Personal Liability for Corporate Fault Reform Bill 2012

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Law and Bills Digest Section

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Personal Liability for Corporate Fault Reform Bill 2012

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House: House of Representatives
Portfolio: Treasury
Commencement: On the day after Royal Assent

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill's home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

The purpose of the Personal Liability for Corporate Fault Reform Bill 2012 (the Bill) is to amend a number of Commonwealth statutes to implement the Council of Australian Governments' (COAG) Directors’ Liability reform.¹ That reform aims to harmonise the imposition of personal criminal liability for corporate fault across Australian jurisdictions.

Background

In the wake of perceived corporate excesses of the 1980s², the Senate Standing Committee on Legal and Constitutional Affairs, in 1989, inquired into and reported on company directors’ duties stating:

Corporate culture is changing. This is in response to a number of forces.

The more productive the corporate sector, the more secure the economic well-being of Australia. Directors are crucial to its success. To restrict unnecessarily the operation of their skills, their industry, their enterprise, is to threaten unnecessarily a factor vital to economic growth. Any regulation of directors’ activities must be warranted and a sensible balance must be found between measures necessary to promote corporate activity in a way which will be of

Footnotes:
¹. The object of the directors’ liability reform is to achieve a nationally consistent and principles-based approach to the imposition of personal criminal liability of directors or other corporate officers for corporate fault.

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benefit to all, and measures necessary to protect the bona fide shareholder, worker, consumer, financier and the public at large. Profitability is but one basis for good corporate citizenship. 3

Over time the regulation of the activities of officers and directors has developed so that it could be said to fall into three broad categories of liability—that is, direct, accessorial or derivative.

**Direct liability** refers to situations where the officer or director is held liable because of his or her own conduct. 4 For example, section 184 of the *Corporations Act 2001* (Corporations Act) 5 provides that a director or other officer of a corporation commits an offence if they are reckless or intentionally dishonest and fail to exercise their powers and discharge their duties in good faith in the best interests of the corporation or for a proper purpose.

**Accessorial liability** is a form of direct liability in that it relates to the conduct of the officers or directors themselves. Usually it occurs where there has been a contravention by a corporation and an officer or director has aided or abetted the contravention, been knowingly concerned in the contravention, or has conspired with others to effect the contravention. 6

**Derivative liability** arises as a consequence of the positions [officers or directors] hold or the functions they perform in their corporation. This derivative form of liability arises without the need to establish that these persons either breached the law through their own misconduct or were accessories to the misconduct of their corporation. 7

**CAMAC discussion paper and report**

In May 2005 the Corporations and Markets Advisory Committee (CAMAC) 8, released a discussion paper about the nature of criminal liability to be imposed on directors—and whether that liability

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8. The Corporations and Markets Advisory Committee was set up in 1989 to provide a source of independent advice to the Australian Government on issues that arise in corporations and financial markets law and practice, Corporations

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should be direct, accessorial or derivative.\(^9\) CAMAC’s main brief was to consider standardisation of the means of attributing liability for the purpose of regulatory efficiency.\(^10\)

CAMAC’s subsequent report expressed concern:

> ... about the practice in some statutes of treating directors or other corporate officers as personally liable for the misconduct of their company unless they can make a relevant defence. Provisions of this kind are objectionable in principle and unfairly discriminate against corporate personnel compared with the way in which other people are treated under the law.\(^11\)

CAMAC expressed the view that ‘as a general principle, individuals should not be penalised for misconduct by a company except where it can be shown that they have personally assisted or been privy to that misconduct, that is, where they were accessories’.\(^12\) However, the Committee acknowledged that:

> ...in some circumstances, a legislature may judge it appropriate to go beyond accessorial liability and impose a duty on a specified individual to ensure that a company complies with a particular legislative requirement... The Committee considers that any such provision should be confined to responsibility for ensuring that a company complies with a specific operational or administrative requirement, such as the filing of a return by a particular date.\(^13\)

In addition, CAMAC took the view that there is a need:

> ... for a more consistent, as well as a more principled, approach to personal liability across Commonwealth, State and Territory jurisdictions. A more standardised approach would reduce complexity and aid understanding. It would assist efforts to promote effective corporate compliance and risk management, while providing more certainty and predictability for the individuals concerned.\(^14\)

To that end, CAMAC considered a number of model provisions against three criteria, being practicality and fairness; suitability; and enforceability.\(^15\) The preferred model, which was proposed by the Australian Law Reform Commission, is set out in **Annexure A** of this Bills Digest.

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12. Ibid., p. 9.
13. Ibid., p. 35.
15. Ibid., p. 48.

