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Dear Manager,

## **Exposure Draft of the Personal Liability for Corporate Fault Reform Bill 2012**

### **1. Introduction**

I would like to take the opportunity to comment on the Personal Liability for Corporate Fault Reform Bill 2012 ("**Exposure Draft**"), and in particular the proposed amendments to the *Corporations Act 2001* (Cth) ("**Corporations Act**").

In summary, the Exposure Draft falls far short of its stated ambitions. It represents a missed opportunity for the Federal Government to introduce reforms to ensure that personal liability for corporate and non-corporate wrongdoing is imposed consistently and in accordance with ordinary principles of criminal justice.

The explanatory document accompanying the Exposure Draft and titled "Personal Liability for Corporate Fault Reform Bill 2012" ("**Explanatory Document**") sets out an ambitious and worthy goal to harmonise the imposition of personal criminal liability for corporate fault. The COAG Principles set out in the Explanatory Document appear to be, of themselves, a rational set of rules that will be useful in guiding reforms.

However, the Exposure Draft fails to achieve the stated ambitions of the reform project. It also fails to take advantage of previous work done in this area by the Corporate and Markets Advisory Committee.

### **2. Failure to meet the COAG Principles**

The Exposure Draft does not reflect or embody the COAG Principles. In particular:

- the second COAG Principle states that "(d)irectors should not be liable for corporate fault as a matter of course". However, this is precisely how the current and proposed subsection 188(2) operates. Failure by a company to comply with the provisions set out in subsection 188(1) automatically results in a secretary or director being liable, subject to the subsection 188(3) defence.
- the third COAG Principle states that "a 'designated officer' approach to liability is not suitable for general application". However, this is precisely how the current and proposed subsection 188(1) and (2) operate. Other corporate officers may have greater responsibility for the company's failure to comply with the provisions set out in subsection 188(1), however, it is a person's status as a secretary or director is a necessary pre-condition to a finding of liability.
- it is not clear whether the fourth COAG Principle is relevant, as it only refers to "criminal liability". However, to the extent that it is intended to apply to civil

penalty provisions like section 188, it is not clear what the “compelling public policy reasons” are for imposing liability or why imposing liability on the corporation itself is likely to promote compliance.

The provisions to which subsection 188(1) applies are primarily administrative in nature and, with a few exceptions, penalise companies for not lodging certain forms on time. It is not clear what the “significant public harm” is if a company is merely late in lodging its forms, or why the imposition of sanctions against the company is insufficient on its own to promote compliance.

- the fifth COAG Principle states that a director could be liable where they have “encouraged or assisted the commissioning of the offence” or “have been negligent or reckless in relation to the corporation’s offending”. This concept of a fault element forming part of the offence is not reflected anywhere in section 188. Instead, the subsection 188(3) defence maintains the objective fact test present in the current law.
- lastly, the aim of the COAG Principles is to ensure that liability is imposed in accordance with the principles of criminal justice. However, ordinary principles of criminal justice do not, as their starting point, place the legal burden of proof on defendants to make out a defence and do not impose liability in the absence of any fault element on the part of the defendant. As stated above, it is not at all apparent why the inversion of ordinary principles of criminal justice is necessary to ensure corporate compliance with the provisions set out in subsection 188(1).

Ultimately, the effect of the amendments proposed by the Exposure Draft is to downgrade the consequences for secretaries and directors who breach section 188. They do not change when a person may be found liable for breaching section 188. These changes do not meet the stated goals of the reform project.

Furthermore, there are other provisions of the Corporations Act which impose liability on directors where their companies breach the Corporations Act. It is not at all apparent why section 188 has been singled out for special treatment.

### **3. Disregard of the Personal Liability for Corporate Fault report by the Corporate and Markets Advisory Committee**

The Exposure Draft does not reflect any of the recommendations made by the Corporate and Markets Advisory Committee (“CAMAC”) in its 2006 report titled “Personal Liability for Corporate Fault”.

The CAMAC report was published with the benefit of many contributions from the legal and corporate community. The main concern it expressed was that the inversion of ordinary criminal law principles in the corporate context was not justifiable. In the words of the CAMAC:

*The Committee is of the view that, as a general principle, individuals should not be made criminally liable for misconduct by a company except where it can be shown that they have personally helped in or been privy to that misconduct, that is, where they were accessories. There was strong support for this position in submissions.*

*The Committee is concerned about the trend in various pieces of legislation to treat directors or other corporate officers as criminally 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 criminal law.*

Furthermore, it recommended that individuals involved in corporate and non-corporate bodies should be treated consistently in respect of the misdeeds of these bodies.

None of the CAMAC report appears to have influenced the preparation of the Exposure Draft.

It is submitted that the CAMAC report provides the Federal Government with an appropriate starting point to reform the entire area of personal liability for individuals involved in the activities of corporate and non-corporate bodies. This is to be preferred to a piecemeal approach to reform.

#### **4. Other comments**

If the Federal Government maintains that the Corporations Act should be amended in the manner of the Exposure Draft, then it should be noted that:

- subsection 188(2) treats directors of proprietary companies and those of public companies inconsistently. If a public company fails to comply with a provision set out in subsection 188(1), its directors are not exposed to personal liability, even if that public company does not have a secretary. Although the failure by a public company to have a secretary is a breach of section 204A, this again does not impose any personal liability on directors (even though the imposition of personal liability in this situation would not be inconsistent with how the Corporations Act currently imposes personal liability).
- the reasoning behind the removal of the word “all” in subsection 188(3) is not clear. It was not explained in the Explanatory Document. Ordinary rules of statutory interpretation would suggest that the proposed subsection 188(3) is intended to have a different meaning to the current subsection 188(3).
- the references to section 1302 in the Exposure Draft are otiose, as that section was repealed by the *Personal Property Securities (Corporations and Other Amendments) Act 2010* (Cth).

Thank you for this opportunity to comment on the Exposure Draft.

Yours faithfully,

Andrew Hii