

30 March 2012

Ms Alix Gallo  
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The Treasury  
Langton Crescent, Parkes ACT 2600

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Dear Ms Gallo,

### **Personal Liability for Corporate Fault Reform Bill 2012**

The Australian Institute of Company Directors welcomes the opportunity to comment on 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 30,000 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 respond to Treasury's request for comments.

#### **1. Summary**

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

- (a) The Draft Bill sets out minor amendments to provisions imposing personal criminal liability on directors in legislation contained in the Federal Treasury portfolio;
- (b) The provisions which impose the most egregious personal criminal liability upon directors in Australia are not contained in legislation within the Federal Treasury portfolio;

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- (c) The Corporations Act 2001 (C'th) sets out the duties and responsibilities of directors and is arguably the only piece of legislation in Australia that should contain provisions imposing personal liability on directors.
- (d) As the Corporations Act is too often amended in a piecemeal fashion, we are reluctant to propose wholesale changes outside of a holistic review of the particular Part or the wider regime.
- (e) Continually making amendments to the Corporations Act, as has occurred over recent years, without regard to the legislative regime as a whole leads to error and the need for consequential amendments. This imposes a significant cost on the community.
- (f) That we have recommended only minor amendments to the provisions reflected in the Draft Bill should not be viewed as suggesting that the issue of personal criminal liability for corporate fault is not a significant one for directors in Australia.
- (g) 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.
- (h) 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.
- (i) 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.
- (j) Any benefit gained from changing the criminal liability imposed on directors and officers for acts of the company to civil liability, is undermined by simultaneously imposing a civil penalty that is higher than the existing penalty for the criminal offence.
- (k) 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.
- (l) the Bill is also unlikely to assist the harmonisation of director liability provisions across Commonwealth, State and Territory legislation because the liability

provisions retained in the Commonwealth legislation are themselves inconsistent.

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.<sup>1</sup>

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.”<sup>2</sup>

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.”<sup>3</sup> 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.”<sup>4</sup>

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”<sup>5</sup> 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 have knowingly authorized or recklessly permitted a contravention, fosters an approach to business which is overly risk adverse and which stifles productivity.

<sup>1</sup> 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.

<sup>2</sup> CAMAC Report *Personal Liability for Corporate Fault* 2006 at 1

<sup>3</sup> CAMAC Report *Personal Liability for Corporate Fault* at 9

<sup>4</sup> CAMAC Report *Personal Liability for Corporate Fault* 2006 at 4

<sup>5</sup> 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<sup>6</sup> 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 to 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.”<sup>7</sup> We were particularly concerned about allowing criminal liability for corporate fault based on a wide interpretation of “compelling public policy reasons.”

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.”<sup>8</sup>

The 2010 Progress Report 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...”<sup>9</sup>

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<sup>6</sup> 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](http://www.treasury.gov.au/content/Company_Directors_Survey/SurveySummary.html)

<sup>7</sup> Media Release: “*MINCO Liability Reform Principles a Disappointment*”, Australian Institute of Company Directors 6 November 2009.

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

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

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In response to the 2010 Progress Report, we called for the COAG Director Liability Reform process to be “completely re-booted.”<sup>10</sup> 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.”<sup>11</sup> We noted that the governments had been afforded “too much wriggle room to avoid genuine reform.”<sup>12</sup>

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 then 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.

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

- (a) no jurisdiction identified all relevant provisions<sup>14</sup>;
- (b) together the jurisdictions identified 77% of all relevant provisions<sup>15</sup>;
- (c) the permitted exclusions exception was inconsistently interpreted and applied between jurisdictions leading to a wide range of results in each Audit;<sup>16</sup>
- (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;<sup>17</sup>
- (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;<sup>18</sup> and
- (f) most jurisdictions did not address the automatic and blanket liability principle at all and retained blanket liability provisions without amendment.<sup>19</sup>

The Corrs Report found that 697 legislative provisions nationally, were the subject of this reform stream.<sup>20</sup> Despite this, since the commencement of the reform process in 2008 to date, only 18 provisions imposing personal criminal liability on directors for corporate fault have been repealed.

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<sup>10</sup> Australian Institute of Company Directors media release: “COAG Reform Council exposes failure of director liability reform” 11 February 2011.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Directors’ Liability Reform Analysis of the application of COAG’s directors’ liability principles, Corrs Chambers Westgarth 5 August 2011

<sup>14</sup> Ibid at 8

<sup>15</sup> Ibid at 17

<sup>16</sup> Ibid at 17

<sup>17</sup> Ibid at 9

<sup>18</sup> Ibid at 19

<sup>19</sup> Ibid at 19

<sup>20</sup> Ibid at 19

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."<sup>21</sup>

In response, the Australian Institute of Company Directors questioned the benefit of re-auditing legislation on a flawed set of 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."<sup>22</sup>

The Company Directors model for reform is set out below. It is against the history of this reform and in light of our model that we make comments in relation to the Federal Government's first 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 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 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.

#### **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.

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

<sup>22</sup> COAG Reform Council, *Seamless National Economy Report on Performance*, Report to the Council of Australian Governments, 23 December 2011 at 186

1. Where a corporation contravenes a statutory requirement the corporation should be held liable.<sup>1</sup>
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).

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<sup>1</sup> 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

Subject to our comments on the Corporations Act below, 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 legislative initiatives reflecting this reform priority.

##### 4.1 *The application of the reform process to the Corporations Act 2001 (C'th)*

The Draft Bill reflects amendments to the legislation in the Treasury portfolio. For company directors the most significant piece of legislation in that portfolio is the Corporations Act. The Corporations Act, given that it sets out the duties and responsibilities of directors and the obligations of companies, is arguably the only piece of legislation in Australia that should contain director liability provisions. It is the one piece of legislation that directors should go to, to determine their potential liability under law. Instead liability is imposed on directors in approximately 700 provisions contained in a multitude of Commonwealth, State and Territory legislation.

Given that the Corporations Act sets out the required conduct of corporations, directors and officers and the regime is designed to ensure consistency across the legislation, we are always reluctant to see piecemeal changes made to this Act.

For this reason, the Australian Institute of Company Directors principles and model provision referred to in section 3 above were not designed with amendments to the Corporations Act in mind. Instead the model was designed to deal with the morass of other Commonwealth, State and Territory legislation that imposed criminal liability on directors for acts of the corporation in a myriad of different circumstances and in an inconsistent way. Our comments in respect of the Corporations Act amendments are therefore made having due regard to the existing liability regime established under that legislation.



We note that continual piecemeal changes made to legislation such as the Corporations Act can lead to errors, the need for later consequential amendments and difficulties for corporations, directors and others to keep abreast of the changes. The Draft Bill provides such an example. We note that it attempts to repeal and substitute section 1302 of the Corporations Act, however, section 1302 of the Corporations Act was repealed by the Personal Property Securities (Corporations and Other Amendments) Act 2010 with effect from 30 January 2012. If it is not possible for Treasury to keep up with the repeals and amendments to legislation within its portfolio, how is it reasonable to expect corporations and directors to do so?

