

Personal Liability for Corporate Fault Reform Bill 2012

The proposed Personal Liability for Corporate Fault Reform Bill 2012 (the Bill) represents the second 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 scope of this project is restricted to a consideration of existing criminal liability provisions, which render a corporate officer liable without the need for the prosecution to demonstrate fault by the officer (subsequently referred to as personal liability in this document).

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 sometimes bear a 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 personal 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 of representatives from Commonwealth, State and Territory governments oversees this reform, and, as requested by COAG, has developed supplementary guidelines (the BRCWG Guidelines) to assist jurisdictions in reauditing their legislation. A legislation audit against the COAG Principles and BRCWG Guidelines has identified a number of personal liability provisions in Commonwealth legislation.

This exposure draft includes proposed amendments to Commonwealth legislation other than Treasury portfolio legislation. An exposure draft of proposed amendments to Treasury portfolio non-tax legislation was exposed for the period from 27 January to 30 March 2012. A number of submissions to this draft were received, which are being considered by Treasury. In line with the COAG milestone for this reform initiative, it is proposed that a consolidated Bill comprising amendments to Commonwealth legislation proposed in the two exposure draft tranches will be introduced by the end of 2012.

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 a number of provisions in Commonwealth legislation may, at first glance, appear to be personal liability provisions, many are in fact a form of accessorial liability, and therefore fall outside the scope of this review. This document explains the amendments to the non-Treasury Commonwealth laws that are being proposed; a number of provisions were identified which imposed personal liability, but which were justified for retention on strong policy grounds. In particular, offences that aim to prevent significant public harm (such as harm to public health) or where liability of the corporation is unlikely to sufficiently promote compliance (for example, where there is a real risk that offences by corporations cannot be effectively prosecuted due to corporate insolvency) were thought to have sufficient policy justification for personal liability to be retained.

Amendments to the Classification (Publications, Films and Computer Games) Act 1995 (Classification Act)

Part 10 of the Classification Act enables special measures to be taken to protect children living in Indigenous communities from being exposed to prohibited material, including sexually explicit and violent materials. Offences within this part include offences in relation to the supply of prohibited material in prescribed areas. Prohibited material is defined to include material rated X 18+, or material that is refused classification.

Section 104 makes corporate managers guilty of an offence if the body corporate has committed an offence against Part 10. This is subject to a defence that the manager did not know of the circumstances that constitute the offence, or took all reasonable steps to prevent the commission of the offence. Given the seriousness of the harm being prevented, the Bill retains personal liability in these circumstances. However, the offence will be restructured to place the burden of proving all elements of the offence on the prosecution, thereby removing the need for a defence. This effectively results in a requirement for a proof of negligence on behalf of the director in order for the director to be guilty of an offence. It is proposed to make clear that if a corporation commits an offence, a director may also be guilty of an offence.

Although Part 10 of the Classification Act is subject to a sunset clause, the amendment will clarify the application of derivative liability should further reforms to the regulation of prohibited materials in Indigenous communities result in an extension of the operation of this Part.

Amendments to the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSIA)

In the exposure draft of the first tranche of the Bill, a number of amendments were proposed to Section 188 and related provisions of the Corporations Act 2001 regarding the liability of company secretaries. These provisions designated company secretaries as responsible for certain administrative functions within the company, and made the secretary personally liable for non-compliance.

Generally, the Corporations (Aboriginal and Torres Strait Islander) Act aims to extend the policy and governance principles that apply to the regulation of corporations under the Corporations Act. Section 265-40 of CATSIA substantially replicates the operation of section 188 of the Corporations Act in placing personal criminal liability on company secretaries. The Bill amends section 265-40 to no longer apply criminal liability. Section 386-10 is also amended to bring the civil penalty in line with those in the proposed amendments to section 188 of the Corporations Act. In addition, it is proposed to insert notes to clearly mark provisions to which section 265-40 applies.

