



# Parliamentary Joint Committee on Corporations and Financial Services

---

Inquiry into the Personal Liability for Corporate  
Fault Reform Bill 2012

October 2012

© Commonwealth of Australia 2012

ISBN 978-1-74229-702-6

Printed by the Senate Printing Unit, Parliament House, Canberra

## Members of the Committee

Ms Deborah O'Neill, <b>Chair</b>	NSW ALP
Senator Sue Boyce, <b>Deputy Chair</b>	QLD LP
Senator Mathias Cormann	WA LP
Senator Rachel Siewert	WA AG
Senator Matt Thistlethwaite	NSW ALP
Senator Anne Urquhart	ALP TAS
Mr Paul Fletcher MP	NSW LP
The Hon Alan Griffin MP	VIC ALP
The Hon Tony Smith MP	VIC LP
Ms Laura Smyth MP	VIC ALP

### SECRETARIAT

Dr Richard Grant, Acting Secretary  
Ms Jane Thomson, Principal Research Officer  
Ms Ruth Edwards, Administrative Officer  
Ms Kate Campbell, Administrative Officer

Suite SG.64  
Parliament House  
Canberra ACT 2600

T: 61 2 6277 3583  
F: 61 2 6277 5719  
E: [corporations.joint@aph.gov.au](mailto:corporations.joint@aph.gov.au)  
W: [www.aph.gov.au/senate/committee/corporations\\_ctte](http://www.aph.gov.au/senate/committee/corporations_ctte)



## Duties of the Committee

Section 243 of the *Australian Securities and Investments Commission Act 2001* sets out the Parliamentary Committee's duties as follows:

- (a) to inquire into, and report to both Houses on:
  - (i) activities of ASIC or the Panel, or matters connected with such activities, to which, in the Parliamentary Committee's opinion, the Parliament's attention should be directed; or
  - (ii) the operation of the corporations legislation (other than the excluded provisions), or of any other law of the Commonwealth, of a State or Territory or of a foreign country that appears to the Parliamentary Committee to affect significantly the operation of the corporations legislation (other than the excluded provisions); and
- (b) to examine each annual report that is prepared by a body established by this Act and of which a copy has been laid before a House, and to report to both Houses on matters that appear in, or arise out of, that annual report and to which, in the Parliamentary Committee's opinion, the Parliament's attention should be directed; and
- (c) to inquire into any question in connection with its duties that is referred to it by a House, and to report to that House on that question.



# Table of Contents

<b>Members of the Committee</b> .....	<b>iii</b>
<b>Duties of the Committee</b> .....	<b>v</b>
<b>Abbreviations</b> .....	<b>ix</b>
<b>Recommendations</b> .....	<b>xi</b>
<b>Chapter 1</b> .....	<b>1</b>
<b>Introduction</b> .....	<b>1</b>
The referral .....	1
Conduct of the inquiry.....	1
Context of the inquiry.....	1
Proposed amendments .....	2
<b>Chapter 2</b> .....	<b>5</b>
<b>The reform agenda of the Council of Australian Governments</b> .....	<b>5</b>
<b>Chapter 3</b> .....	<b>21</b>
<b>Key provisions of the bill</b> .....	<b>21</b>
Corporations Act 2001 .....	21
Foreign Acquisition and Takeovers Act 1975.....	22
Health Insurance Act 1973 .....	23
National Vocational Education and Training Regulator Act 2011 .....	23
Therapeutic Goods Act 1989.....	24
Insurance Contracts Act 1984 .....	24
Taxation Administration Act 1953.....	24
Other Acts amended by the bill.....	25

<b>Chapter 4.....</b>	<b>27</b>
<b>Concerns raised in evidence .....</b>	<b>27</b>
Support for the reform .....	27
Severity of proposed civil penalties .....	28
Retention of reverse onus of proof .....	29
Retention of derivative liability provisions—'principle 4' .....	32
A model provision? .....	35
Harmonisation .....	36
<b>Chapter 5.....</b>	<b>41</b>
<b>Committee view.....</b>	<b>41</b>
Restoring confidence and balance .....	41
COAG reform process and reform agenda.....	42
Conclusion and recommendations.....	44
<b>Appendix 1 .....</b>	<b>45</b>
<b>Submissions received.....</b>	<b>45</b>
<b>Appendix 2.....</b>	<b>47</b>
<b>Public Hearing .....</b>	<b>47</b>
Monday 22 October 2012.....	47



# Abbreviations

AICD	Australian Institute of Company Directors
ALRC	Australian Law Reform Commission
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
BRCWG	Business Regulation and Competition Working Group
CAMAC	Corporations and Markets Advisory Committee
CATSIA	<i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i>
COAG	Council of Australian Governments
Corporations Act	<i>Corporations Act 2001</i>
CRC	COAG Reform Council
CSA	Chartered Secretaries Australia
EM	Explanatory Memorandum
FATA	<i>Foreign Acquisitions and Takeovers Act 1975</i>
HIA	<i>Health Insurance Act 1973</i>
ICA	<i>Insurance Contracts Act 1984</i>
MINCO	Ministerial Council for Corporations
NVETR Act	<i>National Vocational Education and Training Regulator Act 2011</i>
NSE NP	COAG National Partnership Agreement to Deliver a Seamless National Economy
TAA	<i>Taxation Administration Act 1953</i>
TGA	<i>Therapeutic Goods Act 1989</i>
Treasury	Department of Treasury



# **Recommendations**

## **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.



# 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.<sup>1</sup>

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'.<sup>2</sup> 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.<sup>3</sup>

### **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.<sup>4</sup>

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.<sup>5</sup>

---

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.<sup>6</sup>

---

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.





## Chapter 2

### The reform agenda of the Council of Australian Governments

2.1 In 2008, Council of Australian Governments (COAG) launched the Directors' Liability Reform Project as part of its *National Partnership Agreement to Deliver a Seamless National Economy*. The project followed a series of reviews into personal liability on directors for corporate fault. This chapter provides a chronological overview of the respective reviews and key developments in relation to directors' liability. It also details the COAG reform agenda process and the timeline for directors' liability reform.

#### *Senate Standing Committee on Legal and Constitutional Affairs—1989*

2.2 In its November 1989 report titled *Company Directors' Duties*, the Senate Standing Committee on Legal and Constitutional Affairs detailed a trend towards imposing personal liability on directors for corporate fault.<sup>1</sup> In evidence to the committee, Professor Brent Fisse, then professor of law at Sydney University, noted that the present law provides 'for both individual and corporate liability but makes no attempt to achieve a well-balanced mix; the balance in fact achieved depends on the vicissitudes of prosecutorial discretion'.<sup>2</sup> The committee recommended further consideration of an appropriate balance of individual and corporate liability for corporate misconduct.<sup>3</sup>

#### *Corporate Law Reform Program—1997*

2.3 In 1997, a Corporate Law Economic Reform Program paper recognised a 'growing trend for legislatures to impose strict personal liability upon directors of corporations for breaches of statutory obligations by the corporation'.<sup>4</sup> The paper noted the potential ramifications of this trend:

...if directors risk personal liability for breaches incurred by the corporation, irrespective of the directors' culpability, they may be

- 
- 1 Senate Standing Committee on Legal and Constitutional Affairs, *Company Directors' Duties*, November 1989, p. 178.
  - 2 Professor Fisse cited in Senate Standing Committee on Legal and Constitutional Affairs, *Company Directors' Duties*, November 1989, pp 178–179.
  - 3 Senate Standing Committee on Legal and Constitutional Affairs, *Company Directors' Duties*, November 1989, recommendation 21(i), p. xv.
  - 4 Corporate Law Economic Reform Program, *Directors' Duties and Corporate Governance*, Proposals for Reform: Paper No. 3, 1997, p. 53, [archive.treasury.gov.au/documents/283/PDF/full.pdf](http://archive.treasury.gov.au/documents/283/PDF/full.pdf) (accessed 10 October 2012).

increasingly reluctant to serve on boards or may become overly concerned with compliance issues and processes rather than wealth creation. Certainly, it would be an unfair and unnecessary burden on directors if they can potentially be made responsible for breaches by their corporation, even where they have taken all reasonable steps to prevent such breaches.<sup>5</sup>

2.4 The review body recommended consideration of the appropriateness of developing a standard or model *due diligence* defence for directors in cases where they are effectively subject to strict liability under statutes other than the Corporations Law.<sup>6</sup>

### ***Australian Law Reform Commission—2002***

2.5 In its 2002 report *Principled Regulation*, the Australian Law Reform Commission (ALRC) found that there had been an increasing trend towards provisions that 'deem directors and other senior corporate officers personally liable for a contravention where the body corporate has contravened the legislation and may also be held liable for such a contravention'. The ALRC concluded that:

This represents a departure from accessorial liability as proof of knowledge of or involvement *in the contravention* is not an essential element; generally, involvement *in the management* of the body corporate will be sufficient.<sup>7</sup>

2.6 The ALRC noted in this regard that the effect of section 8Y of the *Taxation Administration Act 1953* is to 'reverse the onus of proof' as an officer may escape liability if he or she can prove that he or she was not 'directly or indirectly knowingly concerned in, or party to' the relevant act or omission and did not 'aid, abet, counsel or procure the particular act or omission'.

