

## Chapter 3

### Key provisions of the bill

3.1 The bill proposes amendments to various Acts including the *Corporations Act 2001* and the *Foreign Acquisitions and Takeovers Act 1975*. This chapter considered the key provisions.

#### Corporations Act 2001

3.2 Amendments to the Corporations Act reform certain provisions that impose personal criminal liability for corporate fault to align them with the COAG principles and clarify the circumstances in which corporate officers can be held criminally liable for corporate fault.

3.3 Section 188 of the Corporations Act makes company secretaries criminally liable for certain breaches of the Corporations Act by a company as listed in section 188(1). Item 1 of the bill replaces the existing criminal offence of strict liability in section 188 with a civil offence for a breach by a secretary of a company of a 'corporate responsibility provision'.<sup>1</sup>

3.4 Proposed subsection 188(2) extends the offence to each director of a proprietary company where the proprietary company is in contravention of a 'corporate responsibility provision' and at the time of that contravention, does not have a secretary. Item 18 of the bill inserts a new paragraph 1317(1)(aa) to clarify that subsections 188(1) and (2) are 'civil penalty provisions'. In accordance with the COAG principles, subsection 188(3) provides a defence by clarifying that a person does not contravene subsections 188(1) and (2) if that person can demonstrate that they took 'reasonable steps to ensure that the company complied with the provision'.

3.5 Schedule 3 to the Corporations Act lists the penalties for offences under section 188. The bill amends this section to bring the offences to which section 188 applies into alignment with the Commonwealth *Guide to Framing Commonwealth Offences, Infringement Notices, and Enforcement Powers* and by removing criminal penalties in place of civil penalties in line with the COAG principles. Concerns raised in evidence regarding the proposed new penalties are discussed in the following chapter.

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1 Corporate responsibility provisions cover matters such as changes to the principal place of business, lodgement of notices and annual reports with ASIC and responses to return of particulars.

3.6 Under items 20, 23 and 25 of the bill, civil penalties are strengthened from five penalty units to 60 penalty units in relation to a number of matters.<sup>2</sup> Items 22 and 24 increase existing penalties to 60 penalty units or imprisonment for one year or both in respect to section 205B (lodgement of notices with ASIC), section 319 (lodgement of annual reports with ASIC) and section 320 (lodgement of half-year reports with ASIC).

3.7 Subsection 254Q(13) applies strict liability in relation to a company to offer forfeited shares for sale by public auction or to advertise such a sale in accordance with the subsection and extends the liability to any officer of a company involved in the contravention. The bill removes the extension of liability to any officer of the company involved in the contravention on the basis that it breaches the COAG principles as the 'type of harm that this subsection aims to prevent is not significant enough to warrant strict personal criminal liability for corporate faulty'.<sup>3</sup>

3.8 Similarly, the bill amends subsection 610FC(5) and 610FC(6) to provide for a civil penalty provision. Section 601FC sets out the primary duties of a responsible entity of a managed investment scheme and subsection 610FC(5) currently makes a breach of those duties by the responsible entity a criminal penalty provision under Part 9.4B of the Corporations Act.

3.9 For other sections of the Corporations Act whereby personal criminal liability is applied in relation to the contravention of the section, annotations in the bill clarify those offence provisions for which personal liability will apply.

## **Foreign Acquisition and Takeovers Act 1975**

3.10 The EM notes that section 30 of the *Foreign Acquisitions and Takeovers Act 1975* (FATA) is 'potentially a blanket liability provision'.<sup>4</sup> Section 30, in conjunction with section 31, creates personal liability for breaches of a number of provisions in the FATA. Item 3 of the bill amends subsection 31(1) to clarify the level of involvement by an officer required to trigger personal liability. Under the bill, only an officer of the corporation who authorised or permitted commission of an offence by the corporation will be held personally liable for breach of the law. The EM states the following in relation to subsection 31(1):

Under the existing section 31 of the FATA, where an offence against the Act is committed by a corporation, an officer of the corporation who is in default is guilty of an offence. A reference to an officer who is in default is defined to include a reference to an officer who authorises or permits the commission of the offence.

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2 Sections for which these new civil penalties apply include 142, 145, 146, 178A, 178C, 254X, 346C and 348D.

3 Explanatory Memorandum, Personal Liability for Corporate Fault Reform Bill 2012, p. 9.

4 Explanatory Memorandum, Personal Liability for Corporate Fault Reform Bill 2012, p. 11.

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The current wording in section 31 is ambiguous, providing the penalty for an officer who did not authorise or permit the commission of the offence to nonetheless be liable in some situations. The Bill therefore amends Section 31 to clearly apply personal liability only to an officer who authorises or permits the commission of the offence.<sup>5</sup>

3.11 Amendments in items 5 to 11 of the FATA do not create new offences but insert notes into each of the specified subsections to signpost that the existing provisions relate to the criminal liability of an officer of a corporation if the corporation contravenes or fails to comply with the order of the Treasurer (or his delegate).

3.12 Items 12 to 17 add notes to existing subsections to signpost a reference to section 31 of the Act in relation to the liability of an officer of a corporation.

