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28 June 2012

Ms Alix Gallo
Manager Governance and Insolvency Unit
Corporations and Financial Services Division
The Treasury
Langton Crescent, Parkes ACT 2600

Email: personalliabilityforcorporatefault@treasury.gov.au

Dear Ms Gallo,

Personal Liability for Corporate Fault Reform Bill 2012

The Australian Institute of Company Directors welcomes the opportunity to comment on the second tranche of the Exposure Draft of the Personal Liability for Corporate Fault Reform Bill 2012 (C'th)(the Draft Bill).

The Australian Institute of Company Directors is the second largest member-based director association worldwide, with over 31,000 individual members from a wide range of corporations; publicly-listed companies, private companies, not-for-profit organisations, charities and government and semi-government bodies. As the principal Australian professional body representing a diverse membership of directors, we offer world class education services and provide a broad-based director perspective to current director issues in the policy debate.

The Australian Institute of Company Directors has closely monitored the progress of the current COAG reform agenda set out in the *National Partnership to Deliver a Seamless National Economy* and in particular, the reform stream relating to director liability. As part of this process we have been involved in discussions with the COAG BRCWG and State and Federal Government Ministers, regarding ways to deliver effective reform and appropriate legislative amendments in this area. It is against this background that we again respond to Treasury's request for comments.

We note that this submission follows our previous comments made on 30 March 2012 in relation to the first tranche of legislation to be included in this Bill. However, for the purpose of completeness, we have again included our earlier comments and an explanation of the Company Directors' model for reform in sections 2 and 3 of this document. Our general comments about the second tranche are included at section 4 and our specific comments about each proposed legislative amendment in the second tranche are set out in Appendix A.

1. Summary

In summary, the Australian Institute of Company Directors comments are as follows:

(a) Outside of the Corporations Act, we are of the view that the principles formulated by the Australian Institute of Company Directors (see paragraph 3.1 below) should be used to determine whether provisions imposing personal criminal liability on directors are appropriate.

(b) In circumstances where provisions imposing personal criminal liability on directors are determined to be appropriate, the Australian Institute of Company Directors model provision (see paragraph 3.2 below) should be inserted to ensure consistency across State and Federal legislation.

(c) The application of the Australian Institute of Company Directors principles and model provision avoids the inconsistent outcomes that have occurred as a result of the COAG process.

(d) While we support changing the criminal liability imposed on directors and officers for acts of the company to civil liability in certain circumstances, such as proposed in the Corporations (Aboriginal and Torres Strait Islander) Act 2006, we are of the view the change is undermined by simultaneously imposing a civil penalty that is higher than the existing penalty for the criminal offence.

(e) In order to ensure that the work undertaken in respect of these reforms is not undone, we are of the view that any new personal liability provision proposed in the future should be carefully scrutinized and analysed in accordance with the Company Directors principles. For this reason we do not support new personal liability provisions being introduced by way of regulation, (as is contemplated by the amendments to the Therapeutic Goods Act 1989);

(f) Inserting notes under provisions to identify all of the contraventions within an Act for which a director can be liable for acts of the company, highlights the extent of the provisions which impose personal criminal liability on directors, it does not:

i) reduce the number of onerous criminal liability provisions facing directors;

ii) improve or fix the underlying economic problem the reforms were designed to rectify;

iii) provide an incentive for directors to focus on corporate performance rather than on legislative conformance; or

iv) contribute to business investment, productivity, job creation or economic growth.

(g) The Bill is also unlikely to assist the harmonisation of director liability provisions across Commonwealth, State and Territory legislation because the liability provisions included in the Commonwealth legislation are different to those adopted by States which have passed legislation pursuant to these reforms (including NSW and South Australia). We are of the view that the harmonisation which the reforms contemplated could have been achieved had the Company Directors' model provision been adopted.

Our general comments on the COAG Reforms and the Draft Bill are set out below with further specific comments on each proposed legislative amendment set out in *Appendix A*.

2. Background to the COAG Reforms

The issue of personal liability for corporate fault is a longstanding one and has been the subject of a number of reviews and inquiries.[1]

In 2006, CAMAC identified two principal areas of concern:

- "A marked tendency in legislation across Australia to include provisions that impose personal criminal sanctions on individuals for corporate breach by reason of their office or role within the company (rather than their actual acts or omissions);
- Considerable disparities in the terms of personal liability provisions, resulting in undue complexity and less clarity about requirements for compliance."[2]

CAMAC was of the view that: "as a general principle, individuals should not be penalised for misconduct by a company except where it can be shown that they have personally assisted or been privy to that misconduct, that is, where they were accessories."[3] An important distinction needs to be drawn between:

- "an individual's criminal liability for his or her own misconduct in a corporate context; and
- an individual's criminal liability in consequence of misconduct by a company."[4]

It is the second type of liability which is the focus of these reforms. The reforms are not designed to remove liability from directors who commit or are involved in criminal conduct. The purpose of the reforms is to alleviate directors from being "automatically" liable for the criminal conduct of the company, given that the acts of the corporation can be carried out by a large range of individuals without the director's knowledge or involvement.

"Derivative liability" or "positional liability"[5] laws of the type imposed on directors hinder productivity because they encourage directors to make sub-optimal business decisions, to take an overly cautious approach to decision-making and focus their minds excessively on risk avoidance rather than on ways to improve value, competitiveness and profitability.

A regulatory regime which allows directors to be *criminally* liable outside circumstances where they are accessories or they have knowingly authorized or recklessly permitted a contravention, fosters an approach to business which is overly risk adverse and which stifles productivity.

