AUSTRALIAN INSTITUTE
of COMPANY DIRECTORS

Directors' Liability Reform Amendment Bill 2012 Submission 001

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LEGAL AFFAIRS AND COMMUNITY SAFETY COMMITTEE

18 January 2013

Mr Brook Hastie
Research Director
Legal Affairs and Community Safety Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Mr Hastie,

Review of Directors' Liability Reform Amendment Bill 2012 (QLD)

The Australian Institute of Company Directors welcomes the opportunity to comment on the Directors' Liability Reform Amendment Bill 2012 (the Bill) which sets out the proposed reforms to QLD legislation as part of the director liability reform stream under the COAG *National Partnership Agreement to Deliver a Seamless National Economy*.

The Australian Institute of Company Directors is the second largest member-based director association worldwide, with individual members from a wide range of corporations; publicly-listed companies, private companies, not-for-profit organisations, charities and government and semi-government bodies. As the principal Australian professional body representing a diverse membership of directors, we offer world class education services and provide a broad-based director perspective to current director issues in the policy debate.

The Australian Institute of Company Directors has closely monitored the progress of the current COAG reform agenda set out in the *National Partnership to Deliver a Seamless National Economy* and in particular, the reform stream relating to director liability. As part of this process we have been involved in discussions with the COAG Business Regulation and Competition Working Group (BRCWG) and State and Federal Government Ministers, regarding ways to deliver effective reform and appropriate legislative amendments in this area. It is against this background that we respond to the request for comments by the Legal Affairs and Community Safety Committee.

1. Summary

In summary, the Australian Institute of Company Directors comments are as follows:

(a) The Bill is a disappointing attempt to reform the laws imposing personal criminal liability on directors for acts of the company in QLD;

(b) By using combinations of four different standards of criminal liability the Bill is overly complex. The Bill does not in any way assist directors or officers to understand the circumstances within which they may be criminally liable for acts of the company;

(c) The Bill fails to meet the objectives set out in the Explanatory Notes, in that the Bill:

i) barely reduces the number of provisions which impose personal criminal liability on executive officers for corporate fault;

ii) does not significantly reduce red tape nor the regulatory burden placed on Queensland business;

iii) does not in any way assist in achieving consistency in the approach to the liability of directors with other Australian jurisdictions; and

iv) contrary to the objectives of the COAG reform, inserts *new* provisions imposing personal liability on directors and executive officers.

(d) In a large number of respects, the amendments proposed do not meet the Company Directors' Principles (as set out in paragraph 3.1 below) or the COAG Principles (as defined in section 2 below) for the reform of provisions imposing personal criminal liability on directors in Australia;

(e) The Explanatory Notes to the Bill do not provide any justification for the retention or inclusion of director liability provisions, particularly Type 2 or Type 3 liability provisions (defined in paragraphs 4.1.3 and 4.1.4 below), when the COAG Principles clearly state that directors should not be liable for corporate fault as a matter of course;

(f) In the limited circumstances where provisions imposing personal criminal liability on directors for acts of the company are determined to be appropriate, the Australian Institute of Company Directors model provision is recommended (see paragraph 3.2 below);

(g) The application of the Australian Institute of Company Directors principles and model provision would help Queensland avoid the complex, unclear and inconsistent outcomes that have occurred in other States and Territories as a result of the COAG process; and

(h) In some instances, the Bill retains or inserts new Type 3 director liability provisions (as categorised by the Guidelines accompanying the COAG Principles) in QLD legislation. The Australian Institute of Company Directors strongly opposes the retention or insertion of Type 3 liability provisions on the basis that these provisions fail to observe the fundamental legal principle that a person is innocent until proven guilty.

Our comments on the Bill are set out in more detail in section 4 of this document.

