making position in some of the things that were uncovered in the banking industry at the time.

The final report talked about the boards of those corporations having the right information to undertake their duties. Again, it is very clear that it is not good enough to say, “We didn’t know. We didn’t understand. Banks are complex entities and so it wasn’t something we ever turned our minds to.” Directors need to test and challenge the reports they receive from management. They need to be mindful of their obligation to set the culture for the whole organisation. Culture is set from the top, at the board level, and that is part of the directors’ responsibilities.

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[Member's time extended.]

Ms M.J. HAMMAT: In the report, Commissioner Hayne set out six principles for boards. Some of them might seem self-evident, but he felt it necessary to write them down. They were —

- obey the law —

That would seem, at first blush, not to need to be stated, but there you go. It was the first principle he identified —

- do not mislead or deceive;
- act fairly;
- provide services that are fit for purpose;
- deliver services with reasonable care and skill; and
- when acting for another, act in the best interests of that other.

Commissioner Hayne went on to say that acting in the best interests of the company, which is one of the obligations of directors, is not a binary decision between customers and shareholders. In the end, it is about recognising that shareholders may have a short-term outlook but, if a director takes a longer term perspective, is quite likely that looking after the best interests of the customers will also be in the best interests of the shareholders as well as the employees and the company's other stakeholders. This goes back to the point about serving the best interests of the corporation and understanding that it is not always best assessed by looking at the short-term interests, but by taking a long-term view. That is something that I will come back to shortly.

I think it is impossible not to stop and reflect on the significant review of Crown Resorts Ltd in New South Wales. The Bergin inquiry looked quite deeply into the operation of Crown Resorts in that state and how the board went about its business. The review called into question some of the actions of the directors of that company, finding that they did not act in a way that was consistent with their obligations as directors, particularly on the question of fiduciary duties and the requirement to act in the best interests of the corporation. People will recall that one of the things called into question was the relationship between some board members and their major shareholder, which was Consolidated Press Holdings and James Packer. That issue was clearly ventilated in the review of Crown Resorts, which found that acting in the best interests of the corporation should not be encumbered by the interests of a major shareholder or other stakeholders, and that that needs to be very clear. It is not surprising that in the aftermath of that royal commission, a number of those directors resigned their position.

I want to now turn my mind to something that is sort of future-looking by reflecting on the process of clarifying director obligations, because several issues that are on the horizon will start to be on the minds of directors and people who are on boards. One of those is climate change. This is interesting because, when weighing up the best interests of a company, directors are obliged to consider the long-term interests of a corporation and not necessarily just the short-term interests. A very interesting paper was produced by the Australian Institute of Company Directors called *Climate risk governance guide*, which is a resource for directors on climate-risk governance. This guide sets out how climate change is an emerging issue that directors and boards really need to turn their minds to. The guide identifies two risks for boards as a result of climate change, regardless of the industry. One is the physical risks that might emerge as a result of the kind of impacts of climate change that we are seeing, such as damage to assets, but also, increasingly, supply chain disruption. There is plenty of evidence of how extreme weather events can significantly disrupt our supply chains and can lead to companies running into problems with uninsurability. There are physical risks, but there are also economic transition risks. Basically, companies need to be cognisant of the fact that increasing attention and care is being paid to climate change and that they cannot afford to stick their heads in the sand and think that it is not happening. Governments around the world, including our own, are turning their minds to how to manage climate change. With that comes responses at a policy and regulation level. Indeed, any business that trades with other countries will quite likely have come up against changing expectations in those countries about climate change and how companies meet that need. A whole range of change is happening in this space. It is important that directors think about climate change, and that they do that in the context of understanding the long-term interests of their company. Their requirement to act in the best interests of a company requires them to think about both long-term and short-term issues. As part of their considerations, they will need to turn their mind to the question of how climate change might impact their business. Obviously, that will look different in different industries—some are certainly more exposed to climate change than others—but this should be front of mind of any director of a company. It is great to see that there are excellent resources available to boards and directors to help them start thinking about how to approach climate change.

One thing that I thought was quite interesting in this report is that it outlines the change in expectations. The AICD report states —

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Historically, ‘climate change’ was often considered a ‘stakeholder issue’—a purely environmental, ‘non-financial, ethical’ issue, and its consistency with the ‘best interests’ of the organisation questioned.

The report makes this point —

The stakeholder debate has moved on however, with recognition that consideration of stakeholders such as customers, employees, the environment and the community is often consistent with organisational long-term interests. Put more bluntly, a failure to appropriately manage those stakeholder interests often risks the best interests—including financial interests—of the company and its shareholders/members.

This is a significant shift in how boards should think about climate change, as not just an ethical issue, but also a fundamental issue to consider as part of their obligations as directors.

The other interesting thing that I want to talk about in the time remaining is the emerging issue around data security and privacy. There have been some significant breaches of data, both with Optus and, more recently, Medibank. Lots of people’s personal details have been hacked. There is an active discussion in the federal sphere about whether tighter requirements on companies to have appropriate management in place for the security of personal data should or could be achieved by having more significant penalties. I am sure that this issue will be concentrated in the minds of many directors around the country.

By way of conclusion, I think we have seen an increasing expectation from the community that directors and boards should go about their business using very good governance arrangements. This is partly because corporations have grown significantly in size, complexity and influence, but also because they often have under their management substantial funds or interests of everyday people. It is incredibly important that corporations do not fail and do not lose the hard-earned savings or benefits of everyday people. When things go wrong, there are consequences for many people—investors and clients, who are often everyday people. There are many examples of people having lost substantial sums as a result of corporate failure.