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[1] These include: *Senate Standing Committee on Legal and Constitutional Affairs Company Directors' Duties* (1989); Corporate Law Economic Reform Program Paper No 3 *Directors' Duties and Corporate Governance* (1997); Australian Law Reform Commission *Principled Regulation* (2002); Regulation Taskforce *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business* (2006); and CAMAC *Personal Liability for Corporate Fault* (2006). See CAMAC Report *Personal Liability for Corporate Fault* 2006 at 2 -3.

[2] CAMAC Report *Personal Liability for Corporate Fault* 2006 at 1

[3] CAMAC Report *Personal Liability for Corporate Fault at* 9

[4] CAMAC Report *Personal Liability for Corporate Fault* 2006 at 4

[5] Laws that impose liability on a person for acts of the corporation because the person holds a particular position, regardless of their involvement in the company's contravention.

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A survey of the director community conducted in late 2010[6] by the Australian Institute of Company Directors found:

- the current plethora of laws involving director liability is having a negative effect on board recruitment and retention;
- concerns about director liability are having a negative effect on board decision-making; and
- the compliance burden is hampering directors when it comes to carrying out their primary role of delivering shareholder value and protection, because of concerns about the risk of personal liability.

The issue was of such economic concern that it was included as a reform stream in the COAG *National Partnership to Deliver a Seamless National Economy* in 2008. As part of the reform the Commonwealth, States and Territories were to agree to principles that could be used to audit legislation and identify provisions that required amendment in each jurisdiction.

The Australian Institute of Company Directors, while supportive of efforts to reform these derivative liability laws, expressed concerns about the principles endorsed by the Ministerial Council for Corporations in November 2009.

We stated that the principles were a disappointment and exceptions in the principles provided a "wooly approach to defining what should be very exceptional circumstances and leaves open a potentially very wide range of situations where directors could be personally liable for the misconduct of a corporation."[7] We were particularly concerned about allowing criminal liability for corporate fault based on a wide interpretation of "compelling public policy reasons" because it was ill defined, subjective and thus open to a variety of interpretations that would defeat the purpose of harmonization.

Despite our concerns the MINCO principles were endorsed by COAG in December 2009. We refer to the agreed principles in this document as the COAG Agreed Principles.

By February 2011, the COAG Reform Council identified several risks to the achievement of the Director Liability Reform. At that stage not all of the jurisdictions had completed their audits and those that had completed their audits had not identified any, or only minimal, provisions on their statute books that required amendment. In line with our initial concerns raised when the principles were agreed, the COAG Reform Council Progress Report 2009-2010 (2010 Progress Report) stated "the council is concerned that the directors' liability principles have been applied in a way that raises significant risks to the achievement of this reform."[8]

The 2010 Progress Report, as we had foreshadowed and cautioned, also stated that: "the initial review of the audits indicates that jurisdictions have broadly interpreted the threshold principle of compelling public policy reasons to justify the retention of a significant number of different provisions..."[9]

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[6] The 2010 survey findings reinforce the findings of a 2008 Australian Institute of Company Directors survey of ASX 200 directors conducted with Federal Treasury. See: http://www.treasury.gov.au/content/Company_Directors_Survey/SurveySummary.html

[7] Media Release: "*MINCO Liability Reform Principles a Disappointment*", Australian Institute of Company Directors 6 November 2009.

[8] COAG Reform Council *National Partnership Agreement to Deliver a Seamless National Economy: Performance Report for 2009 -10*, 23 December 2010 at 219

[9] COAG Reform Council *National Partnership Agreement to Deliver a Seamless National Economy: Performance Report for 2009 -10*, 23 December 2010 at 220.

In response to the 2010 Progress Report, we called for the COAG Director Liability Reform process to be "completely re-booted."[10] We stated that the "current process is clearly not working and, in our view, is unlikely to work because it is based on a fatally flawed set of principles."[11] We noted that the governments had been afforded "too much wriggle room to avoid genuine reform."[12]

To assist, we did more than call for the process to be re-set we also provided a solution. The Australian Institute of Company Directors developed a set of rigorous principles and a model provision which could be used to achieve the intended outcome of the reform. In 2011, the Australian Institute of Company Directors' model for reform was presented to State Governments, the Federal Government and representatives of the COAG BRCWG Director Liability Working Group. Although there was keen interest in the alternative approach, there was reluctance from those working on the reform to move away from the COAG Agreed Principles, despite their flaws. To date, no jurisdiction, including the Commonwealth, has raised any issue with our model, nor has any jurisdiction articulated any reason as to why the Company Director's model provision cannot be inserted into their statutes where deemed to be appropriate.

By August 2011, Corrs Chambers Westgarth had completed an independent analysis of the application of COAG's Agreed Principles by each jurisdiction[13] (Corrs Chambers Westgarth Report). Among other things, the Report found that:

(a) no jurisdiction identified all relevant provisions[14];

(b) together the jurisdictions identified 77% of all relevant provisions[15];

(c) the permitted exclusions exception was inconsistently interpreted and applied between jurisdictions leading to a wide range of results in each Audit;[16]

(d) All jurisdictions, except QLD, applied a broad interpretation to the permitted exclusions ...as result a large number of provisions were inaccurately excluded and have not been assessed against the COAG [Agreed] principles;[17]

(e) many jurisdictions overwhelmingly relied on the Public Policy principle to justify the retention of the provisions reviewed, however the majority of the audits did not:

- provide an explanation of the public policy reasons relied upon; or
- where they did provide reasons, establish a compelling or convincing basis for retaining the provision;[18] and

(f) most jurisdictions did not address the automatic and blanket liability principle at all and retained blanket liability provisions without amendment.[19]

The Corrs Report found that 697 legislative provisions nationally, were the subject of this reform stream.[20] Despite this, since the commencement of the reform process in 2008 to date, only 18 provisions imposing personal criminal liability on directors for

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[10] Australian Institute of Company Directors media release: "*COAG Reform Council exposes failure of director liability reform*" 11 February 2011.
[11] Ibid.
[12] Ibid.
[13] Directors' Liability Reform *Analysis of the application of COAG's directors' liability principles*, Corrs Chambers Westgarth 5 August 2011
[14] Ibid at 8
[15] Ibid at 17
[16] Ibid at 17
[17] Ibid at 9
[18] Ibid at 19
[19] Ibid at 19
[20] Ibid at 19

corporate fault have been repealed. This number represents less than half a per cent of all provisions relevant to this reform.

