

## **Personal Liability for Corporate Fault Reform Bill 2012**

The proposed Personal Liability for Corporate Fault Reform Bill 2012 (the Bill) represents the first tranche of the Commonwealth Government's response to the Directors' Liability reform project (the reform project), which forms part of the Council of Australian Governments' (COAG) National Partnership Agreement to Deliver a Seamless National Economy (SNENP).

The reform project aims to harmonise the imposition of personal criminal liability for corporate fault across Australian jurisdictions.

The Bill amends provisions in the Commonwealth laws to ensure that where legislation imposes derivative liability, it is fair and principled, and is not imposed as a matter of course.

### **Context to proposed amendments**

Derivative liability provisions impose criminal liability on directors in situations where they may not be aware of, or have the ability to prevent, the commission of an offence by the company. Additionally, directors who are defendants in such proceedings often bear the burden of proof, reversing the usual situation under the criminal law.

In 2009, the Ministerial Council for Corporations (MINCO) agreed to a set of principles which were approved by COAG (COAG Principles). The principles aim to ensure that, in areas where derivative liability is considered appropriate, it is imposed in accordance with principles of good corporate governance and criminal justice.

The Business Regulation and Competition Working Group (BRCWG), comprising representatives from Commonwealth and State and Territory governments oversees this reform, and as requested by COAG, has developed supplementary guidelines (BRCWG Guidelines) to assist jurisdictions in reauditing their legislation. A legislation audit against the COAG Principles and BRCWG Guidelines has identified derivative liability provisions in Commonwealth legislation.

This Bill amends Treasury (non-taxation) portfolio legislation.

The following are the agreed COAG Principles, against which the legislative amendments are framed:

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:
  - there are compelling public policy reasons for doing so (e.g. 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:
    - 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.
5. 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.
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.

While quite a number of provisions may, at first glance, appear to be derivative liability provisions, many are in fact a form of accessorial liability, and therefore fall outside the scope of this review. Additionally, a number of provisions were identified which, while imposing a derivative liability, were justified on strong policy grounds.

### **Amendments to the Corporations Act 2001**

Section 188 of the Corporations Act designates company secretaries as responsible for certain administrative functions within the company, and makes the secretary personally liable for non-compliance.

The amendments proposed in Schedule 1 of the Bill, in addition to making minor formatting changes for readability and clarity, would render breaches of this section subject to a civil penalty, rather than constituting an offence. While the actions listed in Section 188 are central to the function of a company secretary, the imposition of civil liability for breaches of this nature (combined with the proposed amendments to Section subsection 1317E(1) outlined below) is an adequate mechanism to provide an appropriate incentive for compliance. Section 1302 (regarding the location of company registers) will also be included in the purview of section 188.

Due to the proposed amendment of section 188 to a civil penalty provision, Section 188 will be added to the list of contraventions under subsection 1317E (1), which lists civil penalty provisions for which a court, if it is satisfied that a person has contravened a listed section, must make a declaration of contravention. Section 1317G, which allows substantial penalties to be applied for serious contraventions of the provisions listed in Section subsection 1317E(1), will also be amended to enable a lighter penalty to be imposed for contraventions of section 188 which do not meet the level of seriousness to warrant the more substantial penalties already provided for under section 1317G.

Subsections 1302(3) and 1302(5) will also be redrafted to make clear that a degree of active involvement is required for a person to be guilty of an offence.

In instances where it is appropriate for personal criminal liability to attach to contraventions related to corporate offences (such as where there is active involvement by the person subject to the offence provision, it is preferred that such provisions nonetheless be clearly labelled, to put beyond doubt that criminal liability would attach to contraventions. To this end, a number of notes are proposed to be added to clearly identify these provisions.

Section 601FC of the Corporations Act included personal liability for intentional or reckless involvement in the breach of certain duties owed by responsible entities in registered schemes. This explicit reference to personal liability will be removed, although the standard legal principles regarding accessorial liability for those involved in the commission of offences would remain.

Schedule 3 of the Corporations Act lists the penalties available for breaches of relevant provisions. While the criminal aspect of some breaches of the Corporations Act will be removed, the regulatory need for adequate deterrence remains. Consequently, a number of penalties listed in the Schedule will be increased. Consistent with the *Guide to Framing Commonwealth Offences, Infringement notices, and Enforcement Powers*, developed by the Attorney General's Department, governing the use of penalties, a number of adjustments are proposed to be made to penalty provisions to accord with this guidance.

#### **Amendments to the Foreign Acquisitions and Takeovers Act 1975 (FATA)**

In line with the COAG Principles, section 31 of the FATA will be amended to make clear the level of involvement by an officer that would be required in order to trigger personal liability. A number of notes will also be inserted into the FATA to make clear when sections 30 and/or 31 would apply, and that criminal liability could be applied to an officer of a corporation if the officer authorised or permitted the commission of the offence.

#### **Amendments to the Insurance Contracts Act 1984 (ICA)**

Section 76A of the ICA applies liability to directors, employees or agents of a company if they intentionally or recklessly permit or authorise a contravention of the ICA. This section arguably imposes personal liability in circumstances where the person has not intentionally been involved in the offence, and is, in terms of location within the ICA, physically removed from the offences to which it applies. Consequently, this section will be repealed.

In substitution, section 11DA will be inserted, which will impose criminal liability on a person where the person is a director, employee or agent of an insurer, and permits or authorises a relevant offence against the Act.

#### **Amendments to the Pooled Development Funds Act 1992 (PDFA)**

Section 50 of the PDFA lists a number of offences for which officers or managers of pooled development funds are liable. In line with the COAG Principles, the Bill will repeal this section.