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Treasury discussion paper

In a similar vein, Treasury issued a discussion paper entitled: Review of Sanctions in Corporate Law in March 2007.16 The paper formed the basis for the review of civil and criminal sanctions in the Corporations Act and the Australian Securities and Investments Commission Act 2001 arising from the Taskforce on Reducing Regulatory Burden on Business, which recommended that:

... the Government review penalties for breaches of directors’ duties to ensure that they strike an appropriate balance between promoting good behaviour and ensuring business is willing to take sensible commercial risks. This reflected a concern that exposure to sanctions could engender an overly conservative approach by some directors to the detriment of business development.17

Moves to update directors’ personal liabilities had not progressed before the 2007 Federal election.

Survey of directors

The matter came back on to the legislative agenda when the Rudd Government announced that Treasury was to ‘conduct a survey of 600 directors of S&P/ASX-200 companies in conjunction with the Australian Institute of Company Directors (AICD) to form views on how current laws affect decision making by directors’.18

According to the AICD, the survey results:

provide strong quantitative evidence supporting AICD’s view that director liability, and personal liability in particular, has a negative affect (sic) on board recruitment, retention and decision-making [and that] ... 78 per cent [of the surveyed directors] believed that the risk of personal liability had caused them, or the board on which they sat, to occasionally or frequently take an overly cautious approach to business decision-making. In addition, 64 per cent suggested that such an approach had inhibited an optimal business decision to a medium to high degree.19

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17. Ibid., p. vii.

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COAG involvement

On 29 November 2008, COAG agreed to progress the reforms contained in the National Partnership Agreement to deliver a Seamless National Economy. One of the 27 deregulation priorities involves reform to directors’ liability for corporate fault. The aim of this reform is to achieve a nationally consistent approach to the imposition of criminal liability for directors and corporate officers in cases of corporate fault.

Directors’ liability is currently governed by a host of State and Territory as well as Commonwealth laws that impose personal liability on directors and corporate officers. There are around 700 legislative provisions relating to the personal criminal liability of directors and corporate officers in circumstances of 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 in these roles ...

It was not until November 2009, however, that the then Minister for Financial Services, Superannuation and Corporate Law, Chris Bowen announced that an agreement on a set of principles had been reached at the Ministerial Council for Corporations (MINCO), which would provide the basis on which each jurisdiction would audit their legislative provisions that deal with personal liability of company directors. The principles as enunciated are at Annexure B of this Bills Digest.

The announcement of the principles was met with criticism that they fell short of what had been envisaged. So much so, that the AICD ‘called for the process of reform to be completely rebooted’ on the ground that ‘it is based on a fatally flawed set of principles’.

Impact of the Centro case

Whilst change to directors’ liabilities has been on the agenda by governments on both sides of the political divide for some years, a new impetus for change arose from the Centro case in 2011.

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In that case, the Federal Court found that the six non-executive directors of the Centro group were in breach of their statutory duty of care and diligence. In essence, the Federal Court was satisfied that:

... non-executive directors ... would be liable for errors in company accounts no matter how many internal accountants were involved in preparing the accounts, and no matter that a top-tier accounting firm had audited the accounts and given them an unqualified audit clearance.25

It has been stated that ‘even if, after the Centro judgment, the boardrooms of corporate Australia did not empty overnight, their occupants were certainly extremely concerned about the implications of the decision’.26 Although the breaches of the Corporations Act which applied in Centro are not addressed by this Bill, it is clear that there is business-wide concern about directors’ personal liability in general.

Consultations

Public consultations about the content of this Bill took place in three phases. The first phase occurred in January 2012 with the release of an exposure draft of the proposed amendments to directors' liability laws which:

... aims to ensure that in areas where derivative liability is considered appropriate, it is imposed in accordance with principles of good corporate governance and criminal justice and in a manner that will promote responsible entrepreneurialism and economic growth.27

Eight submissions were received in response to the discussion paper.28

The second phase occurred on 1 June 2012. Parliamentary Secretary to the Treasurer, Bernie Ripoll, released the second exposure draft, which covered ‘amendments to remaining Commonwealth

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26. Ibid., p. 84.

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non-tax legislation’. Submissions in response to the second exposure draft are not available on the Treasury website.

On 14 August 2012, a third exposure draft was released for public consultation covering ‘amendments to the Commonwealth’s tax legislation pursuant the COAG reforms’. Submissions in response to the third exposure draft are not available on the Treasury website.