Throughout 2011, we continued to urge governments around Australia to adopt the Company Directors model for reform but instead the Federal Government in August 2011 announced that there would be a 'new way forward' for the director liability reforms under the COAG process. The announcement stated that "all states and territories will be required to re-audit their laws against COAG's agreed principles and more specific and detailed guidelines and will then have to amend their individual laws."[21]

In response, the Australian Institute of Company Directors questioned the benefit of re-auditing legislation on a still flawed set of underlying principles with additional guidelines added.

In February 2012, despite the States, Territories and the Commonwealth, having had the benefit of the Corrs Chambers Westgarth report, having re-audited their legislation and having had four years within which to achieve a positive economic outcome, the COAG Reform Council again raised concerns about the output of the reform stream not being achieved. The COAG Reform Council Progress Report of 2011 stated:

> "The council remains concerned that the intended output of this reform – a nationally consistent and principled approach to the imposition of personal criminal liability of directors or other corporate officers for corporate fault – is at risk of not being achieved."[22]

The Company Directors model for reform is explained below. As set about above we have still not received feedback from the Government as to why the Company Directors' model provision is inappropriate for adoption in Commonwealth legislation. In the event the provision was to be adopted in federal legislation, the same provision could then be used across the States, contributing to harmonization.

It is against the history of this reform and in light of our model that we now make comments in relation to the Federal Government's second proposed tranche of law reform on this issue.

3. Company Directors approach to reforming the provisions imposing criminal liability on directors

This section sets out the Australian Institute of Company Directors approach to reforming the provisions imposing criminal liability on directors contained in Commonwealth, State and Territory legislation. The Company Directors' model allows for a consistent national approach to the imposition of criminal liability on directors arising from the misconduct of the corporation and avoids the inconsistent outcomes which have arisen as a result of applying the current COAG Agreed Principles.

The application of the Company Directors approach sits alongside, and does not detract from the rigorous duties already required of directors in the Corporations Act 2001 (C'th). The approach does not address the reform of civil liability provisions confronting directors. Going forward, we are of the view that the civil liability provisions facing directors should be the subject of a separate review.

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[21] Media Release: *New Way Forward for Directors' Liability Reforms*, Senator Nick Sherry and David Bradbury MP, 19 August 2011

[22] COAG Reform Council, *Seamless National Economy Report on Performance*, Report to the Council of Australian Governments, 23 December 2011 at 186

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3.1 *Principles*

The Australian Institute of Company Directors recommends that the following principles be applied to reforming the statutory provisions imposing personal criminal liability on directors. The principles should also be considered and applied before any new provisions imposing criminal liability on a director are contemplated.

1. Where a corporation contravenes a statutory requirement the corporation should be held liable.[1]
2. In no circumstances will directors be "automatically" liable for acts of the corporation.
3. A designated officer approach to liability is not suitable for application in any case.
4. The imposition of personal criminal liability on a director for the misconduct of a corporation is confined to situations where:
   (a) the obligation on the corporation, and in turn, the director is clear; and
   (b) the statute addresses a public policy issue of compelling importance (that is, it involves safety to the public health, prevents individuals or the public from death or serious injury or protects children); and
   (c) the harm or the consequences resulting from the company breaching the particular provision are grave or serious (e.g. death or serious injury); and
   (d) the objects of the Act cannot be adequately met by and it has been demonstrated that the objects of the Act have not been met by:
      i) means other than legislation (education, guidelines etc.); or
      ii) effectively regulating the conduct and activities of the corporation; or
      iii) imposing liability solely on the corporation.
5. Where principle 4 has been satisfied and directors' liability is appropriate, directors will only be liable where they have knowingly authorised or recklessly permitted the contravention.
6. In each case, the prosecution will bear the onus of proving that the directors knowingly authorised or recklessly permitted the contravention (i.e. no reverse onus of proof will apply).

1 As a matter of principle, where the corporation contravenes a statutory requirement the corporation should be prosecuted in the first instance, however, there may be circumstances where an individual should be the subject of proceedings in respect of the contravention.

3.2 *Company Directors Model Provision*

Where the principles have been applied and a provision satisfies all of the criteria in principle 4, the existing provision should be omitted and the Company Directors Model provision should be inserted. The purpose of the model provision is to have each statute begin from the premise that a director will not be criminally liable for an act of the company. However, a director will be liable in circumstances where the director knowingly authorised or recklessly permitted the contravention. The onus of proof will be on the prosecution to prove that the directors knowingly authorised or recklessly permitted the contravention.

Where a statute provides for multiple offences, one or more of which satisfy the criteria in principle 4 (Category A offences), sub-section (2) of the model provision

should apply only to those offences. In other words, directors may be prosecuted for serious offences rather than for ancillary or procedural contraventions under an Act.