2. Background to the COAG Reforms

The issue of personal liability for corporate fault is a longstanding one and has been the subject of a number of reviews and inquiries.[1]

In 2006 the Corporations and Markets Advisory Committee (CAMAC) released a report entitled *Personal Liability for Corporate Fault.* In that paper, CAMAC identified two principal areas of concern:

[1] These include: *Senate Standing Committee on Legal and Constitutional Affairs Company Directors' Duties* (1989); Corporate Law Economic Reform Program Paper No 3 *Directors' Duties and Corporate Governance* (1997); Australian Law Reform Commission *Principled Regulation* (2002); Regulation Taskforce *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business* (2006); and CAMAC *Personal Liability for Corporate Fault* (2006). See CAMAC Report *Personal Liability for Corporate Fault* 2006 at 2 -3.

- "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);
- Considerable disparities in the terms of personal liability provisions, resulting in undue complexity and less clarity about requirements for compliance."[2]

CAMAC was of the view 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."[3] An important distinction needs to be drawn between:

- "an individual's criminal liability for his or her own misconduct in a corporate context; and
- an individual's criminal liability in consequence of misconduct by a company."[4]

It is the second type of liability which was intended to be the focus of the reform process administered by COAG. The reform process is not designed to remove liability from directors who themselves personally commit or are involved in criminal conduct. The purpose of the reforms is to reduce the number of legislative provisions making directors "automatically" liable for the criminal conduct of the company, an outcome that is inappropriate and disproportionate given that the acts of the corporation can be carried out by a large range of individuals without the director's knowledge or involvement.

"Derivative liability" or "positional liability"[5] laws of this type imposed on directors hinder productivity because they encourage directors to make sub-optimal business decisions, to take an overly cautious approach to decision-making and focus their minds excessively on risk avoidance rather than on ways to improve value, competitiveness and profitability.

We are of the view that a regulatory regime which allows directors to be *criminally* liable outside circumstances where they are accessories or they have knowingly authorized or recklessly permitted a contravention, fosters an approach to business which is overly risk averse and which stifles productivity. In addition, such a regulatory regime is morally questionable because it may lead to the conviction and punishment of persons for wrongs with which they had no actual involvement and in respect of which they are, morally speaking, innocent.[6]

A survey of the director community conducted in late 2010[7] by the Australian Institute of Company Directors found:

- the current plethora of laws involving director liability is having a negative effect on board recruitment and retention;
- concerns about director liability are having a negative effect on board decision-making; and

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[2] CAMAC Report *Personal Liability for Corporate Fault* 2006 at 1
[3] CAMAC Report *Personal Liability for Corporate Fault at* 9
[4] CAMAC Report *Personal Liability for Corporate Fault* 2006 at 4
[5] Laws that impose liability on a person for acts of the corporation because the person holds a particular position, regardless of their involvement in the company's contravention.
[6] For further discussion on this point, see A.P. Simester, 'Is Strict Liability Always Wrong' in A.P. Simester (ed) *Appraising Strict Liability* 2005 at 128
[7] The 2010 survey findings reinforce the findings of a 2008 Australian Institute of Company Directors survey of ASX 200 directors conducted with Federal Treasury. See: http://www.treasury.gov.au/content/Company_Directors_Survey/SurveySummary.html

- the compliance burden is hampering directors when it comes to carrying out their primary role of delivering shareholder value and protection, because of concerns about the risk of personal liability.

The issue was of such economic concern that it was included as a reform stream in the COAG *National Partnership to Deliver a Seamless National Economy* in 2008. As part of the reform the Commonwealth, States and Territories were to agree to principles that could be used to audit legislation and identify provisions that required amendment in each jurisdiction.

The Australian Institute of Company Directors, while supportive of efforts to reform these derivative liability laws, expressed concerns about the principles endorsed by the Ministerial Council for Corporations in November 2009.

We stated that the principles were a disappointment and exceptions in the principles provided a "wooly 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."[8] We were particularly concerned about allowing criminal liability for corporate fault based on a wide interpretation of "compelling public policy reasons" because it was ill defined, subjective and thus open to a variety of interpretations that would defeat the purpose of harmonization.

Despite our concerns the MINCO principles were endorsed by COAG in December 2009. We refer to the agreed principles in this document as the COAG Principles.

