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Dear Mr Hastie

Submission on the *Directors' Liability Reform Amendment Bill 2012* (Qld)

Thank you for the opportunity to make a submission in relation to the *Directors' Liability Reform Amendment Bill 2012* (Qld) (**Bill**).

1. The need for reform

1.1 Background

Over the last few centuries one of the major drivers of economic prosperity in western countries has been the limited liability company. The benefit to investors has been that they could control their risk by determining how much they were prepared to invest, in the knowledge that if the company failed their liability will be limited to the amount of their investment. The limited liability protection afforded to shareholders was also extended to those persons tasked with the governance and management of these entities, namely the directors and officers of the company. However, first common law, and later statute law, imposed certain fiduciary obligations on the directors to ensure that they acted reasonably and honestly. Today those duties, including the duty to exercise care and diligence, the duty to act in the best interests of the company, and the duty not to misuse information or position are set out in the *Corporations Act 2001* (Cth).

In the last ten years or so however, various jurisdictions in Australia have seen fit to seek to impose considerable additional burden on directors and officers for statutory breaches by corporations. Interestingly (and we have undertaken considerable research in the area), this is a peculiarly Australian phenomenon. Overseas countries have not followed our lead in this area.

What first began as a trickle of these laws eventually became a flood, so that in the last few years provisions of this kind have been finding their way into most statutes being passed into law by Australian States and Territories. If asked about the need for those provisions, legislators generally responded to the effect that these provisions were simply regarded as 'boiler plate' provisions automatically inserted in most Acts by parliamentary counsel without drafting instructions to do so.

Over time, it has become standard practice in most States and Territories for these laws to overturn one of the fundamental planks of our criminal justice system which has been in place from the time of the Magna Carta – namely the presumption of innocence. Under most of these laws, and in particular, most of these laws in Queensland, if a company commits an offence under a statute, every company director and officer is deemed to have committed an offence and has the onus of establishing their own innocence by proving the availability of a defence. In the debate around these provisions, this has become known as the 'reverse onus of proof'.

The consequence is that directors and officers are deemed under the law to have committed an offence regardless of whether they had any involvement in, or knowledge of, the statutory breach by the company. That is to say, a company director or officer is deemed to have committed a criminal offence without any fault or culpability whatsoever.

1.2 The case for reform

The explosion in the number of Commonwealth, State and Territory laws which impose personal liability on directors as a result of a statutory breach by a company has been one of the biggest issues of concern for company directors and officers in recent years. At its peak, (before the recent COAG reform process began to have an effect), there were well over 700 such laws across Australia, including in excess of 100 such laws in Queensland. The vast preponderance of those laws reversed the onus of proof. Understandably, this created a minefield of risk for those holding office as directors or officers.

The need for reform in this area has been apparent for many years. The Corporations and Markets Advisory Committee (**CAMAC**), a body established by the Commonwealth to advise the Government on corporate law matters, in their September 2006 Report entitled '*Personal Liability for Corporate Fault*', recommended substantial reform in the area, including that attempts be made to introduce a nationally uniform model provision which imposes personal liability on directors and officers. That Report identified:

- *'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.'*[1]

They then went on to say this:

> *'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 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.*[2]

[1] CAMAC, '*Personal Liability for Corporate Fault*', September 2006 at page 1.
[2] CAMAC, '*Personal Liability for Corporate Fault*', September 2006 at pages 8-9.

The entire report can be found on the CAMAC website (www.camac.gov.au) at http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2006/$file/Personal_Liability_for_Corporate_Fault.pdf.

