

Dear Mr Hawkins

I am writing to you, in a personal capacity, to express my concern to the Senate Standing Committee on Economics (**the Committee**) about certain provisions in the *Carbon Pollution Reduction Scheme Bill (the Bill)*. Whilst I will not comment on the technical aspects of the Bill, I am particularly concerned at the approach adopted in the drafting of certain provisions in Part 20 of the Bill dealing with the liability of executive officers of bodies corporate.

The continued reliance by Governments in legislation on provisions which either reverse the onus of proof, or impose liability on corporate officers (often widely defined) in relation to corporate non-compliance with legislation, is very troubling. As the Corporations and Markets Advisory Committee (**CAMAC**) noted in its report *Personal Liability for Corporate Fault* (September 2006), this policy which has become endemic in legislation at all levels of Australian Governments is a policy that cannot be supported. That report has now been referred to the Council of Australian Governments, but pending its decision, I believe all Governments should embrace the CAMAC recommendation.

Let me quote from the Summary of Recommendations from that CAMAC report, which I believe should become part of the instructions issued to Parliamentary Counsel involved in drafting legislation of any kind in this country. The common law rule that a person is innocent until proven guilty is one that should not be lightly abandoned by this country. Regrettably it has been ignored in far too many pieces of legislation. The Bill currently being considered by your Committee is another example of a failure to take into account this rule.

“1.5.1 The concerns

The Advisory Committee is concerned about 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.

The encouragement of corporate compliance with applicable laws— which the [Advisory] Committee supports—does not justify a general abrogation of the rights of individuals. Under some of the broadbrush liability provisions summarised in Chapter 2, corporate personnel may be deemed to be liable, and subject to penalties, for corporate conduct that they could not reasonably have influenced or prevented. Such provisions might be seen as delivering a rough form of justice in the context of a ‘one person company’. However that may be, they are not well-suited to the realities and complexities of governance of larger firms, including the currently favoured board model of a majority of non-executive or independent directors who are not involved in day-to-day operations ...”

I understand that the Australian Institute of Company Directors will be making a similar submission to your Committee. I support the thrust of their comments, which I have seen in draft form. As a citizen of this country, I wish to emphasise my criticism of Governments relying on this shorthand method of reversing the onus of proof, and making it necessary for citizens to prove that they are innocent, when in fact the onus should always be on those accusing them of breaches. Only in extraordinary circumstances should there be a departure from this approach. This Bill does not fit into that category, in my view.

I would be happy to expand on these comments if necessary in an appearance before the Committee.

Yours sincerely

Bob Baxt AO

Partner
Freehills