By February 2011, the COAG Reform Council identified several risks to the achievement of the Director Liability Reform. At that stage not all of the jurisdictions had completed their audits and those that had completed their audits had not identified any, or only minimal, provisions on their statute books that required amendment. In line with our initial concerns raised when the principles were agreed, the COAG Reform Council Progress Report 2009-2010 (2010 Progress Report) stated "the council is concerned that the directors' liability principles have been applied in a way that raises significant risks to the achievement of this reform."[9]

The 2010 Progress Report, as we had foreshadowed and cautioned, also stated that: "the initial review of the audits indicates that jurisdictions have broadly interpreted the threshold principle of compelling public policy reasons to justify the retention of a significant number of different provisions..."[10]

In response to the 2010 Progress Report, we called for the COAG Director Liability Reform process to be "completely re-booted."[11] We stated that the "current process is clearly not working and, in our view, is unlikely to work because it is based on a fatally flawed set of principles."[12] We noted that the governments had been afforded "too much wriggle room to avoid genuine reform."[13]

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[8] Media Release: "*MINCO Liability Reform Principles a Disappointment*", Australian Institute of Company Directors 6 November 2009.
[9] COAG Reform Council *National Partnership Agreement to Deliver a Seamless National Economy: Performance Report for 2009 -10*, 23 December 2010 at 219
[10] COAG Reform Council *National Partnership Agreement to Deliver a Seamless National Economy: Performance Report for 2009 -10*, 23 December 2010 at 220.
[11] Australian Institute of Company Directors media release: *"COAG Reform Council exposes failure of director liability reform"* 11 February 2011.
[12] Ibid.
[13] Ibid.

To assist, we did more than call for the process to be re-set we also provided a solution. The Australian Institute of Company Directors developed a set of rigorous principles and a model provision which could be used to achieve the intended outcome of the reform. In 2011, the Australian Institute of Company Directors' model for reform was presented to State Governments, the Federal Government and representatives of the COAG BRCWG Director Liability Working Group. Although there was keen interest in the alternative approach, there was reluctance from those working on the reform to move away from the COAG Principles, despite their flaws.

By August 2011, Corrs Chambers Westgarth had completed an independent analysis of the application of COAG's Principles by each jurisdiction[14] (Corrs Chambers Westgarth Report). Among other things, the Corrs Chambers Westgarth Report found that:

(a) no jurisdiction identified all relevant provisions[15];

(b) together the jurisdictions identified only 77% of all relevant provisions[16];

(c) the permitted exclusions exception was inconsistently interpreted and applied between jurisdictions leading to a wide range of results in each Audit;[17]

(d) All jurisdictions, except QLD, applied a broad interpretation to the permitted exclusions ...as a result a large number of provisions were inaccurately excluded and have not been assessed against the COAG principles;[18]

(e) many jurisdictions overwhelmingly relied on the Public Policy principle to justify the retention of the provisions reviewed, however the majority of the audits (including the audit carried out by QLD) did not:

- provide an explanation of the public policy reasons relied upon; or
- where they did provide reasons, establish a compelling or convincing basis for retaining the provision;[19] and

(f) most jurisdictions did not address the automatic and blanket liability principle at all and retained blanket liability provisions without amendment.[20]

The Corrs Chambers Westgarth Report found that 697 legislative provisions nationally, were the subject of this reform stream.[21] Despite this, since the commencement of the reform process in 2008 to date, less than 25 provisions imposing personal criminal liability on directors for corporate fault have been repealed.

Throughout 2011, we continued to urge governments around Australia to adopt the Australian Institute of Company Directors' model for reform but instead the Federal Government in August 2011 announced that there would be a 'new way forward' for the director liability reforms under the COAG process. The announcement stated that "all states and territories will be required to re-audit their laws against COAG's Agreed Principles and more specific and detailed guidelines and will then have to amend their individual laws."[22]

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[14] Directors' Liability Reform *Analysis of the application of COAG's directors' liability principles*, Corrs Chambers Westgarth 5 August 2011
[15] Ibid at 8
[16] Ibid at 17
[17] Ibid at 17
[18] Ibid at 9
[19] Ibid at 19
[20] Ibid at 19
[21] Ibid at 19
[22] Media Release: *New Way Forward for Directors' Liability Reforms*, Senator Nick Sherry and David Bradbury MP, 19 August 2011

In response, the Australian Institute of Company Directors questioned the benefit of re-auditing legislation on a still flawed set of underlying principles with additional guidelines added.