The fact that we have recommended only minor amendments to the Corporations Act provisions reflected in the Draft Bill, should not in any way be viewed as suggesting that the issue of personal criminal liability for corporate fault is not a significant one for directors in Australia. The issue continues to be serious, however, the majority of provisions in the Corporations Act which impose personal criminal liability upon directors only do so in circumstances where the director has been “involved in” the criminal offence.

Section 79 of the Corporations Act provides that a person is involved in a contravention, if and only if the person:

- “(a) has aided, abetted, counselled or procured the contravention; or
- (b) has induced, whether by threats or promises or otherwise, the contravention; or
- (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention; or
- (d) has conspired with others to effect the contravention.”<sup>23</sup>

The involvement required by the Corporations Act provisions is markedly different from provisions that render directors criminally liable for corporate fault because the person holds the position of director and regardless of the person’s involvement in the offence. It is these latter types of provisions that are the most egregious examples of personal criminal liability for directors in Australia.

#### 4.2 *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.”<sup>24</sup> The proposed reforms, contrary to the statements in the Explanatory Notes do not encourage consistency across Commonwealth, State and Territory legislation.

As noted by CAMAC: “This very lack of harmony can impair ready communication of statutory requirements and effective compliance efforts.”<sup>25</sup>

Leaving the Corporations Act amendments to one side, no attempt has been made in the Bill to further consistency between the liability provisions that will be retained in Commonwealth legislation. On this basis it is unlikely that the Commonwealth will be in a position to encourage harmonisation of State and

<sup>23</sup> Corporations Act 2001 (C’th)

<sup>24</sup> Explanatory Notes at p1.

<sup>25</sup> CAMAC Report *Personal Liability for Corporate Fault* (2006) at 6

Territory legislation in this area, given that it cannot achieve consistency across the legislation, outside the Corporations Act but within the Treasury portfolio.

#### 4.3 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 increasing the terms of imprisonment for particular offences is contrary to the purpose and aims of the COAG Reforms.

Further, any benefit gained by changing the potential liability of individuals from criminal liability to civil liability (as proposed in section 188 of the Corporations Act 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. We are of the view that the proposed amendments to the penalties in the Corporations Act should be re-visited.

#### 4.4 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 Schedule 3, to the *Tax Laws Amendment (2011 Measures No. 8) Bill 2011*. 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.

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

A handwritten signature in black ink, appearing to read 'J. Colvin', with a long horizontal flourish extending to the right.

John H C Colvin  
CEO & Managing Director

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

**1. Corporations Act – Section 188 Duties of Responsible Entity**

Existing Liability Provisions
<p><b>Section 188</b></p> <p><i>Secretary's functions</i></p> <p>(1) A secretary of a company contravenes this subsection if the company contravenes:</p> <ul style="list-style-type: none"> <li>(a) section 142 (requirement for companies to have registered office); or</li> <li>(b) section 145 (requirement for registered office of public company to be open to public); or</li> <li>(c) section 346C (requirement to respond to extract of particulars); or</li> <li>(ca) section 348D (requirement to respond to return of particulars); or</li> <li>(d) section 205B (lodgment of notices with ASIC); or</li> <li>(e) section 146 (notice of change of principal place of business); or</li> <li>(f) section 178A (notice of change to member register (proprietary companies only)); or</li> <li>(g) section 178C (notice of change to share structure (proprietary companies only)); or</li> <li>(h) section 254X (notice of issue of shares); or</li> <li>(i) subsection 319 (1) (lodgment of financial reports); or</li> <li>(j) section 349A (notice of changes to ultimate holding company (proprietary companies only)).</li> </ul> <p>Note: See section 204A for the circumstances in which a company must have a secretary.</p> <p><i>Consequence if director of proprietary company without secretary does not fulfil secretary's function</i></p> <p>(2) Each director of a proprietary company contravenes this subsection if:</p> <ul style="list-style-type: none"> <li>(a) the proprietary company contravenes a provision referred to in subsection (1); and</li> <li>(b) the proprietary company does not have a secretary when it contravenes that section.</li> </ul> <p>(2A) An offence based on subsection (1) or (2) is an offence of strict liability.</p> <p>Note: For strict liability, see section 6.1 of the Criminal Code.</p> <p><i>Defence</i></p> <p>(3) A person does not contravene subsection (1) or (2) if they show that they took all reasonable steps to ensure that the company complied with the section.</p> <p>Note: A defendant bears a legal burden in relation to a matter mentioned in subsection (3), see section 13.4 of the Criminal Code.</p>
Proposed Amendments
<p><i>Responsibility of company secretaries</i></p> <p>(1) A secretary of a company, contravenes this subsection if the company contravenes any of the following provisions (a <b>corporate responsibility provision</b>):</p> <ul style="list-style-type: none"> <li>(a) Section 142 (registered office);</li> <li>(b) Section 145 (public company's registered office to be open to the public);</li> <li>(c) Section 146 (change of principal place of business);</li> <li>(d) Section 178A (change to proprietary company's member register);</li> <li>(e) Section 178C (change to proprietary company's share structure);</li> <li>(f) Section 205B (lodgment of notices with ASIC);</li> <li>(g) Section 254X (issue of shares);</li> <li>(h) Section 319 (lodgment of financial reports);</li> <li>(i) Section 346C (response to extract of particulars);</li> <li>(j) Section 348D (response to return of particulars);</li> <li>(k) Section 349A (change to proprietary company's ultimate holding company);</li> <li>(l) Section 1302 (location of registers).</li> </ul>

Note 1: see section 204A for the circumstances in which a company must have a secretary.

Note 2: This subsection is a civil penalty provision (see section 1317E).

*Responsibility of directors of proprietary companies*

(2) Each director of a proprietary company contravenes this subsection if:

- (a) the proprietary company contravenes a corporate responsibility provision; and
- (b) the proprietary company does not have a secretary when it contravenes that provision.

Note 1: See section 204A for the circumstances in which a company must have a secretary.

Note 2: This subsection is a civil penalty provision (see section 1317E).

*Defence of reasonable steps*

(3) A person does not contravene subsection (1) or (2) in relation to a company's contravention of a corporate responsibility provision if the person shows that he or she took reasonable steps to ensure that the company complied with the provision.

*Location of registers – responsibility of all officers and employees.*

(4) Without limiting subsections (1) and (2), if a company contravenes section 1302 (location of registers), an officer or employee of the company contravenes this subsection if the officer or employee was involved in the company's contravention.

Note 1: Section 79 defines *involved*.

Note 2: This subsection is a civil penalty provision (see section 1317E).

**Comments on Proposed Amendments**

- The proposed amendments still make company secretaries and in some cases, directors of proprietary limited companies liable for the misconduct of the corporation because the person holds that position and regardless of their involvement in the wrongdoing.
- Although the liability under the proposed amendments to section 188 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 188, 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 or director 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 188.
- It is also important to note that section 1302 of the Corporations Act was repealed by the Personal Property Securities (Corporations and Other Amendments) Act 2010 with effect from 30 January 2012. We are of the view that section 1302 should not be re-introduced into the Corporations Act.

