Australian Government

The Treasury

Joint Committee on Corporations and Financial Services

Treasury submission on the Personal Liability for Corporate Fault Reform Bill 2012 ('the Bill')

[16 October 2012]

BACKGROUND

The Directors' Liability reform project is part of the Council of Australian Governments' *National Partnership Agreement to Deliver a Seamless National Economy* (SNE NP). The reform seeks to remove regulatory burdens on directors and corporate officers that cannot be justified on public policy grounds in order to minimise inconsistency and achieve a more harmonised approach across Australian jurisdictions on the imposition of personal criminal liability for corporate fault.

In November 2008, COAG agreed to the reform of personal criminal liability for corporate fault across Australian law, other than for laws relating to workplace health and safety and environmental protection (which were then the subject of separate reform processes).

COAG's decision followed earlier reviews, including by the Australian Law Reform Commission, the Corporations and Markets Advisory Committee (CAMAC) and the Commonwealth Government Taskforce on Reducing the Regulatory Burden on Business (Banks Taskforce), which had recommended reform.

The COAG reform Objectives

This reform seeks to achieve a nationally consistent approach to the imposition of criminal liability for directors and corporate officers in cases of corporate fault. Three key steps were set out for achieving this reform:

(i) agreement on principles for the imposition of personal liability for corporate fault;

(ii) audits of Commonwealth, State and Territory laws against the agreed principles; and

(iii) amendment of legislative provisions that do not accord with the agreed principles, to bring them in line with the agreed principles.

As stated in the COAG Reform Council Seamless National Economy Report on Performance released on 3 February 2012,[1] there are currently a host of Commonwealth, State and Territory laws that impose personal liability on directors and corporate officers for corporate fault. The inconsistency of laws, differing standards of fault and responsibility, and different defences across jurisdictions can be burdensome, and causes complexity and uncertainty for individuals affected.

The reform aims to provide greater certainty for companies, their corporate officers and the public as to when a corporate officer may be personally liable because of a company's misconduct.

The COAG Principles

In December 2009, COAG agreed to a set of Principles ('Principles') proposed by the Ministerial Council for Corporations (MINCO) for national adoption as the basis upon which personal liability for corporate fault should be imposed.[2]

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[1] Seamless National Economy: Report on Performance – Report to the Council of Australian Governments, available at http://www.coagreformcouncil.gov.au/reports/docs/sne-feb-2012/Seamless_National_Economy_2011_Full_Report.pdf

[2] The COAG *agreed principles for the imposition of personal liability for criminal fault* ('The Principles) are available at http://www.coag.gov.au/node/434

The application of a consistent set of principles for the imposition of personal liability for corporate fault by the Commonwealth and all States and Territories, is expected to provide more certainty for all companies that are subject to both Commonwealth and State/Territory laws – and particularly for those companies that trade in multiple jurisdictions.

Broadly the COAG Principles provide that personal criminal liability should only be imposed on a corporate officer for misconduct of the corporation in situations where the special justifications set out in the principles are applicable. These justifications effectively confine the imposition of personal criminal liability for corporate fault to situations where:

- there are compelling public policy reasons;
- 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.

As a general rule, where personal liability is justified, it should only be imposed where the prosecution is able to show all elements of the offence. Only in exceptional circumstances should a defendant be required to demonstrate a defence, such as showing that they took reasonable steps to prevent the offence, to avoid liability.

At the request of COAG, the Business Regulation and Competition Working Group (BRCWG), comprising senior officials from Commonwealth, State and Territory governments and chaired by the Commonwealth Minister for Finance and Deregulation and Commonwealth Minister Assisting for Deregulation, developed a set of supplementary Guidelines ('The Guidelines') to assist jurisdictions in auditing their legislation against the COAG Principles. On 25 July 2012, COAG agreed to apply these Guidelines when drafting future legislation.[3]

Scope of reform

The Guidelines clarify the scope of matters to be covered by the jurisdictional audits as only applying to provisions where a director is held criminally liable for an offence that was committed by the corporation.

The Guidelines make clear that the COAG Principles do not extent to situations where a director may have committed an offence personally, or where a director might be held liable as an 'accessory' to an offence (for example, where the person aided, abetted, counselled or procured the corporation's offence, or was knowingly concerned in the corporation's offence, or generally is liable because of some degree of personal involvement rather than simply because the person is a director).