In February 2012, despite the States, Territories and the Commonwealth, having had the benefit of the Corrs Chambers Westgarth Report, having re-audited their legislation and having had four years within which to achieve a positive economic outcome, the COAG Reform Council again raised concerns about the output of the reform stream not being achieved. The COAG Reform Council Progress Report of 2011 stated:

> "The council remains concerned that the intended output of this reform – a nationally consistent and principled approach to the imposition of personal criminal liability of directors or other corporate officers for corporate fault – is at risk of not being achieved."[23]

In November 2012, the COAG Reform Council released a further report on the progress of the COAG Seamless National Economy reforms. That report clearly stated that the output of the Director Liability Reform was still at risk. The report stated "while the outcomes of government's revised audits appear promising there are two risks to the output of this reform being achieved; governments may not apply directors' liability consistently [and] the final milestone only requires governments to introduce laws not pass them."[24] The COAG report further stated that: "If principles are applied consistently, it is not clear why the results would be different across jurisdictions in this way in a similar policy setting."[25]

Further, the November 2012 COAG Reform Council report re-iterated CAMAC's view that "inconsistent laws, disparate standards of responsibility and different defences across jurisdictions make for a burdensome and complex state of affairs – leading to uncertainty for people in these roles. The inconsistencies detract from good corporate governance, increase compliance costs for business and act as a disincentive for people to take up corporate roles."[26]

The Australian Institute of Company Directors model for reform is explained below. It is against this standard that we have considered and commented upon the reforms proposed by the Commonwealth and State governments. In the event the Australian Institute of Company Directors model provision was to be adopted in state and federal legislation, the same provision could then be used nationally, contributing to harmonization.

3. Company Directors approach to reforming the provisions imposing criminal liability on directors

This section sets out the Australian Institute of Company Directors approach to reforming the provisions imposing criminal liability on directors contained in Commonwealth, State and Territory legislation. The Company Directors' model allows for a consistent national approach to the imposition of criminal liability on directors arising from the misconduct of the corporation and avoids the inconsistent outcomes which have arisen as a result of applying the current COAG Principles.

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[23] COAG Reform Council, *Seamless National Economy Report on Performance*, Report to the Council of Australian Governments, 23 December 2011 at 186

[24] See COAG Reform Council, *Seamless National Economy Report on Performance*, Report to the Council of Australian Governments, 28 November 2012 at 85.

[25] Ibid at 92.

[26] Ibid at 86.

The application of the Company Directors approach sits alongside, and does not detract from the rigorous duties already required of directors in the Corporations Act 2001 (C'th). The approach does not address the reform of civil liability provisions confronting directors. Going forward, we are of the view that the civil liability provisions facing directors should be the subject of a separate review.

3.1 Principles

The Australian Institute of Company Directors recommends that the following principles be applied to reforming the statutory provisions imposing personal criminal liability on directors. The principles should also be considered and applied before any new provisions imposing criminal liability on a director are contemplated.

1. Where a corporation contravenes a statutory requirement the corporation should be held liable.[1]
2. In no circumstances will directors be "automatically" liable for acts of the corporation.
3. A designated officer approach to liability is not suitable for application in any case.
4. The imposition of personal criminal liability on a director for the misconduct of a corporation is confined to situations where:
   (a) the obligation on the corporation, and in turn, the director is clear; and
   (b) the statute addresses a public policy issue of compelling importance (that is, it involves safety to the public health, prevents individuals or the public from death or serious injury or protects children); and
   (c) the harm or the consequences resulting from the company breaching the particular provision are grave or serious (e.g. death or serious injury); and
   (d) the objects of the Act cannot be adequately met by and it has been demonstrated that the objects of the Act have not been met by:
      i) means other than legislation (education, guidelines etc.); or
      ii) effectively regulating the conduct and activities of the corporation; or
      iii) imposing liability solely on the corporation.
5. Where principle 4 has been satisfied and directors' liability is appropriate, directors will only be liable where they have knowingly authorised or recklessly permitted the contravention.
6. In each case, the prosecution will bear the onus of proving that the directors knowingly authorised or recklessly permitted the contravention (i.e. no reverse onus of proof will apply).

