

Chapter 5

Committee view

5.1 The committee recognises that reforming directors' liability is an important step to providing certainty for company directors and greater economic confidence. The bill fulfils the Commonwealth's commitment to the Council of Australian Governments' (COAG) reform agenda by amending the law relating to personal liability for offences committed by corporations. By significantly reducing the scale of legislation that imposes director liability and providing for greater national consistency, the bill and the broader reform is expected to cut red tape, promote confidence in directors' decision-making and reduce risks, enabling a greater focus on productivity.

5.2 Evidence before the committee not only affirmed the growing need for reform in this area in light of a substantial number of director liability provisions, but also the groundswell of support for such reforms. As Mr Bruce Cowley of the Law Council of Australia noted:

The notion of director liability provisions started to appear in state laws in Australia as a trickle during the 1980s. But they became a flood in the 1990s and 2000s, to the extent of which by a couple of years ago there were over 700 laws throughout Australia which imposed personal liability on directors.¹

Restoring confidence and balance

5.3 Notwithstanding reservations regarding some of the bill's provisions and COAG principles, there was common appreciation among witnesses to the inquiry that the reform as reflected in the bill will reduce the level of risk for directors and the burden to corporate officers while providing greater certainty and restoring confidence.²

5.4 The purpose of the bill and wider reform is to focus attention on key areas of liability laws to ensure compliance while reducing the burden of liability laws to enable greater focus on corporate performance. The committee acknowledges that this reform involves a process to provide for type 1 offences as the default position: type 2 and 3 offences will be the exception for which specific public policy grounds must be established. The committee considers that the retention of derivative liability laws, provided for in the bill, is consistent with this position and adheres to COAG principle 4.

1 Mr Bruce Cowley, Law Council of Australia, *Committee Hansard*, 22 October 2012, p. 1.

2 Mr Bruce Cowley, Law Council of Australia, *Committee Hansard*, 22 October 2012, pp 6–7.

5.5 Furthermore, the committee holds the view that the bill establishes a balance in relation to corporate responsibility. The committee appreciates that the Australian community expects company directors to take a higher level of responsibility in relation to the companies they direct. Where directors' liability provisions are justified, it is vital that directors are aware of what those offences are and concern themselves with compliance with the law. By providing for a narrower range of type 3 offences, the emphasis and therefore the attention of directors will be given to those offences. As Mr Paul Miller of the New South Wales Department of Premier and Cabinet noted:

In that way, it assists with compliance and proper risk management by boards by indicating more clearly to boards that there are particular categories of offences where we as a society think that you should pay special attention and where we think that it is clearly your responsibility to ensure that the company complies with this.³

5.6 At the same time, however, the removal of criminal liability in relation to provisions such as section 188 of the Corporations Act and the imposition of strong civil penalties ensures this balance. The committee accepts that it is inappropriate to impose criminal liability in such instances, but that the proposed civil penalties fulfil public expectations regarding the need for a deterrent and 'a strong public interest in requiring a company secretary to turn their mind to the need for a company to comply with the law'.⁴

COAG reform process and reform agenda

5.7 Evidence to the committee highlighted the extensive and rigorous process undertaken by COAG and related bodies including the Business Regulation and Competition Working Group (BRCWG) to establish consensus in relation to corporate fault reform. COAG committed to this important economic reform in late 2008 and undertook an exhaustive consultation process culminating in agreement across Australian jurisdictions to apply a common set of principles and guidelines to Commonwealth, state and territory legislation.

5.8 The committee is satisfied that the process to develop both the COAG principles and guidelines that underpin the reform agenda and draft the bill itself was rigorous, extensive and took into consideration the recommendations of stakeholders, including the AICD's model provision. Furthermore, the committee acknowledges work undertaken at the federal level whereby public consultation on the bill before the committee was conducted in three tranches from January to September 2012. The development of COAG principles and guidelines was a prolonged process which took into consideration a range of options and approaches, including a model provision.

3 Mr Paul Miller, NSW Department of Premier and Cabinet, *Committee Hansard*, 22 October 2012, p. 22.

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

These guidelines have in turn been the basis of a rigorous auditing process by the states and territories.⁵

5.9 The committee notes the concerns of some stakeholders that the reform does not go far enough. Mr Cowley of the Law Council of Australia emphasised to the committee that while the Law Council was 'strongly supportive of what the Commonwealth is doing through the bill, we do believe that there are other areas of reform and that the bill could in fact go further'.⁶ Similarly, while noting the complexities involved in working across Australian jurisdictions, Professor Baxt of the Law Council of Australia acknowledged the gravitas of the reform but expressed the view that it was a first step.⁷ Likewise, CSA supported the bill but had some reservations 'about its lack of reach in some instances'.⁸

5.10 The proposal to establish a model provision that all jurisdictions undertake to implement is one example in this regard. The committee is satisfied that a model provision would not work for reasons explained by the Parliamentary Counsel's Committee. However, the committee does recognise that the reform process has been taken a step further given that the Commonwealth has issued drafting instructions to its Office of Parliamentary Counsel to ensure that the COAG principles and guidelines are met when the imposition of criminal responsibility on directors is under consideration. These administrative arrangements are expected to provide for greater consistency in future legislation. They will be reviewed by Treasury and the Attorney-General's Department to ensure compliance with the COAG principles and guidelines. This will ensure that:

in the drafting process, any proposed new personal liability provisions will be considered in the context of previously drafted provisions. This will facilitate increased consistency in future legislation, subject to the policy objectives of the legislation.⁹

5.11 Further, the committee was assured by the Department of Finance and Deregulation that the chairs of the BRCWG have written to the chairs of the Ministerial Council for Corporations to ensure that consistency applies to national model laws into the future.¹⁰

5 Mr Paul Miller, NSW Department of Premier and Cabinet, *Committee Hansard*, 22 October 2012, p. 21.

6 Mr Bruce Cowley, Law Council of Australia, *Committee Hansard*, 22 October 2012, p. 1.

7 Professor Robert Baxt, Law Council of Australia, *Committee Hansard*, 22 October 2012, p. 4.

8 Ms Judith Fox, Chartered Secretaries Australia, *Committee Hansard*, 22 October 2012, p. 9.

9 Mr Bruce Paine, Department of Treasury, *Committee Hansard*, 22 October 2012, p. 14.

10 Mr Peter McCray, Department of Finance and Deregulation, *Committee Hansard*, 22 October 2012, p. 17.

Conclusion and recommendations

5.12 The committee is confident that the bill and the wider reform agenda will provide greater certainty for company directors and reduce red tape. A reduction in the number of offences that include directors' liability provisions will provide for a significant reduction in the legislative and regulatory burden.

5.13 The committee is satisfied that the bill fulfils the Commonwealth's obligations to the reform of personal liability for corporate fault. It recommends that the bill be passed.

Recommendation 1

5.14 The committee recommends that the Personal Liability for Corporate Fault Reform Bill 2012 be passed.

Recommendation 2

5.15 The committee recommends that the Department of Treasury monitor the application of the reverse onus of proof for company directors and corporate officers. The committee recommends that Treasury report its findings to the Minister 12 months after the bill has been passed, and report any matters of concern to the Parliamentary Joint Committee on Corporations and Financial Services.

Ms Deborah O'Neill MP

Chair