1.3 Effect on the director community

There is no doubt that these issues and the inherent uncertainty as to the scope of liability under existing legislation acts as a disincentive to those considering accepting an appointment, or considering whether to continue in their current position, as a director or officer of a company. Both the CAMAC Report[3] and surveys conducted by the Australian Institute of Institute of Company Directors (**AICD**) in 2008 in conjunction the Federal Treasury and in 2010 support this conclusion. In particular, the AICD report in relation to its 2010 survey states that:

- *'**Overly cautious decision-making:** 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 ...*
- ***Impact on director recruitment:** 56.8 per cent of respondents knew of other directors who had declined the offer of a directorship primarily due to the risk of personal liability, while 32.2 per cent personally declined an offer for this reason. 52.2 per cent said they knew of someone who had resigned from a board due to liability concerns; 22.2 per cent said they had resigned from a position themselves.*
- ***Concern for organisational impact:** 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 ...*
- ***Impact on consideration of directorship as a future career:** Seventy-four per cent of those who identified themselves in the survey as "aspiring directors" (when asked to nominate their primary role or interest in directorship) said the risk of personal liability had made them reconsider directorship as a career.*[4]

1.4 COAG Principles

In response to widespread concerns of the kind which were articulated in the AICD survey, in November 2008, the Council of Australian Governments (**COAG**) initiated a review of Commonwealth, State and Territory laws imposing personal criminal liability for corporate fault, with a view to increased harmonisation of the laws. As part of the COAG *National Partnership Agreement to Deliver a Seamless Economy*, the review has resulted in agreement on principles and guidelines for reform.

The Committee no doubt has access to the COAG Principles, but it is probably worthwhile emphasising here the key points of the Principles:

1. *Where a corporation contravenes a statutory requirement, the corporation should be held liable in the first instance.*
2. *Directors should not be liable for corporate fault as a matter of course or by blanket imposition of liability across an entire Act.*
3. *A "designated officer" approach to liability is not suitable for general application.*
4. *The imposition of personal criminal liability on a director for the misconduct of a corporation should be confined to situations where:*

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[3] CAMAC, '*Personal Liability for Corporate Fault*', September 2006 at pages 32, 40 and 63.
[4] Australian Institute of Company Directors, '*Impact of Legislation on Directors*', November 2010, pages 4-5.

(a) *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);*

(b) *liability of the corporation is not likely on its own to sufficiently promote compliance; and*

(c) *it is reasonable in all the circumstances for the director to be liable having regard to factors including:*

i. *the obligation on the corporation, and in turn the director, is clear;*

ii. *the director has the capacity to influence the conduct of the corporation in relation to the offending; and*

iii. *there are steps that a reasonable director might take to ensure a corporation's compliance with the legislative obligation.*

5. *Where principle 4 is satisfied and directors' liability is appropriate, directors could be liable where they:*

(a) *have encouraged or assisted in the commission of the offence; or*

(b) *have been negligent or reckless in relation to the corporation's offending.*

6. *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.*

It is clear from the above articulation of the reform process instigated by COAG, that States and Territories are being asked to examine their laws, consider where simply making a corporation liable for its own breaches may not be a sufficient remedy and only where that is the case, make directors and officers liable. If there is a compelling public policy reason to make directors and officers liable (for example where public harm may be caused), then it is appropriate to make them subject to criminal prosecution, but only where the three factors set out in paragraph 4(c) above are considered, and then only where they have encouraged or assisted in the commission of the offence or been negligent or reckless.

The retention of a reverse onus of proof seems to be largely at variance with these principles, except in very rare situations. Furthermore, if directors and officers have not encouraged or assisted in the commission of an offence, it is at odds with our system of justice that they should have the onus of establishing their own innocence.

2. Assessment of proposed Queensland reforms

2.1 Very limited reduction in potential liability

When the Bill was first announced and prior to its introduction into Parliament, the Queensland Government stated that it had identified 3,800 offences for which a director can be personally liable under existing laws and that reforms introduced by the Bill would reduce the number of offences by half.[5] Whilst the number of statutory provisions for which a director or officer may be liable may have been reduced, the Bill only reduces by two the actual number of Acts that impose liability for the breach of director liability provisions.
Furthermore, on our analysis, this means that the reversal of the usual onus of proof has been retained in well over 50 Acts in Queensland, comprising:

[5] Attorney-General and Minister for Justice The Honourable Jarrod Bleijie, Media Release '*Government commits to red-tape reductions and reforms*', 7 September 2012.