Reform progress

COAG agreed that all existing Commonwealth, State and Territory legislation to be audited against the Principles. The original deadline for this task under the milestones was mid-August 2009. However, as there was no agreement on principles by that date the milestone was delayed until April 2010. Under the SNE NP, jurisdictions were then required to enact legislation to reform their directors' liability provisions by December 2010.

[3] The audits do not cover core environmental protection legislation or Acts based on national model legislation.

In the meantime, the COAG Reform Council's (CRC) 2009-10 report had found that the jurisdictions' audits against the COAG Principles were deficient and that the objectives of the directors' liability reform were unlikely to be achieved. In making its assessment, the CRC particularly noted the absence of any collective consideration of jurisdictions' audits and the lack of agreement on the legislative areas to which agreed principle should apply. The CRC had sought advice on the audits from a law firm (Corrs Chambers Westgarth), which provided a report on the areas where the audits were deficient.

To address the CRC's concerns, the BRCWG formed a sub-committee chaired by NSW (and included representatives from all jurisdictions) which concluded that the CRC's concerns were justified and recommended further action to achieve the reform outcomes. The Implementation Plan under the SNE NP was revised to reflect those actions.

Revised implementation plan

COAG agreed the following the revised Implementation Plan, which required: (a) BRCWG to develop more detailed guidelines to provide greater clarity and consistency for jurisdictions as to the manner in which the COAG Principles are to be applied; (b) all jurisdictions to review their audits of existing legislation against the COAG Principles in light of the more detailed BRCWG Guidelines; (c) jurisdictions (through the BRCWG sub-committee) to collectively review the audit outcomes to ensure that all jurisdictions had applied the Principles appropriately and consistently; and (d) jurisdictions to implement the audit outcomes by introducing legislation to make the necessary amendments by the end of 2012. It also commits all jurisdictions to agree to apply the Principles in future legislation.

Draft BRCWG Guidelines were prepared and in November 2011, BRCWG agreed that they were to be used as a 'working draft' for jurisdictions to commence the re-audit of their directors' liability provisions. All jurisdictions have completed re-auditing their legislation against the COAG Principles and BRCWG Guidelines and submitted to BRCWG draft recommendations for amendments to legislation using a standard template previously also approved by BRCWG.

As well as applying the BRCWG Guidelines, the revised audits also took into account the deficiencies identified in the CRC report.

On 23 March 2012, the BRCWG Sub-committee met and they commenced the process of collectively reviewing the individual Audit Reports to satisfy themselves that all jurisdictions had applied the COAG Principles and Guidelines in a consistent and rigorous manner. The Department of Treasury and the Department of Finance and Deregulation participated at these discussions for the Commonwealth jurisdiction. There also exists a general consensus amongst jurisdictions as to the general categories of very serious public harms for which the use of directors' liability provisions might be considered appropriate under the Principles and Guidelines. Following review of the information about audit processes and outcomes in each jurisdiction, jurisdictions reconsidered some aspects of their audit outcomes where material difference of approach had been evident.

In June 2012, the final outcomes from the audits and collective review were reported to BRCWG. All jurisdictions have indicated that they will seek to introduce an omnibus Bill to implement all or most of the audit outcomes by December 2012. In some cases, amendments to particular Acts may be implemented through a separate portfolio amendment bill.

(i) Audit of existing Commonwealth laws against the COAG Principles

The proposed amendments in the Bill reflect the outcomes of the audit of Commonwealth legislation following a process of collective review by the BRCWG Sub-Committee as foreshadowed by the revised implementation plan to ensure that differences between jurisdictions in the application of the Principles and Guidelines were minimised.

The Commonwealth's audit results were provided to all jurisdictions through the BRCWG Sub-committee via a template developed by the Sub-committee for that purpose and ease of cross-jurisdictional comparisons. Information of the Commonwealth's audit outcomes also explained what proposed amendments would be required to align its laws with the Principles and Guidelines. Following the collective review of the draft outcomes, the Commonwealth reconsidered its audit outcomes in the light of shared information before finalising its audit outcomes.

In finalising the proposed amendments in the Bill, the Commonwealth also had regard to comments received through consultation conducted on the draft Bill (see section below).

As part of the collective review of cross-jurisdictional audit outcomes, a number of areas were identified where consensus between jurisdictions was required. For example, the Principles contemplate that personal criminal liability for corporate fault may be appropriate in circumstances where an offence has the potential to cause serious public harm. A general consensus was reached as to the types of serious public harms for which the imposition of personal liability was justified. This consensus ensures that, after all jurisdictions amend their legislation to bring them into alignment with the Principles and Guidelines, personal criminal liability for corporate fault will only be imposed where an offence risks a serious public harm occurring, and will be imposed consistently across jurisdictions.