We have also seen the role of director become more professionalised. As I mentioned at the beginning of my contribution, the Australian Institute of Company Directors now offers training and accreditation—I think the Governance Institute is also in this space—to ensure that people are well qualified to step into those roles. It is absolutely appropriate that governments take an active interest in good governance. It is absolutely appropriate that the state government work with the federal government and, through COAG, other state government agencies to ensure that we have an appropriate system of regulation for companies and an appropriate system that ensures that directors take their obligations very seriously and go about their work very carefully. This bill is part of a broader national approach. It is very important for making sure that there is rigour in the system and that everyday people can have confidence in the corporations that make up such a significant part of the Australian economy. With that, I will end my comments. I commend the bill to the house.

MR C.J. TALLENTIRE (Thornlie) [11.36 am]: I am very pleased to rise to speak on the Directors’ Liability Reform Bill 2022. I was collecting my thoughts on this bill this morning as I was about to suffer a little prick into a vein to give blood for a blood test. It was a wonderful distraction, so I am very thankful to the Whip for giving me this opportunity to prepare for this bill and, therefore, distract myself from that little bit of pain. What was interesting was that I spoke to the phlebotomist about the bill and she was quite struck by the significance of this legislation, because in briefly outlining it to her, it became evident that the rules of governance around the operations of people who are on boards and the responsibilities that directors have need to be fully understood. There is a community expectation of that. I note the remarks of the member for Mirrabooka on this very point: the community expectation is that people who hold directorships take their role seriously and be across the papers that are provided to them prior to board meetings so that they are well informed for any decisions they have to make. That is really important. I note that the legislation confines itself to the operations of directors as defined through our corporations law as people who are officers of bodies corporate. However, I think this issue will be of some interest to those of us who hold a position on a board in some sort of volunteer capacity and, indeed, those of us who hold a position on a school board. There is clearly a responsibility for people on those boards to look at the details of financial statements and issues around decisions on the employment of staff and such things. Responsibilities are very much a part of the role of a director, and directors need to be aware of those responsibilities.

For those in the corporate sector, being a director is obviously a very well remunerated position. People are paid extremely well to be directors on company boards. They are perhaps in a position to invest the time to be confident about the decision-making that they are involved in. Being aware of the risks to which they might be exposed becomes a part of their responsibility set. To some extent, this legislation will clarify the limits around their risks and responsibilities. The member for Cockburn touched on this. I believe the community expectation, and what we need to be sure of, is that officers are not shielded and cannot say, “Well, I took this cost-cutting measure because it was in the interests of the company’s finances.” They should not be able to feel like they can get away with making a decision because the corporation would be held legally responsible if something went wrong. There are number

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of domains in which this risk exists, including the spheres of the environment, health and safety and transport, to name just three. These are clearly areas in which people can make decisions that will impact the broader wellbeing of society and our community. I know it can sometimes be frustrating for someone who is working in an organisation when an idea is suddenly throw up but they are told they are not allowed to do it because it is going to be a problem.

An expression that can be especially irritating to hear is: “That’s more than my job’s worth.” I find it to be a fascinating expression. People who say that are colloquially referred to as jobsworths. I must refer the origins of the expression to the fellow on the ABC *Breakfast* program, Daniel Midgley, who does a very good job on the segment “Speakeasy” and his podcast *Because Language*. It is always entertaining to hear his analysis of the origins of various expressions. The idea of people being obstructive is not what this legislation is about. It is very much about clarifying where responsibilities lie. If an officer in an organisation is unhappy about a measure that is being brought in because although it will reduce costs, it will also potentially have some sort of pollution event or some sort of habitat destruction associated with it—a type of environmental event—they clearly have a responsibility to make it known that there is a problem. In the end, that will be their best defence should there be some sort of prosecution down the track. To delve into this a little more, there are various such offences in the Biodiversity Conservation Act. These are referred to in the Directors’ Liability Reform Bill because certain amendments will be made to them. It is worth looking at some of them. There is an offence around modifying the occurrence of a threatened ecological community. The provision in the Biodiversity Conservation Act reads —

A person must not modify an occurrence of a threatened ecological community unless the person is authorised ...

Clearly, an authorisation is someone’s best defence here, but otherwise they would be committing an offence. It is not valid to hide behind the idea that it is the corporation that did it, not them. A level of responsibility has to be taken. That example was from the Biodiversity Conservation Act relating to threatened ecological communities. Similar examples relate to the contravention of habitat conservation notices and taking or processing threatened fauna and flora or sandalwood. Throughout the legislation, a requirement is placed on people to ensure that they act within the law and are not in a position in which they can say, “It was a decision made by my company.” The idea that somebody could be shielded by a shell company, perhaps worth only a few dollars, is completely wrong. Likewise, there should not be any hiding behind the name of a bigger corporation. The community expectation is that people have to be held responsible and often the way to enforce our very useful, valid and important legislation such as the Biodiversity Conservation Act is to ensure there is enforceability and that an individual has to take responsibility.

