

Your ref:
Our ref: Company Law Committee

18 January 2012

Research Director
Legal Affairs and Community Safety Committee
Parliament House
George Street
BRISBANE QLD 4000

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Dear Research Director

Directors' Liability Reform Amendment Bill 2012

Thank you for providing the Queensland Law Society with the opportunity to provide comments on the *Directors' Liability Reform Amendment Bill 2012* (the **Bill**).

The Society welcomes the sentiments expressed by the Attorney-General in his introductory speech on the first reading of the Bill that:

'The bill substantially reduces, across the Queensland statute book, the number of provisions that impose personal and criminal liability on directors for offences committed by corporations—directors liability provisions. There has been a tendency in the past to provide for blanket directors liability to apply to offences under acts without adequate justification.

The bill responds to concerns expressed by the business community and the legal profession about the number and complexity of provisions that impose personal liability on directors for corporate fault.¹

However, the Society has concerns about both the process and substance of the Bill as set out in this submission.

1. Lack of consultation

The Society has not been consulted on the Bill and notes that there has been no public consultation prior to the Bill being introduced into the House. The Society is strongly of the view that broad consultation on legislation at an early stage is the key to good law.

¹ Queensland, *Parliamentary Debates*, Legislative Assembly, 28 November 2012, 2855-2856.

The Explanatory Notes for the Bill state that:

'General community consultation was not possible due to the timeframes required to introduce the legislation to meet COAG's milestone that legislation to implement the results of the legislative audit be introduced by the end of 2012.'

However, the Society notes that the Bill was announced by the Honourable Attorney-General and Minister for Justice on 7 September 2012.² The Society believes that at least some targeted consultation may have been possible in the two and a half months between this announcement and the introduction of the Bill. This consultation may have avoided the need for substantive concerns expressed in this submission to be raised.

The Christmas and New Year holiday period timeframe available for making submissions on the Bill, given its release on 28 November 2012, mean that it has not been possible for the Society to conduct an exhaustive review. It is therefore possible that there are issues relating to unintended drafting consequences or fundamental legislative principles which we have not identified.

2. Infringement of fundamental legislative principles without adequate justification

Section 4(1) of the *Legislative Standards Act 1992* (Qld) (**LSA**) identifies '*fundamental legislative principles*'. These are stated in the same provision to be '*the principles relating to legislation that underlie a parliamentary democracy based on the rule of law*'. Section 4(2) of the LSA states that one of these principles is that the legislature should have regard to the rights and liberties of individuals. Section 4(3)(d) provides that, among other things, whether legislation has sufficient regard for the rights and liberties of individuals can be determined by reference to whether the legislation reverses the onus of proof in criminal proceedings without justification.

In this regard, the Society has previously endorsed³ the analysis of the Commonwealth Government's Corporations and Markets Advisory Committee (**CAMAC**) on personal liability for corporate fault. CAMAC was of the view that legislative provisions that reverse the onus of proof so that directors are liable for corporate fault unless able to make out a defence are '*objectionable in principle and unfairly discriminate against corporate personnel compared with the way in which other people are treated under the criminal law*'.

- *the deeming of individuals to be guilty of an offence, by reason of an office they hold or a role they play, unless they can establish a defence, offends ordinary notions of fairness*
- *the reversal of the onus of proof inherent in such provisions is contrary to the general presumption of innocence in criminal law*
- *the fact that someone is a corporate officer should not subject that person to criminal liability in a way that an individual in other circumstances, or an individual in a responsible position in a non-corporate organization, would not be so subject*
- *the fact that a corporate officer may be able, in the circumstances of a particular case, to make out a relevant defence and thereby avoid conviction does not remove the*

² Attorney-General and Minister for Justice The Honourable Jarrod Bleijie, 'Government commits to red-tape reductions and reforms' (Media Statement, 7 September 2012).

³ Queensland Law Society, Submission to the Minister for Transport and Main Roads, *Director's Liability in the Heavy Vehicles National Law*, 16 May 2012.

seriousness of the risk to reputation and the apprehension, effort and expense to which he or she is subject by being exposed to criminal liability on a prima facie basis

- *as a practical matter, whatever justification there may be, in the context of a small or closely held company, for treating the individuals who run the company as personally responsible for its conduct, this approach becomes increasingly problematic in the case of larger corporate organizations. It does not fit at all well with the current Australian preferred governance model of boards constituted by a majority of non-executives*
- *an undue skewing of personal liability provisions, towards the interests of corporate compliance at the expense of individual fairness, will discourage people from accepting board or managerial positions in corporate enterprises.*⁴

As is acknowledged in the Explanatory Notes to the Bill, every instance where the Bill inserts a new 'Type 2' provision (director is deemed liable for corporate fault unless able to prove to the evidential standard that the director did not know of, or took all reasonable steps to prevent the corporation from committing the relevant offence) or 'Type 3' provision (director is deemed liable for corporate fault unless able to prove to the persuasive standard that the director did not know of, or took all reasonable steps to prevent the corporation from committing the relevant offence) infringes the fundamental legislative principles set out in section 4 of the LSA.