A similar process ensures that a defendant is only subjected to a burden of proof (for example, where an offence imposes personal liability on a director unless the director can show that reasonable steps were taken to prevent an offence from being committed) where this is justified under the Principles and Guidelines, and in a consistent manner between jurisdictions. This is primarily relevant for the States and Territories – the reversal of burden of proof with respect to directors' personal liability is relatively rare in Commonwealth legislation.

More generally, for constitutional reasons, some areas of law covered by Commonwealth legislation are not comparable to the areas covered by State and Territory laws (for example, laws that govern banking, corporations and taxation). The issue of consistency is therefore generally more significant for State and Territory legislation.

Nonetheless, where there were areas of thematic overlap (for example, there are Commonwealth, State and Territory laws that provide protection of vulnerable persons, such as children or the elderly) subsequent discussions between jurisdictions ensured that the material differences between the ways in which jurisdictions had approached the auditing process or had interpreted the Principles or Guidelines were largely resolved.

This does not mean that provisions that impose personal criminal liability for corporate fault will necessarily be identical across jurisdictions. Variations in the drafting of provisions that impose such liability may remain both within and between jurisdictions. However, the passage of this Bill, in conjunction with the passage of similar Bills in the States and Territories pursuant to the reform of directors' liability under the SNE NP, should ensure that across Australia, personal criminal liability for corporate fault is imposed in accordance with the COAG Principles and Guidelines and in a manner consistent with the principles of good corporate governance and criminal law.

(ii) Consistency in future legislation

As part of their commitment to the reform, all jurisdictions have agreed to implement administrative mechanisms appropriate to that jurisdiction to ensure that jurisdictions continue to apply the COAG Principles and Guidelines when framing future legislation.

To ensure that the consistency achieved by this reform continues to apply to future legislation, the Commonwealth has implemented a number of steps to apply the Principles and Guidelines when drafting future legislation, specifically:

- The Commonwealth has issued drafting directions to the Office of Parliamentary Counsel, to ensure that the COAG Principles and Guidelines are met where it is proposed to introduce personal liability for corporate fault. These directions also require that, where a proposed provision would impose personal liability for corporate fault, agencies consult with the Attorney General's Department and Treasury.

- As part of the Attorney General's Department document '*Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*', when considering imposing criminal responsibility on directors or officers of bodies corporate, agencies and drafters must apply the COAG Principles and Guidelines, and consult with Treasury.

States and Territories have also reported to COAG that similar mechanisms will be implemented in their respective jurisdictions to ensure consistency and compliance with the Principles and Guidelines in future legislation.

Personal Liability for Corporate Fault Reform Bill

The amendments in the *Personal Liability for Corporate Fault Reform Bill* (the Bill) represent the directors' liability provisions in Commonwealth legislation that, as a result of the auditing process and informed by the consultation on the draft Bill undertaken in 2012, were recommended for repeal or amendment in line with the Principles and Guidelines.

The Bill amends Commonwealth legislation such that it is consistent with the consensus reached between jurisdictions in the interpretation of the Principles and Guidelines.

Consultation in the development of the Bill

Public consultation on the Bill was conducted in three tranches.[4] The consultation period and subject matter covered in each tranche was as follows:

- Tranche 1 (*Consultation period: 27 January 2012 to 30 March 2012*) – Proposed amendments to Commonwealth Treasury portfolio legislation, other than tax legislation. The bulk of submissions for the consultation process were received in relation to this tranche. This tranche was consulted on prior to the publication of the Guidelines on 25 July 2012. Consequently, the submissions did not benefit from the clarification to the scope of the reform process provided by the Guidelines.

- Tranche 2 (*Consultation Period: 1 June 2012 to 29 June 2012*) – Proposed amendments to Commonwealth non-Treasury portfolio legislation.

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[4] The three consultation tranches are available at http://www.treasury.gov.au/ConsultationsandReviews/Submissions/2012/Personal-liability-for-Corporate-Fault-Reform-Bill-2012

- Tranche 3 (*Consultation period: 14 August 2012 to 3 September 2012*) – Proposed amendments to Commonwealth tax legislation.

The Commonwealth Treasury carefully considered the matters raised in the consultation process before advising the Government. Furthermore, the development of Commonwealth's revised audit outcomes and the Bill also had regard to the CRC Report and the analysis it commissioned from Corrs Chambers Westgarth on the application of the COAG Principles by each jurisdiction in relation to an initial audit of all Australian legislation.