The absence of public comment in relation to the second and third exposure drafts may be due to the mechanical nature of many of the provisions, which insert signposts to existing instances of personal liability for directors, executive officers and agents of companies, rather than explicitly creating new offences. These provisions are set out in Schedules 2–6 of the Bill.

This Bill is an amalgamation of the three exposure draft bills and includes most of the provisions from the drafts.

**Basis of policy commitment**

The Bill arises from the National Partnership Agreement to deliver a Seamless National Economy. One of the deregulation priorities involves reform to directors’ liability for corporate fault.

According to the Parliamentary Secretary to the Treasurer, Bernie Ripoll:

> The Bill amends a significant number of provisions across a range of Commonwealth legislation that impose personal criminal liability for corporate fault, other than for laws relating to workplace health and safety and environmental protection, which have been subject to separate reform processes. It will ensure that a person is only made criminally liable for the fault of a corporation where it is fair and reasonable in all circumstances to do so.

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33. The first exposure draft proposed to repeal subsections 1302(3) and (5) of the Corporations Act. However, the whole of section 1302 had already been repealed by the *Personal Property Securities (Corporations and Other Amendments) Act 2010*, viewed 8 November 2012, [http://www.comlaw.gov.au/Details/C2010A00096/Download](http://www.comlaw.gov.au/Details/C2010A00096/Download)

34. B Ripoll (Parliamentary Secretary to the Treasurer), *Directors’ liability reforms introduced in Parliament*, media release, 19 September 2012, viewed 10 October 2012, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F1927304%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F1927304%22)

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Committee consideration

The Bill was referred to the Parliamentary Joint Committee on Corporations and Financial Services for inquiry. The Committee published its report on 29 October 2012 after receiving only four submissions.  

The Committee made two recommendations: that the Bill be passed and that the Department of Treasury monitor the application of the reverse onus of proof for company directors and corporate officers and report its findings to the Minister 12 months after the bill has been passed, and report any matters of concern to the Committee.  

The Senate Standing Committee for the Scrutiny of Bills considered the contents of the Bill and had no comments to make.  

The Parliamentary Joint Committee on Human Rights (Parliamentary Human Rights Committee) examined the legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011.  

The Parliamentary Human Rights Committee acknowledged that the statement of compatibility indicates that the bill:  

engages and promotes the right to the presumption of innocence in Article 12 [sic] of the International Covenant on Civil and Political Rights. The bill amends provisions to remove obligations on defendants to show an applicable defence. Removing this obligation promotes the presumption of innocence.  

The Parliamentary Human Rights Committee considered that the Bill does not appear to raise any human rights concerns and that the statement of compatibility is adequate.

35. Details of the inquiry are at:  
36. Parliamentary Joint Committee on Corporations and Financial Services, Inquiry into the Personal Liability for Corporate Fault Reform Bill 2012, October 2012, p. xi, viewed 5 November 2012,  
37. Standing Committee on the Scrutiny of Bills, Alert Digest No. 12 of 2012, Senate, Canberra, 10 October 2012, p. 30, viewed 5 November 2012,  

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Policy position of non-government parties/independents

At the time of writing this Bills Digest, the Bill had not attracted comment by the non-government parties or the independents.

Position of major interest groups

Australian Institute of Company Directors

The AICD has been a significant proponent for change to director liabilities on the grounds that:

... these laws are stifling business investment and job creation ... This is not about directors’ self-interest. These laws affect decisions about whether existing operations are expanded, whether new projects go ahead and where they are located.39

In response to the first exposure draft the AICD submitted its own Company Directors Model provision—the text of which is at Annexure C of this Bills Digest.40

The AICD makes two principal points. First, it argues that a model liability provision should be used:

The purpose of the model provision is to have each statute begin from the premise that a director will not be criminally liable for an act of the company. However, a director will be liable in circumstances where the director knowingly authorised or recklessly permitted the contravention. The onus of proof will be on the prosecution to prove that the directors knowingly authorised or recklessly permitted the contravention.41

Robert Baxt, along with the AICD, argues that legislation with either a reversal of the onus of proof regime, or a strict liability regime, needs ‘to be drastically revised’.42 He argues that:

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41. Ibid., p. 7.