Moving on to the Environmental Protection Act, which is also well cited in the legislation before us, in which the offences are around pollution events. It could well be that a company not maintaining the scrubbers on its stacks could save it a lot of money, but that should not be entertained because there are mechanisms that would make those people responsible for such offences and eventually culpable. These measures are very important. As a society, I think we are still grappling with decisions that could lead to what we might call death by a thousand cuts. This is often the case for a whole range of environmental matters. To use an example, a trucking fleet could decide that it will not maintain its diesel engines on the recommended frequency. A bit of extra mileage might be sought between various servicing times. As a consequence of that, there is extra pollution. It seems quite minor on the scale of an individual truck. Someone might be stuck behind the truck at the traffic lights. If the various filters in their car are open, or perhaps the windows are down, the fumes will go into their car. Sure, they can overtake the vehicle and it will all be over within 30 seconds. They can rely on their metabolism to get rid of those pollutants and they will probably suffer no consequence at all—let us hope so. However, if we multiply this by a whole trucking fleet that is circulating around the Perth area, to use the capital city as an example, perhaps that is a whole series of pollution events.

I must commend the RAC for its latest work on Perth’s air quality and the amount of air quality monitoring it is doing. For this form of point-source pollution that is occurring, it is timely that we are seeing the advent of clean energy options. That is well and truly within our sights in the future and the vast majority of the passenger vehicle fleet is likely to be electric and therefore there will be no risk of this form of pollution. For the trucking fleet it is likely that, in time, we will have hydrogen-powered vehicles, if not electric ones in some cases. Clearly, new options will be available to us and that is very timely. If decisions are made in this way that will allow this death by a thousand cuts with a hundred vehicles on the road, each polluting a little bit and each member of society being exposed to a just little amount of the sulphur dioxide and particulate matter—PM10 or PM2.5—there is an increased risk right across the population of those particles being lodged in the bloodstream and causing some serious health problem to an individual. With the multiplication of these things, we get that risk. There is an issue for us to ensure that directors’ liability works at this individual level but also across something as seemingly benign as the maintenance of, say, a trucking fleet. It is very important that those decisions are made. The same would

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apply to decisions made in the food sector around the quality of ingredients going into pre-packaged food. It is very important that that is of the highest order and no risks are taken there.

I now want to switch to something else—that is, people who might knowingly advocate against the public good. I guess this is something that we will hear more about down the track. I know that the member for Mirrabooka touched on this when she mentioned the need for directors of corporations to be aware of their decision-making around the threat posed by climate change. It is true that the director of a company that is about to embark on a major project that will have very extensive greenhouse gas emissions must have a good knowledge of it, as everyone now should have. As it is something that will further exacerbate the climate change threat, they cannot say that they do not have good knowledge of the risk. If they begin to knowingly advocate against the threat, they are perhaps following in the footsteps of those who gave out information about the threat of cigarette smoking but then chose to downplay and advocate against it and say that there was not in fact a risk involved. There are similarities; these patterns of behaviour emerge again and again. Things that happened in the corporate world 50 years ago are now emerging in other spheres.

Smoking does not seem to go away. I heard on 6PR this morning that the vaping sector is looking to mount a further campaign to justify vaping. Simon Beaumont sounded happy to give them some airspace—pardon the pun! I am pleased that he qualified it by saying that the new campaign will be funded by British American Tobacco. When there is an overwhelming body of scientific evidence against something, I think it is very important that it is made clear.

The notion of a director and the definitions around directorships is a very interesting one. We have to consider the breadth of responsibilities that people have in various roles. I was bemused, if not quite irritated, by decisions made by directors at ABC news on 26 October when electricity prices were a topic of the day. Our local ABC 720 ran a news bulletin with a story straight from the east coast about how electricity prices were set to spike, but it made no reference to the fact that we have no connection with the national electricity market. It made no comment about the fact that good decisions made in this place by the Minister for Energy, and indeed by his predecessors, and the excellent work by many people in the energy sector in this state, have saved us from the electricity price hikes that perhaps are going to be seen on the east coast; I profess no knowledge of what happens on the east coast. But a director of news made the decision to run that bulletin as though it applied to Western Australians without any qualification. I think that suggests a degree of negligence and laziness on the part of that news director. I think we have to ensure that this idea of directors' liability is seen in a broader context and realise that others have responsibility.

It is not just those who are directors of corporations who are in positions of great power. The news directors of various broadcasting bodies have enormous power and influence, and there is a need to ensure that they are held accountable and that there is no irresponsible, misleading or confusing broadcasting. That is another area that I find very interesting about this legislation. It is perhaps an ongoing discussion in many ways because there will be further discussion about the nuance of this set of amendments, the implications of them and how these things will work into the future.

I shall conclude my remarks by commending the bill to the house. I look forward to seeing how its passage and its position on the statute book will ensure that there is greater clarity for directors in Western Australia.

MRS L.M. O'MALLEY (Bicton) [11.54 am]: I begin my contribution to the Directors' Liability Reform Bill 2022 by stating at the outset, as the member for Mirrabooka did, that I am no lawyer.

Ms M.M. Quirk: That's a plus, isn't it?

Mrs L.M. O'MALLEY: Diversity! Diversity, member, is going to be one of the themes I will speak to. That is certainly an important reflection.

The ACTING SPEAKER (Mr D.A.E. Scaife): You should never be ashamed of not being a lawyer.

Mrs L.M. O'MALLEY: Absolutely not, Acting Speaker!

My experience with the theme and the points of this bill really come from being a community member and a former local government councillor. Like the member for Mirrabooka and others in this house, I also participated in the Australian Institute of Company Directors course some time ago. One of the key features that I will talk about is the importance of really understanding the roles and responsibilities of participants of a board or executive committee and how courses like the one offered by the AICD can assist those participants to understand those roles. There is a barrier to that of course; that is, they are hellishly expensive. I will also speak about those barriers to participation and how that comes back to the all-important aspect of diversity on boards. Mr Acting Speaker, you spoke earlier about some ways—what was it?