- 29 existing Acts containing directors' liability provisions which have not been amended[6]; and
- 27 Acts which will be amended to include new provisions containing a reversal of the usual onus of proof.

out of approximately 100 Acts in Queensland which currently impose personal liability on company directors and officers. We submit very strongly that this is fundamentally wrong and inappropriate under our system of justice. It is certainly at odds with the expectations of COAG, the views of CAMAC and the reasonable expectations of company directors and officers that they be treated in the same way as all other citizens under the law.

2.2 Reversal of the onus of proof

While there may be circumstances in which a director or officer will be involved in, or have knowledge of, statutory breaches by a company, it does not follow that if a company has committed a statutory breach each director and officer of the company is at fault.
In our submission, directors and officers should only be liable where they are involved in the statutory breach in some way and the prosecution should be required to establish their involvement as an element of the offence. This position was supported by CAMAC in its Report where they said:

> *'The Committee is 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.'*[7]

The majority of the Queensland Acts imposing personal liability on directors and officers as a result of a statutory breach by a company contain a reversal of the usual onus of proof. We argue strongly that those provisions should be removed or amended to restore the usual position, namely that the prosecution must bear the onus of proof to establish culpability on the part of the director or officer beyond reasonable doubt, because, as CAMAC said, 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.'[8]

It is important to be clear that Type 2 provisions and the Type 3 – persuasive burden provisions, as described in the Bill, reverse the onus of proof and the distinction between the 'evidential' burden and the 'persuasive' burden is of semantic interest only.

In our view, it is a distinction without difference to say that directors can escape liability if they 'satisfy the evidential burden' of proving that they did not know of a matter or could not reasonably be expected to have known of it unless the prosecution proves the contrary beyond reasonable doubt (Type 2 provisions) and saying that directors must prove that they did not know of the matter or could not reasonably be expected to have known of it (Type 3 – persuasive burden provisions)

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[6] Of these, the Explanatory Notes to the Bill state that eight of those 29 Acts are due to be repealed and replaced for other reasons, are subject to other review processes or are outside the scope of the COAG directors' liability reform project. Nonetheless, there do not appear to be any plans to amend or repeal the remaining 21 Acts containing directors' liability provisions, most of which contain a reversal of the onus of proof.

[7] CAMAC, '*Personal Liability for Corporate Fault*', September 2006 at page 34.
[8] CAMAC, '*Personal Liability for Corporate Fault*', September 2006 at pages 8-9.

While Type 1 provisions do not in fact reverse the onus of proof, the casting of the provision works so unfairly against directors that it places them in an almost similar position. Under Type 1 provisions, all the prosecution is required to prove is that the company committed an offence and that directors did not take all reasonable steps to prevent the commission of the offence. That is an extremely low bar for the prosecution to pass. Furthermore, the provisions contain no defences. In the circumstances, Type 1 provisions can reasonably be considered to be even harsher than Type 2 and Type 3 provisions which reverse the onus of proof, because in the case of those provisions, directors at least have the opportunity to prove that they were not in any way culpable. Due to the lack of available defences in Type 1 provisions, directors do not even have the ability to establish their own innocence.

2.3 Application of the COAG principles

It is worthwhile considering the COAG Principles and seeing how the new Queensland provisions sit alongside them. While on their face, the objects enunciated in the Explanatory Notes to the Bill seem to endorse the Principles, on closer examination, the Bill itself does not seem to pay close regard to most of the Principles at all.