2.7 The ALRC made a number of recommendations of which Recommendations 8-1, 8-2 and 8-4 were later considered by the 2008 Corporations and Markets Advisory Committee (CAMAC) as an integral part of a model provision it recommended. These three ALRC recommendations are as follows:

Recommendation 8-1—The Regulatory Contraventions Statute should provide that any provision in legislation that deems an individual to be personally liable for the contravening conduct of a corporation should define the individual who

---

5 Corporate Law Economic Reform Program, *Directors' Duties and Corporate Governance*, Proposals for Reform: Paper No. 3, 1997, pp 53–54, [archive.treasury.gov.au/documents/283/PDF/full.pdf](http://archive.treasury.gov.au/documents/283/PDF/full.pdf) (accessed 10 October 2012).

6 Corporate Law Economic Reform Program, *Directors' Duties and Corporate Governance*, Proposals for Reform: Paper No. 3, 1997, pp. 53-54, Corporate Law Economic Reform Program, *Directors' Duties and Corporate Governance*, Proposals for Reform: Paper No. 3, 1997, p. 54.

7 Australian Law Reform Commission, *Principled Regulation*, 2002, pp 316–317.

---

may be liable as an individual (by whatever name called and whether or not the individual is an officer of the corporation) who is concerned in, or takes part in, the management of the corporation and includes an individual:

- (a) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
- (b) who has the capacity to affect significantly the corporation's financial standing; or
- (c) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the individual in the proper performance of functions attaching to the individual's professional capacity or his or her business relationship with the directors or the corporation).<sup>8</sup>

Recommendation 8-2—The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, any legislation that deems an individual to be personally liable for the contravening conduct of a corporation should include a fault element that the individual knew that, or was reckless or negligent as to whether, the contravening conduct would occur.<sup>9</sup>

Recommendation 8-4—The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, any provision in legislation that deems an individual to be personally liable for the contravening conduct of a corporation should include as a threshold test for liability that:

- (a) the individual failed to take all reasonable steps to prevent the contravening conduct; and
- (d) the individual was in a position to influence the conduct of the body corporate in relation to the contravening conduct.<sup>10</sup>

### ***Taskforce on Reducing the Regulatory Burdens on Business—January 2006***

2.8 In its January 2006 report, the Taskforce on Reducing the Regulatory Burdens on Business highlighted the inconsistencies across jurisdictions in provisions imposing personal liability on company directors and officers for corporate fault. It recommended that COAG initiate reviews to identify reforms to achieve 'more

---

8 Australian Law Reform Commission, *Principled Regulation*, 2002, pp 324–325.

9 Australian Law Reform Commission, *Principled Regulation*, 2002, p. 329.

10 Australian Law Reform Commission, *Principled Regulation*, 2002, p. 335.

nationally consistent regulation of personal liability for company directors and officers'.<sup>11</sup>

2.9 The Taskforce received evidence from companies that the personal liability attached to a number of directors' duties had led to a 'very conservative approach by some directors to the detriment of business development'.<sup>12</sup> In recommending that the Australian Government review the penalties for breaches of directors' duties, the Taskforce commented that:

While the Taskforce supports the deterrent value of penalties for breaches of regulatory obligations, it is important that the use of penalties strikes an appropriate balance between promoting good behaviour and ensuring business is willing to take sensible commercial risks. A risk-averse approach by business may limit their willingness to adopt innovative approaches in developing products and meeting new challenges. It would also be reflected in an overly cautious approach to compliance such as in product disclosure statements. This would undermine the overall efficiency and dynamism of the economy.<sup>13</sup>

### ***Corporations and Markets Advisory Committee—September 2006***

2.10 In September 2006, CAMAC reviewed the circumstances in which directors and other individuals involved in managing a company can incur personal criminal liability in consequence of misconduct by the company. It 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) unless they can establish an available defence; and
- considerable disparities in the terms of personal liability provisions, resulting in undue complexity and less clarity about requirements for compliance.<sup>14</sup>

2.11 CAMAC raised concerns regarding legislation which in effect deems an individual to be criminally responsible for a breach by a company of a statutory requirement. It emphasised the need to distinguish an individual's criminal liability for

---

11 Taskforce on Reducing Regulatory Burdens on Business, *Rethinking Regulation*, January 2006, Recommendation 5.28, p. 107, <http://www.regulationtaskforce.gov.au/> (accessed 10 October 2012).

12 Taskforce on Reducing Regulatory Burdens on Business, *Rethinking Regulation*, January 2006, p. 90.

13 Taskforce on Reducing Regulatory Burdens on Business, *Rethinking Regulation*, January 2006, p. 90.

14 Corporations and Markets Advisory Committee, *Personal Liability for Corporate Fault*, September 2006, p. 1, [www.camac.gov.au/.../Personal\\_Liability\\_for\\_Corporate\\_Fault.pdf](http://www.camac.gov.au/.../Personal_Liability_for_Corporate_Fault.pdf) (accessed 10 October 2012).

---

his/her own misconduct in a corporate context from an individual's criminal liability in consequence of misconduct by a company.

2.12 In raising concerns with the latter context, otherwise termed 'derivative liability', CAMAC noted that the 'usual pattern in these statutes is to hold the individual criminally liable in consequence of the corporate misconduct unless he or she can prove one or more of the defences set out in the legislation'. Derivative liability arises without the need to establish that 'these persons either breached the law through their own misconduct or were accessories to the misconduct of their corporation'.<sup>15</sup> The CAMAC report highlighted concerns with:

...the practice in some statutes of treating directors or other corporate officers as personally liable for misconduct by their company unless they can make out a relevant defence. Provisions of this kind are objectionable in principle and unfairly discriminate against corporate personnel compared with the way in which other people are treated under the law.<sup>16</sup>

2.13 CAMAC held 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>17</sup>

2.14 In highlighting the lack of legislative consistency across the Commonwealth, states and territories, CAMAC stated that the differences in legislative approach and the consequential lack of harmony result in a situation whereby:

Directors and other individuals may be subject to differing standards of responsibility with divergent defences available to them under various statutes that affect the operations of their company in different jurisdictions. This very lack of harmony can impair ready communication of statutory requirements and effective compliance efforts.<sup>18</sup>

2.15 CAMAC recommended a more consistent, principled approach to personal liability across Commonwealth, state and territory jurisdictions. It called for a more standardised approach and considered three models to that end. Recognising that a legislature may see the need to impose on relevant corporate personnel 'a more positive duty of care in regard to corporate conduct that may be derived from ordinary principles of accessory liability', CAMAC identified three criteria for assessing the

---

15 Corporations and Markets Advisory Committee, *Personal Liability for Corporate Fault*, Discussion Paper, May 2005, p. 1.

16 Corporations and Markets Advisory Committee, *Personal Liability for Corporate Fault*, September 2006, p. 8.

17 Corporations and Markets Advisory Committee, *Personal Liability for Corporate Fault*, September 2006, p. 6. Corporations and Markets Advisory Committee, *Personal Liability for Corporate Fault*, September 2006, p. 9.

18 Corporations and Markets Advisory Committee, *Personal Liability for Corporate Fault*, September 2006, p. 6.

elements of any extended personal liability provision—practicality and fairness, suitability and enforceability.<sup>19</sup> The criteria were applied in relation to the following three possible model provisions:

*1. A model provision based on the ALRC's 2002 report*

2.16 This model combines the ALRC recommendations (8-1, 8-2 and 8-4 listed above) in a provision similar to that in the *Environment Protection and Biodiversity Conservation Act 1999* and *Hazardous Waste (Regulation of Exports and Imports) Act 1989* that impose personal liability for corporate fault.