The Company Directors Model provision is as follows:

> **[section number] – Offences by corporations**
>
> (1) If a corporation contravenes, whether by act or omission, any provision of this Act or the regulations, each person who is a director of the corporation or who is concerned in the management of the corporation will not be taken to contravene the same provision subject to subsection (2).
>
> (2) A director of the corporation or a person concerned in the management of the corporation will be liable for a contravention of the corporation where the person knowingly authorised or recklessly permitted the contravention.
>
> (3) A person may be proceeded against and convicted under a provision pursuant to this section whether or not the corporation has been proceeded against or convicted under the provision.
>
> (4) Nothing in this section affects any liability imposed on a corporation for an offence committed by the corporation against this Act or the regulations.
>
> (5) The Court may, on application by any interested person and taking into account all of the circumstances surrounding the contravention, make an order, unconditionally or subject to such conditions as the Court imposes, relieving a person in whole or part from any liability in respect of a contravention of subsection (2).

4. General Comments on the Draft Bill (Tranche 2)

We are of the view that the model provision set out above is a preferable alternative to the differently worded derivative liability provisions contained in legislation across Australia. We believe the above principles and model provision, where appropriate, should be reflected in all legislative initiatives reflecting this reform priority and should become the default position for all legislative drafting instructions when this issue arises.

4.1 *The Bill does not contribute to harmonisation of liability provisions across Commonwealth, State and Territory legislation.*

The explanatory notes to the Draft Bill provide that: "The reform project aims to harmonise the imposition of personal criminal liability for corporate fault across Australian jurisdictions."[23] The proposed reforms, contrary to the statements in the Explanatory Notes do not encourage consistency across Commonwealth, State and Territory legislation because the liability provisions included in the Commonwealth legislation are different to those adopted by States which have passed legislation pursuant to these reforms (including NSW and South Australia). We are of the view that the harmonisation which the reforms contemplated could have been achieved had the Company Directors' model provision been adopted.

As noted by CAMAC: "This very lack of harmony can impair ready communication of statutory requirements and effective compliance efforts."[24]

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[23] Explanatory Notes at p1.

[24] CAMAC Report *Personal Liability for Corporate Fault* (2006) at 6

4.2 Penalties

The Australian Institute of Company Directors understands the policy rationale for removing provisions imposing criminal liability from individual directors and at the same time increasing the penalties for companies in respect of the same offence. However, we are of the view that any benefit gained by changing the potential liability of individuals from criminal liability to civil liability (as proposed in section 265-40 of the Corporations (Aboriginal and Torres Strait Islander) Act 2006 for example), is undone if the amount of the penalty imposed on the individual for a civil breach becomes more onerous than the current penalty for a criminal breach under the same provision. Again, such an increase appears to be inconsistent with the intent and purpose of the COAG reforms which is to alleviate directors from being "automatically" liable for the criminal conduct of the company and to boost the focus on corporate performance rather than compliance with overly burdensome liability laws.

4.3 Commonwealth legislation not addressed in the first or second tranche of the Personal Liability for Corporate Fault Reform Bill.

We note that the Corrs Chambers Westgarth Report listed all of the Commonwealth provisions that in their view were relevant to this reform. These provisions were either:

(a) reviewed by the Commonwealth during its audit;
(b) not identified by the Commonwealth in its audit; or
(c) inaccurately excluded from the reform, by a misinterpretation of the permitted environmental protection and OH&S exclusions.

The Acts which contain liability provisions identified in the Corrs Chambers Westgarth Report which have not been amended or repealed, in either Tranche 1 or Tranche 2 of the Personal Liability for Corporate Reform Bill 2012 are as follows:

- Age Discrimination Act 2004
- Banking Act 1959
- Crimes (Taxation Offences) Act 1980
- Customs Act 1901
- Insurance Act 1973
- Life Insurance Act 1995
- National Consumer Credit Protection Act 2009
- Private Health Insurance Act 2007
- Shipping Registration Act 1981
- Trade Marks Act 1995; and
- Hazardous Waste (Regulation of Exports and Imports) Act 1989

We recommend that the Commonwealth re-review the above mentioned legislation to ensure that no further amendments are required to be included in the Draft Bill.

4.4 Maintaining the reforms going forward

In order to ensure that the work undertaken in respect of these reforms is not undone, we are of the view that any new personal liability provision contemplated in the future should be carefully scrutinized to ensure that it accords with the Company Directors principles before being introduced. For this reason we do not support new personal liability provisions, being able to be introduced by way of regulation making. Any new proposal to insert a provision which imposes personal

liability on directors for corporate fault should be firmly supported by rigorous policy analysis, that analysis should be publicly disclosed and open for public comment, and if warranted new provisions should only be adopted after legislative amendments have been considered and debated by parliament.

We note that amendments proposed to the Therapeutic Goods Act 1989 limit the potential personal liability of executive officers for corporate fault, to breaches by the company of the provisions prescribed in section 54BA. However, section 54BA includes "regulations prescribed for the purpose of this paragraph." We are concerned that in addition to the approximately 96 provisions already prescribed, allowing further provisions to be added by way of regulation, rather than by legislative amendment, will lack scrutiny and has the potential to undermine any improvements made as a result of this reform.

We strongly recommend that proposed subsection 54BA(b) of the Therapeutic Goods Act be deleted.

4.5 The wider liability issue

Whilst our comments are directed most specifically at the Draft Bill, we also wish to raise a major issue that the Australian Institute of Company Directors has continued to confront in recent Commonwealth legislative initiatives.

In particular we refer to the *Corporations Amendment (Improving Accountability on Director and Executive Remuneration)* Act 2011 and the *Tax Laws Amendment (2012 Measures No. 2) Bill* 2012.This legislation and draft legislation, amongst others, are examples of where strict liability regimes targeting directors were included in the legislation. Whilst not necessarily carrying criminal sanctions this type of legislation nevertheless imposes significant sanctions on directors. While not within the ambit of the COAG reforms, these provisions are drafted in complete contradiction to the spirit of the COAG Agreed Principles discussed in our full submission.