Principles 1 and 2 appear to have been given very little weight indeed. The premise behind Principle 1, namely that it may be sufficient to impose liability on a corporation for statutory breach to ensure statutory compliance rather than impose liability on both the corporation and its directors, appears to have been given little consideration. Furthermore, as noted earlier, after the reforms there will be only two fewer Acts imposing liability on directors and officers. This implies little other than lip service has been paid to a consideration of whether it is appropriate just to make the corporation liable as opposed to directors and whether a form of 'blanket' liability is appropriate at all.

Similarly, Principle 4 seems to have been substantively disregarded. The conclusion of the drafters seems to be that there are compelling public policy reasons why directors should be made liable for corporate breaches in all but two of the statutes in which those provisions appear, and that there are still some 1,900 provisions where there are compelling public policy reasons why such provisions should be retained.

While some weight seems to have been given to Principle 5, (which says that where there **are** compelling public policy reasons to make directors criminally liable for a corporate breach, that they should be regarded as liable only if they have encouraged or assisted in the commission of the offence or have been negligent or reckless), it has only been adopted in an ad hoc manner for relatively minor breaches and is only applied as the sole model in a minority of Acts.

The only Principle which seems to have been given any substantial weight at all is Principle 6, which was intended to be applied only in the most extreme sort of situation, after all of the other Principles had been considered and found to be inadequate. This Principle says that in some cases it might be appropriate to put the directors to proof that they took reasonable steps to prevent the commission of an offence. Not even this Principle goes so far as to mandate a reversal of the onus of proof, and yet the drafters of the Bill seem to have relied extensively on this Principle to allow them to impose extensive new provisions which reverse the onus of proof in 27 Acts, while leaving in place approximately 29 Acts which already contain provisions reversing the onus of proof.

We regard it as unfortunate that the drafters of the Bill paid such scant regard to the substance and spirit of the Principles and sought to use Principle 6, which was only intended for use where the most compelling of cases existed, as an opportunity to preserve the unfair status quo.

2.4 No reduction in complexity

To add to the unfairness faced by directors and officers, the Bill introduces four new types of directors' liability provisions (not three as stated in the Explanatory Notes to the Bill[9]) in varying combinations across 80 Acts. In 33 Acts the Bill will introduce two different types of liability provision[10] and in seven Acts there will be three new different types of liability provision.[11] On top of this, it is proposed to retain 29 existing Acts which contain the old form of drafting,[12] so that in addition to the four new forms of liability many of the old form provisions continue. In the circumstances, apart from having to deal with an unfair regime reversing the usual onus of proof, directors and officers will have to confront a bewildering array of old and new liability provisions. How will directors sensibly have any idea what their obligations are?

3. Activity in other States

In the last 12 months we have seen Governments in a number of other States announce the repeal or modification of many laws imposing personal liability on company directors. So far, each of NSW, Victoria, South Australia, Tasmania and the Australian Capital Territory have all announced significant reforms to director liability laws.

In our submission, Queensland's reforms fall somewhat short of reforms in other States, in particular, those in NSW.

Through the passage of the *Miscellaneous Acts Amendment (Directors' Liability) Act No. 2 2011* (NSW) and more recently, through the *Miscellaneous Acts Amendment (Directors' Liability) Act 2012* (NSW), there are now only six statutes remaining in that State which still reverse the onus of proof. The NSW reforms have also resulted in the number of provisions imposing personal liability on company directors in NSW legislation being reduced from more than 1,000 to about 150.[13]

The NSW reforms have drawn widespread support from the business community. For example, the NSW approach was welcomed by the Australian Institute of Company Directors. The AICD's Chief Executive Officer and Managing Director, Mr John Colvin congratulated the NSW Government for 'restoring the presumption of innocence until proven guilty in this legislation, which is fundamental to a functioning democracy' and said he was '... pleased to see NSW taking significant strides and leading the way on this important area of reform.'[14]

Indeed, it is fair to say that the approach taken in NSW both addresses the concerns raised by CAMAC in its 2006 report[15] and follows the COAG Principles closely.