1 As a matter of principle, where the corporation contravenes a statutory requirement the corporation should be prosecuted in the first instance, however, there may be circumstances where an individual should be the subject of proceedings in respect of the contravention.

3.2 Company Directors Model Provision

Where the principles have been applied and a provision satisfies all of the criteria in principle 4 above, the existing provision should be omitted and the Company Directors model provision should be inserted. The purpose of the model provision is to have each statute begin from the premise that a director will not be criminally liable for an act of the company. However, a director will be liable in

circumstances where the director knowingly authorised or recklessly permitted the contravention. The onus of proof will be on the prosecution to prove that the directors knowingly authorised or recklessly permitted the contravention.

Where a statute provides for multiple offences, one or more of which satisfy the criteria in principle 4 (Category A offences), sub-section (2) of the model provision should apply only to those offences. In other words, directors may be prosecuted for serious offences rather than for ancillary or procedural contraventions under an Act.

The Company Directors model provision is as follows:

[section number] – Offences by corporations

(1) If a corporation contravenes, whether by act or omission, any provision of this Act or the regulations, each person who is a director of the corporation or who is concerned in the management of the corporation will not be taken to contravene the same provision subject to subsection (2).

(2) A director of the corporation or a person concerned in the management of the corporation will be liable for a contravention of the corporation where the person knowingly authorised or recklessly permitted the contravention.

(3) A person may be proceeded against and convicted under a provision pursuant to this section whether or not the corporation has been proceeded against or convicted under the provision.

(4) Nothing in this section affects any liability imposed on a corporation for an offence committed by the corporation against this Act or the regulations.

(5) The Court may, on application by any interested person and taking into account all of the circumstances surrounding the contravention, make an order, unconditionally or subject to such conditions as the Court imposes, relieving a person in whole or part from any liability in respect of a contravention of subsection (2).

4. General Comments on the Bill

It is against the history of the reform (set out in section 2 above) and in light of the Company Directors' model for reform (section 3 above) that we now make specific comments in relation to the Bill.

4.1 Four types of provisions in the draft legislation

The Bill inserts combinations of four different types of director liability provisions across 80 QLD Acts. The Australian Institute of Company Directors is of the view that the various combinations of these different types of provisions will lead to enormous complexity and will make it almost impossible for any director or officer to understand his or her obligations under these laws.

We are strongly of the view that if the QLD Government intends to pass legislation that will be complied with, the law must be clear and capable of being understood. We are of the view that the amendments proposed fail to do this. The four different liability provisions and our comments on each are set out below.

4.1.1. Executive (deemed) liability provision

The Bill includes a provision which the Explanatory Notes refer to as an "executive (deemed) liability provision."[27] This type of provision generally states:

> "If a corporation commits an offence against a provision of this Act, each executive officer of the corporation is taken to have also committed the offence if—
>
> (a) the officer authorised or permitted the corporation's conduct constituting the offence; or
>
> (b) the officer was, directly or indirectly, knowingly concerned in the corporation's conduct."

While this provision appears to sit underneath the Heading "Type 3" liability in the Explanatory Notes, it is not a Type 3 liability provision. Pursuant to this provision, the prosecution would be required to prove beyond a reasonable doubt that the executive officer authorized or permitted, or was knowingly concerned in, the corporation's conduct constituting the offence, before the executive officer would be found criminally liable. The label given to the provision is therefore misleading, executive officers will not be "deemed" to have committed the corporation's offence, rather executive officers will only be liable if they have some involvement in the corporation's offence.

While this provision is similar to the Company Directors' model provision (set out in paragraph 3.2 above) we are of the view that the drafting of the Company Directors' model provision is superior to that of the "executive (deemed) liability provisions" contained in the Bill.