**2. Corporations Act – section 208(1)**

<p><b>Existing Liability Provision</b></p> <p><b>Section 208</b> <b>Need for member approval for financial benefit</b></p> <p>(1) For a public company, or an entity that the public company controls, to give a financial benefit to a related party of the public company:</p> <p>(a) the public company or entity must:</p> <p>(i) obtain the approval of the public company's members in the way set out in sections 217 to 227; and</p> <p>(ii) give the benefit within 15 months after the approval; or</p> <p>(b) the giving of the benefit must fall within an exception set out in sections 210 to 216.</p> <p>Note: Section 228 defines <i>related party</i>, section 9 defines <i>entity</i>, section 50AA defines <i>control</i> and section 229 affects the meaning of <i>giving a financial benefit</i>.</p> <p>(2) If:</p> <p>(a) the giving of the benefit is required by a contract; and</p> <p>(b) the making of the contract was approved in accordance with subparagraph (1)(a)(i) as a financial benefit given to the related party; and</p> <p>(c) the contract was made:</p> <p>(i) within 15 months after that approval; or</p> <p>(ii) before that approval, if the contract was conditional on the approval being obtained;</p> <p>member approval for the giving of the benefit is taken to have been given and the benefit need not be given within the 15 months.</p> <p><b>Section 209</b> <b>Consequences of breach</b></p> <p>....</p> <p>(2) A person contravenes this subsection if they are involved in a contravention of section 208 by a public company or entity.</p> <p>Note 1: This subsection is a civil penalty provision.</p> <p>Note 2: Section 79 defines <i>involved</i>.</p> <p>(3) A person commits an offence if they are involved in a contravention of section 208 by a public company or entity and the involvement is dishonest.</p>
<p><b>Proposed Amendments</b></p>
<p>Essentially, the amendments propose to add a note after subsection 208(1) which provides: "Note 2: For the criminal liability of a person dishonestly involved in a contravention of this subsection, see subsection 209(3). Section 79 defines <i>involved</i>."</p>
<p><b>Comments on Proposed Amendments</b></p>
<p>Under section 209(3) a person will be liable if they are involved in a contravention of section 208. A person will be criminally liable if they are dishonestly involved in an offence. Given that the provision does not impose automatic derivative liability on the director for acts of the corporation, the Australian Institute of Company Directors does not recommend any changes to the underlying provisions.</p> <p>The Australian Institute of Company Directors does not have any objection to the insertion of a note to signal the criminal liability for a contravention of section 208.</p>

### 3. Corporations Act - sections 254J and 254K

<p><b>Existing Liability Provisions</b></p> <p><b>Section 254J</b> <b>Redemption must be in accordance with terms of issue</b></p> <p>(1) A company may redeem redeemable preference shares only on the terms on which they are on issue. On redemption, the shares are cancelled.</p> <p>Note: For the power to issue redeemable preference shares see paragraph 254A(1)(b) and subsections 254A(2) and (3).</p> <p>(2) This section does not affect the terms on which redeemable preference shares may be cancelled under a reduction of capital or a share buy-back under Part 2J.1.</p> <p><b>Section 254K</b> <b>Other requirements about redemption</b></p> <p>A company may only redeem redeemable preference shares:</p> <ul style="list-style-type: none"> <li>(a) if the shares are fully paid-up; and</li> <li>(b) out of profits or the proceeds of a new issue of shares made for the purpose of the redemption.</li> </ul> <p>Note: For a director's duty to prevent insolvent trading on redeeming redeemable preference shares, see section 588G.</p> <p><b>Section 254L</b> <b>Consequences of contravening section 254J or 254K</b></p> <p>(1) If a company redeems shares in contravention of section 254J or 254K:</p> <ul style="list-style-type: none"> <li>(a) the contravention does not affect the validity of the redemption or of any contract or transaction connected with it; and</li> <li>(b) the company is not guilty of an offence.</li> </ul> <p>(2) Any person who is involved in a company's contravention of section 254J or 254K contravenes this subsection.</p> <p>Note 1: Subsection (2) is a civil penalty provision (see section 1317E).</p> <p>Note 2: Section 79 defines <i>involved</i>.</p> <p>(3) A person commits an offence if they are involved in a company's contravention of section 254J or 254K and the involvement is dishonest.</p>
<p><b>Proposed amendments</b></p> <p>The amendments propose to add a notes after sections 254J(1) and 254K which provide:</p> <p>"Note 2: For the criminal liability of a person dishonestly involved in a contravention of this subsection, see subsection 254L(3). Section 79 defines <i>involved</i>."</p>
<p><b>Comments on Proposed Amendments</b></p> <p>Sections 254J and 254K do not impose automatic criminal liability on directors for acts of the company. Criminal liability will only accrue to directors that are dishonestly involved in a company's contravention of section 254J or section 254K.</p> <p>The Australian Institute of Company Directors does not propose any amendments to the underlying provisions and has no objection to the insertion of notes to signal that personal criminal liability will accrue if a director is dishonestly involved in the company's contravention of these sections.</p>

4. Corporations Act – section 254Q

**Existing Liability Provision**

**Section 254Q**

**No liability companies--forfeiture and sale of shares for failure to meet call**

*Forfeiture and sale of shares*

(1) A share in a no liability company is immediately forfeited if:

- (a) a call is made on the share; and
- (b) the call is unpaid at the end of 14 days after it became payable.

Note: The holder of the share may redeem it under section 254R.

(2) The forfeited share must then be offered for sale by public auction within 6 weeks after the call became payable.

*Advertisement of sale*

(3) At least 14 days, and not more than 21 days, before the day of the sale, the sale must be advertised in a daily newspaper circulating generally throughout Australia. The specific number of shares to be offered need not be specified in the advertisement and it is sufficient to give notice of the sale by advertising to the effect that all shares on which a call remains unpaid will be sold.

*Postponement of sale*

(4) An intended sale of forfeited shares that has been duly advertised may be postponed for not more than 21 days from the advertised date of sale. The date to which the sale is postponed must be advertised in a daily newspaper circulating generally in Australia.

(5) There may be more than 1 postponement but the sale cannot be postponed to a date more than 90 days from the first date fixed for the intended sale.

*Shares may be offered as credited to a particular amount*

(6) The share may be sold credited as paid up to the sum of:

- (a) the amount paid upon the share at the time of forfeiture; and
- (b) the amount of the call; and
- (c) the amount of any other calls becoming payable on or before the day of the sale;

if the company in accordance with its constitution or by ordinary resolution so determines.

*Reserve price*

(7) The directors may fix a reserve price for the share that does not exceed the sum of:

- (a) the amount of the call due and unpaid on the share at the time of forfeiture; and
- (b) the amount of any other calls that become payable on or before the date of the sale.

*Withdrawal from sale*

(8) The share may be withdrawn from sale if no bid at least equal to the reserve price is made at the sale.

*Disposal of shares withdrawn from sale*

- (9) If:
- (a) no bid for the share is received at the sale; or
  - (b) the share is withdrawn from sale;

the share must be held by the directors in trust for the company. It must be then disposed of in the manner determined by the company in accordance with its constitution or by resolution. Unless otherwise specifically provided by resolution, the share must first be offered to shareholders for a period of 14 days before being disposed of in any other manner.