The proposed Queensland reforms do neither.

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[9] The Explanatory Notes to the Bill refer to Types 1 to 3. The notes refer to two types of provision under the heading Type 3 being the 'Executive liability (persuasive burden) provision' and the ' Executive (deemed) liability provision'.

[10] For example, the *Building Act 1975*, the *Education (Queensland College of Teachers) Act 2005* and the *Greenhouse Gas Storage Act 2009*.

[11] For example, the Electricity Act 1994, the Food Act 2006 and the Mineral Resources Act 1989

[12] For example, the *Contract Cleaning Industry (Portable Long Service Leave) Act 2005*, the *Foreign Ownership of Land Register Act 1988* and the *Urban Land Development Authority Act 2007*.

[13] Explanatory Note to the *Miscellaneous Acts Amendment (Directors' Liability) Act 2012* (NSW).

[14] Australian Institute of Company Directors Media Release, *'NSW takes an important step towards improving director liability'*, 21 November 2012.

[15] CAMAC, *'Personal Liability for Corporate Fault'*, September 2006.

The approach taken in NSW was (after repealing around 85% of their director liability provisions) to propose only two different models for the comparatively few provisions where it was still considered necessary to retain director liability in some form.

The two models are called the 'executive liability provision' and the 'corporate liability provision'. Of the two types of provision, the 'executive liability provision' sets the bar higher for directors. Generally these provisions are found in statutes which address the more serious and sensitive matters. While the 'executive liability provision' does not require actual involvement in the statutory breach, directors and officers will not be liable unless it can be proven that they had actual knowledge of, or ought reasonably to be expected to have known about, the statutory breach by the company and failed to take all reasonable steps to prevent or stop the breach.

By contrast, the 'corporate liability provision' requires a degree of actual involvement in the statutory breach by the company. Under these provisions, directors and officers will only be considered to have committed an offence if they:

- aided, abetted, counselled, procured or induced the statutory breach;
- conspired with others to effect statutory breach; or
- were knowingly concerned in, or a party to, the statutory breach in some other way.

This provision is similar in approach to the Queensland Type 3 – deemed liability provisions, only it has been given significantly wider application in NSW than in Queensland.

In our submission, the NSW provisions seem well thought out and deal with directors fairly and equitably, making them liable only when their conduct falls below an acceptable standard. We urge the Committee to consider whether a model similar to that adopted in NSW ought also to be adopted in Queensland.

4. An opportunity missed

While the Bill goes some way to reforming Queensland laws imposing personal liability on company directors and officers for the actions of the companies they manage, unfortunately it falls short of delivering what was expected and what is needed.

In particular the Bill:

- has not sought to address the very significant concerns (identified by CAMAC and others) about those provisions which continue to reverse the onus of proof and deem directors guilty unless they prove their own innocence;
- has not reduced the complexity of the directors' liability laws in Queensland (and via the complex matrix of liability provisions scattered throughout the 80 Acts which have been amended by the Bill, has probably actually increased the complexity); and
- has failed to address the spirit of the COAG reforms as set out in the COAG Principles.

The result will be a legislative regime that is not only a disincentive to those considering accepting an appointment as a director but also unnecessarily inconsistent in its approach and a significant burden to carrying on businesses in this state. Furthermore, the much-lauded NSW reforms mean that there is a significant risk that NSW will be regarded as more pro-business than Queensland and draw business opportunities away from this State.

The significant recommendations which we make are these:

- that the reversal of the onus of proof be removed from all director liability provisions remaining in Queensland; and
- that reforms similar to those undertaken in NSW be pursued in Queensland. Doing so would see most of the remaining director liability provisions removed (as noted earlier, NSW has only retained 150 in total as opposed to Queensland's 1900) and see the remaining provisions being drafted in a fairer and more equitable way which results in directors only being able to be successfully prosecuted where they are truly culpable.

Yours faithfully
MINTER ELLISON

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