

8 April 2009

The Secretary
Senate Select Committee on Climate Policy
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Dear Sir/Madam

SENATE SELECT COMMITTEE ON CLIMATE POLICY

The Australian Institute of Company Directors (AICD) welcomes the opportunity to make a submission to the Senate Select Committee on Climate Policy.

AICD has over 24,000 individual members from a wide range of corporations: publicly-listed companies, private companies, not-for-profit organisations, and government and semi-government bodies. Our membership is drawn predominantly from the small to medium (SME) and public sectors. As the principal professional body representing a diverse membership of directors, we therefore provide a broad-based director perspective to the climate policy debate.

We **enclose** our submission (SUBM2009-08) to the Department of Climate Change on the Carbon Pollution Reduction Scheme Bill (Bill) for your attention. We note that your terms of reference state that you welcome submissions on “any related matter” to climate policy. It is in that context that we draw to the Committee’s attention to the director liability provisions of the Bill.

Directors make an important contribution to economic growth through their oversight and monitoring of companies. The laws that apply to directors, as to other citizens, should be “principled laws” – they must be fair, clear, consistent and stringent with appropriate penalties. This is not the case with the provisions of the Bill. We are particularly concerned with the drafting of certain provisions in Part 20 of the Bill dealing with the liability of executive officers of bodies corporate.

The continued reliance by Governments in legislation on provisions which either reverse the onus of proof, or impose liability on corporate officers in relation to corporate non-compliance with legislation, is of serious concern. As the Corporations and Markets Advisory Committee (CAMAC) noted in its report *Personal Liability for Corporate Fault* (September 2006), this policy which has become common in legislation is a policy that cannot be supported. The report has now been referred to the Council of Australian Governments.

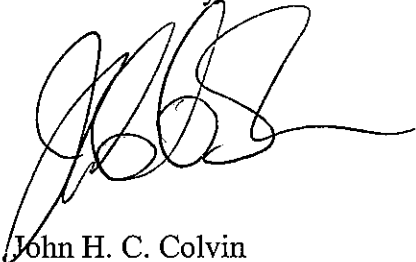
Provisions deeming corporate officers to be liable, and subject to penalties, for corporate conduct that they could not reasonably have influenced or prevented might be seen as delivering a form of justice in the context of a one-person company. However, they do not reflect the realities and complexities of governance of larger firms, including the board model of a majority of non-executive or independent directors who are not involved in day-to-day operations of the company.

“Principled laws” do not reverse the burden of proof in court proceedings; they uphold the fundamental pillars of a democratic society and the rule of law. Directors like any other citizens in Australia should not be required to prove their innocence. However, the onus of proof appears to be reversed, for example, in section 336 in relation to a person who argues a mistake of fact as a defence to a civil penalty order. This type of provision should be removed from the Bill.

AICD believes that there is also a need for a broad-based defence or safe harbour in statutes for directors when they make commercial decisions in good faith having informed themselves about subject matter of a decision and have acted in best interests of company. If directors’ actions meet the criteria they should not, with benefit of hindsight, be liable for errors of judgment. Such law reform would enable the majority of directors, who carry out their duties diligently, to better focus on strategic decision-making, thereby enhancing company performance and benefitting the Australian economy. The Bill should include such a safe harbour provision.

We would be pleased to expand upon any of these views and provide further information the Committee may require. Please contact myself or Gabrielle Upton, Legal Counsel, on (02) 8248 6635 if you have any questions.

Yours faithfully



John H. C. Colvin
Chief Executive Officer

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