The Society acknowledges that legislation may infringe the fundamental legislative principles set out in section 4 of the LSA where there is adequate justification for doing so. However, the Society is concerned that the information released in relation to the Bill to date (including the Explanatory Notes) does not outline in any detail why some offences merit 'Type 3' provisions while others merit 'Type 2' or 'Type 1' provisions. The only information provided in the Explanatory Notes in this regard is that '*Types 2 and 3 liabilities have been reserved for offences the commission of which creates a risk of significant public harm ... or are considered essential to protect State revenue collection*'. Given the large number and wide variety of statutes amended by the Bill, the Society is strongly of the view that this issue needs to be explored further in relation to each statute that is to be amended, particularly those where it is intended to retain or impose 'Type 2' or 'Type 3' provisions. The Society encourages the Committee to recommend that statutes that are presently proposed under the Bill to have or retain 'Type 2' or 'Type 3' provisions should have those provisions removed or, at a minimum, downgraded to 'Type 1' provisions.

3. Implementation of the COAG principles

Prior to the last state election on 24 November 2011, the Society wrote to leaders of all political parties in Queensland with a list of important issues for the Queensland legal profession. One of these was that each party commit to:

'actively engage and implement in Queensland reforms to achieve the nationally consistent approach to the imposition of personal criminal liability for directors and other corporate officers in circumstances of corporate fault agreed by all States at COAG as a part of the deregulation priorities in the Revised National Partnership to Deliver a Seamless National Economy'

The Society continues to believe that this remains an important issue for the Queensland legal profession. However, having regard to the COAG Principles and Guidelines (which are outlined in the Explanatory Notes to the Bill), the Society is concerned that these principles have not

⁴ Corporations and Markets Advisory Committee, *Personal Liability for Corporation Fault* (2006) at 33-34.

been adhered to in the drafting of the Bill. In particular, the Society notes that COAG Principle 5 provides that:

*'[where] directors' liability is appropriate, directors could be liable where they:
(a) have encouraged or assisted in the commission of the offence; or
(b) have been negligent or reckless in relation to the corporation's offending.'*

As currently drafted in the Bill, even the 'Type 1' liability provisions, which require the prosecution to prove that a director did not take all reasonable steps to prevent corporate fault resulting in an offence, are more onerous than the position adopted under the COAG Principles. The Society recommends that the Committee carefully consider the approach adopted in the Bill against the COAG Principles and Guidelines and, to the extent that there are any significant departures, recommend that these departures be addressed.

4. Activity in other Australian jurisdictions

The Society is aware of reforms to laws imposing personal liability for corporate fault in other Australian jurisdictions and is concerned that Queensland risks being left behind if it does not do more with the opportunity presented by the Bill to reform its current laws. For example, the Society understands that the corresponding legislation in New South Wales, the *Miscellaneous Acts Amendment (Directors' Liability) Act 2012* (NSW), will, with one exception, result in the removal of 'Type 3' provisions from all of the statutes that it amends. Another of the key legal issues that was included in the letter sent by the Society to the leaders of all political parties before the last state election was that:

'Within the first 12 months following the election to introduce and pass in the Queensland Parliament amending legislation which at least matches in scope and breadth the New South Wales Miscellaneous Acts Amendment (Directors' Liability) Bill 2011, passed in May 2011.'

The Society continues to believe that this issue remains important to the Queensland legal profession. As the representative body of solicitors in Queensland, many of whom undertake corporate, commercial and other work for companies of all sizes, the Society is concerned that the current form of the Bill might lead to some companies concluding that it may be preferable to establish operations in other jurisdictions. Conversely, if Queensland were to take a similar approach to New South Wales, or go further, then such an initiative might encourage more companies to establish their operations in this state.

5. Next steps

Thank you again for the opportunity to provide comments on the Bill. Please contact our Principal Policy Solicitor, Mr Matt Dunn on 3842 5889 or via email on m.dunn@qls.com.au for further information.

Yours faithfully

Annette Bradfield
President