*2. A model provision reflecting the predominant pattern in current state and territory provisions*

2.17 This model was rejected by CAMAC on the grounds that it lacks any personal fault element. CAMAC held that this model places a 'considerable burden on any defendant, who has to prove a defence on the balance of probability'.<sup>20</sup>

The model states that where a corporation contravenes relevant legislation, 'any director or other person who is concerned, or takes part, in the management of the corporation is also liable unless the person proves that he or she:

- was not in a position to influence the relevant conduct, or (if the person cannot prove this defence) that he or she
- exercised all due diligence to prevent the relevant conduct, or
- took all reasonable steps to prevent the relevant conduct.<sup>21</sup>

*3. A model provision based on section 144 of the Victorian Occupational Health and Safety Act 2004*<sup>22</sup>

2.18 While CAMAC saw merit in the provision for setting out factors for a court to take into account in determining a person's guilt in consequence of corporate misconduct, it considered the provision 'too open-ended in the way it ties criminal liability to failure to take reasonable care'.<sup>23</sup>

---

19 Corporations and Markets Advisory Committee, *Personal Liability for Corporate Fault*, September 2006, pp 43–44.

20 Corporations and Markets Advisory Committee, *Personal Liability for Corporate Fault*, September 2006, p. 56.

21 Corporations and Markets Advisory Committee, *Personal Liability for Corporate Fault*, September 2006, p. 54.

22 Corporations and Markets Advisory Committee, *Personal Liability for Corporate Fault*, September 2006, p. 44.

23 Corporations and Markets Advisory Committee, *Personal Liability for Corporate Fault*, September 2006, p. 58.

Where an offence committed by a body corporate is attributable to an officer of the body corporate failing to take reasonable care, that officer is also guilty of an offence.

In determining whether an officer of a body corporate is guilty of an offence, regard must be had to:

- what the officer knew about the matter concerned, and
- the extent of the officer's ability to make, or participate in the making of, decisions that affect the body corporate in relation to the matter concerned, and
- whether the contravention by the body corporate is also attributable to an act or omission of any other person, and
- any other relevant matter.

'Officer' has the same meaning as in s 9 of the Corporations Act.<sup>24</sup>

### *CAMAC recommended model*

Where a corporation contravenes relevant provisions, the prosecution must prove the following physical and fault elements in any action against an individual based on that individual's position in the company in relation to that contravening conduct:

- the individual, by whatever name called, was a director or other officer of the corporation or otherwise took part, or was otherwise concerned, in the management of the corporation, and
- the individual was in a position to influence the conduct of the body corporate in relation to the contravening conduct, and
- the individual knew that, or was reckless or negligent as to whether, the contravening conduct would occur.

It is a defence if the individual took all reasonable steps to prevent the contravening conduct. The individual has an evidential burden to raise that defence, which the prosecution would then have to negate beyond reasonable doubt.<sup>25</sup>

### *Treasury discussion paper (2007)*

2.19 In March 2007, Treasury issued a discussion paper titled the *Review of Sanctions in Corporate Law*. This paper formed the basis for the review of civil and criminal sanctions in the *Corporations Act 2001* and the *Australian Securities and*

---

24 Corporations and Markets Advisory Committee, *Personal Liability for Corporate Fault*, September 2006, p. 56.

25 Corporations and Markets Advisory Committee, *Personal Liability for Corporate Fault*, September 2006, p. 53.

*Investments Commission Act 2001* emanating from the Regulation Taskforce recommendation to review penalties for breaches of directors' duties.<sup>26</sup>

### ***Survey of directors–May 2008***

2.20 Treasury, in conjunction with the Australian Institute of Company Directors (AICD), conducted a survey of 600 directors of S&P/ASX-200 companies to consider the impact of current laws on decision making by directors. The survey provided a sample of the views of Australia's estimated 2.1 million directors.<sup>27</sup> The survey revealed that director liability, and personal liability in particular, had a 'negative affect [sic] on board recruitment, retention and decision-making'. Further, 78 per cent of those surveyed believed that the risk of personal liability had caused them, or the board on which they sat, 'to occasionally or frequently take an overly cautious approach to business decision-making'. Of them, 64 per cent suggested that such an approach had 'inhibited an optimal business decision to a medium to high degree'.<sup>28</sup>

### ***COAG Directors' Liability reform project–November 2008***

2.21 On 29 November 2008, COAG agreed to progress reform of personal criminal liability for corporate fault across Australian law.<sup>29</sup> The matter of directors' personal criminal liability was considered a serious economic concern to the extent that it was included as a reform stream as part of COAG's seamless national economy reforms aimed at promoting competition, boosting productivity, improving labour mobility, and reducing business compliance costs by removing unnecessary or inconsistent regulation.

2.22 Indeed, a survey of its company director members conducted in November 2010 by the AICD found that:

---

26 Treasury, *Review of Sanctions in Corporate Law*, Commonwealth of Australia, 2007, p. vii.

27 Australian Institute of Company Directors, 'Reforms still stuck at the starting line', *The Boardroom Report*, Vol. 10, Issue 2, 8 February 2012, p. 1, <http://www.google.com.au/url?sa=t&rct=j&q=coag%20directors%20liability%20reform%20700%20&source=web&cd=6&ved=0CEAQFjAF&url=http%3A%2F%2Fwww.companydirectors.com.au%2F~%2Fmedia%2F8F6EE3E75B254151BFECB494E4AE1BAE.ashx&ei=SE57UISHBq-XiQfri4DIDw&usg=AFQjCNEpl8fLLLvurDdyp55dLd17V-SjCA> (accessed 15 October 2012).

28 Australian Institute of Company Directors, 'AICD welcomes findings on director liability', *Company Director Magazine*, 1 February 2009, <http://www.companydirectors.com.au/Director-Resource-Centre/Publications/Company-Director-magazine/2000-to-2009-editions/2009/February/Inside-AICD-Director-liability-Feb-09> (accessed 15 October 2012).

29 Laws relating to workplace health and safety and environmental protection were excluded on the basis that they were subject to separate reform processes at the time. Explanatory Memorandum, Personal Liability for Corporate Fault Reform Bill 2012, para 1.3.



- 
- 65 per cent said they felt the risk of personal liability had caused them or a board on which they sit to take an overly cautious approach to business decision-making frequently or occasionally;
  - more than 90 per cent of respondents said that the personal liability of directors had an impact on optimal business decision-making or outcomes. Of these respondents, 42.4 per cent noted that this impact was marginal while 6.7 per cent viewed the impact as severe; and
  - more than 90 per cent of respondents were moderately to seriously concerned about the lost time and opportunity costs for companies defending actions brought as a result of automatic personal liability for directors, and corporate legal expenses that would be incurred.<sup>30</sup>

2.23 The COAG reform initiative commits all jurisdictions to establishing a nationally consistent and principled approach to the imposition of personal liability on directors and other corporate officers for corporate fraud. As part of the reform agenda, COAG endorsed a three-step approach to reforming derivative liability in Australia:

- (a) COAG endorsed principles to guide jurisdictions when imposing personal liability for corporate fault. The principles concern personal liability provisions that hold directors and other corporate officers criminally liable because an offence has been committed by the corporation. Guidelines were also developed to provide greater clarity and consistency in the way the COAG principles would apply.
- (b) All jurisdictions would undertake an audit of their legislation against these principles and recommend amendments to bring them into line with the principles. The outcomes of the respective audits by Commonwealth, states and territories were collectively reviewed to ensure that the principles had been applied appropriately.
- (c) Jurisdictions would commit to implementing the audit outcomes by introducing legislation to make any necessary amendments to their laws by the end of 2012, and to apply the COAG principles when drafting future legislation.<sup>31</sup> COAG had set December 2012 as the deadline by which a legislative plan to implement agreed reforms and legislation would be introduced.<sup>32</sup>

---

30 Australian Institute of Company Directors, *Impact of Legislation on Directors*, November 2010, p. 4, <http://www.companydirectors.com.au/General/Header/Media/Media-Releases/2010/Liability-laws-damaging-the-economy-director-survey-reveals> (accessed 10 October 2012).

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

32 COAG Reform Council, *Seamless National Economy Report on Performance*, Report to the Council of Australian Governments, 23 December 2011, p. 180.

### *COAG principles and guidelines*

2.24 The six principles for the imposition of personal liability for corporate fault were endorsed by the Ministerial Council for Corporations (MINCO) in November 2009 and by COAG a month later. The Commonwealth, states and territories agreed to apply the principles to existing legislation as well as to new legislation. With over 700 different legislative provisions relating to personal criminal liability of directors and corporate officers across the Commonwealth, states and territories, the Assistant Treasurer and Minister Assisting for Deregulation, the Hon. David Bradbury MP stated that application of the principles is expected to:

- reduce, using five of the jurisdictions implementing this reform as an example, the number of underlying offences from 6,700 to 2,400—a reduction of over 60 per cent; and
- [almost] halve the number of Acts which include directors' liability provisions, from 287 to 148.<sup>33</sup>

### *COAG principles*

2.25 The six COAG principles are as follows:

- (a) Where a corporation contravenes a statutory requirement, the corporation should be held liable in the first instance.
- (b) Directors should not be liable for corporate fault as a matter of course or by blanket imposition of liability across an entire Act.
- (c) A 'designated officer' approach to liability is not suitable for general application.
- (d) The imposition of personal criminal liability on a director for the misconduct of a corporation should be confined to situations where:
  - there are compelling public policy reasons for doing so (for example, in terms of the potential for significant public harm that might be caused by the particular corporate offending);
  - liability of the corporation is not likely on its own to sufficiently promote compliance; and
  - it is reasonable in all the circumstances for the director to be liable having regard to factors including:
    - that the obligation on the corporation, and in turn the director, is clear;

---

33 The Hon. David Bradbury MP, Assistant Treasurer and Minister Assisting for Deregulation, 'Benefits and outcomes of the seamless national economic agenda', Regulatory reform conference, 27 September 2012, <http://assistant.treasurer.gov.au/DisplayDocs.aspx?doc=speeches/2012/009.htm&pageID=005&min=djba&Year=&DocType=> (accessed 15 October 2012).