Amendments to the Health Insurance Act 1973 (HIA)

Section 129AA of the HIA makes it an offence for a proprietor of a private hospital to offer or accept a bribe to enable a patient to be admitted to the hospital under certain circumstances. Subsection 129AA(2) makes an officer of a corporation guilty of an offence where the corporation has committed an offence. This includes (but is not limited to), an officer who wilfully authorises or permits the commission of the offence. This personal liability does not meet the COAG principles, and is proposed to be repealed.

Sections 23DZZIQ, 23 DZZIR and 23DZZIS of the HIA impose offences relating to the making of bribes or threats to induce a person to provide certain medical services. These offences were aimed at encouraging fair competition between providers of pathology and diagnostic imaging services, and to deal with claims of prohibited practices within the pathology sector in particular. These provisions had been included in consultation with the pathology industry at the time, which had found that regulation without personal liability had proved ineffective in combating prohibited practices within the sector. The Bill does not remove the personal liability imposed by these sections: however it is proposed to insert notes to make clear that personal liability may apply. A minor amendment to section 23DZZIO to correct a typographical error is also included.

Amendments to the National Measurement Act 1960 (NMA)

Section 19G of the NMA extends personal liability to directors of a company where the company has performed the physical element of an offence under the NMA, as well as to other officers in more narrow circumstances. As more effective mechanisms currently exist to regulate trade measurement activities in other Commonwealth legislation, there is no compelling public policy reason to retain personal liability for offences under the NMA. Accordingly, it is proposed that section 19G be repealed.

Amendments to the National Vocational Education and Training Regulator Act 2011 (NVET)

Section 133 of NVET applies personal liability for executive officers to all offences under the Act, where an organisation commits an offence, the officer knew the offence would be committed, could prevent the conduct, and failed to take all reasonable steps to do so. The types of offences covered by the NVET broadly relate to a registered training organisation acting outside the scope of their registration, or generally failing to meet duties specific to such registered organisations.

The relevant offences under the NVET seek to address issues in the market for international students, where some companies were established for the purpose of subverting the immigration process. Corporate penalties such as fines and loss of registration would be ineffective where companies may circumvent prosecution for wrongdoing by dissolving when action was taken. For this reason, the Bill does not remove personal liability from the NVET. It is proposed to insert notes into the relevant offence provisions to ensure that it is clear that personal liability may apply.

Amendments to the Therapeutic Goods Act 1989 (TGA)

Section 54B of the TGA applies blanket liability to executives of a company where the company commits an offence under the Act, and the executive was in a position to influence the conduct, knew that the conduct would occur, and failed to take reasonable steps to prevent the conduct. Consequently, a large number of offences are subject to personal liability.

As the TGA essentially governs the supply of healthcare products to the Australian public, justifications for the retention of personal liability include the serious harm that could result from supply of unsafe healthcare products, and the likelihood that suppliers may be smaller companies for which company liability would be insufficient to promote compliance. Additionally, a court is to have regard to any action the officer took to ensure the corporation was aware of the need to comply with the Act, and the action taken upon becoming aware of the commission of the offence. Combined with the required level of involvement for the relevant officer (essentially a negligence

standard), the retention of personal liability for a number of offences under the TGA is warranted on strong public policy grounds.

Generally, offences under the TGA have three tiers of seriousness, based on the level or likelihood of harm. While personal liability is retained for the more serious offences, in general the Bill removes personal liability from the offences of the lowest tier of seriousness. Additionally, the blanket liability provision is proposed to be removed, and replaced by a requirement that only prescribed provisions are subject to personal liability. This approach ensures that for any future proposed offences under the TGA, a positive policy decision will be required to apply personal liability by adding it to the table inserted by section 54BA, rather than having it apply by default. It is proposed to insert notes to offences to make clear where personal liability will continue to apply.

Amendments to the Veterans' Entitlements Act 1986 (VEA)

Sections 93D and 93E of the VEA impose liability on directors, amongst others, where a corporation is in default. The term 'in default' is defined to include accessorial liability. As with a similar provision in the Foreign Acquisitions and Takeovers Act 1975 (which was included in the first tranche exposure draft), for greater certainty, the Bill expressly restricts the operation of personal liability to situations where the officer intentionally authorised or permitted the commission of the offence.