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Governance and Insolvency Unit
Corporations and Capital Markets Division
PARKES ACT 2600

By Email: personalliabilityforcorporatefault@treasury.gov.au

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Dear Sir/Madam,

Re: Exposure Draft – Personal Liability for Corporate Fault Reform Bill 2012.

Thank you for the opportunity to comment on the Exposure Draft – Personal Liability for Corporate Fault Reform Bill 2012. Please find outlined below Australian Unity's response, for your consideration.

Australian Unity is a national health, financial services and retirement living organisation providing a range of services designed to enhance the wellbeing of members, customers and the community. It is a mutual company, which has been providing for the needs of Australians for more than 165 years. The Australian Unity Group employs more than 1,250 people who look after the needs of more than 400,000 customers. Its activities include provision of private health insurance, retirement living and funds management services.

1. General comments

The proposed amendments constitute a good starting point for reform and we look forward to the next tranche of proposals.

2. Schedule 1. Corporations Act 2001 amendments

As the current proposals address the Corporations Act 2001 (Act), we recommend that a further section be amended - section 1300 of the Act.

This is because the current formulation of section 1300 is in conflict with the COAG principles, as it currently imposes strict criminal liability on individuals in circumstances where the obligation is unclear and potentially in conflict with other sections of the Act, where the obligation is attached to the corporation, and where the person exposed to the liability may not have any capacity to influence the conduct of the corporation in relation to the matter.

By way of background, section 173 deals with the rights of persons to inspect or obtain copies of a company register. Following certain alleged abuses of these rights, where registers were accessed for the purpose of making unsolicited discounted offers for the purchase of shares/units from vulnerable holders, the section was amended. With effect from 13 December 2010, section 173 made the right to obtain a copy of all or part of a register subject to compliance with proper purpose procedures:

'S 173 Right to inspect

- (1) *A company or registered scheme must allow anyone to inspect a register kept under this Chapter. If the register is not kept on a computer, the person inspects the register itself. If the register is kept on a computer, the person inspects the register by computer.*
- (3) *The company or scheme must give a person a copy of the register (or a part of the register within 7 days if the person:*
 - (a) *makes an application to the company or registered scheme in accordance with subsection (3A); and*
 - (b) *pays any fee (up to the prescribed amount) required by the company or scheme.*
- (3A) *An application is in accordance with this subsection if:*
 - (a) *the application states each purpose for which the person is accessing the copy; and*
 - (b) *none of those purposes is a prescribed purpose; and*
 - (c) *the application is in the prescribed form. '*

Prescribed purpose under section 173 (3A)(b) was defined to include making an offer or invitation to which Division 5A of Part 7.9 of the Act applies. This division regulates the making of unsolicited offers to purchase financial products and provides a disclosure regime so as to ensure adequate investor protection in situations where an investor may not know the value of their financial products.

The above provisions mean that a person is not entitled to receive a copy of all or part of a register unless the person makes application in the prescribed form, stating the purposes for which the copy is being requested, and none of these purposes is a prescribed purpose.

Notwithstanding these changes, recent proceedings by a company associated with David Tweed has drawn attention to section 1300 of the Act, which was not amended at the time of amendment of section 173 (perhaps being overlooked). Section 1300 provides:

S 1300 Inspection of books

- (1) *A book that is by this Act required to be available for inspection must, subject to and in accordance with this Act, be available for inspection at the place*

where, in accordance with this Act, it is kept and at all times when the registered office in this jurisdiction of the body corporate concerned is required to be open to the public.

- (2A) *If a person asks a proprietary company in writing to inspect a particular book of the company that the person has a right to inspect, the company must make it available within 7 days, for inspection by the person at the place where it is required to be kept.*
- (2B) *An offence based on subsection (2A) is an offence of strict liability.*
- (3) *A person permitted by this Act to inspect a book may make copies of, or take extracts from, the book and any person who refuses or fails to allow a person so permitted to make a copy of, or take an extract from, the book is guilty of an offence.*
- (4) *An offence based on subsection (3) is an offence of strict liability.*

It is unclear whether the right to make a copy under section 1300(3) is now subject to the same proper purpose regime as required by section 173(3).

In recent proceedings David Tweed's Direct Share Purchasing Corporation (DSP) commenced proceedings against Australian Unity seeking to force it to register a transfer of units in one of its mortgage trusts, despite the fact that the unit holder disputed the purported transfer, which was pursuant to an unsolicited offer to purchase financial products off-market.

In relation to those proceedings DSP sought access to several member registers of Australian Unity funds and to copy material from them in relation to a number of investors. It was alleged that section 1300(3) gave the company the right to copy (record), without complying with the proper purpose requirements in section 173(3). We do not agree with that assertion, however the wording of the two sections makes the interpretation of these sections less than crystal clear. Questions also arose around the right of a person to seek an 'inspection' under section 1300 and then to use blackberry / photographic or other technology to copy a register without following the proper purpose procedures in section 173(3). It was also unclear how many "individuals" are exposed to the risk of strict liability under section 1300 (3) for "refusing or failing to allow" the inspection. For example, would it include a receptionist who fails to procure an inspection when the person seeking the inspection arrives with photographic equipment at a self nominated but unconfirmed time?

Imposing personal criminal liability on a strict liability basis in these circumstances is in conflict with the agreed COAG Principles, against which the legislative amendments are framed, and in particular:

- 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.*

In view of the forgoing we recommend that the following amendments be made to section 1300:

- remove the personal liability of "*any person who refuses or fails to allow a person so permitted to make a copy*". This does not serve any compelling public policy rationale and is particularly unfair when the interpretation of the requirements of section 1300 (3) in relation to the extent and preconditions attached to making copies is so unclear and inconsistent.
- breach of section 1300 (3) should not be an offence of strict liability
- make the rights to copy of a book or any part of a book subject to the same proper purpose regime as applies under section 173(3).

These amendments would mean that adequate mechanisms to provide an appropriate incentive for compliance would be retained, the intent of the Act regarding proper purpose for authorising copies of the register would be upheld, and the COAG principles regarding personal liability for corporate fault would be applied.

Yours sincerely,



Kirsten Mander

General Counsel & Company Secretary
Australian Unity Limited