- that the director has the capacity to influence the conduct of the corporation in relation to the offending; and
  - that there are steps that a reasonable director might take to ensure a corporation's compliance with the legislative obligation.
- (e) Where principle 4 is satisfied and directors' liability is appropriate, directors could be liable where they:
- have encouraged or assisted in the commission of the offence; or
  - have been negligent or reckless in relation to the corporation's offending.
- (f) In addition, in some instances, it may be appropriate to put directors to proof that they have taken reasonable steps to prevent the corporation's offending if they are not to be personally liable.

2.26 The Explanatory Memorandum (EM) notes that the reform project aims to 'harmonise the imposition of personal criminal liability for corporate fraud across Australian jurisdiction'. In its 2009-10 performance report, the COAG Reform Council highlighted the following 'significant' risk to the achievement of the output of the reform:

based on a preliminary review of the jurisdiction audits that have been finalised, the council is concerned that the directors' liability principles have been applied in a way that raises significant risks to the achievement of the principles-based approach of this reform.<sup>34</sup>

2.27 Noting that the reform was being pursued to provide greater certainty for companies, their corporate officers and the public as to when a corporate officer may be personally criminally liable because of a company's misconduct, the COAG Reform Council emphasised that the application of a consistent set of principles for the imposition of the liability by the Commonwealth, states and territories should provide more certainty for companies. However, its initial review of the audits indicated that:

jurisdictions have broadly interpreted the threshold principle of 'compelling public policy reasons' to justify the retention of a significant number of different provisions, based on specific jurisdictional priorities and existing legislative schemes. In addition, it seems that, in some instances, this 'public policy' threshold is being considered as the preeminent principle, with less regard to whether—once this threshold has been met—the form of liability imposed is consistent with the other principles.<sup>35</sup>

---

34 COAG Reform Council, *National Partnership Agreement to Deliver a Seamless National Economy: Performance Report for 2009-10*, p. 203, <http://www.coagreformcouncil.gov.au/reports/competition.cfm> (accessed 10 October 2012).

35 COAG Reform Council, *National Partnership Agreement to Deliver a Seamless National Economy: Performance Report for 2009-10*, p. 220.

2.28 In conclusion, the COAG Reform Council stated that it considers:

that it will not be possible to achieve a *nationally consistent* approach to directors' liability if the principles are applied in varying ways by each jurisdiction. It will not be possible to achieve a *principles-based approach* to directors' liability if there are instances where all of the principles are not applied in considering the retention, amendment or repeal of the relevant legislative provisions.<sup>36</sup>

#### *Centro case (June 2011)*

2.29 On 27 June 2011, the final decision in the Centro case provided new impetus for change to directors' liabilities.<sup>37</sup> In the case, the Federal Court found that six non-executive directors of the Centro Group were in breach of their statutory duty of care and diligence under the *Corporations Act 2001*. The case concerned the role and responsibilities of directors in relation to financial reporting. It found that Centro's financial statements failed to properly classify certain interest bearing liabilities as \$1.5 billion of current (short-term) liabilities were classified as non-current (long-term) liabilities and guarantees of US\$1.75 billion of an associate's short-term debt were not disclosed. Similarly, the 2007 accounts of Centro Real Estate failed to disclose \$500 million of short-term liabilities that had been classified as non-current.<sup>38</sup>

2.30 Justice Middleton found that in approving the financial statements, each director failed to take all responsible steps required of them to exercise the care and diligence the law requires of them.<sup>39</sup>

#### *COAG guidelines*

2.31 COAG engaged Corrs Chambers Westgarth to examine the audits conducted by all jurisdictions to ascertain where they accurately applied the COAG principles. In August 2011, Corrs Chambers Westgarth published an independent analysis of the application of COAG's principles by each jurisdiction and found that, among other things, many jurisdictions 'overwhelmingly relied on the Public Policy principle to justify the retention of the provisions reviewed' but that their audits did not explain the

---

36 COAG Reform Council, *National Partnership Agreement to Deliver a Seamless National Economy: Performance Report for 2009–10*, p. 220.

37 ASIC v Healey & Ors [2011] FCA 717 (the Centro case)

38 Bryan Frith, 'Centro ruling reminds directors where their responsibilities lie', *The Australian*, 29 June 2011, <http://www.theaustralian.com.au/business/opinion/centro-ruling-reminds-directors-where-their-responsibilities-lie/story-e6frg9kx-1226083776840> (accessed 15 October 2012).

39 Australian Institute of Company Directors, 'Centro Case Summary. ASIC v Healey & Ors [2011] FCA 717', 27 June 2011; Grant Thornton, 'The Centro case: Where to from here?', [www.granthornton.com.au/Publications/Newsletters/fr\\_1107.asp](http://www.granthornton.com.au/Publications/Newsletters/fr_1107.asp) (accessed 14 October 2012); Group of 100, *The Centro Experience - A wake up call for Directors*, 2012, [www.group100.com.au/.../g100-centro-experience-2012.pdf](http://www.group100.com.au/.../g100-centro-experience-2012.pdf) (accessed 15 October 2012).

public policy reasons relied upon or where they did provide reasons, establish a 'compelling or convincing basis for retaining the provision'.<sup>40</sup> The COAG Reform Council acknowledged the findings of the Corrs Chambers Westgarth report and recommended that COAG utilise the findings to advance the reform process.<sup>41</sup>

2.32 At the request of COAG, its Business Regulation and Competition Working Group (BRCWG) developed a set of supplementary guidelines to assist jurisdictions in auditing their legislation against the COAG principles. On 25 July 2012, COAG agreed to apply these guidelines when drafting future legislation.

2.33 In August 2011, following concerns raised by the COAG Reform Council in its performance reports, the Minister Assisting on Deregulation, Senator the Hon. Nick Sherry announced that all states and territories would be required to re-audit their laws against the COAG principles and the specific guidelines. Thereafter, they would have to amend their laws.<sup>42</sup> New milestones and timeframes were introduced. COAG set the final milestone in the implementation plan to require jurisdictions to develop a 'legislative plan to implement agreed reforms and introduce legislation by December 2012'.<sup>43</sup> However, of the milestone, the Minister stated that:

The final milestone in the Seamless National Economy Implementation Plan will be to introduce legislation by December next year and I'm sure the States and Territories acknowledge that business expects them to have legislation passed by this time.<sup>44</sup>

2.34 Four months later, the COAG Reform Council reiterated its concern that the intended reform may not be achieved:

The council remains concerned that the intended output of this reform—a nationally consistent and principled approach to the imposition of personal

---

40 Corrs Chambers Westgarth, *Analysis of the application of COAG's directors' liability principles*, August 2011, p. 37.

41 COAG Reform Council, *Seamless National Economy: Report on Performance*, Report to the Council of Australian Governments, 23 December 2011, p. 183, <http://www.coagreformcouncil.gov.au/reports/competition.cfm> (accessed 15 October 2012).

42 Senator the Hon. Nick Sherry and the Hon. David Bradbury MP, 'New Way Forward for Directors' Liability Reforms', *Media Release*, 19 August 2011, <http://archive.innovation.gov.au/ministersarchive2011/sherry/MediaReleases/Pages/NEWWAYFORWARDFORDIRECTORSLIABILITYREFORMS.html> (accessed 12 October 2012).

43 Paul McClintock AO, Chairman, COAG Reform Council, 'COAG's reform agenda and the Seamless National Economy', Address at AICD, 2 April 2012, <http://www.coagreformcouncil.gov.au/media/index.cfm#speeches> (accessed 15 October 2012).