The Australian Institute of Company Directors is strongly opposed to this approach. We believe there is no justification for strict liability or the reversal of the onus of proof in legislation without, at the very least, a careful consideration of the criteria or similar criteria which underpin the current COAG reform process.

As you may be aware, we have been invited to and have responded energetically to discuss with Treasury officials the suitable drafting of such legislation where these types of provisions are being considered for possible inclusion in the relevant legislation. However, despite our concerns the continual inclusion of strict liability provisions imposing penalties or other significant sanctions upon directors continues unabated in Commonwealth legislation.

We cannot stress enough, that the process of alleviating the criminal liability of directors for corporate fault will be undermined if the provisions are simply replaced with onerous strict liability offences or by provisions imposing significant civil penalties.

As foreshadowed, our specific comments on the amendments proposed by the Draft Bill are set out in Appendix A.

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We hope that our comments will be of assistance to you. If you would like to further discuss our views please do not hesitate to contact me on (02) 8248 6600.

Yours sincerely,

John H C Colvin
CEO & Managing Director

Appendix A – Legislative amendments proposed by the Personal Liability for Corporate Fault Reform Bill 2012 (C'th) (Second Tranche)

1. Classification (Publications, Films and Computer Games) Act 1995

The main object of the Part proposed to be amended by the Bill is to "protect children living in Indigenous communities in the Northern Territory from being exposed to prohibited material."[25]

Existing Liability Provision
Section 104 (1) An offence against this Part that is committed by a body corporate is also taken to have been committed by: (a) each body corporate manager and (b) any State/Territory body corporate manager for the State or Territory in which the offence is committed. (2) A body corporate manager or State/Territory body corporate manager does not commit an offence because of subsection (1) if he or she: (a) does not know of the circumstances that constitute the offence; or (b) knows of those circumstances but takes all reasonable steps to prevent the commission of the offence as soon as possible after he or she becomes aware of those circumstances. Note: A defendant bears an evidential burden in relation to the matters in subsection (2) – see subsection 13.3(3) of the *Criminal Code*.
Proposed Amendments
At the end of sections 101 and 102 Add: Note: For the liability of a body corporate manager, or a State/Territory body corporate manager, see section 104. **At the end of sections 103(1) and (2)** Add: Note: For the liability of a body corporate manager, or a State/Territory body corporate manager, see section 104. **Section 104** Repeal the section, substitute: **Liability of Body Corporate Managers** *Body corporate managers generally* (1) A body corporate manager commits an offence if: (a) the body corporate commits an offence against this Part; and (b) the manager knew that the offence would be committed; and (c) the manager was in a position to influence the conduct of the body corporate in relation to the commission of the offence; and (d) the manager failed to take all reasonable steps to prevent the commission of the offence.

[25] See section 98A of the *Classification (Publications, Films and Computer Games)* Act 1995.

State/Territory body corporate managers

(2) A State/Territory body corporate manager for a State or Territory commits an offence if:

(a) the body corporate commits an offence against this Part within the State or Territory; and

(b) the manager knew that the offence would be committed; and

(c) the manager was in a position to influence the conduct of the body corporate in relation to the commission of the offence; and

(d) the manager failed to take all reasonable steps to prevent the commission of the offence.

Maximum penalties

(3) The maximum penalty for an offence against subsection (1) or (2) is one-fifth of the maximum penalty that could be imposed for the offence committed by the body corporate, subject to subsection (4).

(4) An offence against subsection (1) or (2) that relates to an offence committed by a body corporate against subsection 103(2) (supplying 5 or more items in or to a prescribed area) is punishable by either or both of the following:

(a) a pecuniary penalty not exceeding 200 penalty units:

(b) Imprisonment for a term not exceeding 2 years

Comment on Proposed Amendments

The Australian Institute of Company Directors is of the view that section 104 should, in line with our comments below, either be repealed or amended.

Applying the Company Directors model, we are of the view that all of the components of the criteria (with one exception) have been met. For example:

- the obligation on the corporation and the director is clear;
- the provisions are designed to protect children (and therefore address a compelling public policy issue); and
- the consequences of prohibited material being available in the prescribed area may be grave or serious.

It is not clear, however, that it has been demonstrated that the objects of the Act cannot, or have not been met by imposing liability solely on the corporation in this circumstance. Pursuant to the Company Directors model it is therefore arguable that all of the criteria have not been met and that the existing derivative liability provision should be repealed.

In the event that the Commonwealth Government takes the view that imposing liability solely on the corporation will not achieve the objects of the Part, the Australian Institute of Company Directors recommends that section 104 be repealed and the Company Directors' model provision be inserted rather than the provision proposed. We do note, however, that the amendments proposed are an improvement on the existing liability provision at section 104 of the Classification (Publications, Films and Computer Games) Act 1995.

2. Corporations (Aboriginal and Torres Strait Islander) Act 2006

Existing Liability Provision

265-40 Responsibility of secretaries for certain contraventions

(1) A secretary of an Aboriginal and Torres Strait Islander corporation commits an offence if the corporation contravenes:
- (a) subsection 69-20(1) or (2) (requirement to lodge copy of constitutional changes); or
- (b) section 88-1 (requirement to lodge material about change of name); or
- (c) subsection 112-5(5), (6) or (7) (requirements about registered office); or
- (d) section 180-35 (requirement to give copy of register of members or register of former members); or
- (e) subsection 304-5(1), (3), (5) or (6) (requirement to lodge details of directors and secretaries); or
- (f) section 330-10 (requirement to lodge general report); or
- (g) section 348-1 (requirement to lodge annual report).