The ACTING SPEAKER: Bail—corporate bail.

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Mrs L.M. O'MALLEY: Yes. I was not aware of how that can really support participation for those who may find financial aspects a barrier to participating on boards.

My reflections will be much about the body corporate board or executive group itself. I note that there are many terms that could be appropriately applied to an executive group that performs the role relevant to this bill. I will use the term “board” while speaking to the bill that we are here to debate today. I offer the following to provide some background and context to this bill. Quite simply —

“Board” is one of several names used to signify the group of people assigned the responsibility to govern an organisation, company or other similar entity. A board is a legal requirement of a number of different forms of for-profit and non-profit organisations.

Your organisation’s board might be called the board of directors, board of trustees, committee, management committee, council, governing body, responsible entity, or one of a variety of other names, depending on your organisation’s legal form or constitutions. The individuals who serve on the board might be called board members, directors, committee members, non-executive directors or trustees.

...

The purpose and responsibilities of the board as well as the restrictions and limitations placed on it will vary between organisations, depending on the specifications of the organisation’s constitution. In general, the purpose of a board is to provide the organisation it serves with strategic direction and purpose.

It thereby reflects the needs of the masses, as they may be called. Continuing —

An effective board is proactive and drives the work of the organisation, rather than responding to it. The board also has ultimate responsibility for the finances of the organisation and holds legal responsibility for its ventures and actions. The board’s main contact with the organisation is through the chief executive officer (CEO) or equivalent and it is responsible for appointing and managing this individual.

For these reasons the proper functioning of a board and the diligence of its members is closely linked to the organisation’s capacity to operate effectively.

As I mentioned at the outset, my interest in this area is in diversity and how a shift in the numbers within a board—the balance—can shift the culture of the board or that organisation. Diversity on boards is important for a number of reasons, one being that boards are like any other group in that they are simply reflective of society. Society is made up of a diverse mix; therefore, to operate most effectively, a board should reflect that. I am talking about diversity in gender, race, ability and many other things so that a board can be really effective and reflect society. A board that more closely reflects society will make better, more informed decisions, which can have a positive impact on a company’s bottom line. A little something I found on the Harvard University website refers to boards having more women and states —

Having women on your board is good for your bottom line.

Many studies have shown that having a more diverse board is good for business. For example, of the 842 active companies on the Fortune 1000, women hold 18.8 percent of board seats—an increase from 17.7 percent in 2014 —

These figures are slightly outdated, of course. We would hope that more modern figures would show an even greater increase. It continues —

and 14.6 percent in 2011—and 45 percent of all companies on the Fortune 1000 have 20 percent or greater women on their board. In addition, over 55 percent of the companies that became inactive on the index had one or zero women on their boards.

Let us talk about removing barriers to participation so that we increase diversity and, therefore, create stronger cultural balance on boards. I spoke previously about financial barriers. Barriers can also be simply about opportunity. I reflect on some of the boards that I am more familiar with in my capacity as a local member—those associated with sporting clubs, in particular Australian Football League clubs. This traditionally male-dominated sport has undergone a massive change in the last few years, from the football field to officials and now, increasingly, boards. There are barriers to that change, and a lot of the barriers come down to a simple fear of change. The membership of many of the football club boards that I see has been continuous for a long time—decades. That is not to detract from the passion that those board members have for their clubs and the organisation, but there is a reluctance to share the space to increase diversity, and particularly gender diversity. One of the things the government has done around participation on boards is the OnBoardWA program, which has had some impact. I certainly think it reflects very strongly that aspirational goals are not working and that affirmative action is needed to continue to increase diversity.

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Boards are typically required to have a minimum of three members, also known as directors. According to the *Better boards: NFP board member remuneration report 2016* —

... boards of Australian non-profit organisations are usually made up of between 7 and 10 members and 8 on average. New members of a board might be elected by the organisation's membership (if it has one), or appointed by current members.

The board is usually made up of individuals who are not employed by the organisation. They might have a particular interest or personal stake in the organisation's mission; they might have been called to serve on the board because of a particular skill-set required by the board ... or they might represent the interests of a certain group of stakeholders ...

A board director may be held personally liable for the actions of the organisation if found negligent in carrying out his or her duties.

That, of course, speaks to the bill before us. Effective and legally compliant boards will have several key features, including good governance, responsibility, accountability, consensus, strategic direction and diversity. The importance of those features to the delivery of the organisation that boards, both public and private, oversee cannot be understated. I will expand on some of those features when I conclude my remarks today.

Looking at the bill itself and its background, as we heard previously, directors' liability reform was one of 27 regulation priorities that formed part of the National Partnership Agreement to Deliver a Seamless National Economy, an intergovernmental agreement that was entered into by the commonwealth and all states and territories in 2008. The Council of Australian Governments—COAG—coordinated the implementation of the national agreement, which included driving the reform project's key milestones and ensuring that states and territories complied with the priorities of the agreement. One of the key features I will take a look at is the increased protective features, such as the imposition of personal criminal liability on a director for the misconduct of a corporation, which this bill states should be confined to certain situations.

