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Leaders in governance

10 October 2012

Dr Richard Grant
Acting Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
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CANBERRA ACT 2600

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Dear Dr Grant

Personal Liability for Corporate Fault Reform Bill 2012

Chartered Secretaries Australia (CSA) is the peak body for over 7,000 governance and risk professionals in Australia. It is the leading independent authority on best practice in board and organisational governance and risk management. Our accredited and internationally recognised education and training offerings are focused on giving governance and risk practitioners the skills they need to improve their organisations' performance.

We welcome the opportunity to comment on the Personal Liability for Corporate Fault Reform Bill 2012 (the bill). Our Members have primary responsibility to develop and implement governance frameworks in public listed, unlisted and private companies, and not-for-profit and public sector organisations. We have drawn on their experience in our submission.

General comments

CSA is pleased to see that the amendments to *Corporations Act 2001*, *Corporations (Aboriginal and Torres Strait Islander) Act 200*6, *Insurance Contracts Act 1984*, *Foreign Acquisitions and Takeovers Act 1975*, *Income Tax Assessment Act 1936*, *Taxation Administration Act 1953*, *Superannuation Guarantee (Administration) Act 1992*, *Pooled Development Funds Act 1992*, *Therapeutic Goods Act 1989*, *Health Insurance Act 1973*, *Veterans' Entitlements Act 1986*, *Classification (Publications, Films and Computer Games) Act 1995*, *National Measurement Act 1960*, and *National Vocational Education and Training Regulator Act 2001* are generally more in line with the Council of Australian Government (COAG) principles[i] than the amendments as shown in the Exposure Drafts of the reform of Commonwealth legislation (as set out in three tranches released throughout 2012). The COAG principles aim to ensure that derivative liability imposed on directors and other corporate officers is in accordance with principles of good corporate governance and criminal justice, and is not imposed as a matter of course.

CSA is of the view that the amendments to the derivative liability provisions in the Personal Liability for Corporate Fault Reform Bill 2012 improve on the earlier Exposure Drafts in seeking to address the inequity and overreach in the treatment of individuals where the company is in breach of the law, as exemplified in imposing criminal liability in situations where directors may not be aware of, or have the ability to prevent, the commission of an offence by the company

and requiring directors to prove their innocence, which is a reverse of the burden of proof as it operates under the criminal law.

We note that some derivate liability provisions have been repealed, some amended to accessorial liability provisions and some retained. The repeals and amendments are welcome, as they manifest a commitment to:

- remove personal criminal liability for corporate fault where such liability is not justified
- remove the burden of proof on defendants to establish a defence to a charge
- replace personal criminal liability for corporate fault with civil liability where a non-criminal penalty is appropriate.

We also note that where personal criminal liability has been retained, explanation is provided as to why. Such explanation is essential to understanding the public policy reasons for:

- retaining criminal liability
- how the decisions for the amendments contained in this Bill relate to the COAG principles.

The bill

CSA supports the amendment replacing the current criminal liability imposed on company secretaries and directors under s 188 of the *Corporations Act 2001* with a civil liability. CSA notes that the penalties for breach of this provision have been significantly increased and is of the view that relief from criminal liability is of great note given the significant increase in the severity of penalties.

CSA is disappointed to note that the onus of proof continues to rest with the director in s 8Y of the *Taxation Administration Act 1953*, denying directors the presumption of innocence until proved guilty, which is a fundamental tenet of criminal law. Under the effect of this provision, a director must prove that they did not aid or abet any taxation offence undertaken by a corporation.

The argument for retaining this provision as currently drafted, as put forward in an earlier explanatory memorandum, is that the Australian Taxation Office (ATO) relies on this section to prosecute 'directors who repeatedly and seriously neglect their company's tax obligations'.

CSA is of the strong view that if the legislation is aimed at repeated and serious neglect, then a reversal of the burden of proof on the whole pool of directors, rather than just the very small minority, is clearly inappropriate. To prove such behaviour, the ATO should have amassed sufficient evidence to show that the directors in question were culpable in the commitment of the taxation offences of their corporations.

CSA therefore believes that accessorial liability would be appropriate, and would relieve the great majority of directors who do not commit or aid and abet taxation offences from the threat of serious criminal prosecution where they are presumed to be guilty.

Lack of consistency in reform process

CSA notes that, although all states and the Commonwealth have reaffirmed a commitment to the Directors' Liability reform project (part of COAG's National Partnership Agreement to Deliver a Seamless National Economy) to establish a nationally consistent and principled approach to the imposition of personal liability on directors and other corporate officers for corporate fault, the approach overall is still piecemeal.