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The rights of individuals ... are well understood in our legal system. A person is assumed to be innocent until proven guilty. While there may need to be a modification of this principle in certain circumstances, this should occur rarely.43

Second, the AICD argues that the Corporations Act should be the only piece of legislation in Australia that contains director liability provisions. ‘It is the one piece of legislation that directors should go to, to determine their potential liability under law’.44

Australian Shareholders Association

The Chief Executive of the Australian Shareholders Association, Vas Kolesnikoff, is reported as stating he was:

... concerned about a watering down of liabilities. We believe that clearly the directors are in a role paid quite handsomely in most cases, and there is reliance on their skills and duties by shareholders ... We believe that any move away from accountability of directors is certainly dangerous.45

Financial implications

According to the Explanatory Memorandum, the financial impact of the amendments will be nil.46

Main issues

Adequacy of the reform

The harm which this Bill is purported to address is that of derivative liability—that is, where a person’s liability arises from the position they hold or the functions they perform in a corporation, rather from any breach of the law arising through their own misconduct. Principle 4, which was endorsed by MINCO, sets out the circumstances in which, ideally, personal criminal liability should

43. ibid.
44. Australian Institute of Company Directors, Submission to Treasury, Personal Liability for Corporate Fault Reform Bill 2012 (first tranche), op. cit., p. 8.

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be imposed on a director. The question is whether the provisions of the Bill are consistent with this principle. The following points in relation to the Bill are noteworthy.

First, the Bill contains only one significant amendment to the Corporations Act, in section 188. Chartered Secretaries Australia considered that the Bill ‘does not achieve the aim of the COAG principles’ in that the ‘amendments proposed by the Bill are limited’. Most of the provisions of subsection 188(1) are administrative in nature and penalise companies for not lodging certain forms on time. Chartered Secretaries Australia was particularly concerned about the lack of more substantive amendments to the Corporations Act.

Second, the amendment to section 188 of the Corporations Act maintains a derivative liability and a person who wishes to rely on the defence of ‘reasonable steps’ continues to bears the onus of proof.

Third, according to the Law Council of Australia, ‘in the interests of ensuring optimal drafting, the model provision proposed by the Australian Law Reform Commission (and supported by CAMAC) should be adopted’. It was not.

Despite the sense of disappointment by stakeholders that the Bill does not contain widespread amendments to derivative liability provisions in the Corporations Act, the Bill does clarify, in provisions in the Corporations Act and the other statutes amended by this Bill, that liability in relation to certain offences is accessorial in nature rather than derivative.

Position of the states

In its 2011 Report on Performance, the COAG Reform Council noted its concern that the intended output of this reform—a nationally consistent and principled approach to the imposition of personal criminal liability on directors or other corporate officers for corporate fault—is at risk of not being achieved. This may well be correct. This Bill does not provide a model law to be mirrored in state laws and the progress of the states towards harmonisation has been slow. It was reported in June 2011 that:

States have taken multimillion-dollar bets in their budgets that the Gillard government will reward them for reforms they are yet to deliver, earning a rebuke from Canberra ... assistant

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47. The MINCO Principles are set out in Annexure B to this Digest, at page 23.
49. Ibid., p. 3.

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minister for deregulation Nick Sherry warned he expected more progress towards a key reform a uniform approach in cases where company directors are held personally and criminally liable for corporate wrongdoing before payments were made.\textsuperscript{52}

To that end, Guidelines were approved by COAG on 25 July 2012, as part of the implementation of the \textit{National Partnership Agreement to Deliver a Seamless National Economy}.\textsuperscript{53} The purpose of the Guidelines is to ensure that all Australian jurisdictions, and all agencies within those jurisdictions, interpret and apply the COAG-agreed principles for assessment of directors’ liability provisions consistently and in accordance with the intentions of COAG.\textsuperscript{54}

This has led to a positive response from Queensland, with Premier Campbell Newman indicating that he hopes to ‘introduce the directors’ liability reform bill by the end of the year’.\textsuperscript{55}

Similarly in NSW, the Government has adopted the Guidelines and has announced that it will ‘introduce a Bill to implement the audit outcomes later this year’ with the reforms to ‘reduce the number of NSW offences to which Directors’ Liability Provisions apply from over 1,000 to less than 150’.\textsuperscript{56} However, it is not clear whether each of the states will have undertaken the required audit of their legislation and prepared suitable amendments by the deadline of December 2012.

\section*{Key provisions}

\section*{Schedule 1—Corporations Act}

\subsection*{Civil penalty provisions}

\textbf{Item 1} repeals and replaces section 188 of the Corporations Act.\textsuperscript{57} The effect of \textbf{proposed section 188} is to replace the existing criminal offence of strict liability with a civil offence for a breach by a secretary of a company of a \textit{‘corporate responsibility provision’}. These are listed in \textbf{proposed

\begin{itemize}
  \item Section 188 of the Corporations Act is replaced by a new civil offence for a breach by a secretary of a company of a corporate responsibility provision.
\end{itemize}

\begin{itemize}
  \item Item 21 is a consequential amendment to repeal the existing penalty amounts for section 188 at table item 31 of Schedule 3 to the Corporations Act.
\end{itemize}

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subsection 188(1). That list replicates all of the provisions that are in existing subsection 188(1) with two differences:

- the bracketed description of each provision has been shortened and
- an additional provision—section 320 (lodgement of half-year reports) has been added as proposed paragraph 188(1)(i).

