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The Treasury
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Via email: personalliabilityforcorporatefault@treasury.gov.au

PRINCIPAL MEMBERS



ACI would like to thank Treasury for providing an opportunity for ACI to make comment on the *Personal Liability for Corporate Fault Reform Bill 2012* (the bill).

ACI is the peak industry body for the practice of compliance, risk and governance in Australasia. Our members are professionals actively engaged in the private, professional services and Government sectors within Australia, New Zealand, Singapore, Thailand and Hong Kong.

The consultation paper proposes a number of amendments to existing legislation in order to bring these Treasury portfolio Acts into line with agreed COAG Principles. Our comments as such are not so much directed to the proposed legislative amendments but rather the principles that underpin them.

As is always the case, ACI has approached this submission with the most pragmatic solution in mind to achieve the intended outcomes of the amendments and it should be read in the context of this intent.

ACI appreciates the difficulty faced by company directors in assuming responsibility for ensuring all aspects of an organisation's conduct fall within the confines of the legislative parameters that have been established. This is especially applicable for businesses that operate in complex environments, with a geographically diverse workforce across multiple state and international jurisdictions.

It is obvious that in many instances, it is the CEO (or equivalent) and senior management that holds greater sway over the culture of the organisation; their day to day operations; and the resulting compliance and risk outcomes. So although we acknowledge that the culture of an

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organisation 'comes from the top', that may not, in practical terms, be the Board.

It is on this basis that it appears COAG has removed personal criminal liability for directors, except in a number of circumstances.

However, ACI questions the ability of regulators or legislation to be able to make the distinction between when personal or corporate criminal liability may come into effect as outlined in the bill's explanatory memorandum.

Specifically we refer to COAG 4 that states:

"The imposition of personal criminal liability on a director for the misconduct of a corporation should be confined to situations where:

- It is reasonable in all the circumstances for the director to be liable having regard to factors including:
- the obligation on the corporation, and in turn the director, is clear;
- the director has the capacity to influence the conduct of the corporation in relation to the offending; and
- there are steps that a reasonable director might take to ensure a corporation's compliance with the legislative obligation."

ACI believes that there are two subsections to COAG principle 4 that require specific attention when legislation is being amended to reflect these general COAG principles.

While we acknowledge that directors have the capacity to influence a corporation's culture through their actions or inactions, without the employment of highly trained compliance professionals, this influence will be limited. As earlier noted, in practice achieving the desired outcomes requires a sophisticated management program, education and communications strategy, monitoring and controls. Directors rarely execute these kind of management programs themselves, although they can offer invaluable support, validation and resources.

Therefore ACI recommend to Treasury that the various Acts in question should also acknowledge the place and role played by compliance professionals in ensuring organisational compliance.

ACI believes that all organisations should be required to have the following in place on either a permanent or outsourced basis:

A director or senior manager responsibility for:

- (a) overseeing your compliance measures;
and
- (b) reporting to the governing body
(including having ready access to the governing body).

Assurance that the area responsible for compliance:

- (a) is independent enough to do its job properly;
- (b) has adequate staff, resources and systems; and
- (c) has access to relevant records.

Specifically, we believe the proposed amendment to s.188 (3) of the Corporations Act would be greatly improved by providing a defence to the directors and company secretary, as a contravention of the Act would not have occurred, if a compliance professional had been appointed by the organisation as we have outlined above.

Taking this approach would not only ensure consistency in the treatment of compliance across all organisations captured by Treasury administered legislation, but would also have the potential to raise the level of compliance throughout the Australian business community while also assisting Treasury and COAG in achieving its regulatory goals.

However, we believe that the inclusion of the above references into legislation will only go part way to addressing the issue of improved compliance and therefore an improvement in the effectiveness to the role of company director. ACI believes that Treasury should also specify (in regulation or guidance note) the skill set should be

possessed by the individual who is assigned the compliance functions detailed above.

As demonstrated earlier, the management systems to achieve these objectives; keep directors meaningfully informed; and integrate with the strategic goals of the organisation and market, require the attention of dedicated professionals, who understand these sensitivities and the balancing of meeting external regulatory expectations as well as internal business objectives.