4.1.2 Type 1 - Executive liability (standard) provision

The QLD formulation of a Type 1 liability provision is as follows:

> "(1) An executive officer of a corporation commits an offence if—
> (a) the corporation commits an offence against an executive liability (standard) provision; and
> (b) the officer did not take all reasonable steps to ensure the corporation did not engage in the conduct constituting the offence.
>
> Maximum penalty—the penalty for a contravention of the executive liability (standard) provision by an individual.
>
> (2) In deciding whether things done or omitted to be done by the executive officer constitute reasonable steps for subsection (1)(b), a court must have regard to—
> (a) whether the officer knew, or ought reasonably to have known, of the corporation's conduct constituting the offence against the executive liability (standard) provision; and
> (b) whether the officer was in a position to influence the corporation's conduct in relation to the offence against the executive liability (standard) provision; and
> (c) any other relevant matter."

While Type 1 provisions do not reverse the onus of proof which is positive, the Australian Institute of Company Directors remains of the view that only an accessorial liability provision or the Company Directors' model provision should be inserted when a criminal director liability provision for an act of the corporation is warranted.

[27] See Explanatory Notes to the Bill at page 5

Assessing whether a director took "*all* reasonable steps" to prevent the conduct of the corporation is always determined with the benefit of hindsight. Unfortunately directors do not have the benefit of hindsight when dealing with issues in real time.

4.1.3 Type 2 – Executive Liability (evidential burden) provision

The Explanatory Notes refer to Type 2 liability provisions as "executive liability (evidential burden)" provisions. The QLD formulation of a Type 2 liability provision is as follows:

> "(1) If a corporation commits an offence against an executive liability provision, each executive officer of the corporation is taken to have also committed an offence against the provision.
>
> (2) However, the executive officer is not taken to have also committed an offence against the executive liability provision if—
>
> (a) firstly, the officer satisfies the evidential burden of showing that—
>
> (i) the officer did not know, and could not reasonably have been expected to have known, of the corporation's conduct constituting its offence against the executive liability provision; or
>
> (ii) the officer took all reasonable steps to ensure the corporation did not engage in the conduct constituting its offence against the executive liability provision; and
>
> (b) secondly, the officer having complied with paragraph (a), the prosecution does not prove the contrary beyond reasonable doubt."
>
> (3) In deciding whether things done or omitted to be done by the executive officer constitute reasonable steps for subsection (2)(a)(ii), a court must have regard to whether the officer was in a position to influence the corporation's conduct in relation to its offence against the executive liability provision.

The Australian Institute of Company Directors does not support shifting the evidential burden onto directors as proposed above. We reiterate that "*all* reasonable steps" available to a director in any given circumstance will only be known in hindsight. On this basis, it will be difficult for directors to satisfy the evidential burden in showing that they took *every* reasonable step available to them to prevent the conduct.

We are also of the view that no compelling case has been made for shifting the evidential burden in respect of the amendments proposed. As a matter of principle, it should be for the prosecution to prove, even if only prima facie, that a director did not act reasonably before they can be held liable.

4.1.4 Type 3 - Executive liability (persuasive burden) provision

We are of the view that describing these provisions as shifting the "persuasive" burden is inaccurate and has the potential to be misleading. Type 3 provisions shift the *legal burden* of proof and therefore overturn the fundamental legal principle that a person is innocent until proven guilty. The Australian Institute of Company Directors objects to the insertion or retention of these provisions in QLD legislation.

The formulation of the Type 3 liability provisions in the Bill is as follows:

> If a corporation commits an offence against an executive liability provision, each executive officer of the corporation is taken to have also committed an offence against the provision.
>
> (2) However, it is a defence for the executive officer to prove that—
>
> (a) the officer did not know, and could not reasonably have been expected to have known, of the corporation's conduct constituting its offence against the executive liability provision; or
>
> (b) the officer took all reasonable steps to ensure the corporation did not engage in the conduct constituting its offence against the executive liability provision.
>
> (3) In deciding whether things done or omitted to be done by the executive officer constitute reasonable steps for subsection (2)(b), a court must have regard to whether the officer was in a position to influence the corporation's conduct in relation to its offence against the executive liability provision.