<p><i>Suspension of voting rights attached to share held in trust</i></p> <p>(10) At any meeting of the company, no person is entitled to any vote in respect of the shares held by the directors in trust under subsection (9).</p> <p><i>Application of proceeds of sale</i></p> <p>(11) The proceeds of the sale under subsection (2) or the disposal under subsection (9) must be applied to pay:</p> <ul style="list-style-type: none"> <li>(a) first, the expenses of the sale; and</li> <li>(b) then, any expenses necessarily incurred in respect of the forfeiture; and</li> <li>(c) then, the calls on the share that are due and unpaid.</li> </ul> <p>The balance (if any) must be paid to the member whose share has been sold. If there is a share certificate that relates to the share, the balance does not have to be paid until the member delivers the certificate to the company.</p> <p><i>Validity of sale</i></p> <p>(12) If a sale is not held in time because of error or inadvertence, a late sale is not invalid if it is held as soon as practicable after the discovery of the error or inadvertence.</p> <p><i>Failure to comply an offence</i></p> <p>(13) If there is failure to comply with subsection (2) or (3), the company and any officer of the company who is involved in the contravention are each guilty of an offence.</p> <p><i>Strict liability offences</i></p> <p>(14) An offence by the company based on subsection (13) is an offence of strict liability.</p> <p>Note: For <b>strict liability</b>, see section 6.1 of the <i>Criminal Code</i>.</p>
<p><b>Proposed Amendments</b></p>
<p>In subsection 254Q(13) omit and “any officer of the company who is involved in the contravention are each” and substitute “is”.</p>
<p><b>Comments on Proposed Amendments</b></p>
<p>The Australian Institute of Company Directors is of the view that the public policy reasons for making directors and officers criminally liable in respect of the existing contraventions are not compelling. For this reason, we support the proposal to remove the liability from directors and officers and to retain the provisions imposing liability on the company for a contravention.</p>

## 5. Corporations Act – sections 256B and 256D(4)

<p><b>Existing Liability Provision</b></p>
<p><b>Section 256B</b> <b>Company may make reduction not otherwise authorised</b></p> <p>(1) A company may reduce its share capital in a way that is not otherwise authorised by law if the reduction:</p> <ul style="list-style-type: none"> <li>(a) is fair and reasonable to the company's shareholders as a whole; and</li> <li>(b) does not materially prejudice the company's ability to pay its creditors; and</li> <li>(c) is approved by shareholders under section 256C.</li> </ul> <p>A cancellation of a share for no consideration is a reduction of share capital, but paragraph (b) does not apply to this kind of reduction.</p> <p>Note 1: One of the ways in which a company might reduce its share capital is cancelling uncalled capital.</p>

Note 2: Sections 258A- 258F deal with some of the other situations in which reductions of share capital are authorised. Subsection 254K(2) authorises capital reductions involved in the redemption of redeemable preference shares and subsection 257A(2) authorises reductions involved in share buy-backs.

Note 3: For a director's duty to prevent insolvent trading on reductions of share capital, see section 588G.

(1A) To avoid doubt, a cancellation of a partly-paid share is taken to be for consideration.

(2) The reduction is either an equal reduction or a selective reduction. The reduction is an **equal reduction** if:

- (a) it relates only to ordinary shares; and
- (b) it applies to each holder of ordinary shares in proportion to the number of ordinary shares they hold; and
- (c) the terms of the reduction are the same for each holder of ordinary shares.

Otherwise, the reduction is a **selective reduction**.

- (3) In applying subsection (2), ignore differences in the terms of the reduction that are:
- (a) attributable to the fact that shares have different accrued dividend entitlements; or
  - (b) attributable to the fact that shares have different amounts unpaid on them; or
  - (c) introduced solely to ensure that each shareholder is left with a whole number of shares.

### Section 256D

#### Consequences of failing to comply with section 256B

- (1) The company must not make the reduction unless it complies with subsection 256B(1).
- (2) If the company contravenes subsection (1):
- (a) the contravention does not affect the validity of the reduction or of any contract or transaction connected with it; and
  - (b) the company is not guilty of an offence.
- (3) Any person who is involved in a company's contravention of subsection (1) contravenes this subsection.

Note 1: Subsection (3) is a civil penalty provision (see section 1317E).

Note 2: Section 79 defines **involved**.

- (4) A person commits an offence if they are involved in a company's contravention of section 256B and the involvement is dishonest.

#### Proposed Amendments

The main amendment proposed is to insert a note after section 256B(1) which provides that:

"Note 4: For the criminal liability of a person dishonestly involved in a contravention of subsection 256D(1) based on this subsection, see subsection 254D(4). Section 79 defines **involved**."

#### Comments on Proposed Amendments

Under section 256D, directors will only be criminally liable in circumstances where they are dishonestly involved in a company's contravention of section 254B(1).

The Australian Institute of Company Directors does not propose any amendments to the underlying provisions and has no objection to the insertion of a note to signal that personal criminal liability will accrue to a director if they are dishonestly involved in the company's contravention of section 256B(1).

6. Corporations Act – section 259A and 259B, 259F

Existing Liability Provision
<p><b>Section 259A</b> <b>Directly acquiring own shares</b></p> <p>A company must not acquire shares (or units of shares) in itself except:</p> <ul style="list-style-type: none"> <li>(a) in buying back shares under section 257A; or</li> <li>(b) in acquiring an interest (other than a legal interest) in fully-paid shares in the company if no consideration is given for the acquisition by the company or an entity it controls; or</li> <li>(c) under a court order; or</li> <li>(d) in circumstances covered by subsection 259B(2) or (3).</li> </ul> <p><b>Section 259B</b> <b>Taking security over own shares or shares in holding company</b></p> <p>(1) A company must not take security over shares (or units of shares) in itself or in a company that controls it, except as permitted by subsection (2) or (3).</p> <p>(2) A company may take security over shares in itself under an employee share scheme that has been approved by:</p> <ul style="list-style-type: none"> <li>(a) a resolution passed at a general meeting of the company; and</li> <li>(b) if the company is a subsidiary of a listed domestic corporation--a resolution passed at a general meeting of the listed domestic corporation; and</li> <li>(c) if paragraph (b) does not apply but the company has a holding company that is a domestic corporation and that is not itself a subsidiary of a domestic corporation--a resolution passed at a general meeting of that holding company.</li> </ul> <p><i>Special exemptions for financial institutions</i></p> <p>(3) A company's taking security over shares (or units of shares) in itself or in a company that controls it is exempted from subsection (1) if:</p> <ul style="list-style-type: none"> <li>(a) the company's ordinary business includes providing finance; and</li> <li>(b) the security is taken in the ordinary course of that business and on ordinary commercial terms.</li> </ul> <p>(4) If a company acquires shares (or units of shares) in itself because it exercises rights under a security permitted by subsection (2) or (3), then, within the following 12 months, the company must cease to hold those shares (or units of shares). ASIC may extend this period of 12 months if the company applies for the extension before the end of the period.</p> <p>(5) Any voting rights attached to the shares (or units of shares) cannot be exercised while the company continues to hold them.</p> <p>(6) If, at the end of the 12 months (or extended period), the company still holds any of the shares (or units of shares), the company commits an offence for each day while that situation continues.</p> <p>(7) An offence based on subsection (6) is an offence of strict liability.</p> <p>Note: For <i>strict liability</i>, see section 6.1 of the <i>Criminal Code</i>.</p>

**Section 259F**

**Consequences of failing to comply with section 259A or 259B**

- (1) If a company contravenes section 259A or subsection 259B(1):
- (a) the contravention does not affect the validity of the acquisition or security or of any contract or transaction connected with it; and
  - (b) the company is not guilty of an offence.
- (2) Any person who is involved in a company's contravention of section 259A or subsection 259B(1) contravenes this subsection.

