



HENRY DAVIS YORK  
LAWYERS

30 March 2012

Our Ref JDL/SVB000  
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Dear Treasury

**Exposure Draft - Personal Liability for Corporate Fault Reform Bill 2012**

Henry Davis York is grateful for the opportunity to comment on the Exposure Draft of the Personal Liability for Corporate Fault Reform Bill 2012. Our submission is set out in the attachment to this letter.

We would be happy to elaborate on our comments if that would be of further assistance.

Yours faithfully  
Henry Davis York

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## Personal Liability for Corporate Fault Reform Bill 2012

### Submission on Exposure Draft

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#### 1 Executive Summary

We endorse the proposal to nationalise directors' liability and welcome the changes contained in the Personal Liability for Corporate Fault Reform Bill 2012 (**Reform**). Whilst we recognise that the Reform is only tranche one of the Government's proposed amendments to directors' liability, we do have some initial concerns regarding the application and adequacy of the changes contained in the Reform.

#### 2 Scope of application

The Reform is designed to harmonise the approach to imposing personal criminal liability for corporate fault across all jurisdictions.

We support such harmonisation to promote equality and consistency, although question the capacity of the Reform to achieve it. Whilst we recognise that a draft Bill relating to other Commonwealth legislation is yet to be introduced, in its current state, the Reform has a disappointing scope of application.

The Reform only applies to Treasury legislation, excluding taxation. This is a piecemeal approach to harmonisation, and is a far cry from the nationally consistent, principles-based approach initially envisioned. The inadequacy of the Reform's application is exacerbated by the fact that the states and territories have shown little progress toward harmonising their laws and insufficient commitment has been shown toward ensuring that the states and territories comply with moves toward harmonisation<sup>1</sup>.

If harmonisation across the jurisdictions is a serious goal, a whole of government approach needs to be adopted at the Commonwealth level. Amending Commonwealth legislation via a portfolio-by-portfolio approach is an insufficient step towards national unity and will not force states and territories to enact mirroring legislation.

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<sup>1</sup> We note that in its 2011 Annual Progress Report, the COAG Reform Council stated that there was a serious risk that the reforms would not be achieved.

We submit that the scope of the Reform's application is insufficient and that a broader application needs to be considered.

### **3 Adequacy of the Reform**

The Reform was introduced following complaints from directors relating to the onerous requirements imposed upon them, particularly in the wake of the *Centro*<sup>2</sup> case. We agree that onerous requirements upon directors impact negatively upon board recruitment, retention and decision-making, and as a consequence, entrepreneurialism and economic growth, and maintain that reform is necessary in order to ensure fairness for directors. In particular, we maintain that personal criminal liability should only be imposed in a limited range of special situations, namely in light of compelling public policy reasons or where penalties on the corporation do not sufficiently deter illicit behaviour.

The change to section 188 of the Corporations Act, namely the move from criminal penalties to civil penalties is a welcome one, and whilst the increase in civil penalties in Schedule 3 of the Corporations Act may seem counterintuitive to some, we accept the need for deterrence measures. We further agree with the additional changes to the Corporations Act, and supports the amendments made to the Foreign Acquisitions and Takeovers Act 1975, Insurance Contracts Act 1984 and the Pooled Development Funds Act 1992.

That said, in light of the fact that two years have passed since the COAG reforms were developed by the Ministerial Council for Corporations, the Reform delivers surprisingly little substance. The Reform does not address director liability in a significant way, namely, as referred to in the Reform's explanatory materials, because many of the provisions in the Corporations Act that seemingly refer to derivative liability do in fact refer to accessorial liability, and therefore further reforms will be necessary in order to reduce the significant burdens currently imposed upon directors.

Altering penalties eases the plight of directors, but does not overcome the negative economic consequences of having directors reluctant to serve and make entrepreneurial decisions on boards. In order to alleviate the inherent misgivings in the current system, a clear statement on directors' liability is required and reforms should not be constrained to provisions regarding personal criminal liability. We submit that the Reform should be broadened, such that clarity relating to personal liability is increased and directors' actions are not unreasonably curtailed by the risk of personal liability, whether that liability be derivative or not.

As a final note, we raise the potential impact of the Reform upon insurers of directors and officers (D&O). At present, D&O insurers are precluded from indemnifying directors and officers found criminally responsible under the Corporations Act. In replacing strict liability offences with civil penalty provisions (reform to section 188 of the Corporations Act), a higher burden will be placed upon D&O insurers. Whilst D&O insurers may find the Reform unfavourable to them, we submit that the benefits to directors far outweigh any such detriment to D&O insurers.

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<sup>2</sup> *ASIC v Healey & Ors* [2011] FCA 717.

#### **4 Conclusion**

Whilst we welcome the Reform and generally agree with the changes made, we do remark upon the Reform's limited application and scope. We acknowledge that the Reform is only the first in a series of legislative reforms and we look forward to seeing the changes made in the next tranche of the proposed amendments.

**Henry Davis York**

30 March 2012

This Submission has been prepared by James Lonie and Sarah Bullock, members of the Corporate Advisory Group at Henry Davis York. Their contact details are set out below:

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