All states and the Commonwealth have committed to undertake a second jurisdictional audit of provisions where a director is held criminally liable for an offence that was committed by the

corporation, and to implement the audit outcomes by introducing legislation to make the necessary amendments by the end of 2012. This is to be commended.

The Personal Liability for Corporate Fault Reform Bill 2012 is a testament to the Commonwealth's commitment to this process and timetable.

However, missing from this process is any attempt to establish a nationally consistent approach such as would be effected by the use of a model provision that would ensure harmonisation of provisions imposing personal liability on directors and corporate offices for corporate fault. The liability provisions in Commonwealth legislation are different from those adopted by the states.

The report by the Corporations and Markets Advisory Committee (CAMAC) in 2006[ii] noted that minimising inconsistency between Australian jurisdictions in the application of personal liability for corporate fault in government laws is required to address the considerable disparities in the terms of personal liability provisions, which result in undue complexity and less clarity about requirements for compliance.

The CAMAC report also provided a model provision proposed for use in circumstances where a legislature sees a need to make a designated corporate officer personally responsible for the discharge of a specified obligation (p 42).[iii] CSA notes that the Australian Institute of Company Directors (AICD) has also put forward a model provision to ensure consistency across state and federal legislation.

While CSA accepts that there is no one department, at either Commonwealth or state level (including the Commonwealth Treasury) that could drive the use of such a model provision across state and federal legislation, our view remains that one of the stated objectives — national consistency in the imposition of personal liability on directors for corporate fault — cannot be achieved until such time as full harmonisation occurs and a model provision is introduced and implemented across all jurisdictions.

CSA recognises that it is only through the commitment of the federal and state governments, through the COAG process, that such a reform can be achieved.

CSA notes that, at the request of COAG, the Business Regulation and Competition Working Group (BRCWG), comprising senior officials from Commonwealth, state and territory governments and chaired by the Commonwealth Minister for Finance and Deregulation and Commonwealth Minister Assisting for Deregulation, developed a set of supplementary Guidelines to assist jurisdictions in auditing their legislation against the COAG Principles. On 25 July 2012, COAG agreed to apply these Guidelines when drafting future legislation — a commitment CSA applauds.

Given the success of this group in developing such guidelines for application across all jurisdictions, CSA is of the view that the BRCWG could be reconvened to assist the federal, state and territory governments develop and agree a model provision that could be applied across jurisdictional legislation, thus finally achieving one of the prime aims of the reform process.

Without such a concerted, agreed effort, the current reform process will simply replace one patchwork of inconsistent legislation with another.

CSA recognises that the Parliamentary Joint Committee on Corporations and Financial Services (the Committee) is currently conducting an inquiry into the Personal Liability for Corporate Fault Reform Bill 2012 as a stand-alone piece of legislation. However, CSA is of the view that the Committee could make a recommendation in its report on the need for further commitment from

all governments in Australia to develop and introduce a model provision for personal liability for corporate fault. This would address one of the key objectives of the reform process.

In preparing this submission, CSA has drawn on the expertise of the members of our national policy committee, the Legislation Review Committee. We are more than happy to discuss with you the issues highlighted in this submission.

Yours sincerely

Tim Sheehy
CHIEF EXECUTIVE

End notes

[i] On 7 December 2010, COAG agreed to a set of six principles for the imposition of personal criminal liability for directors and other corporate officers in circumstances of corporate fault (COAG Principles). The Principles are that:

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
    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.

[ii] Corporations and Markets Advisory Committee, *Personal liability for corporate fault*, September 2006. The report was prepared in response to the reference to the Advisory

Committee in July 2002 by the then Parliamentary Secretary to the Treasurer of issues relating to directors' duties and personal liability.

[iii] Corporations and Markets Advisory Committee, *Personal liability for corporate fault*, September 2006, p 38: 'A corporation must appoint an individual [or individuals] within the corporation to be a designated officer [for particular designated purposes]. If the corporation fails to appoint a designated officer, each director of the corporation is taken to be a designated officer. A designated officer must take reasonable steps to ensure compliance by the corporation with its obligations under the Act [in relation to those designated purposes]. A designated officer is liable for non-compliance unless that person establishes [on the balance of probabilities] that he or she took all reasonable steps to prevent the non-compliance.'