Note 1: Subsection (2) is a civil penalty provision (see section 1317E).

Note 2: Section 79 defines *involved*.

- (3) A person commits an offence if they are involved in a company's contravention of section 259A or subsection 259B(1) and the involvement is dishonest.

**Proposed Amendments**

The proposed amendment is to insert a note after sections 259A which provides: "For the criminal liability of a person dishonestly involved in a contravention of this section, see subsection 259F(3). Section 79 defines *involved*."

A note is also proposed after section 259B(1) which provides: "For the criminal liability of a person dishonestly involved in a contravention of this subsection, see subsection 259F(3). Section 79 defines *involved*."

**Comments on Proposed Amendments**

A director will be criminally liable for a contravention of 259A and 259B (1) if they have dishonestly been "involved in" a contravention.

The Australian Institute of Company Directors does not propose any amendments to the underlying provisions and has no objection to the insertion of a note which signals that if a director is dishonestly involved in a contravention of sections 259A and 259B(1) they will be subject to criminal liability.

7. Corporations Act – sections 260A and 260D

<p><b>Existing Liability Provision</b></p> <p><b>Section 260A</b> <b>Financial assistance by a company for acquiring shares in the company or a holding company</b></p> <p>(1) A company may financially assist a person to acquire shares (or units of shares) in the company or a holding company of the company only if:</p> <ul style="list-style-type: none"> <li>(a) giving the assistance does not materially prejudice: <ul style="list-style-type: none"> <li>(i) the interests of the company or its shareholders; or</li> <li>(ii) the company's ability to pay its creditors; or</li> </ul> </li> <li>(b) the assistance is approved by shareholders under section 260B (that section also requires advance notice to ASIC); or</li> <li>(c) the assistance is exempted under section 260C.</li> </ul> <p>(2) Without limiting subsection (1), financial assistance may:</p> <ul style="list-style-type: none"> <li>(a) be given before or after the acquisition of shares (or units of shares); and</li> <li>(b) take the form of paying a dividend.</li> </ul> <p>(3) Subsection (1) extends to the acquisition of shares (or units of shares) by:</p> <ul style="list-style-type: none"> <li>(a) issue; or</li> <li>(b) transfer; or</li> <li>(c) any other means.</li> </ul> <p><b>Section 260D</b> <b>Consequences of failing to comply with section 260A</b></p> <p>(1) If a company provides financial assistance in contravention of section 260A:</p> <ul style="list-style-type: none"> <li>(a) the contravention does not affect the validity of the financial assistance or of any contract or transaction connected with it; and</li> <li>(b) the company is not guilty of an offence.</li> </ul> <p>(2) Any person who is involved in a company's contravention of section 260A contravenes this subsection.</p> <p>Note 1: Subsection (2) is a civil penalty provision (see section 1317E). Note 2: Section 79 defines <i>involved</i>.</p> <p>(3) A person commits an offence if they are involved in a company's contravention of section 260A and the involvement is dishonest.</p>
<p><b>Proposed Amendments</b></p> <p>Again, the amendments propose to add a note after 260A(1) which provides that: "For the criminal liability of a person dishonestly involved in a contravention of this section, see subsection 260D(3). Section 79 defines <i>involved</i>."</p>
<p><b>Comments on Proposed Amendments</b></p> <p>The existing Corporations Act provision provides that a director will only be criminally liable for the acts of the company where they have been dishonestly involved in the company's contravention.</p> <p>The Australian Institute of Company Directors does not propose any amendments to the underlying provisions and has no objection to the insertion of notes to signal that personal criminal liability will accrue to a director if they are dishonestly involved in the company's contravention of section 260A.</p>

**8. Corporations Act – section 319(5A)**

The Australian Institute of Company Directors has no objection to the repeal of subsection 319(5A). The subsection relates to a subsection (319(5)) which no longer exists within the Act and the amendment appears to remove this anomaly.

**9. Corporations Act – section 328(4)**

<b>Existing Liability Provision</b>
<p><b>Section 328A</b> <b>Auditor's consent to appointment</b></p> <p>(1) A company, the directors of a company or the responsible entity of a registered scheme must not appoint an individual, firm or company as auditor of the company unless that individual, firm or company:</p> <ul style="list-style-type: none"> <li>(a) has consented, before the appointment, to act as auditor; and</li> <li>(b) has not withdrawn that consent before the appointment is made.</li> </ul> <p>For the purposes of this section, a consent, or the withdrawal of a consent, must be given by written notice to the company, the directors or the responsible entity of the scheme.</p> <p>(2) A notice under subsection (1) given by a firm must be signed by a member of the firm who is a registered company auditor both:</p> <ul style="list-style-type: none"> <li>(a) in the firm name; and</li> <li>(b) in his or her own name.</li> </ul> <p>(3) A notice under subsection (1) given by a company must be signed by a director or senior manager of the company both:</p> <ul style="list-style-type: none"> <li>(a) in the company's name; and</li> <li>(b) in his or her own name.</li> </ul> <p>(4) If a company, the directors of a company or the responsible entity of a registered scheme appoints an individual, firm or company as auditor of a company in contravention of subsection (1):</p> <ul style="list-style-type: none"> <li>(a) the purported appointment does not have any effect; and</li> <li>(b) the company or responsible entity, and any officer of the company or responsible entity who is in default, are each guilty of an offence.</li> </ul>
<b>Proposed Amendment</b>
<p>Again the Draft Bill proposes to add a note after subsection 328A(4) which provides:</p> <p>“Note: An officer of a company, or of a responsible entity, is in default if the officer is involved in the contravention of subsection (1) by the company, the company directors or the entity (see section 83). Section 79 defines <i>involved</i>.”</p>
<b>Comments on Proposed Amendments</b>
<p>There does not appear to be any compelling policy reason for making the directors liable for an offence here when the undesirable behaviour can be limited by the company or responsible entity being subject to liability.</p> <p>The Australian Institute of Company Directors recommends that only the company be liable for a contravention of section 328A. On this basis we recommend that the words “and any officer of the company or the responsible entity”, be deleted from sub-section (4)(b) and the word “is”, be inserted prior to “guilty of an offence.”</p>