The Australian Institute of Company Directors concerns about the reversal of the onus of proof are set out in more detail in paragraph 4.2 directly below.

4.2 Presumption of Innocence should always apply

The Australian Institute of Company Directors has significant concerns that a number of the proposed amendments to QLD legislation insert or retain Type 3 director liability provisions under the COAG Guidelines. These provisions render directors automatically liable for the corporation's criminal offence unless the director can establish a defence. The director bears the *legal burden* of proving the defence.

In other words, these provisions reverse the fundamental legal principle that a person is innocent until proven guilty and are contrary to recognised principles of criminal law. The Australian Institute of Company Directors is of the view that the normal principles of justice and fairness that apply to all other citizens prosecuted for criminal offences should also apply to directors.

We note that CAMAC's report *Personal Liability for Corporate Fault* stated:

- "The reversal of the onus of proof inherent in such provisions is contrary to the general presumption of innocence in criminal law;
- The fact that someone is a corporate officer should not subject that person to criminal liability in a way that an individual in other circumstances, or an individual in a responsible position in a non-corporate organization would not be so subject;
- The fact that a corporate officer may be able, in the circumstances of a particular case, to make out a relevant defence and thereby avoid conviction does not remove the seriousness of the risk to reputation and the apprehension, effort and expense to which he or she is subject by being exposed to criminal liability on a prima facie basis."[28]

The Australian Institute of Company Directors recommends that as a priority, the Type 3 liability provisions contemplated in the Bill be reconsidered and amended. We are of the view that the retention or insertion of these provisions has not been sufficiently justified pursuant to either the Company Directors' Principles or the COAG Principles. For example, under the COAG Principles the imposition of

[28] CAMAC *Personal Liability for Corporate Fault* 2006 at p34.

personal criminal liability on a director for the misconduct of a company should be confined to situations where, in summary, there are compelling public policy reasons for doing so, the 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.

The Explanatory Notes do not sufficiently demonstrate that where director liability provisions have been retained or inserted, there is a compelling public policy reason for doing so, and why the QLD Government is of the view that the liability of the corporation on its own is not likely to promote compliance.

Further, and more importantly, no sufficient justification has been provided as to why it is appropriate to undermine the Rule of Law (a fundamental pillar of our democratic society) by deciding to retain or insert Type 3 provisions.

4.3 QLD legislation not proposed for amendment in the Bill.

We note that the Corrs Chambers Westgarth Report listed all of the QLD provisions that in their view were relevant to this reform. Minter Ellison also produced a document in July 2010 titled *Protecting Your Position* (the Minter Ellison Analysis). The provisions identified in the Corrs Chambers Westgarth Report were either:

(a) reviewed by QLD during its audit;
(b) not identified by QLD in its audit; or
(c) excluded from the reform, by the permitted environmental protection and OH&S exclusions.

Many of the QLD Acts which contain liability provisions identified in the Corrs Chambers Westgarth Report and the Minter Ellison Analysis have not been earmarked for amendment or repeal by the QLD Government. The QLD Government has not set out in the Explanatory Notes why Acts containing relevant director liability provisions (other than the eight Acts specifically identified in the Explanatory Notes)[29] will not be amended.

We are of the view that there are a number of provisions that should be re-reviewed and repealed or amended, these include:

- Agricultural Chemicals Distribution Control Act 1966 (s 44)
- Chemical Usage (Agricultural and Veterinary) Control Act 1988 (s 30A)
- Coal Mining Safety and Health Act 1999 (s 262)
- Community Services Act 2007 (s 123)
- Contract Cleaning Industry (Portable Long Service Leave) Act 2005 (ss 132, 133)
- Cooperatives Act 1997 (s 454)
- Criminal Proceeds Confiscation Act 2002 (s 253)
- Dental Technicians Registration Act 2001 (s 196)

[29] The Acts identified were: the *Sustainable Planning Act* 2009, the *Child Care Act* 2006, the *Work Health and Safety Act* 2011, the *Environmental Protection Act* 1994, the *Marine Parks Act* 2004, the *Nature Conservation Act* 1992, the *Recreation Areas Management Act* 2006 and the *Vegetation Management Act* 1999.