Penalty: 5 penalty units.

(2) An offence based on subsection (1) is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code* .

(3) A person does not contravene subsection (1) if they show that they took all reasonable steps to ensure that the corporation complied with the section.

Note: A defendant bears a legal burden in relation to a matter mentioned in subsection (3) (see section 13.4 of the *Criminal Code*).

Proposed Amendments

The proposed amendments insert notes after sections 69-20, 88-1(2), 112-5, 180-35, 304-5, 330-10 and 348-1 to signal that a secretary may be liable for a civil penalty for a contravention of these sections. In addition, the following amendments are proposed:

Section 265-40
Repeal the section, substitute:

265-40 Responsibility of secretaries for certain contraventions

(1) A secretary of an Aboriginal and Torres Strait Islander corporation contravenes this subsection if the corporation contravenes any of the following provisions:
- (a) subsection 69-20(1) or (2) (requirement to lodge copy of constitutional changes);
- (b) section 88-1 (requirement to lodge material about change of name);
- (c) subsection 112-5(5), (6) or (7)(requirements about registered office);
- (d) section 180-35 (requirement to give copy of register of members or register of former members);
- (e) subsection 304-5(1), (3), (5) or (6) (requirement to lodged details of directors and secretaries);
- (f) section 330-10 (requirement to lodge general report);
- (g) section 348-1 (requirement to lodge annual report).

Note: This subsection is a civil penalty provision (see section 386-1)

Defence of reasonable steps (2) A person does not contravene subsection (1) in relation to a corporation's contravention of a provision mentioned in that subsection if the person shows that he or she took reasonable steps to ensure that the corporation complied with the provision. **After paragraph 386-1(1)(a)** Insert: (aa) subsection 265-40(1)(secretaries' responsibilities); **After subsection 386-10(1)** Insert: *Responsibilities of secretaries for certain corporate contraventions* (1A) Without limiting subsection (1), if a declaration of contravention by a person of subsection 265-40(1) has been made under section 386-1, a Court may order the person to pay the Commonwealth a pecuniary penalty of up to $3,000.
Comment on Proposed Amendments
The proposed amendments still make company secretaries of Aboriginal and Torres Strait Islander corporations liable for the misconduct of the corporation because the person holds the position of company secretary and not because of their involvement in the wrongdoing. Although the liability under the proposed amendments to section 265-40 will be changed from a criminal offence to a provision attracting civil liability, we do not support provisions that impose 'designated officer' liability. In line with the change from a criminal offence to a civil contravention, we note that the proposed amendments to section 254-40, delete the note which currently provides that a defendant "bears a legal burden in relation to a matter mentioned in subsection (3), see section 13.4 of the Criminal Code." We support amendments that return the legal burden of proof to the prosecution. It is a fundamental principle of the Australian legal system that persons should be "innocent until proven guilty." We do note, however, that a company secretary will still be made automatically liable for the civil contravention of the corporation under this provision and will bear the burden of proving that they took reasonable steps to ensure that the company complied with the provision. The Australian Institute of Company Directors is of the view that it is appropriate for the company alone to bear the liability for contraventions of section 265-40. We note that the current penalty for the criminal offence is 5 penalty units ($550) yet the proposed amendments increase the civil pecuniary penalty to $3000. Our concerns regarding this approach are set out at section 4.2 of the submission above.

3. Health Insurance Act 1973

Existing Liability Provisions
Subsections 129AA(2) and (3) (2) Where an offence against this section is committed by a corporation, an officer of the corporation who is in default is guilty of an offence against this section. (3) A reference in subsection (2) to an officer who is in default, in relation to an offence committed by a corporation, includes a reference to an officer who wilfully authorizes or permits the commission of the offence. **Section 23DZZIT Application of this Division to an executive officer of a body corporate** (1) An executive officer of a body corporate commits an offence if: (a) the body corporate commits an offence against this Division; and (b) the officer knew that the offence would be committed; and (c) the officer was in a position to influence the conduct of the body in relation to the commission of the offence; and (d) the officer failed to take all reasonable steps to prevent the commission of the offence. Note: In making a determination for the purposes of paragraph (1)(d), a court is to have regard to the matters set out in section 23DZZIH. (2) The maximum penalty for an offence against subsection (1) is the maximum penalty that a Court could impose in respect of an individual for the offence committed by the body corporate.
Proposed Amendments
Subsections 129AA(2) and (3) Repeal the subsections. **Subsections 129AA(6) (definition of *officer*)** Repeal the definition. **Signalling Personal Liability** The proposed amendments also seek to amend subsections 23DZZIQ(1), (2), (4) and (5), subsections 23DDZZIR(1) and (3) and subsections 23DZZIS(1) and (3) to insert a note which states: "For the liability of an executive officer of a body corporate, see section 23DZZIT." **Section 23DZZIO** Omit: "An executive officer of a body corporate might commit an offence under this Part if the body corporate commits an offence under this Part." Substitute: "An executive officer of a body corporate might commit an offence if the body corporate commits an offence against this Division."
Comment on Proposed Amendments
As set out in the Explanatory Notes, section 129AA of the Health Insurance Act "makes it an offence for a proprietor of a private hospital to offer or accept a bribe to enable a patient to be admitted to the hospital under certain circumstances. Subsection 129AA(2) makes an officer of a corporation guilty of an offence where the corporation has committed an offence. This includes (but is not limited to), an officer who wilfully authorises or permits the commission of the offence."