10. Corporations Act – section 328B

<p><b>Existing Liability Provision</b></p> <p><b>Section 328B</b> <b>Nomination of auditor</b></p> <p>(1) Subject to this section, a company may appoint an individual, firm or company as auditor of the company at its AGM only if a member of the company gives the company written notice of the nomination of the individual, firm or company for appointment as auditor:</p> <ul style="list-style-type: none"> <li>(a) before the meeting was convened; or</li> <li>(b) not less than 21 days before the meeting.</li> </ul> <p>This subsection does not apply if an auditor is removed from office at the AGM.</p> <p>(2) If a company purports to appoint an individual, firm or company as auditor of the company in contravention of subsection (1):</p> <ul style="list-style-type: none"> <li>(a) the purported appointment is of no effect; and</li> <li>(b) the company and any officer of the company who is in default are each guilty of an offence.</li> </ul> <p>(3) If a member gives a company notice of the nomination of an individual, firm or company for appointment as auditor of the company, the company must send a copy of the notice to:</p> <ul style="list-style-type: none"> <li>(a) each individual, firm or company nominated; and</li> <li>(b) each auditor of the company; and</li> <li>(c) each person entitled to receive notice of general meetings of the company.</li> </ul> <p>This is so whether the appointment is to be made at a meeting or an adjourned meeting referred to in section 327D or at an AGM.</p> <p>(4) The copy of the notice of nomination must be sent:</p> <ul style="list-style-type: none"> <li>(a) not less than 7 days before the meeting; or</li> <li>(b) at the time notice of the meeting is given.</li> </ul>
<p><b>Proposed Amendments</b></p> <p>Again the Draft Bill proposes to add a note after subsection 328B(2) which provides:</p> <p>“Note: An officer of a company is in default if the officer is involved in the company’s contravention of subsection (1) (see section 83). Section 79 defines <i>involved</i>.”</p>
<p><b>Comments on Proposed Amendments</b></p> <p>There does not appear to be any compelling public policy reason for making the directors liable for an offence here when the undesirable behaviour can be limited by the company being subject to liability.</p> <p>The Australian Institute of Company Directors recommends that only the company be liable for a contravention of section 328B. On this basis we recommend that the words “and any officer of the company who is in default” be deleted from sub-section (2)(b) and the word “is” be inserted prior to “guilty of an offence.”</p>

**11. Corporations Act – section 601FC (6)**

**Existing Liability Provision**

**Section 601FC**

**Duties of responsible entity**

(1) In exercising its powers and carrying out its duties, the responsible entity of a registered scheme must:

- (a) act honestly; and
- (b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the responsible entity's position; and
- (c) act in the best interests of the members and, if there is a conflict between the members' interests and its own interests, give priority to the members' interests; and
- (d) treat the members who hold interests of the same class equally and members who hold interests of different classes fairly; and
- (e) not make use of information acquired through being the responsible entity in order to:
  - (i) gain an improper advantage for itself or another person; or
  - (ii) cause detriment to the members of the scheme; and
- (f) ensure that the scheme's constitution meets the requirements of sections 601GA and 601GB; and
- (g) ensure that the scheme's compliance plan meets the requirements of section 601HA; and
- (h) comply with the scheme's compliance plan; and
- (i) ensure that scheme property is:
  - (i) clearly identified as scheme property; and
  - (ii) held separately from property of the responsible entity and property of any other scheme; and
- (j) ensure that the scheme property is valued at regular intervals appropriate to the nature of the property; and
- (k) ensure that all payments out of the scheme property are made in accordance with the scheme's constitution and this Act; and
- (l) report to ASIC any breach of this Act that:
  - (i) relates to the scheme; and
  - (ii) has had, or is likely to have, a materially adverse effect on the interests of members;as soon as practicable after it becomes aware of the breach; and
- (m) carry out or comply with any other duty, not inconsistent with this Act, that is conferred on the responsible entity by the scheme's constitution.

(2) The responsible entity holds scheme property on trust for scheme members.

Note: Under subsection 601FB(2), the responsible entity may appoint an agent to hold scheme property separately from other property.

(3) A duty of the responsible entity under subsection (1) or (2) overrides any conflicting duty an officer or employee of the responsible entity has under Part 2D.1.



<p>(5) A responsible entity who contravenes subsection (1), and any person who is involved in a responsible entity's contravention of that subsection, contravenes this subsection.</p> <p>Note 1: Section 79 defines <i>involved</i>.</p> <p>Note 2: Subsection (5) is a civil penalty provision (see section 1317E).</p> <p>(6) A person must not intentionally or recklessly be involved in a responsible entity's contravention of subsection (1).</p>
<p><b>Proposed Amendments</b></p>
<p>The Draft Bill proposes to repeal section 601FC(6).</p>
<p><b>Comments on Proposed Amendments</b></p>
<p>The Australian Institute of Company Directors has no objection to the repeal of section 601FC (6).</p>

## 12. Corporations Act – section 1302

<p><b>Existing Liability Provision</b></p>
<p><b>Section 1302</b> <b>Location of registers</b> [Repealed]</p> <p>[s1320 rep Act 96 of 2010, s 3 and Sch 1 itme 26, with effect from 30 Jan 2012...]</p>
<p><b>Proposed Amendments</b></p>
<p>The amendments proposed seek to repeal subsection 1302(3) and substitute:</p> <p>“(3) If a default is made in complying with subsection (1) in its application to any register of a company by any of the following person, the person is guilty of an offence:</p> <p>(a) the company;</p> <p>(b) a person who has arranged with the company to make up the register on its behalf.</p> <p>Note: A person mentioned in paragraph (b) is in default if the person is involved in the company’s contravention of the subsection (1) (see section 83). Section 79 defines involved.”</p> <p>In subsection 1302(5) the amendments proposed are to:</p> <p>“Omit any officer of the company who is in default are each” substitute “is.”</p>
<p><b>Comments on Proposed Amendments</b></p>
<p>The Australian Institute of Company Directors notes that section 1302 was repealed by the Personal Property Securities (Corporations &amp; Other Amendments) Act 2010 with effect from 30 January 2012. As the existing provision has already been repealed we see no reason why a substitute provision should be re-inserted and linked to section 188 of the Act to create a new civil penalty provision.</p>