44 Senator the Hon. Nick Sherry and the Hon. David Bradbury MP, 'New Way Forward for Directors' Liability Reforms', *Media Release*, 19 August 2011.

criminal liability of directors or other corporate officers for corporate fault—is at risk of not being achieved.<sup>45</sup>

### ***BRCWG collective review of audit reports—March 2012***

2.35 In March 2012, a sub-committee of the BRCWG was formed which initiated a collective review of individual audit reports to ensure that all jurisdictions had applied the COAG principles and guidelines consistently. In June 2012, the final outcomes of the audits and collective review were reported to the BRCWG. The Treasury, which was part of the discussions for the Commonwealth, noted that the collective review had identified a number of areas where consensus between jurisdictions was required:

For example, the Principles contemplate that personal criminal liability for corporate fault may be appropriate in circumstances where an offence has the potential to cause serious public harm. A general consensus was reached as to the types of serious public harms for which the imposition of personal liability was justified. This consensus ensures that, after all jurisdictions amend their legislation to bring them into alignment with the Principles and Guidelines, personal criminal liability for corporate fault will only be imposed where an offence risks a serious public harm occurring, and will be imposed consistently across jurisdictions.<sup>46</sup>

2.36 Similarly, consensus was reached in relation to the provision that a defendant would only be subjected to a burden of proof where justified under the COAG principles and guidelines. Furthermore, where there were areas of thematic overlap across jurisdictions such as laws that provide protection for vulnerable persons, 'subsequent discussions between jurisdictions ensured that the material differences between the ways in which jurisdictions had approached the auditing process or had interpreted the Principles or Guidelines were largely resolved'.<sup>47</sup> Nevertheless, Treasury noted that:

This does not mean that provisions that impose personal criminal liability for corporate fault will necessarily be identical across jurisdictions. Variations in the drafting of provisions that impose such liability may remain both within and between jurisdictions. However, the passage of this Bill, in conjunction with the passage of similar Bills in the States and Territories pursuant to the reform of directors' liability under the SNE NP, should ensure that across Australia, personal criminal liability for corporate fault is imposed in accordance with the COAG Principles and Guidelines and in a manner consistent with the principles of good corporate governance and criminal law.<sup>48</sup>

---

45 COAG Reform Council, *Seamless National Economy: Report on Performance*, Report to the Council of Australian Governments, 23 December 2011, p. 186.

46 Department of Treasury, *Submission 4*, p. 4.

47 Department of Treasury, *Submission 4*, p. 4.

48 Department of Treasury, *Submission 4*, p. 4.

### *Implementation across the states and territories*

2.37 In June 2012, all jurisdictions 'indicated that they will seek to introduce an omnibus Bill to implement all or most of the audit outcomes by December 2012'.<sup>49</sup>

2.38 According to the COAG Reform Council, there are over 700 state and territory laws imposing personal liability on the 2.1 million Australian company directors.<sup>50</sup> In 2010, the AICD reported that Western Australia had the highest number of laws imposing personal liability on directors with 139 followed by NSW with 134 and Queensland with 106.<sup>51</sup>

2.39 On 31 July 2012, the NSW government released a Memorandum formally adopting the COAG guidelines as NSW policy and announced that it would implement the outcomes of its audit of existing NSW Acts against the guidelines by the end of 2012.<sup>52</sup> The proposed amendments add to reforms already implemented by the NSW government in 2001 in the *Miscellaneous Acts Amendment (Directors' Liability) Act 2011*. The reforms are expected to reduce the number of NSW offences to which directors' liability provisions apply from over 1000 to less than 150.<sup>53</sup>

2.40 NSW was the second jurisdiction to take steps to implement the directors' liability reforms after the ACT.<sup>54</sup>

2.41 In Queensland, Premier the Hon. Campbell Newman stated that there are over 3800 offences for which a director can be held personally liable for acts undertaken by their company with or without their knowledge. Premier Newman noted that the reforms being considered 'will mean a director will only be personally liable if they

---

49 Department of Treasury, *Submission 4*, p. 3.

50 Paul McClintock AO, Chairman, COAG Reform Council, 'COAG's reform agenda and the Seamless National Economy', Address at AICD, 2 April 2012, <http://www.coagreformcouncil.gov.au/media/index.cfm#speeches> (accessed 15 October 2012).

51 Australian Institute of Company Directors, 'States fail to reform test again says directors', *Media Release*, 6 December 2010, <http://www.companymen.com.au/General/Header/Media/Media-Releases/2010/States-fail-the-reform-test-again-say-directors> (accessed 15 October 2012).

52 The Hon. Barry O'Farrell MP, 'M2012-09 Directors' Liability Reform', *Announcement*, 31 July 2012, [http://www.dpc.nsw.gov.au/announcements/ministerial\\_memoranda/2012/m2012-09\\_directors\\_liability\\_reform](http://www.dpc.nsw.gov.au/announcements/ministerial_memoranda/2012/m2012-09_directors_liability_reform) (accessed 15 October 2012).

53 The Hon. Barry O'Farrell MP, 'M2012-09 Directors' Liability Reform', *Announcement*, 31 July 2012.

54 Michaela Whitbourne and Mark Skulley, 'NSW backs COAG reforms', *Australian Financial Review*, 5 May 2011, p. 7, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F741069%22> (accessed 15 October 2012).

encourage or assist in the commission of an offence or they have been negligent regarding its commission'.<sup>55</sup> The Premier highlighted that the reforms would reduce the number of offences for which a director can be held personally liable would be cut by half.<sup>56</sup> Queensland Attorney-General, the Hon. Jarrod Bleijie announced that legislation addressing company directors liabilities would be introduced before the end of the year.<sup>57</sup> He highlighted that '[C]onsistency of approach to directors' liability across Australia is paramount'.<sup>58</sup>

### ***Exposure drafts of the bill***

2.42 As part of the Commonwealth's fulfilment of its obligations to the COAG reform agenda, Treasury released three exposure drafts of the Personal Liability for Corporate Fraud Reform Bill 2011 (the bill being examined by this report) in January, June and August 2012 and engaged in a consultation from 27 January 2012 to 3 September 2012.

2.43 The bill includes many of the provisions originally contained in the exposure drafts and is largely an amalgamation of the three exposure draft bills. Treasury noted the following in relation to the consultation process:

The Commonwealth Treasury carefully considered the matters raised in the consultation process before advising the Government. Furthermore, the development of Commonwealth's revised audit outcomes and the Bill also had regard to the CRC Report and the analysis it commissioned from Corrs Chambers Westgarth on the application of the COAG Principles by each jurisdiction in relation to an initial audit of all Australian legislation.<sup>59</sup>

- 
- 55 The Hon. Campbell Newman, Premier, Keynote Speech – AICD & UQ Business School Leader's Edge Luncheon, *Media Statement*, 25 September 2012, <http://statements.qld.gov.au/Statement/2012/9/25/keynote-speech--aicd--uq-business-school-leaders-edge-luncheon> (accessed 15 October 2012).
- 56 The Hon. Campbell Newman, Premier, Keynote Speech – AICD & UQ Business School Leader's Edge Luncheon, *Media Statement*, 25 September 2012.
- 57 The Hon. Campbell Newman, Premier and the Hon. Jarrod Bleijie, Attorney-General, 'Company director reforms a boost for business', *Joint statement*, 25 September 2012, <http://statements.qld.gov.au/Statement/2012/9/25/company-director-reforms-a-boost-for-business> (accessed 15 October 2012).
- 58 The Hon Jarrod Bleijie, Attorney-General, 'Government commits to red-tape reductions and reforms', *Media Statement*, 7 September 2012, <http://statements.qld.gov.au/Statement/Id/80432> (accessed 15 October 2012).
- 59 Department of the Treasury, *Submission 4*, p. 6.



## 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.

---

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.

---

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.

---

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

---

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

---

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*.

---

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.



# Chapter 4

## Concerns raised in evidence

4.1 All witnesses that gave evidence to the inquiry voiced their support for reform to corporate liability laws.<sup>1</sup> Some witnesses highlighted the fact that they had campaigned for reform to directors' liability for some years.<sup>2</sup> However, concerns were raised about specific provisions in the bill, the Council of Australian Governments (COAG) principles that underpin the reform and whether application of the principles across Commonwealth, state and territory legislation would result in harmonisation.<sup>3</sup> This chapter examines these concerns.

### Support for the reform

4.2 By implementing the COAG directors' liability reform, the bill was recognised by witnesses as removing a barrier which has distracted corporate officers from core business and negatively impacted productivity and the economic performance of their companies. Mr Bruce Cowley of the Law Council of Australia stated that the reform will 'help to reduce red tape, remove uncertainty, and to an extent, provide more uniformity'.<sup>4</sup> Professor Robert Baxt of the Law Council of Australia held that the existence of different regulatory regimes across the Commonwealth, states and territories costs the Australian economy an estimated \$16 billion a year.<sup>5</sup> Mr Peter Abraham, a member of Chartered Secretaries Australia (CSA) provided the committee with a director's perspective on the reform:

After 14 years as company secretary of ASX top-20 companies with 10,000 employees and 350 sites across Australia—and much of that time in a dual role of general counsel—it is a relief to me to see that attempts are being made to rationalise the circumstances in which directors and other officers

---

1 Australian Institute of Company Directors, *Submission 1*; Chartered Secretaries Australia, *Submission 2*, p. 1; Confidential, *Submission 3*; Mr Bruce Cowley, Law Council of Australia, *Committee Hansard*, 22 October 2012, p. 1.