### **Health Insurance Act 1973**

3.13 The bill amends the *Health Insurance Act 1973* (HIA) to remove the personal criminal liability for corporate fault on company officers in a range of circumstances. Section 129AA makes it an offence for a practitioner or medical entrepreneur to receive or obtain a bribe from a proprietor of a private hospital in return for enabling a person to be admitted as a patient, and for the proprietor of a private hospital to offer such a bribe. The bill repeals subsections 129AA(2), 129AA(3) and 129AA(6) to prevent the extension of personal criminal liability to officers of the corporation where those officers were not directly involved in the conduct.

3.14 The bill further amends section 23DZZIT by clarifying that executive officers may incur personal liability where a company engages in conduct that is intended to induce a person to request pathology or diagnostic imaging services from a provider.

### **National Vocational Education and Training Regulator Act 2011**

3.15 The bill amends the *National Vocational Education and Training Regulator Act 2011* (NVETR Act) to limit the circumstances when directors and other executive officers can be held personally liable for the offences of the company in the circumstances listed in section 133A of the Act. Currently, section 133 applies personal liability for executive officers to all offences under the Act. An offence is committed by an executive officer if their organisation has committed an offence and the officer knew the offence would be committed, could prevent the conduct, and failed to take reasonable steps to do so.

3.16 The bill amends section 133 by inserting a new section 133A to limit the offences where directors can be personally liable for breaches by their corporation of

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5 Explanatory Memorandum, Personal Liability for Corporate Fault Reform Bill 2012, p. 12.

those offences contained within the new section. Criminal liability in relation to the Act is retained under the bill on the basis that:

there are compelling public policy grounds in the protection of vulnerable people, and that corporate penalties alone are not likely to be effective in deterring the prohibited practice.<sup>6</sup>

### **Therapeutic Goods Act 1989**

3.17 The amendments to the *Therapeutic Goods Act 1989* (TGA) remove derivate liability for 'relatively minor offences by removing the current blanket application of derivative liability'.<sup>7</sup> Currently, all executive officers can be personally liable for all offences committed under the TGA.

3.18 Under the new section 54BA of the bill, derivative liability will only apply to those sections listed under subsection 54BA(1) of the TGA, and any regulations prescribed for that purpose. The EM further explains that:

Section 54BA retains existing powers under the Act to prescribe offences in regulations made under the TGA that will attract personal liability for executive officers, and allows certain provisions under the *Crimes Act 1914* and the Criminal Code to continue to apply.<sup>8</sup>

### **Insurance Contracts Act 1984**

3.19 Section 76A of the *Insurance Contracts Act 1984* (ICA) is a blanket liability provision which applies to a number of offences, including offences in relation to the provision of documents to ASIC and offences surrounding interactions between insurers and insured parties.

3.20 The bill repeals section 76A, thereby removing the blanket liability imposed for all offences under the ICA and replaces it with a new section 11DA, which applies personal liability in relation to subsections 11C (2), 11D (2) and 11D (3). The EM emphasises that the amendment 'preserves personal liability in relation to ASIC's ability to obtain documents, and the supplying of false or misleading information to ASIC'.<sup>9</sup>

### **Taxation Administration Act 1953**

3.21 Section 8Y of the *Taxation Administration Act 1953* (TAA) reverses the onus of proof for officers of corporations and others in relation to taxation offences. This is

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6 Explanatory Memorandum, Personal Liability for Corporate Fault Reform Bill 2012, p. 19.

7 Explanatory Memorandum, Personal Liability for Corporate Fault Reform Bill 2012, p. 23.

8 Explanatory Memorandum, Personal Liability for Corporate Fault Reform Bill 2012, p. 26.

9 Explanatory Memorandum, Personal Liability for Corporate Fault Reform Bill 2012, p. 30.

retained under the bill. In an explanatory document released as part of the third tranche of the proposed amendments on 14 August 2012, Treasury provided the following reasoning for this approach:

The Government has decided not to amend section 8Y. In reaching this conclusion the Government has taken into account a range of factors outlined in the COAG guidelines, including the magnitude of harm that the offending conduct would likely cause, the effectiveness of corporate penalties in preventing this conduct and the availability of evidence to the prosecution and the director.<sup>10</sup>

3.22 Concerns raised by the Australian Institute of Company Directors and Chartered Secretaries Australia in relation to the retention of this provision are considered in chapter 4 of this report.<sup>11</sup>

### **Other Acts amended by the bill**

3.23 The bill amends other Acts that provide personal criminal liability for corporate fault including:

- *Child Support (Registration and Collection) Act 1988;*
- *Classification (Publications, Films and Computer Games) Act 1995;*
- *Corporations (Aboriginal and Torres Strait Islander) Act 2006;*
- *Income Tax Assessment Act 1936;*
- *National Measurement Act 1960;*
- *Pooled Development Funds Act 1992;*
- *Superannuation Guarantee (Administration) Act 1992;* and
- *Veterans' Entitlements Act 1986.*

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10 Explanatory document, Personal Liability for Corporate Fault Reform Bill 2012, Third tranche, 14 August 2012, <http://www.treasury.gov.au/ConsultationsandReviews/Submissions/2012/Personal-Liability-for-Corporate-Fault-Reform-Bill-Tranche-3> (accessed 17 October 2012).

11 Australian Institute of Company Directors, *Submission 1*, Attachment 3, p. 2; Chartered Secretaries Australia, *Submission 2*, p. 2.