- Electrical Safety Act 2002 (s 199)
- Electricity—National Scheme (Queensland) Act 1997 (s 85)
- Exotic Diseases in Animals Act 1981 (s 42)
- Fair Trading Act 1989 (ss 52, 96)
- Family Services Act 1987 (s 29)
- Foreign Ownership of Land Register Act 1988 (s 26)
- Mining and Quarrying Safety and Health Act 1999 (s 241)
- Plant Protection Act 1989 (s 29A)
- Speech Pathologists Registration Act 2001 (s 192)
- Stock Act 1915 (s 45)
- Transport Security (Counter-Terrorism) Act 2008 (s 55)
- Urban Land Development Authority Act 2007 (s 140)

4.4 The Bill does not meet the objectives of the COAG reforms or the Explanatory Notes

We are of the view that it is important for the Committee to note the following characteristics of the Bill:

- Of the 80 Acts amended, the Bill repeals only two director liability provisions;
- The Bill reverses the legal burden of proof in 21 Acts;
- The Bill fails to amend director liability provisions in 20 other Acts, the majority of which also reverse the legal burden of proof;
- The Bill reverses the evidentiary burden of proof in 6 Acts;
- In only 34 of the 80 Acts which are to be amended by the Bill, officers will be liable where they authorised, permitted or were knowingly concerned in the offence. In the remaining 46 Acts, a standard less than this is required for a director to be liable for a criminal offence;
- In seven Acts, three different types of liability provisions will apply to render directors liable for a corporation's offence; and
- In 33 Acts, two different types of liability provisions will apply to render directors liable for a corporation's offence.

On this basis, we are of the view that the Bill fails to meet the objectives set out in the Explanatory Notes, in that the Bill:

- barely reduces the number of provisions which impose personal criminal liability on executive officers for corporate fault;
- does not significantly reduce red tape nor the regulatory burden placed on Queensland business;
- does not in any way assist in achieving consistency in the approach to the liability of directors with other Australian jurisdictions; and

- contrary to the objectives of the COAG reform, inserts new provisions imposing personal liability on directors and executive officers.

5. Conclusion

We are of the view that the Bill proposed requires serious reconsideration and re-drafting before it is further considered by the QLD parliament.

Despite positive announcements from the Government, the content of the Bill itself is disappointing and falls well short of implementing appropriate and effective reform of QLD director liability laws along the lines mandated by COAG. If the Bill had been open for consultation before being introduced into parliament, the Australian Institute of Company Directors would have been in a position to raise its concerns and to recommend substantial changes at a much earlier stage, unfortunately this did not occur.

We are concerned that unless the QLD Government reconsiders the Bill, many companies, particularly small businesses, will choose States other than QLD within which to carry on their operations. In this regard, we note that NSW recently passed amendments that only inserted accessorial liability and/or Type 1 liability provisions across 46 pieces of NSW legislation. The consequence of the reforms in NSW is that there remains a very small number (on our calculations, something less than 10) Acts where the onus of proof remains reversed. The QLD approach falls well short of the Australian Institute of Company's Director's approach and the NSW approach, and should therefore be reconsidered.

The Australian Institute of Company Directors again recommends that the wording of the Company Directors' model provision (set out above) or an accessorial liability provision be inserted into legislation in circumstances where a director liability provision is warranted. We are of the view that the model provision set out above is a preferable alternative to the different liability provisions contained in the Bill. We believe the above principles and model provision, where appropriate, should be reflected in all legislative initiatives reflecting this reform priority and should become the default position for all legislative drafting instructions when this issue arises.

We hope that our comments will be of assistance to you. If you would like to further discuss our views please do not hesitate to contact me or Leah Watterson on (02) 8248 6600.

Yours sincerely,

L Watterson

per: Rob Elliott
General Manager of Policy &
General Counsel