2 Mr Bruce Cowley of the Australian Law Council informed the committee that the Law Council of Australia had 'been campaigning for reform in the area for many years'. *Committee Hansard*, 22 October 2012, p. 1. Similarly, Ms Judith Fox of CSA stated that CSA had 'participated since 2005 in consultations on proposed reformed personal liability for corporate fault, noting our reservations with derivate liability at every stage'. *Committee Hansard*, 22 October 2012, p. 9.

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

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

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

can be found liable for criminal offences as a result of conduct by their employers.<sup>6</sup>

4.3 To emphasise the need for personal liability reform, Mr Cowley of the Law Council of Australia provided an overview of the current legislative landscape from the viewpoint of the director community:

Within each state and territory there are quite often over 100 laws which impose personal liability on directors, and within each state there are different ways in which they have drafted those laws. There is no uniformity or consistency about how they have gone about drafting the laws, and every state has its own unique drafting style as well. So what we have found is this complete mishmash of laws across Australia—over 700 laws—which make directors personally liable for offences committed by companies, and in many, many cases reversing the onus of proof. So, you can understand as a company director, even if you are just carrying on business within one state it is hard enough to keep on top of what all those laws require of you, but where you have over 700 laws all potentially applying to you, if you are a director of a company which carries on business across the whole country, it can be something of a nightmare.<sup>7</sup>

### **Severity of proposed civil penalties**

4.4 Specific concerns were raised by the Australian Institute of Company Directors (AICD) in relation to the civil penalties imposed by the bill. The AICD held that any benefit gained by changing the potential liability of individuals from criminal liability to civil liability as proposed in the bill—including to section 188 of the *Corporations Act 2001* and section 265-40 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*—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'.<sup>8</sup> Noting that the civil penalty of \$3,000 'far exceeds' the fine for the current criminal offence of \$550,<sup>9</sup> the AICD held that:

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.<sup>10</sup>

---

6 Mr Peter Abraham, Chartered Secretaries Australia, *Committee Hansard*, 22 October 2012, p. 10.

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

8 Australian Institute of Company Directors, *Submission 1*, Attachment 1, p. 10 and Attachment 2, p. 2.

9 Australian Institute of Company Directors, *Submission 1*, Attachment 1, p. 26.

10 Australian Institute of Company Directors, *Submission 1*, Attachment 1, p. 10.



4.5 However, Chartered Secretaries Australia (CSA) supported the amendment to section 188, emphasising that the significant increase in the severity of the penalties for breach of the provision has provided for 'relief from criminal liability'.<sup>11</sup>

4.6 Mr Yisheng Ho from Treasury explained that the more significant civil penalty was imposed to ensure that an adequate deterrence mechanism was maintained. While the reform process is aimed at removing unjust personal criminal liability and providing for a robust regulatory regime in relation to criminal penalties, the types of offence under consideration including section 188 of the Corporations Act 'did not justify a criminal penalty'. At the same time, however, the types of offences covered by these provision need to be prevented so the 'middle ground' was to provide for a larger civil penalty. Mr Ho explained that this approach enables retention of the deterrence effect while removing the criminal nature of the offence.<sup>12</sup>

### **Retention of reverse onus of proof**

4.7 The Law Council of Australia, CSA and the AICD were concerned with the retention of section 8Y of the *Taxation Administration Act 1953* in relation to the onus of proof which rests with the director. The AICD stated:

The effect of section 8Y of the Taxation Administration Act is that if a corporation commits a taxation offence, a director of the corporation *will be deemed to be guilty* of the same offence. In other words, the provision reverses the fundamental legal principle that a person is innocent until proven guilty.<sup>13</sup>

4.8 Similarly, Professor Baxt of the Law Council of Australia held that 'there is absolutely no justification at all' for the 'presumption of innocence which is so essentially part and parcel of our law to be resiled from in this fashion'.<sup>14</sup> Mr Cowley of the Law Council of Australia argued that the assumption behind the origins of the reversal of onus of proof is that 'all directors were the guiding hands of everything that happened in every company' but that:

when you have a small company that is basically mum and dad, with them being the two directors and the shareholders and the key employees as well, then you can see a logic in that. But as soon as you get any bigger than that—as soon as a company is a larger size—there are people within the organisation who can commit offences that are totally unknown to the directors.<sup>15</sup>

---

11 Chartered Secretaries Australia, *Submission 2*, p. 2.

12 Mr Yisheng Ho, Department of the Treasury, *Committee Hansard*, 22 October 2012, pp 15-16.

13 Australian Institute of Company Directors, *Submission 1*, Attachment 3, p. 2.

14 Professor Robert Baxt, Law Council of Australia, *Committee Hansard*, 22 October 2012, p. 3.

15 Mr Bruce Cowley, Law Council of Australia, *Committee Hansard*, 22 October 2012, p. 5.

4.9 Recognising that there are 'relatively few Commonwealth laws' which reverse the onus of proof, the Law Council of Australia argued in favour of the bill removing the reversal of the onus of proof in section 8Y because 'if the Commonwealth is prepared to make exceptions that makes it easier for the states to make exceptions as well'.<sup>16</sup>

4.10 CSA challenged the argument for retaining the provision as expressed in the EM, which is that the Australian Taxation Office (ATO) relies on the section to 'prosecute directors who repeatedly and seriously neglect their company's tax obligations'.<sup>17</sup> It stated a 'strong view' that if the legislation is aimed at repeated and serious neglect, then a 'reversal of the burden of proof on the whole pool of directors, rather than just the very small minority, is clearly inappropriate'. Furthermore, to prove such behaviour, the ATO should have 'amassed sufficient evidence to show that the directors in question were culpable in the commission of the taxation offences of their corporations'.<sup>18</sup>

4.11 The AICD held that the effectiveness of the proposed amendments to section 444-15 of Schedule 1 to the Taxation Administration Act, paragraph 252(1)(j) of the *Income Tax Assessment Act 1936* and subsection 57(7) of the *Superannuation Guarantee (Administration) Act 1993* are undermined by the retention of section 8Y of the Taxation Administration Act.<sup>19</sup> The AICD recommended as an alternative that section 8Y be amended to become an accessorial liability provision which requires the prosecution to prove a director's involvement as an accessory to the corporation's taxation offence.<sup>20</sup> Similarly, CSA argued in favour of accessorial liability as appropriate and would 'relieve the great majority of directors who do not commit or aid and abet taxation offences from the threat of serious criminal prosecution where they are presumed to be guilty'.<sup>21</sup>

4.12 However, in an explanatory document released with the third tranche of the exposure draft of the bill, Treasury held that the section effectively operates as an accessorial liability provision:

Section 8Y provides a defence to directors who can show, on the balance of probabilities, that they were not involved in the company's offending. As such, section 8Y operates, in substance, as an accessorial liability provision. It would not be feasible to shift the burden and require the prosecution to

---

16 Mr Bruce Cowley, Law Council of Australia, *Committee Hansard*, 22 October 2012, pp 2–3.

17 Explanatory Memorandum, Personal Liability for Corporate Fault Reform Bill 2012

18 Chartered Secretaries Australia, *Submission 2*, p. 2.

19 Australian Institute of Company Directors, *Submission 1*, Attachment 3, p. 2.

20 Australian Institute of Company Directors, *Submission 1*, Attachment 3, p. 2.

21 Chartered Secretaries Australia, *Submission 2*, p. 2.

---

prove a director's involvement in the company's offence, especially as such information could be peculiarly within the knowledge of the director.<sup>22</sup>

4.13 Treasury further held that a director would be in a 'significantly better position to be able to adduce evidence that shows they were not involved in the company's offence rather than explicitly require the prosecution to establish their involvement'. Moreover, the ATO is reliant upon section 8Y to prosecute directors who 'repeatedly and serious neglect their company's tax obligations'. However:

In this context, the ATO does not prosecute directors in relation to offences committed by companies as a matter of course. The ATO's public position on prosecutions (as set out in ATO Practice Statement Fraud Control and the Prosecution Process) notes that the ATO has a range of compliance strategies available, such as the imposition of administrative penalties and the initiation of civil recovery processes, as alternatives to prosecutions.<sup>23</sup>

4.14 Mr Peter McCray from the Department of Finance and Deregulation explained to the committee that during negotiations between jurisdictions regarding the application of the COAG principles, there was a strongly held view that the three provisions—type 1, type 2 and type 3, which reverses the onus of proof—should be retained to provide for greater flexibility. However, the underlying assumption which underpins the guidelines is that type 1 provisions would be the default and type 2 and type 3 the exceptions.<sup>24</sup>

4.15 Treasury explained that section 8Y had not been amended because the ability to demonstrate that a director was not involved in the offence is 'something that is peculiarly within the knowledge of the director'. Furthermore, it would be 'quite easy for a defendant to show in these circumstances' whereas in converting the offence into an accessorial provision 'there would be a significant increase in the administration costs and in the practicalities of administering the section'.<sup>25</sup>

4.16 Treasury also noted that the retention of section 8Y is an 'important part of maintaining the public's confidence in the tax system'. Mr Bruce Paine explained the policy position more broadly:

---

22 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).