The Australian Institute of Company Directors supports the repeal of subsection 129AA(2) and (3), given that the subsections do not comply with the Company Directors principles or the COAG Agreed Principles. It follows that if subsections 129AA(2) and (3) are repeated, that subsection 129AA(6) should also be repealed. We note that section 23DZZIT also imposes personal liability on executive officers of body corporates and yet no amendment is proposed to this provision. Instead, only notes are included under the provisions in the Division to signal potential personal liability of an executive officer. If as the Explanatory Notes suggest, the objects of the Division could not be met by an alternative regulatory response, section 23DZZIT should be omitted and the Company Directors model provision inserted. The Australian Institute of Company Directors has no objection to the amendment proposed to section 23DZZIO.

4. National Measurement Act 1960

Existing Liability Provision
Section 19G Offence committed by a body corporate--liability of directors etc. (1) If a physical element of an offence is committed by a body corporate, the physical element must also be attributed to each person who is: (a) a director of the body corporate; or (b) an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy. (2) If intention, knowledge or recklessness is a fault element in relation to a physical element of the offence, that fault element must be attributed to a director of the body corporate if the director: (a) intentionally, knowingly or recklessly carried out the relevant conduct; or (b) expressly, tacitly or impliedly authorised or permitted the commission of the offence. (3) If intention, knowledge or recklessness is a fault element in relation to a physical element of the offence, that fault element must be attributed to a person mentioned in paragraph (1)(b) if the person: (a) intentionally, knowingly or recklessly carried out the relevant conduct; or (b) expressly, tacitly or impliedly authorised or permitted the commission of the offence.
Proposed Amendments
Section 19G Repeal the section.
Comments on Proposed Amendments
The Australian Institute of Company Directors supports the repeal of section 19G given that it does not meet the Company Directors principles or the COAG Agreed Principles.

5. National Vocational Education and Training Regulator Act 2011

Existing Liability Provision
Section 133 - Liability of executive officer of registered training organisation (1) An executive officer of a registered training organisation commits an offence if: (a) the organisation commits an offence; and (b) the officer knew that the offence would be committed; and (c) the officer was in a position to influence the conduct of the organisation in relation to the commission of the offence; and (d) the officer failed to take all reasonable steps to prevent the commission of the offence. (2) The maximum penalty for an offence against subsection (1) is one-fifth of the maximum penalty that could be imposed for the offence committed by the registered training organisation. (3) An executive officer of a registered training organisation contravenes this subsection if: (a) the organisation contravenes a civil penalty provision; and (b) the officer knew that the contravention would occur; and (c) the officer was in a position to influence the conduct of the organisation in relation to the contravention; and (d) the officer failed to take all reasonable steps to prevent the contravention. (4) The maximum civil penalty for a contravention of subsection (3) is one-tenth of the maximum penalty that could be imposed for the contravention of the civil penalty provision by the registered training organisation.
Proposed Amendments
The amendments propose to insert a note under sections 93, 95, 97, 99, 101(1) and (2), 103(1) and (2), 105(1) and (2), 107, 109, 114, 116(1), 118, 120, 122, 124, 126, 128 and 140(5) of the Act. The note will provide that "For the liability of an executive officer of a registered training organisation, see section 133." Minor amendments are also made to the notes under subsection 116(2).
Comments on Proposed Amendments
The amendments proposed merely add notes underneath all of the provisions in the Act, for which an executive officer may be liable for a corporate breach. Section 133, does not distinguish between the seriousness of the contraventions under the Act and therefore imposes blanket liability on executive officers for any breach. Principle 3 of the COAG Agreed Principles expressly provides that "directors should not be liable for corporate fault as a matter of course or by blanket imposition of liability across an entire Act." Further, the provision also does not appear to meet all the criteria under the Company Directors principles, given that statute does not address safety to the public health, prevent individuals from death or serious injury, or protect children. Despite this, we note that the Government has serious concerns about vocational training companies being established for the purpose of subverting the immigration process and intends to retain a liability provision in this Act. In our view, it has not been established that the objects of the Act cannot be met by regulating the conduct and activities of the corporation or by imposing liability solely on the company. However, if a liability provision is to be included in this Act we recommend that the existing provision be deleted and the Company Directors' model provision inserted.

6. Therapeutic Goods Act 1989

Existing Liability Provision

Section 54B Application of this Act to an executive officer of a body corporate

(1) An executive officer of a body corporate commits an offence if:
(a) the body corporate commits an offence against this Act; and
(b) the officer knew that the offence would be committed; and
(c) the officer was in a position to influence the conduct of the body in relation to the commission of the offence; and
(d) the officer failed to take all reasonable steps to prevent the commission of the offence.

Note: An offence against this Act includes an offence against the regulations: see subsection 3(7).

(2)The maximum penalty for an offence against subsection (1) is the maximum penalty that a Court could impose in respect of an individual for the offence committed by the body corporate.

.....

(5) In this section: *executive officer* of a body corporate means a person, by whatever name called and whether or not a director of the body, who is concerned in, or takes part in, the management of the body.

Proposed Amendments

Section 54B
Repeal the heading, substitute:

54B Personal liability of an executive officer of a body corporate

Paragraph 54B(1)(a)
After "Act" insert "covered by section 54BA"

After section 54B
Insert:

54BA Personal Liability of an executive officer of a body corporate: specific offences

(1) For the purposes of paragraph 54B(1)(a), this section covers offences against:
(a) the provisions referred to in the table in subsection (2); and
(b) regulations prescribed for the purpose of this paragraph; and
(c) section 6 of the Crimes Act 1914, or section 11.1, 11.4 or 11.5 of the Criminal Code in relation to an offence against a provision referred to in paragraph (a) of this subsection or a regulation referred to in paragraph (b) of this subsection; and
(d) section 136.1, 137.1 or 137.2 of the *Criminal Code* in relation to this Act or the regulations.