13. Corporations Act 1317E(1)(a) and 1317G(1B)

<p><b>Existing Provision</b></p> <p><b>Section 1317E(1)</b></p> <p>If a Court is satisfied that a person has contravened 1 of the following provisions, it must make a declaration of contravention:</p> <p>(a) subsections 180(1) and 181(1) and (2), 182(1) and (2), 183(1) and (2) (officers' duties);</p> <p>(b) subsection 209(2) (related parties rules);</p> <p>.....</p> <p><b>Section 1317G(1)</b> <b>Pecuniary penalty orders</b> <i>Corporation/scheme civil penalty provisions</i></p> <p>(1) A Court may order a person to pay the Commonwealth a pecuniary penalty of up to \$200,000 if:</p> <p>(a) a declaration of contravention by the person has been made under section 1317E; and</p> <p>(aa) the contravention is of a corporation/scheme civil penalty provision; and</p> <p>(b) the contravention:</p> <p>(i) materially prejudices the interests of the corporation or scheme, or its members; or</p> <p>(ii) materially prejudices the corporation's ability to pay its creditors; or</p> <p>(iii) is serious.</p>
<p><b>Proposed Amendments</b></p> <p><b>Section 1317E(1)(aa)</b></p> <p>The amendment proposes to insert the following sub-section (aa):</p> <p>"Subsection 188(1), (2) or (4) (responsibilities of secretaries etc. for certain corporate contraventions)."</p> <p><b>Section 1317G(1B)</b></p> <p>The amendment proposes to insert the following sub-section (1B) into section 1317G:</p> <p>"(1BA) Without limiting subsection (1), if a declaration of contravention by a person of subsection 188(1),(2) or (4) has been made under section 1317E, a Court may order the person to pay the Commonwealth a pecuniary penalty of up to \$3,000."</p>
<p><b>Comments on Proposed Amendments</b></p> <ul style="list-style-type: none"> <li>• Under the current section 188, a company secretary will commit an offence if the corporation breaches the section. Under the proposed changes section 188 will impose civil liability for a contravention.</li> <li>• The Australian Institute of Company Directors is of the view that designated officer liability for company contraventions is inappropriate and that the company alone should be liable for any contraventions of section 188.</li> <li>• The penalty provision proposed by 1317G(1B) is ambiguous. It suggests that the Court may order a person in breach of section 188(1),(2) or (4) a pecuniary penalty of up to \$3,000. Despite this, the provision also states that this is "without limiting subsection (1)". This drafting may suggest that the Court still has the power to order a pecuniary penalty of up to \$200,000 for a contravention of section 188, an amount which would be inappropriate for the offences listed under that section. We are also of the view that a civil penalty of \$3,000, far exceeds the amount of the fine for the current criminal offence being \$550 and undermines the reform sought to be achieved .</li> </ul>

14. Corporations Act – Schedule 3 Penalties

Current Penalties			Proposed Amendments
Item	Provision	Penalty	
9	Subsections 142(1) and (2)	5 penalty units.	Repeal and insert: “60 penalty units” (Increases the penalty from \$550 to \$6,600)
12	Subsections 145(1) and (3)	5 penalty units.	Repeal and insert: “60 penalty units” (Increases the penalty from \$550 to \$6,600)
13	Subsection 146(1)	5 penalty units.	Repeal and insert: “60 penalty units” (Increases the penalty from \$550 to \$6,600)
29A	Subsection 178A(1)	5 penalty units.	Repeal and insert: “60 penalty units” (Increases the penalty from \$550 to \$6,600)
29B	Subsection 178C(1)	5 penalty units.	Repeal and insert: “60 penalty units” (Increases company fine from \$550 to \$6,600)
31	Subsections 188(1) and (2)	5 penalty units.	Repeal (Repeals the fine of \$550 replaces with civil liability and pecuniary penalty of \$3,300).
44	Subsections 205B(1), (2), (4) and (5)	10 penalty units or imprisonment for 3 months, or both.	Repeal and substitute: 60 penalty units or imprisonment for 1 year or both. (Increases the fine from \$1,100 to \$6,600 and extends the term of imprisonment).
84	Subsections 254X(1) and (2)	5 penalty units.	Repeal and substitute: “60 penalty units”
112	Subsection 319(1)	25 penalty units or imprisonment for 6 months, or both.	Repeal and substitute: “60 penalty units or imprisonment for 1 year or both.”
118	Subsections 346C(1) and (2)	5 penalty units.	Repeal and substitute “60 penalty units”
119B	Subsection 348D(1)	5 penalty units	Repeal and substitute “60 penalty units”
119C	Subsection 349A(1)	5 penalty units	Repeal and substitute “60 penalty units”
163A	Subsection 601FC(6)	2,000 penalty units or imprisonment for 5 years, or both.	Repeal the item.

Current Penalties		Proposed Amendments
Item	Provision	Penalty
		Add subsection 1302(3) 60 penalty units
		Add subsection 1302(5) 60 penalty units

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.”

### Comments on Proposed Amendments

The Australian Institute of Company Directors understands the policy basis behind removing the criminal liability from the individual and increasing the monetary penalty on the company in respect of the same offence. However, we are of the view that increasing the terms of imprisonment for individuals for acts of the company, is contrary to the purpose and aims of the COAG Reforms. It is therefore unclear why the legislation needs to increase the terms of imprisonment already in place.

As set out in our comments relating to the proposed amendments of sections 188 of the Corporations Act, despite changing the liability of the individual under section 188 from criminal to civil, the amount of penalty imposed on the individual for a breach of the section would actually be higher under the proposed amendments than the current penalties under the Act. 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 boost the focus on performance rather than conformance as a result. Increasing the civil penalty under section 188 for company secretaries and directors of proprietary companies will not have this effect. We again note that section 1302 has already been repealed and that the amendments proposing to attach increased penalties to this provision should be removed.

### 15. Foreign Acquisitions and Takeovers Act 1975 - sections 30 and 31

Existing Liability Provision
<p><b>Section 30 - Offences</b></p> <p>(1) A person who contravenes or fails to comply with an order made under Part II is guilty of an offence against this section.</p> <p>(2) Where a person has been convicted of an offence consisting of a contravention, or failure to comply with, an order made under Part II and the contravention or failure continues after he or she has been so convicted, the person is guilty of a further offence against this section.</p> <p>(3) Where an order made under Part II requires a person to do anything within a particular time and the person fails to do that thing within that time, the person shall be deemed to continue to fail to comply with the order until he or she does that thing.</p> <p>(4) A person who is convicted of an offence against this section is punishable by a fine not exceeding 500 penalty units or imprisonment for a period not exceeding 2 years, or both.</p> <p><b>Section 31 – Offences by officers of corporations</b></p> <p>(1) Where an offence against a provision of this Act is committed by a corporation, an officer of the corporation who is in default is guilty of an offence against this section and is punishable on conviction by the penalty provided in that provision.</p>

<p>(2) A reference in subsection (1) to an officer who is in default, in relation to an offence committed by a corporation, includes a reference to an officer who authorizes or permits the contravention of the offence.</p>
<p><b>Proposed Amendments</b></p>
<p>The main proposed amendment in relation to the Foreign Acquisitions and Takeovers Act 1975 is to amend section 31(1) to omit the words “an officer of the corporation who is in default” and substitute: “an officer of the corporation who authorised or permitted the commission of the offence.”</p> <p>This amendment would be followed by the repeal of the subsection 31(2).</p>
<p><b>Comments on Proposed Amendments</b></p>
<p>This provision is unlikely to meet all of the criteria set out in the Company Director principles for the imposition of personal criminal liability on directors for acts of the company. In particular, the conduct sought to be regulated is likely to be achieved by imposing liability solely on the company. On this basis, section 31 of the Act could be repealed.</p> <p>If however, the Federal Government would prefer for an express liability provision to be included in the Draft Bill we recommend the use of the Company Directors model provision.</p>