23 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).

24 Mr Peter McCray, Department of Finance and Deregulation, *Committee Hansard*, 22 October 2012, p. 15.

25 Mr Yisheng Ho, Department of the Treasury, *Committee Hansard*, 22 October 2012, p. 16.

Essentially, we are talking about fairness and equity between taxpayers. Another factor is avoiding excessive administration costs by the ATO if they had to prove things that are really within the power of directors to know. Part of fairness and equity is that it avoids higher taxes elsewhere, assuming parliaments are not going to reduce expenditure beyond what it is otherwise. If higher taxes had to be imposed elsewhere we think there are good arguments that it would distort the economy and impede economic growth to something lower than what it would otherwise be.<sup>26</sup>

### **Retention of derivative liability provisions—'principle 4'**

4.17 The AICD acknowledged the policy rationale for removing provisions imposing criminal liability from individual directors while increasing the penalties for companies in respect of the same offence. It recognised that 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'. However, the AICD claimed that it does not:

- reduce the number of onerous criminal liability provisions facing directors;
- improve or fix the underlying economic problem the reforms were designed to rectify;
- provide any incentive for directors to focus on corporate performance rather than on legislative conformance; or
- contribute to business investment, productivity, job creation or economic growth.<sup>27</sup>

4.18 COAG's principle 4 provides for the imposition of personal criminal liability on a director for company misconduct but specifies that there must be 'compelling public policy reasons for doing so'. The AICD was particularly concerned about principle 4 which it argued allowed criminal liability for corporate fault based on a 'wide interpretation of compelling public policy reasons'.<sup>28</sup> Furthermore, the AICD rejected provisions in the bill on the basis that they do not meet all the criteria of COAG principle 4 and upheld the view that section 19G of the *National Measurement Act 1960* and subsections 93D(6) and (7) and 93E(6) and (7) of the *Veterans' Entitlements Act 1986* should be repealed for this reason.<sup>29</sup> Similarly, the AICD supported the repeal of section 76A of the *Insurance Contracts Act 1984* under the bill but objected to the proposed insertion of section 11DA on the basis that it does not meet all the criteria of COAG principle 4:

---

26 Mr Bruce Paine, Department of the Treasury, *Committee Hansard*, 22 October 2012, p. 16.

27 Australian Institute of Company Directors, *Submission 1*, Attachment 2, p. 2.

28 Australian Institute of Company Directors, *Submission 1*, Attachment 1, p. 4.

29 Australian Institute of Company Directors, *Submission 1*, Attachment 2, pp 17 and 21.

---

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.<sup>30</sup>

4.19 CSA also voiced opposition to derivative liability in relation to directors. It noted that it was 'particularly unjust where the breach is caused by conduct outside of their control and they made reasonable efforts to ensure that appropriate compliance systems and processes were in place'. Moreover, CSA observed that derivative liability provisions often require directors to prove their innocence, which is a reverse of the burden of proof. As Ms Judith Fox told the committee: '[t]his can be the case even where civil liability rather than criminal liability is imposed on directors and other officers'.<sup>31</sup>

4.20 CSA did acknowledge that derivative liability provisions are justified in certain cases. As Mr Abraham explained:

If directors have been negligent in ensuring that they have appropriate policies in place in corporations or if they have encouraged management within the organisation to cut corners or breach laws or whatever, without a doubt we are not trying to protect directors in those circumstances. If they have been reckless in how the company is operating or even worse, they have aided and abetted, then, clearly, they ought to be liable. But certainly that is going to be a minority.<sup>32</sup>

4.21 Mr Abraham argued that the compelling public policy reasons 'exception was being interpreted very liberally to avoid amending personal liability provisions'.<sup>33</sup> Mr Cowley of the Law Council of Australia held the view that the COAG principles 'do leave a bit of a door open in the sense that the states can form a view about the piece of legislation that it is so fundamental that the reversal of the onus of proof ought to remain'.<sup>34</sup> Similarly, the AICD expressed the view that the COAG principles were a disappointment and exceptions in the principles 'provided a woolly 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>35</sup>

---

30 Australian Institute of Company Directors, *Submission 1*, Attachment 1, p. 31.

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

32 Mr Peter Abraham, Chartered Secretaries Australia, *Committee Hansard*, 22 October 2012, p. 12.

33 Mr Peter Abraham, Chartered Secretaries Australia, *Committee Hansard*, 22 October 2012, p. 10.

34 Mr Bruce Cowley, Law Council of Australia, *Committee Hansard*, 22 October 2012, p. 4.

35 Australian Institute of Company Directors, *Submission 1*, Attachment 1, p. 4.

4.22 The bill and wider program of reform seeks to remove regulatory burdens on directors and corporate officers that cannot be justified on public policy grounds and to achieve a more harmonised approach across all Australian jurisdictions on the imposition of criminal liability. In this regard, COAG principle 4 sets out specific justifications for the imposition of criminal liability while the bill amends provisions in Commonwealth laws to ensure that where the legislation imposes derivative liability, it is 'fair and principled, and is not imposed as a matter of course'.<sup>36</sup> Mr McCray from the Department of Finance and Deregulation explained to the committee the process in relation to the broader question of the circumstances in which personal criminal liability might apply:

The broad framing is that there is a compelling public policy reason for personal criminal liability to apply and there are guidelines which are now public documents. These guidelines were prepared within BRCWG to guide decision-making in this area. The guidelines provided quite a range of concrete examples of the risk of significant public harm that might apply and might justify the imposition of personal criminal liability.

If you think of that as the first gate that a policy judgement needs to get through before you come to the question of type 1, type 2 or type 3, you have already got quite a rigorous test to establish whether personal criminal liability might apply.

Is there a compelling public policy reason based upon risk of significant public harm? If the answer is yes, then you turn to the question of type 1, type 2 and type 3 provisions.<sup>37</sup>

4.23 The NSW Department of Premier and Cabinet told the committee that following the state's reforms, the only provisions in NSW legislation for which type 3 liability will remain is in environmental legislation. As Mr Paul Miller explained:

The types of provisions in the core environmental legislation are things like running a chemical plant without a licence to do so. Essentially, the provision says that if a corporation runs a chemical plant without a licence to do so then the directors will be liable like the company is liable, unless they can prove that they took reasonable steps to ensure that the company got a licence or that it was not operating a chemical plant.<sup>38</sup>

---

36 Exposure Draft, Personal Liability for Corporate Fault Reform Bill 2012, First tranche, 27 January 2012, <http://archive.treasury.gov.au/contentitem.asp?ContentID=2300> (accessed 24 October 2012).

37 Mr Peter McCray, Department of Finance and Deregulation, *Committee Hansard*, 22 October 2012, p. 15.

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

## A model provision?

4.24 Chapter 2 noted CAMAC's consideration in its 2006 report of three possible model provisions as options to standardise the approach to personal liability across Commonwealth, state and territory jurisdictions.<sup>39</sup> CAMAC recommended a modified version of a model proposed by the Australian Law Reform Council.<sup>40</sup>

4.25 The AICD, CSA and the Law Council of Australia supported the introduction of a model provision such as that recommended by CAMAC and the AICD.<sup>41</sup> CSA held that the CAMAC model provision 'requires proof that an individual was in a position to influence the outcome and it puts the burden of proof on the prosecution, not the defence'.<sup>42</sup> Further, Ms Fox of CSA argued that a model provision would ensure harmonisation across legislation in all jurisdictions and urged the committee to recommend to COAG that it should embark on a second stage of reform to develop and agree on a model provision that could be applied nationwide.<sup>43</sup> Mr Abraham of CSA further clarified that a standard provision such as that proposed by the AICD could be applied to all legislation imposing criminal liability and that:

Unless we achieve a concrete and tangible commitment for all Australian jurisdictions to lock in the principles that apply to the imposition of derivative liability for directors and officers, the complexity, inconsistency and lack of understanding about how to effect compliance will be further entrenched in our own patchwork legislative landscape.<sup>44</sup>

4.26 However, Treasury representatives informed the committee that the question of a single provision by way of a model law was 'looked at very substantively during the course of designing this reform'. Mr McCray of the Department of Finance and Deregulation explained that technical policy advice provided by the Parliamentary Counsel's Committee made it clear that it was 'not feasible to develop a model provision' that could achieve the degree of uniformity expected by CSA and other stakeholders. Mr McCray explained that:

---

39 Corporations and Markets Advisory Committee, *Personal Liability for corporate fault*, September 2006, [http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2006/\\$file/Personal\\_Liability\\_for\\_Corporate\\_Fault.pdf](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2006/$file/Personal_Liability_for_Corporate_Fault.pdf) (accessed 22 October 2012).