(2) The table for the purpose of paragraph (1)(a) is as follows:

Corporate Offences for which executive officers may be personally liable

Provisions

Subsection 14(1), (2),(6),(7),(10) or (11)	Subsection 15(2) or (3)
Subsection 19B(1) or (2)	Subsection 21A(1),(2),(5) or (6)
Subsection 22(7AB)	Subsection 22A(1) or (2)

Subsection 29A(1)	Subsection 29B(3) or (4)
Subsection 30EC(1) or (2)	Subsection 30F(4B) or (4C)
Subsection 31(5A) or (5B)	Subsection 31D(1)
Subsection 31E(1)	Subsection 32BA(1) or (2)
Subsection 32BB(1) or (2)	Subsection 32BC(1) or (2)
Subsection 32BD(1) or (2)	Subsection 32CH(1)
Subsection 32CJ(6) or (7)	Subsection 32DO(1) or (2)
Subsection 32DQ(1)	Subsection 32DR(3) or (4)
Subsection 32EF(1) or (2)	Subsection 32HC(1) or (2)
Subsection 32JB(2) or (3)	Subsection 32JI(2)
Subsection 35(1),(2),(5) or (7)	Subsection 41EI(1) or (2)
Subsection 41FE(1) or (2)	Subsection 41JB(4) or (5)
Subsection 41JH	Subsection 41JI(1)
Subsection 41KC(1) or (2)	Subsection 41MA(1),(2), (5),(6),(9) or (10)
Subsection 41MC(2) or (3)	Subsection 41ME(1),(2),(5) or (6)
Subsection 41MF(1) or (3)	Subsection 41MH
Subsection 41MI(1) or (2)	Subsection 41MN(1) or (2)
Subsection 41MNB(1)	Subsection 41MP(1)
Subsection 41MQ(3) or (4)	Subsection 42E(1)
Subsection 42T(1) or (2)	Subsection 42V(6) or (6A)
Subsection 42W(1) or (2)	Subsection 54AB(1)

Signalling Personal Liability

The amendments also insert notes under the provisions set out in the table to alert executive officers to their potential liability under the provisions.

Comments on Proposed Amendments

Pursuant to this Act directors can be held personally liable for the acts of the company in relation to approximately 96 offences, many of which impose terms of imprisonment. While the number of provisions is substantial and potentially onerous, we note that the provisions imposing personal liability on executive officers are prescribed and relate to the most serious offences within the Act.

In the event it can be established that the objects of the Act cannot be met by effectively regulating the conduct of the corporation or by imposing liability solely on the corporation, then the Company Directors principles would be met in regard to these provisions. As a result we recommend that section 54B of the Act be replaced by the Company Directors model provision and confined to the provisions prescribed in the table proposed in 54BA(2).

We are concerned that as drafted, the proposed 54BA provides for new liability provisions to be made by way of regulation rather than by legislation. This drafting seems to be at odds with the statement in the Explanatory Notes which provides: "this approach ensures that for any future proposed offences under the TGA, a positive policy decision will be required to apply personal liability by adding it to the table inserted by section 54BA, rather than having it apply by default." We are strongly of the view that every personal liability provision should be carefully scrutinized by Federal parliament in order that the improvements made by these COAG reforms are not undermined going forward. For this reason, corporate offences for which directors can become liable should not be able to be added by way of regulation. Any offence for which personal liability accrues to a director should be carefully scrutinized by Federal parliament. As such, we recommend that section 54BA(1)(b) be deleted and the reference to section 54BA(1)(b) in subsection 54BA(1)(c) also be deleted.

7. Veterans' Entitlements Act 1986

Existing Liability Provision
Section 93D(6) (6) Where an offence against this section is committed by a corporation, an officer of the corporation who is in default is guilty of an offence against this section. (7) A reference in subsection (6) to an officer who is in default, in relation to an offence committed by a corporation, includes a reference to an officer who intentionally authorises or permits the commission of the offence. **Section 93E (6)** (6) Where an offence against this section is committed by a corporation, an officer of the corporation who is in default is guilty of an offence against this section. (7) A reference in subsection (6) to an officer who is in default, in relation to an offence committed by a corporation, includes a reference to an officer who intentionally authorises or permits the commission of the offence.
Proposed Amendments
Subsection 93D(6) Omit "an officer of the corporation who is in default" substitute "an officer of the corporation who intentionally authorised or permitted the commission of the offence." **Subsection 93D(7)** Repeal the subsection **Subsection 93E(6)** Omit "an officer of the corporation who is in default" substitute "an officer of the corporation who intentionally authorised or permitted the commission of the offence." **Subsection 93E(7)** Repeal the subsection
Comments on Proposed Amendments
We are of the view that subsections 93D(6)&(7) & 93E(6)&(7) do not meet the criteria of the Company Directors principles and that the liability provisions should be repealed.

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While the public policy reasons for preventing referrals for inappropriate pathology are important, and arguably compelling (if in fact they involve safety to the public health and not just the payment model for health services) it is likely that the conduct can be regulated without imposing personal liability on corporate officers. For example, by effectively regulating the conduct and activities of the corporation, imposing liability on the corporation and imposing liability on the individual committing the offence, there may not be a need for liability to be imposed on corporate officers for acts of the company.

However, we note that the liability will now only be imposed on directors in circumstances where they have intentionally authorised or permitted the offence. If a provision imposing personal liability on corporate officers is to be included then we recommend that the Company Directors' model provision be inserted, as a substitute for the existing provision.