I come back to the barriers to participation. As I said, I have been a local government councillor and I have undertaken the Australian Institute of Company Directors course. The structure of a council within local government closely reflects a board, so this is appropriate education that can assist councillors and local government authorities to undertake and understand their roles and responsibilities. I am also a small business owner—I like to say that. It is actually my husband who does all the work; I am just able to claim it. He is the one who built the business, predominantly, over the last 20 years. I am really proud of the business we have, which is part of a larger national organisation, and that my husband has now stepped onto the board of owners. In doing so, he has incredibly strong knowledge from being a business owner and operator, and all that comes with that. In stepping onto the board, he has taken on the additional responsibilities that come with that. Fortunately, the national company has been able to ensure that he has gone through quite a stringent education process. I am sure he would not mind me saying that he is a self-made man who left school at the conclusion of year 10. He did an apprenticeship and has since gone on to be a very successful business owner. What he is able to contribute in his role, which is around financial governance, is incredibly important and a huge responsibility. He takes it incredibly seriously, as do many other directors and board members I know of. There are those who do not take it so seriously, and we have heard those stories shared by other members. It was a big decision for him to put his hand up to participate in this role, and he will do so for the next three years—he is one year in. I think his contribution to the board of owners has been really important in that he is able to advocate on their behalf and bring to the national company an understanding of the challenges that exist within the delivery of small business.

In reflecting upon that, it was only because he had a good framework for undertaking that particular role that he said yes to doing that. I am aware that that does not necessarily exist in many other corporations and organisations.

I again want to pivot to what I am very familiar with, namely local West Australian Football League clubs. Those clubs have aspirations to have greater diversity on their boards, but the mechanisms by which they are attempting to do that at this time are somewhat lacking and need to be strengthened.

I now go back to the COAG national agreement. Principle 4(c) states —

it is reasonable in all the circumstances for the director to be liable having regard to factors including:

- i. the obligation on the corporation, and in turn the director, is clear;
- ii. the director has the capacity to influence the conduct of the corporation in relation to the offending; and
- iii. there are steps that a reasonable director might take to ensure a corporation's compliance with the legislative obligation.

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Bringing Western Australia into line with the national agreement is an important step in ensuring that people who are willing and wish to participate on boards not only understand their roles and responsibilities, but also will continue to be given protection, so long as they have taken all reasonable steps, given that not everyone will have a law background. The roles and responsibilities of directors have not previously been considered as onerous as they should have been.

[Member's time extended.]

Mrs L.M. O'MALLEY: We have been talking about effective boards. Effective boards are able to reach consensus. The directors of the board and its officers need to have a strong understanding of their roles as leaders and consensus builders. They also need to reflect the diversity of skill, experience, attributes and background necessary to provide effectiveness in creating a culture of inclusion, upholding basic fiduciary principles, establishing a strong governance model, and providing appropriate oversight and a focus on accountability.

The Directors' Liability Reform Bill 2022 will provide important national consistency and strengthen the governance arrangements and legal frameworks that surround bodies corporate or boards, and I thank the Attorney General for bringing this bill to the house.

MS H.M. BEAZLEY (Victoria Park) [12.13 pm]: I stand today to address the chamber on the Directors' Liability Reform Bill 2022. We have a responsibility in this place to ensure transparency and accountability for every facet of society, particularly in our corporate sector. The Directors' Liability Reform Bill 2022 will rectify areas of law in which transparency and accountability relating to bodies corporate has been too general or unclear, and will reduce an unjust onus being placed on an individual or director of a corporation. These reforms intend to standardise across the nation the process of inflicting consequence on directors of bodies corporate. This bill proposes to reduce and standardise offences in the Western Australian statute book that impose personal criminal liability on directors or officers of corporate bodies, for offences committed by those bodies from a failure to take necessary steps to prevent such offences from occurring.

Directors' liability reform was one of 27 deregulation priorities that formed part of the National Partnership Agreement to Deliver a Seamless National Economy. In November 2008, the Council of Australian Governments, or COAG, agreed to introduce increased harmonisation across the country when imposing personal criminal liability on directors for corporate fault. This reform has been a long time coming, but this is also a good time to harmonise our financial governance guideposts across the country as we face the challenging economic headwinds ahead.

COAG also agreed to a set of six principles under which directors would be deemed criminally liable for offences committed by corporations and bodies corporate. The COAG principles are —

1. Where a corporation contravenes a statutory requirement, the corporation should be held liable in the first instance.
2. Directors should not be liable for corporate fault as a matter of course or by blanket imposition of liability across an entire Act.
3. A "designated officer" approach to liability is not suitable for general application.
4. The imposition of personal criminal liability on a director for the misconduct of a corporation should be confined to situations where:
 - (a) there are compelling public policy reasons for doing so (e.g. in terms of the potential for significant public harm that might be caused by the particular corporate offending);
 - (b) liability of the corporation is not likely on its own to sufficiently promote compliance; and
 - (c) it is reasonable in all the circumstances for the director to be liable having regard to factors including:
 - i. the obligation on the corporation, and in turn the director, is clear;
 - ii. the director has the capacity to influence the conduct of the corporation in relation to the offending; and
 - iii. there are steps that a reasonable director might take to ensure a corporation's compliance with the legislative obligation.

I might take this time to apologise to the primary school kids in the gallery, because this is incredibly dry legislation for you to be here to listen to. I hope you enjoy your lunch.

I continue —

5. Where principle 4 is satisfied and directors' liability is appropriate, directors could be liable where they:

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- (a) have encouraged or assisted in the commission of the offence; or,
- (b) have been negligent or reckless in relation to the corporation's offending.

The students have left the chamber. I put them off straightaway! I continue —

- 6. In addition, in some instances, it may be appropriate to put directors to proof that they have taken reasonable steps to prevent the corporation's offending if they are not to be personally liable.

