

Chapter 1

Introduction

The referral

1.1 On 20 September 2012 the House of Representatives referred the Personal Liability for Corporate Fault Reform Bill 2012 ('the bill') to the Parliamentary Joint Committee on Corporations and Financial Services ('the committee') for inquiry and report. The committee set a reporting date of 29 October 2012.

Conduct of the inquiry

1.2 Details of the committee's inquiry were made available on the committee's website. The committee received four submissions, which are listed in Appendix 1.

1.3 The committee held a public hearing in Sydney on 22 October 2012 and heard from Treasury and the Department of Finance and Deregulation as well as industry representatives and involved stakeholders. Appendix 2 lists the names of the witnesses who appeared.

1.4 The committee thanks the organisations and individuals who contributed to the inquiry.

Context of the inquiry

1.5 The bill implements the Council of Australian Governments' (COAG) Directors' Liability reform, which aims to harmonise the imposition of personal criminal liability for corporate fault across Australian jurisdictions. In the Minister's Second Reading Speech, the Parliamentary Secretary to the Treasurer, the Hon. Bernie Ripoll MP stated that:

This reform commits all jurisdictions to establishing a nationally consistent and principled approach to the imposition of personal criminal liability on directors and corporate officers for corporate fault. The initiative aims to remove regulatory burdens on directors and corporate officers that cannot be justified on public policy grounds, and to minimise inconsistency between Australian jurisdictions in the way personal liability for corporate fault is imposed in Australian laws.¹

1.6 The Directors' Liability Reform Project forms part of the *COAG National Partnership Agreement to Deliver a Seamless National Economy* (NSE NP) which was originally announced on 29 November 2008. The reform is the culmination of

1 The Hon. Bernie Ripoll MP, Parliamentary Secretary to the Treasurer, Second Reading Speech, *House of Representatives Hansard*, 19 September 2012, p. 19.

earlier reviews that had recommended directors' liability reform in light of an 'increasing tendency for personal liability provisions to be introduced in Australian law as a matter of course and without robust justification'.² The Parliamentary Secretary to the Treasurer recently explained that such provisions could operate in a manner that was:

- unfair in the sense that an individual could face a criminal penalty for a breach of the law by a corporation when the individual had no knowledge of or control over the breach;
- inefficient to the extent that company directors could face excessive risk of personal criminal liability, which may detract from their strategic and entrepreneurial responsibilities.

Further, inconsistencies in the standards of personal responsibility both within and across jurisdictions were resulting in undue complexity and a lack of clarity about responsibilities and requirements for compliance.³

Proposed amendments

1.7 The bill proposes to amend a number of Commonwealth Acts to:

- remove personal criminal liability for corporate fault where such liability is not justified;
- remove the burden of proof on defendants to establish a defence to a charge;
- replace personal criminal liability for corporate fault with civil liability where a non-criminal penalty is appropriate; and
- clarify the circumstances where personal criminal liability is justified.⁴

1.8 In relation to personal criminal liability, the bill seeks to ensure that a person is only made criminally liable for the fault of a corporation where it is fair and reasonable to do so after taking into account the following factors:

- the nature of the harm that the crime would cause;
- the extent to which corporate officers can directly control the relevant corporate conduct; and
- the effectiveness of other forms of penalties and enforcement against the corporation alone.⁵

2 The Hon. Bernie Ripoll MP, Parliamentary Secretary to the Treasurer, Second Reading Speech, *House of Representatives Hansard*, 19 September 2012, p. 19.

3 The Hon. Bernie Ripoll MP, Parliamentary Secretary to the Treasurer, Second Reading Speech, *House of Representatives Hansard*, 19 September 2012, p. 19.

4 Explanatory Memorandum, Personal Liability for Corporate Fault Reform Bill 2012, Outline, p. 1.

1.9 The amendments proposed to be made by the bill apply the principles across legislation administered by various Commonwealth portfolios, including the *Corporations Act 2001*, *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, *Insurance Contracts Act 1984*, *Foreign Acquisitions and Takeovers Act 1975*, *Income Tax Assessment Act 1936*, *Taxation Administration Act 1953*, *Superannuation Guarantee (Administration) Act 1992*, *Polled Development Funds Act 1992*, *Therapeutic Goods Act 1989*, *Health Insurance Act 1973*, *Veterans' Entitlements Act 1986*, *Classification (Publications, Films and Computer Games) Act 1995*, *National Measurement Act 1960* and the *National Vocational Education and Training Regulator Act 2011*.

1.10 Once implemented by all jurisdictions (i.e. the Commonwealth, states and territories), the reform is expected to 'significantly reduce the overall number of laws containing directors' liability provisions nationally' which will in turn, reduce the 'regulatory compliance burden on businesses'. At the same time, the reform retains laws that are 'necessary to ensure that company directors and other corporate officers take reasonable steps to ensure that their companies comply with their obligations under the law'. In terms of the overall effect of the bill, the Parliamentary Secretary to the Treasurer held that:

This is an important red tape reduction that will benefit all Australian businesses. In particular, the application of a consistent set of principles by the Commonwealth and all states and territories will provide greater certainty for companies that are subject to both Commonwealth and state or territory laws, and those that trade in multiple jurisdictions, thus helping to promote a more seamless national economy.⁶

5 The Hon. Bernie Ripoll MP, Parliamentary Secretary to the Treasurer, Second Reading Speech, *House of Representatives Hansard*, 19 September 2012, p. 20.

6 The Hon. Bernie Ripoll MP, Parliamentary Secretary to the Treasurer, Second Reading Speech, *House of Representatives Hansard*, 19 September 2012, p. 20.