## 16. Foreign Acquisitions and Takeovers Act 1975 – multiple amendments

<p><b>Proposed Amendments</b></p>
<p>Multiple amendments are proposed to insert the following note after numerous provisions of the Foreign Acquisitions and Takeover act 1975:</p> <p>“Note: For the criminal liability of an officer of a corporation if the corporations contravenes or fails to comply with an order under this subsection, see sections 30 and 31.”</p> <p>The subsections after which the note will be inserted include:</p> <ul style="list-style-type: none"> <li>• Subsections 18(2),(3) and (4)</li> <li>• Subsections 19(2), (3) and (4)</li> <li>• Subsections 20(2) and (3)</li> <li>• Subsections 21(2) and (3)</li> <li>• Subsections 21A(2), (3) and (4)</li> <li>• Subsection 22(1)</li> </ul> <p>Multiple amendments are also proposed to insert the following note after numerous provisions of the Foreign Acquisitions and Takeovers Act 1975:</p> <p>“Note: For the liability of an officer of a corporation, see section 31.”</p> <ul style="list-style-type: none"> <li>• Subsections 25(IC);</li> <li>• Subsections 26(2)</li> <li>• Subsection 26A(2);</li> <li>• Subsection 30(1)</li> <li>• Subsection 36(2)</li> </ul>
<p><b>Comments on Proposed Amendments</b></p>
<p>While we have no objection to the insertion of notes to signal the personal liability which may accrue to directors, we note that the number of notes contained in the draft Bill, shows the number of provisions for which directors may be liable in just one Act.</p>

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.

It is unclear why liability cannot be imposed solely on the company for these contraventions. We note that it has not been demonstrated that the objects of the Act have not been met by, effectively regulating the conduct and activities of the corporation or by imposing liability solely on the corporation.

#### 17. Insurance Contracts Act 1984 – section 76A

Existing Liability Provision
<p><b>Section 76 A – Liability of directors and employees etc.</b></p> <p>(1) A director of a company, or an employee or agent (whether of a corporation or of an individual), who intentionally or recklessly permits or authorizes a contravention of this Act by the company, corporation or individual, as the case may be, is guilty of an offence against this Act and, subject to subsection (2) is punishable by the penalty provided in respect of that contravention.</p> <p>(2) If a director of a company, or an individual who is an employee or agent of a corporation, intentionally or recklessly permits or authorizes a contravention by the company or corporation, the reference in subsection (1) to the penalty provided in respect of the contravention is a reference to:</p> <ul style="list-style-type: none"> <li>(a) the penalty that would apply to an individual in respect of the contravention; or</li> <li>(b) if there is no penalty provided by an individual – a penalty not exceeding one-fifth of the penalty applying to the company or corporation in respect of the contravention.</li> </ul> <p>(3) If:</p> <ul style="list-style-type: none"> <li>(a) a company or corporation is the agent of an individual; and</li> <li>(b) a director of the company, or an employee or agent of the corporation, intentionally or recklessly permits or authorizes a contravention of this Act by the company or corporation in its capacity as agent of the individual;</li> </ul> <p>then despite, subsection (1), the offence committed by the company or the constitution as agent is punishable by a penalty not exceeding 5 times the penalty applying to the individual.</p>
Proposed Amendments
<p><b>Section 76A</b></p> <p>Repeal the section</p> <p><b>After Section 11D</b></p> <p>Insert:</p> <p><b>11DA Supervisory powers – liability of directors, employees and agents of insurers</b></p> <p>(1) A person (the responsible person) commits an offence if:</p> <ul style="list-style-type: none"> <li>(a) the responsible person is:</li> </ul>

<p>(i) a director of a company that is an insurer; and  (ii) an employee or agent of an insurer; and  (b) the responsible person permits or authorises the insurer to engage in conduct; and  (c) the conduct constitutes an offence (the insurer offence) against subsection 11C(2) or 11D(2) or (3); and  (d) The insurer commits the insurer offence.</p> <p>Penalty: 150 penalty units</p> <p>(2) There is no fault element for the physical element described in paragraph (1)(d) other than the fault elements (if any) of the physical elements of the insurer offence.</p> <p>(3) To avoid doubt:  (a) an insurer does not commit the insurer offence, for the purposes of subsection (1), if the insurer has a defence to the insurer offence; and  (b) a person may be convicted of an offence against subsection (1) even if the insurer concerned has not been prosecuted for, or convicted of, the insurer offence.</p> <p>(4) In this section:  <b>conduct</b> means:  (a) an act; or  (b) an omission to perform an act.  <b>engage</b> in conduct means:  (a) do an act; or  (b) omit to perform an act.</p>
<p><b>Comments on Proposed Amendments</b></p> <ul style="list-style-type: none"> <li>• The Australian Institute of Company Directors supports the repeal of section 76A of the Insurance Contracts Act. However we do not support the insertion of the proposed section 11DA.</li> <li>• Applying the Company Directors model, section 11DA does not meet all the criteria of principle 4. For example, the public policy issues sought to be addressed by the statute are not compelling (as defined in the principles) and there has been no suggestion that the objects of the Act cannot be adequately met by, nor has it been demonstrated that the objects of the Act have not been met by, effectively regulating the conduct and activities of the corporation or imposing liability solely on the corporation.</li> <li>• On this basis, section 76A should be repealed and no additional derivative liability provision inserted. However, if the Federal Government intends to insert a liability provision, the Australian Institute of Company Directors recommends that the Company Directors model provision be inserted and applied to the specified contraventions.</li> </ul>

18. Pooled Development Funds Act

<b>Existing Liability Provision</b>
<p><b>Section 50 – Criminal consequences of contravening certain provisions</b></p> <p>(1) If a PDF contravenes a provision specified in the table:</p> <p>(a) the pdf is guilty of an offence; but</p> <p>(b) each officer or investment manager of the PDF who is involved in the contravention is guilty of an offence punishable by convention by a penalty not exceeding the one set out in the table in relation to that provision.</p> <p>..... [NB: table omitted here]</p> <p>(2) If a company that is an eligible corporation contravenes section 49:</p> <p>(a) the company is not guilty of an offence; but</p> <p>(b) each officer of the company who is involved in the contravention is guilty of an offence punishable, on conviction, by a fine not exceeding \$10,000.</p> <p>(3) For the purposes of subsections (1) and (2), a person is involved in a contravention if, and only, if the person:</p> <p>(a) has aided, or abetted, counselled or procured the contravention; or</p> <p>(b) has induced, whether by threats or promises or otherwise, the contravention; or</p> <p>(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to the contravention; or</p> <p>(d) has conspired with others to effect the contravention.</p> <p>(4) The effect that a provision has for the purposes of this section is additional to, and does not prejudice the effect that the provision otherwise has (for example, for the purposes of section 47).</p>
<b>Proposed Amendments</b>
<p>In summary the Bill proposes the following legislative amendments.</p> <p><b>Section 50</b> Repeal the section</p> <p><b>Subsection 51(2)</b> Omit “not being a PDF”</p>
<b>Comments on Proposed Amendments</b>
<p>The Australian Institute of Company Directors agrees that section 50 should be repealed.</p>