The intent of this bill is therefore to apply the COAG principles to the Western Australian statute book. Exclusively applying these six COAG principles to hold individuals to account for the actions of a body corporate when the actions of the individual were justifiably neglectful will ensure more critical deliberation about the designation of blame and the weight of consequences. This will enable a tightening of cases in which an individual may be accused of neglect for cases that generally may be minor individual neglect from the director specifically.

Extensive progress has been made on this bill since its initial introduction in 2015, with further alterations still required, as reflected in these reforms. Specifically, the reforms focus on limiting and standardising derivative liability. Derivative liability encompasses personal criminal liability of officers for the offending of a body corporate when they have failed to take all reasonable steps to prevent the body corporate from committing an offence. This is different from the liability of officers who have committed offences themselves and are therefore directly liable. It is also different from accessorial liability, which means that a director is found to be an accessory to crimes committed by the body corporate.

The bill aims to limit and standardise all provisions that impose derivative liability on directors and other officers of bodies corporate offences and proposes to amend 69 state acts to do so. This bill also aims to reduce across 21 acts the liability of directors to hold responsibility for the acts of a corporation, and instead will condense any definition of liability to the Criminal Code only. This will allow for overarching responsibility to be removed, retaining only specifically serious conditions in which an individual is liable for the actions of a corporation.

These reforms include three additions to the Criminal Code. The first, or type 1, is that a director is presumed to have taken all reasonable steps to prevent the body corporate committing the offence, and therefore is not liable, unless the prosecution proves that he or she failed to take all reasonable steps. The second, or type 2, is that a director is presumed to have committed the offence committed by the body corporate unless he or she leads evidence that suggests a reasonable possibility that he or she took all reasonable steps to prevent the commission of the offence by the body corporate. The third, or type 3, requires a director to prove on the balance of probabilities that he or she took all reasonable steps to prevent the body corporate's offending.

In 2020, we tightened work health and safety legislation in response to fatal workplace accidents in Western Australia. These changes focused on increased penalties for neglect of workers, with stricter responsibilities on the individual or director. This was in response to legitimate concerns that the penalties at the time were too relaxed and did not reflect the severity of the offence and the reality for the workers and their families who were impacted. These reforms now place significant penalties upon individuals and businesses that severely neglect to comply with workplace safety guidelines and knowingly conduct risky business that could cause death or serious harm.

Legislation like the Work Health and Safety Act 2020 protects workers from harm and ensures that the responsibility stays with the perpetrator. Labor has remained consistent with its deep-rooted advocacy for workers' rights and welfare. Bills like the Directors' Liability Reform Bill 2022 work alongside other legislation such as the Industrial Relations Legislation Amendment Act and the Work Health and Safety Act to ensure that workers have a safe place in which to work and that directors are also safe from the unlawful and unethical activities of corporations they represent. I commend the bill to the house.

MS C.M. TONKIN (Churchlands) [12.21 pm]: I rise today in support of the Directors' Liability Reform Bill 2022. Apparently this bill has anaesthetic qualities, if the member for Thornlie is to be believed, and I hope that my contribution does not have a sedative effect on those listening! The useful thing about contributing to this debate is that I have had to gain a much deeper understanding of directors' liability. It has been a learning process but one about which I should be informed because of not only my role in this place, but also the reach of this legislation into many aspects of business and community life. This reform bill amends a total of 69 Western Australian statutes, reflecting the principles agreed through the Council of Australian Governments in 2008 as part of the National Partnership Agreement to Deliver a Seamless National Economy.

With consultations beginning in 2013 under the Barnett Liberal-National government, this reform bill has had a very long gestation. Come to think of it, my grandson was born in 2013 and next year he goes into year 5 at school. That is a long time. In 2013, extensive consultations were held with every agency responsible for the acts that seek to impose personal liability on directors of bodies corporate. This process involved the department of justice

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conducting a detailed audit of the statutes at that time. That must have been a scintillating effort! This often involved further amendments to the draft bill as new acts were proclaimed.

In 2015, a version of the Directors' Liability Reform Bill was introduced into the Legislative Council by the former Attorney General. It was immediately referred to a parliamentary committee to consider the implications for the state of the intergovernmental agreement. However, the bill did not progress and lapsed when the thirty-ninth Parliament was prorogued in 2017. The current bill is substantially the same in policy as the 2015 bill, with substantial work being done since 2020 to update the bill with references to relevant legislation that has commenced operation since 2015, and to accommodate statutes that are in the process of being amended or repealed.

The Directors' Liability Reform Bill 2022 proposes to reduce the number of and standardise offences in the Western Australian statutes that impose personal criminal liability on officers of bodies corporate for offences committed by those bodies corporate when those officers have failed to take reasonable steps to prevent the body corporate's offending. It is another of those elegant pieces of legislation with which I am particularly enamoured. I like this type of legislation because it makes the law as it applies to directors or officers of bodies corporate clear and consistent nationally, as well as within this state. Such clarity and consistency makes doing business easier by improving the quality of corporate governance. The bill supports the harmonisation of statutes across Australia in line with nationally agreed principles and ensures that all Western Australian statutes reflect this principled and harmonised position. This is the third bill on which I have recently contributed to debate that seeks to put a harmonised national approach into Western Australian law. I like this sort of legislation; it is good stuff. The other bills were the Trans-Tasman Mutual Recognition (Western Australia) Amendment Bill 2022 and the Fair Trading Amendment Bill 2021.

