Personal Liability for Corporate Fault Reform Bill 2012

The proposed Personal Liability for Corporate Fault Reform Bill 2012 (the Bill) represents the third 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 will amend 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

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 COAG Guidelines) to assist jurisdictions in re-auditing their legislation. On 23 July 2012, COAG agreed that all jurisdictions would apply these guidelines when drafting future legislation.

A legislation audit against the COAG Principles and Guidelines has identified a number of personal liability provisions in Commonwealth 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 second exposure draft proposing amendments to non-Treasury portfolio Commonwealth legislation was exposed for the period from 1 June to 29 June 2012. This third (and final) exposure draft includes the proposed amendments to Commonwealth tax legislation.

In line with the COAG milestone for this reform initiative, it is proposed that a consolidated Bill comprising all proposed amendments to Commonwealth legislation (that is, incorporating the proposed amendments from all three 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.

Proposed amendments to Commonwealth tax legislation

The legislative audit identified the following four provisions in the tax laws which potentially raise issues when assessed against the COAG principles:

- section 8Y of the *Taxation Administration Act 1953* (section 8Y);
- section 444-15 of Schedule 1 to the *Taxation Administration Act 1953* (section 444-15);
- paragraph 252(1)(j) of the *Income Tax Assessment Act 1936* (paragraph 252(1)(j)); and
- subsection 57(7) of the *Superannuation Guarantee (Administration) Act 1992* (subsection 57(7).

Section 8Y deems company directors (and other individuals involved in the management of the company) liable for taxation offences committed by their company, but with a defence to those individuals who can show they were not directly involved in the company’s offence.

The other three provisions appear to impose an absolute liability on directors. However, there is a Full Federal Court decision from 1984 (*Reynolds v The Deputy Commissioner of Taxation* 84 ATC

4689) relating to paragraph 252(1)(j) which suggests that this provision (and therefore, arguably, the other two provisions) may only be enlivened as a result of a director's own actions.

The Commonwealth Government has carefully assessed each of these provisions against the COAG principles.

Notwithstanding that section 444-15, paragraph 252(1)(j) and subsection 57(7) arguably impose only an accessorial liability on directors, the Government has decided to amend these provisions to remove this personal liability. The Government has retained the ability to serve a notice on a company by giving it to a director. Due to the unique function of the public officer of a company as created by statute, the liability of the public officer has been retained.

The Government has decided not to amend section 8Y. In reaching this conclusion the Government has taken into account a range of factors outlined in the COAG guidelines, including the magnitude of harm that the offending conduct would likely cause, the effectiveness of corporate penalties in preventing this conduct and the availability of evidence to the prosecution and the director.

- Section 8Y provides a defence to directors who can show, on the balance of probabilities, that they were not involved in the company's offending. As such, section 8Y operates, in substance, as an accessorial liability provision. It would not be feasible to shift the burden and require the prosecution to prove a director's involvement in the company's offence, especially as such information could be peculiarly within the knowledge of the director.
  - As a matter of practicality a director would be in a significantly better position to be able to adduce evidence that shows they were not involved in the company's offending rather than explicitly require the prosecution to establish their involvement.
- The ATO relies on section 8Y to prosecute those directors who repeatedly and seriously neglect their company's tax obligations. If the ATO is unable to prosecute these individuals, it could significantly undermine the public's confidence in the fairness of the tax system and the ATO's ability to enforce the law.
  - In this context, the ATO does not prosecute directors in relation to offences committed by companies as a matter of course. The ATO's public position on prosecutions (as set out in ATO Practice Statement Fraud Control and the Prosecution Process) notes that the ATO has a range of compliance strategies available, such as the imposition of administrative penalties and the initiation of civil recovery processes, as alternatives to prosecutions.