40 Corporations and Markets Advisory Committee, *Personal Liability for corporate fault*, September 2006, p. 53.

41 Australian Institute of Company Directors, *Submission 1, Attachment 1* (correspondence to Treasury dated 28 June 2012), p. 8.

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

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

44 Mr Peter Abraham, Chartered Secretaries Australia, *Committee Hansard*, 22 October 2012, pp 10–11.

This was essentially because of the nature in which the criminal law is captured in legislation. The law varies quite considerably across jurisdictions—in other words, jurisdictions coming to deal with reforms to personal criminal liability start from a different place and there are different starting points, so a model law would not achieve consistency. A model law, even if it were workable in practice, would take you away from consistency because of the different starting points.<sup>45</sup>

4.27 As a model provision would not achieve national consistency, an alternative approach by way of the application of principles and guidelines was pursued to achieve national consistency.

### **Harmonisation**

4.28 In evidence to the committee, Mr Paul Miller of the New South Wales Department of Premier and Cabinet argued that complete harmonisation in the application of personal liability provisions throughout the all jurisdictions is not possible. As a representative on the BRCWG and chair of the BRCWG sub-committee, Mr Miller noted that the approach of the working group was to achieve 'consistency by ensuring that there is consistency in the underlying approach that is taken'. Mr Miller told the committee:

So if a consistent principle is applied, the outcomes will be consistent even if there are differences because of the differences in the underlying offence or the difference in the regulatory regimes that apply. To answer your question directly, I do not think it is possible to achieve consistency in this area of law alone. I think you would need to try to harmonise the entire regulatory regime in order to do that and in my view the approach which has been taken to focus on principles and to achieve consistency through principles is the best way to get as much consistency as you can achieve in the absence of a uniform national law in a particular area.<sup>46</sup>

4.29 In terms of applying these 'consistent principles', Mr Miller drew the committee's attention to the importance of the negotiations at the centre of government through the BRCWG, rather than leaving the reforms to the portfolio agencies.<sup>47</sup> In his evidence to the committee, Mr Miller described the process through which the BRCWG was able to lead the process of reauditing state legislation to ensure compliance with the COAG principles:

...we started at the highest level and we worked our way down. We looked at the broad numbers and looked at whether, in terms of the reduction in

---

45 Mr Peter McCray, Department of Finance and Deregulation, *Committee Hansard*, 22 October 2012, p. 14.

46 Mr Paul Miller, NSW Department of Premier and Cabinet, *Committee Hansard*, 22 October 2012, p. 23.

47 Mr Paul Miller, NSW Department of Premier and Cabinet, *Committee Hansard*, 22 October 2012, p. 24.



directors liability provisions, we were sort of coming out at the same area. It was quite a useful process in the sense that there were some jurisdictions that were outliers, where their numbers did not show that they had applied to the guidelines as rigorously as others, and that of itself led those jurisdictions to go back and reconsider their results. That was the first part of the process.

The second part was then to try to break down by portfolio area whether there was a consensus about the types of provisions that might justify a directors liability provision and the types that clearly do not. In portfolio areas where only one jurisdiction, for example, was seeking to apply directors liability, we could essentially query that jurisdiction and say: 'Well, none of us think that it's necessary, so why, applying the guidelines, do you think it's necessary in that area?'

In terms of the next level down, we focused on some particular areas where there was consistency in the underlying offence but no consistency in the directors liability provisions. For example, all the states have legislation dealing with censorship and child protection provisions; so, in those areas where there was a disparity, it was easy to recognise the disparity and to talk through where we should land on that. Similarly, with some of the taxation legislation where we have provisions about protecting the state's revenue by making people pay their taxes, there was originally some disparity there about whether directors liability should apply.

That process took about three to four months. By June, we were able to report back to the BRCWG that, in our view, all of the jurisdictions had genuinely and, I can say, in very good faith undertaken a rigorous assessment, consistent with the guidelines. That was essentially the report that the BRCWG then adopted and provided to COAG.<sup>48</sup>

4.30 Treasury emphasised that the reform process in general, and the bill specifically, 'does not envisage a one-size-fits all approach to directors' liability'. As Mr Paine explained:

The guidelines envisage personal liability provisions which differ according to factors such as the availability of defences, the burden of proof and the level of involvement by director before liability is triggered. These factors reflect the policy decisions that may be made from time to time on the degree of involvement directors are expected to have in the actions of a company and the care that directors are expected to take in ensuring that their company complies with the law. Because of this there will always be a number of different provisions that impose personal liability for corporate fault.<sup>49</sup>

---

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

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

4.31 Mr Paine further noted that extensive discussions were conducted at officer level across all jurisdictions to ensure a 'degree of consistency' in the imposition of personal liability across Australia and 'consistency of approach across jurisdictions'. Of this process, he emphasised that:

For example, all jurisdictions collectively reviewed their audits to identify any inconsistency and all jurisdictions reached consensus on the types of harm that justified the imposition of personal liability. That process does not guarantee identical legislation across all jurisdictions. However, with the passage of this bill and similar reforms being progressed by states and territories under the national partnership agreement, there will be improved consistency in the imposition of criminal liability for directors and corporate officers in the case of corporate fault.<sup>50</sup>

4.32 Moreover, Treasury emphasised that the passage of the bill in conjunction with the passage of similar bills across other jurisdictions should ensure that personal criminal liability for corporate fault is imposed in accordance with the COAG principles and guidelines and in a manner 'consistent with the principles of good corporate governance and criminal law'.<sup>51</sup>

4.33 The committee believes that the arguments put by Treasury and the NSW Government counter criticism that the reform process has failed to harmonise personal liability provisions across jurisdictions. Mr Cowley of the Law Council of Australia argued that while the reform process was likely to result in the removal of many laws at federal and state level which reverse the onus of proof, 'one outcome that seemed unlikely to be achieved is uniformity of the laws across the country'. He continued:

The Commonwealth and each of the states which have so far embarked on the reform process have all gone their own way. They have all developed their own new laws to take away the reversal of the onus of proof, but the laws are all being developed in different models by the Commonwealth and each of the relevant states. I fear that we have lost an opportunity to bring all the laws into line because, as I said, we have this complete mishmash of laws across the country.<sup>52</sup>

4.34 Similarly, the AICD claimed in its submission that harmonisation of director liability provisions across Commonwealth, state and territory legislation was unlikely because the 'liability provisions included in the Commonwealth legislation are different to those adopted by States which have passed legislation pursuant to these reforms (including NSW and South Australia)'.<sup>53</sup> CSA argued that the reform process was missing 'any attempt to establish a nationally consistent approach such as would be effected by the use of a model provision that would ensure harmonisation of

---

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

51 Department of Treasury, *Submission 4*, p. 4.

52 Mr Bruce Cowley, Law Council of Australia, *Committee Hansard*, 22 October 2012, p. 3.

53 Australian Institute of Company Directors, *Submission 1*, Attachment 2, p. 2.

provisions imposing personal liability on directors and corporate officers for corporate fault'.<sup>54</sup>

---

54 Chartered Secretaries Australia, *Submission 2*, p. 3.



# 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.<sup>1</sup>

### 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.<sup>2</sup>

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.<sup>3</sup>

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'.<sup>4</sup>

### **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.<sup>5</sup>

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'.<sup>6</sup> 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.<sup>7</sup> Likewise, CSA supported the bill but had some reservations 'about its lack of reach in some instances'.<sup>8</sup>

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.<sup>9</sup>

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.<sup>10</sup>

---

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**



# **Appendix 1**

## **Submissions received**

- 1 Australian Institute of Company Directors
- 2 Chartered Secretaries Australia Ltd
- 3 Confidential
- 4 The Treasury



# **Appendix 2**

## **Public Hearing**

**Monday 22 October 2012**

### **Witnesses**

#### **Law Council of Australia Ltd**

Mr Bruce Cowley, Deputy Chairman, Corporations Committee, Business Law Section  
Professor Robert Baxt AO, Business Law Section Executive Member and Member,  
Corporations Committee

#### **Chartered Secretaries Australia Ltd**

Ms Judith Fox, Director, Policy  
Mr Peter Abraham, Member

#### **The Treasury**

Mr Yisheng Ho, Analyst  
Mr Bruce Paine, Principal Adviser

#### **Department of Finance and Deregulation**

Mr Peter McCray, First Assistant Secretary, Deregulation Policy Division

#### **New South Wales Government**

Mr Paul Miller, General Counsel, NSW Department of Premier and Cabinet