It is important to note that although the bill uses in its title "directors' liability", it adopts the definition of "officer" in relation to a body corporate as set out in the commonwealth Corporations Act 2001 and includes—it is a long list—a director or secretary of the corporation; a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; a person who has the capacity to affect significantly the corporation's financial standing; a person in accordance with whose instructions or wishes the directors of the corporation are accustomed to act, excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation; a receiver, or receiver and manager, of the property of the corporation; an administrator of the corporation; an administrator of a deed of company arrangement executed by the corporation; a restructuring practitioner for the corporation; a restructuring practitioner for a restructuring plan made by the corporation; a liquidator of the corporation; or a trustee or other person administering a compromise or arrangement made between the corporation and someone else. A person having any of the listed functions is an officer of a body corporate for the purpose of this legislation, regardless of what they choose to call themselves. Elon Musk recently described himself in his Twitter profile as "chief twit", before later changing the description to "complaint hotline operator". Regardless of what he calls himself, in Australia, Elon Musk would be an officer of a body corporate and therefore subject to application of the directors' liability reform legislation in this state.

The bill reflects some very important COAG principles. I know that my colleagues have listed these important principles, but for the sake of my own clarity of thinking, I will list them again. First, when a corporation contravenes a statutory requirement, that corporation should be held liable in the first instance. Second, directors should not be liable for corporate fault as a matter of course or by blanket imposition of liability across an entire act. That is significant in the way in which these principles will be applied to a number of other acts. Third, a "designated officer" approach to liability is not suitable for general application. Fourth, the imposition of personal criminal liability on a director for the misconduct of a corporation should be confined to situations in which there are compelling public policy reasons for doing so—for example, the potential for significant public harm that might be caused by the particular corporate offending; liability of the corporation is not likely on its own to sufficiently promote compliance; and it is reasonable in all the circumstances for the director to be liable having regard to factors including the obligation on the corporation and, in turn, the director is clear, the director has the capacity to influence the conduct of the corporation in relation to the offending, and there are steps that a reasonable director might take to ensure a corporation's compliance with the legislative obligation. The fifth principle says that when the fourth principle is satisfied and directors' liability is appropriate, directors could be liable when they have encouraged or assisted in the commission of an offence or have been negligent or reckless in a corporation's offending. In addition, in some circumstances, it may be appropriate for directors to prove that they have taken reasonable steps to prevent a corporation's offending if they are not to be held personally liable. In fact, that reverses the usual onus of proving the elements of an offence.

There is nowhere to run and there is nowhere to hide. These principles make clear the circumstances in which directors may be held personally and criminally liable for a body corporate's offending when they have failed to take reasonable steps to prevent the body corporate from committing an offence. This is termed "derivative liability",

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which is distinct from direct liability whereby directors themselves have committed an offence. The liability derives from their role as a director. Derivative liability is also distinct from accessorial liability, which is when directors are liable because they have been accessories to the body corporate's offences.

The bill is not principal legislation. It will not be a standalone act. Instead, it will insert standard provisions relating to derivative liability into the Criminal Code and apply these provisions to specified offences in existing acts when appropriate so that officers will be personally liable when the offences have been committed by bodies corporate and officers have failed to take reasonable steps to prevent the offending. That is crystal clear and it has been made crystal clear in this bill.

How will the bill amend the Criminal Code? The bill sets out standard provisions relating to liability that will be inserted into the Criminal Code to reflect the three types of acceptable derivative liability identified by COAG through its principles. Type 1 provides that a director is presumed to have taken all reasonable steps to prevent the body corporate from committing an offence and therefore is not liable, unless the prosecution proves that he or she failed to take all reasonable steps. This category is embodied in proposed section 39 of the Criminal Code, as set out in the bill. Type 2 provides that a director is presumed to have committed the offence committed by the body corporate, unless he or she leads evidence that suggests a reasonable possibility that he or she took all reasonable steps to prevent the commission of the offence by the body corporate. Once this evidence is adduced, the prosecution will bear the onus of proving that the director did not take all reasonable steps. This category is embodied in proposed section 40 of the Criminal Code, as set out in the bill. Type 3 requires the director to prove on the balance of probabilities that he or she took all reasonable steps to prevent the body corporate's offending. This category is embodied in proposed section 41 of the Criminal Code, as set out in the bill.

How will this bill amend other acts? The overall scheme of the bill is to limit and standardise provisions so that this additional layer of derivative liability will apply only to offences that warrant it. Accordingly, it will remove officers' liability altogether from 21 acts. The bill proposes to delete all provisions that impose blanket liability on officers for all offences under an act, with some exceptions. That blanket liability is mentioned in the key principles underpinning this legislation. The bill does not seek to impose type 2 liability for any offences, but proposed section 40 will be included in the Criminal Code to give agencies the flexibility to apply that liability in the future, if required. This legislation is going to be bulletproof and futureproof.

All that is to say that how these three types of acceptable derivative liability that are to be inserted into the Criminal Code will be reflected in other acts will be nuanced. The specifics of how the bill will amend these other acts are set out in divisions 1 to 69. Because of the nuanced treatment of other acts, I will leave discussion of these to my good colleagues who have a much better grasp of the legal significance of these than I have. In particular, I look to the Attorney General in that regard. This is important but complex legislation and I commend the bill to the house.

MS C.M. ROWE (Belmont) [12.38 pm]: I rise today to make a contribution to the debate on the important Directors' Liability Reform Bill 2022. I firmly believe that strong regulations that drive and strengthen corporate governance in every capacity is an essential pillar to underpin our economy.