To this point, ACI has produced a White Paper on this issue and the attached table to the submission outlines a summary of the competencies ACI has found over the past 16 years demonstrate that a person has the skills and knowledge required to be successful in the role as well as ensuring their organisation meets their compliance obligations. We would support the introduction of this criteria by Treasury in determining if an employee with the title of compliance manager/officer is suitable to hold the role.

Not only are trained compliance professionals in the best position to establish compliance frameworks, and to ensure directors and corporations meet their obligations, compliance professionals are also best placed to undertake compliance reviews, by employing established Compliance Review Protocols (CRP).

The purpose of these protocols is to enable organisations and regulators to confidently rely on reports that are produced as a result of a compliance review. The aim of the protocols is to benchmark the quality, consistency, transparency and effectiveness of both the compliance review process as well as the resultant report.

The protocols have been specifically developed to enable organisations to:

- Better understand what is required of them when they are subject to a mandated compliance review as part of a regulator's enforcement outcome.
- Obtain more value from compliance reviews by being able to negotiate more effectively with external reviewers.
- More effectively plan and undertake internal reviews.

The aim of the protocols is also to provide regulators with:

- A set of procedures that can be incorporated or referred to in enforcement and surveillance activities.
- A response to concerns about the quality and consistency of compliance review reports.

The protocols have also been developed to enable the compliance industry to:

- Have a minimum standard for compliance programme reviews and reporting that will enable realistic comparison and benchmarking across organisations as to the effectiveness of compliance measures.
- Set competency benchmarks for persons undertaking reviews in order that compliance professionals can further develop the compliance profession's certification structure.

ACI is of the view that these review protocols, in conjunction with compliance management frameworks established by fully trained compliance professionals, is the only way to ensure both corporations and directors alike are in a position to ensure that regulatory obligations, and the government and COAG's objectives, will be met.

Once again ACI would like to thank Treasury for providing this opportunity to comment upon the proposed legislative amendments. Should you require any additional information or seek clarification on the comments that appear in this submission, please do not hesitate to contact ACI on (02) 9292 1788.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'M. Tolar', with a stylized flourish extending to the right.

Martin Tolar CCP

Managing Director

Please note that the views expressed in this submission represent those of the collective ACI membership. Consequently, individual members and organisations may hold a different perspective on some of the points raised and therefore reserve the right to make comment in their own right.

Table 1: Compliance Professional Capabilities

	Pre- Management*	Management**	Senior Management***
Generic Skills			
Skill Transfer Training	✓	✓	✓
Communications Programs	✓	✓	✓
Assertiveness	✓	✓	✓
Leadership and Team Building	✓	✓	✓
Negotiation, Influencing, Facilitation and Mediation		✓	✓
Creative Problem Solving		✓	✓
Business Process			
Changes Leadership & Organizational Behavior	✓	✓	✓
Project Management	✓	✓	✓
Performance Management & Analysis	✓	✓	✓
Investigatory: Forensic Review & Monitoring	✓	✓	✓
Quality Processes and Systems		✓	✓
Information Management Systems & Reporting		✓	✓
Internal auditing and general monitoring		✓	✓
Business Planning, Budgeting and Reporting		✓	✓
Generic Compliance			
Compliance Framework, Planning & Implementation	✓	✓	✓
Risk Management Frameworks including fraud	✓	✓	✓
Corporate Governance Frameworks	✓	✓	✓
Ethics and Social Responsibility	✓	✓	✓

Breach Identification Management & Escalation Processes		✓	✓
Complaints Handling Processes		✓	✓
Compliance Policy Development & Regulatory Relationships			✓
Due Diligence Processes			✓
Whistleblower Systems			✓
Compliance Training Programs			✓
Legal Compliance			
Law for Non Lawyers	✓	✓	✓
Privacy, Anti-Trust, Consumer Protection, Corporations Act.		✓	✓
Criminal Code, Anti-Money Laundering			✓

* 2-5 years experience (competency component of ACI Associate designation)

** Greater than 5 years experience and generally in people management role (competency component of ACI CCP designation)

*** Greater than 10 years experience – senior management demonstrating thought leadership in compliance (competency component of ACI CCP(Fellow) designation).