I will take everybody back in time to 2007. At that time, I was starting out as a relatively fresh-faced financial planner. Little did I know that I was about to move into pretty uncharted waters for the financial services industry and, indeed, the global industry as a whole. As many members in this place will recall, that was the year that we tipped over into what is now referred to as the global financial crisis. There are different assessments of which day it was triggered, but it is important to talk a little bit about some of the factors that led to that crisis. It is a very clear example of how catastrophic it can be when insufficient mechanisms are in place around corporate governance and how companies can operate. Millions of innocent people lost their jobs, their retirement savings, their life savings and, indeed, their homes.

In financial services, it is well known that there are two things that drive the market—greed and fear. In the lead-up to this period, things were looking particularly strong globally. In the US, there was strong economic growth, low inflationary pressure and relatively low unemployment. Importantly, the cost of buying a home was rising, but everything else was looking fairly positive, so the outlook was very optimistic. Banks started to consider putting money into housing. I am talking about investment banks in particular. The fourth largest at the time was Lehman Brothers, which no longer exists, and it decided to move in a dramatic way into the housing space. A lot of Americans were finding it incredibly difficult to borrow money for properties. Of course, good old corporate greed kicked in in a really gross way in the US, and Lehman Brothers, amongst others, decided to invest in low-documentation loans. Basically, that meant people did not have to provide a great deal of proof that they could afford to meet the repayments required on that loan.

Everybody here who has bought a home knows that to get a loan, they have to prove their capacity to make the repayments on a regular basis. Prudent mortgage brokers and bankers will do a stress test to see what a prospective borrower's capacity would be if interest rates were to rise one or possibly two per cent. I am a financial planner

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by background, and I certainly do my due diligence when I look at these things. We have seen some pretty radical increases in interest rates—and decreases; we are just coming out of that period.

At that time, there was a move towards low-doc loans. Prior to going into financial planning, I did a stint working for a mortgage lender. I was fresh-faced and just out of university, but even in my naivety I could recognise that this did not bode well. We were lending money to people who probably should not have been given a loan. I was just the admin person at the time, but I was privy to a lot of meetings. That is not to cast shade or make accusations; it was a great organisation. Its practice was well and truly standard, and it was operating well within the legislative framework of the time.

As things went on and low-doc loans became immensely popular, there was a huge influx of new home owners and investors in the property market in America and then in Europe. I had forgotten about this, but, in researching and refreshing my memory about this time, I recalled the ninja loans. They were shocking—“No income? No assets? No problems.” That is how they were advertised. If it seems too good to be true, it obviously is. All the big investment banks lurched towards these loans with absolute fervour. It became known as the subprime crisis. Suddenly things started to change. A lot of the bigger banks took on too many of these high-risk assets, which had been bundled up by hedge funds. Hedge funds are not known for being particularly prudent in anything, really. A lot of the bigger institutions started to feel the heat from the increase in defaults on these low-doc ninja loans. That had catastrophic effects, and it all started to unravel.

In the US, the government responded swiftly due to the concept that the banks were too big to fail, which is interesting. One wonders who that was designed to save. Was it designed to save the everyday Americans who had their own retirement savings tied up in these investments, or the big corporates? Nonetheless, the Federal Reserve and the government at the time introduced a specific fund to sweep in and bail out the big banks. Lehman Brothers, though, was not one of them. In September 2008, the morning that Lehman Brothers filed for bankruptcy, financial markets went into freefall right across the globe because it signalled that things had gotten out of hand. That had catastrophic effects, which flowed on to Europe and much of Asia, and we were not immune to that here, either.

For everyday Americans, that meant that a huge number of jobs were lost. A documentary was made about the aftermath, and it showed people crying, having lost everything. It was hard to be sympathetic towards the people who had worked for Lehman Brothers and the big corporate investment banks; they had been so cavalier. I am incredibly critical of those individuals, but, equally, we have to be critical of governments across the globe that allowed this environment to develop and flourish. It was not until this crisis swept the globe that there was a reaction and safeguards were put in.

The reason I wanted to speak on this bill was to highlight the impacts of not having a secure and strong foundation in the corporate world to protect everyday people—Western Australians, in this instance. This is really critical. In financial planning, in the aftermath of this, it was harrowing. I remember having clients whose superannuation assets were frozen because they were tied up in property investments in the US. I had people who were on the cusp of retiring, and they were not necessarily people who had millions of dollars. They were ordinary working people who had saved conscientiously through their superannuation, and they had to make hard decisions about putting off retirement. They had to think about selling and downsizing, not because they wanted to but because all of a sudden their superannuation had taken a huge hit and that was going to have a major impact on how long it would support them through their retirement years. I saw that. That caused intense—I cannot stress that enough—insecurity amongst the seniors I was dealing with at the time. They had worked hard and done everything right. They had paid off their mortgages, and they were not afforded the opportunity to rely upon their savings, because of the rampant greed of big investment banks across the globe. I think that is a salient lesson to the world.

That was many years ago now, but I like to think that the types of reforms that we are looking at today carry on that idea of putting in place protection mechanisms and safeguards when people are in positions of power and authority. There should be enormous safeguards around dealing with people's life savings. Even though it happened in 2007, I think I had put a lot of it out of my mind. Going back, it is clear to see how destructive that was at the time. It had a very powerful impact.

I would like to take the opportunity to thank and acknowledge the Attorney General for bringing this really important bill to the house for us to debate today. The bill looks to harmonise legislation across the country. This is important, because as the member for Cockburn said in his contribution, we want to make sure that Western Australia makes itself a really attractive place for people to do business. We certainly want to make sure that we encourage people to invest in Western Australia. I thank members for the opportunity to speak on this bill.

Debate interrupted, pursuant to standing orders.

[Continued on page 5559.]