Under proposed subsection 188(2) the offence is extended to each director of a proprietary company where the proprietary company contravenes a ‘corporate responsibility provision’ and, at the time of the contravention, the proprietary company does not have a secretary.\(^5\) Item 18 inserts proposed paragraph 1317E(1)(aa) to make clear that subsections 188(1) and (2) are ‘civil penalty provisions’. It is a defence if a person took reasonable steps to ensure that the company complied with the provision.

Items 20, 23 and 25 increase the amounts of civil penalties from five penalty units to 60 penalty units\(^5\) in respect of the following matters:

- section 142 (registered office)
- section 145 (public company’s registered office to be open to public)
- section 146 (change of principal place of business)
- section 178A (change to proprietary company’s member register)
- section 178C (change to proprietary company’s share structure)
- section 254X (issue of shares)
- section 346C (response to extract of particulars)
- section 348D (response to return of particulars) and
- section 349A (change to proprietary company’s ultimate holding company).

Items 22 and 24 increase existing penalties to 60 penalty units or imprisonment for one year, or both, in respect of:

- section 205B (lodgement of notices with ASIC)
- section 319 (lodgement of annual reports with ASIC) and
- section 320 (lodgement of half-year reports with ASIC).

Items 2–13 operate to insert notes to clearly signpost that the existing provisions relate to the criminal liability of a person who is dishonestly ‘involved’ in the contravention of the relevant

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58. Subsection 204A(1) of the Corporations Act provides that a proprietary company is not required to have a Secretary but, if it does have one or more secretaries, at least one of them must ordinarily reside in Australia. Section 204F of the Corporations Act provides that a secretary holds office on the terms and conditions (including as to remuneration) that the directors determine.

59. Under section 4AA of the Crimes Act 1914, a penalty unit is equivalent to $110. This means that the penalty has increased from $550 to $6600. However the Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Bill 2012, which was introduced to the House of Representatives on 10 October 2012 will, if enacted, increase the penalty unit amount to $170. The effect would be that the maximum penalty would be $10 200.

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subsection. Under section 79 of the Corporations Act a person is involved in a contravention if, and only if, the person:

- has aided, abetted, counselled or procured the contravention
- has induced, whether by threats or promises or otherwise, the contravention
- has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention or
- has conspired with others to effect the contravention.

This means that the liability created by these subsections is accessorial liability—not derivative liability.

Similarly, item 15 adds a note after subsection 328A(4) to signify that the liability which arises from a breach of section 328A (about an auditor’s consent to appointment) is accessorial liability.

**Schedule 2—Foreign Acquisitions and Takeovers Act**

The *Foreign Acquisitions and Takeovers Act 1975* (FATA)\(^60\) empowers the Treasurer or his delegate (usually the Assistant Treasurer) to review investment proposals to decide if they are contrary to Australia’s national interest. The Treasurer may make orders prohibiting a proposed acquisition or requiring the disposal of property or interests that have been acquired in respect of:

- acquisitions of shares\(^61\)
- acquisitions of assets\(^62\)
- arrangements relating to directorate of corporations\(^63\)
- arrangements relating to control of Australian businesses\(^64\) and
- acquisitions of interests in Australian urban land.\(^65\)

The amendments in items 5–11 of Schedule 2 to the Bill do not create new offences. Instead, they insert notes into each of the specified subsections to clearly signpost that the existing provisions relate to the criminal liability of an officer of a corporation if the corporation contravenes or fails to comply with an order of the Treasurer (or his delegate).

Items 1–4 amend the offences provisions of the FATA. In particular, item 3 amends subsection 31(1) to make clear that where an offence against a provision of the FATA is committed by a corporation—an officer of the corporation who ‘authorised or permitted’ the commission of the

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61. Section 18, FATA.
62. Section 19, FATA.
63. Section 20, FATA.
64. Section 21, FATA.
65. Section 21A, FATA.

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offence is guilty of the offence. This means that the person must have engaged in conduct which is the ‘fault’ element of any offence.

Similarly, items 12–17 add notes to existing subsections of the FATA to signpost a reference to section 31 of the FATA in relation to the liability of an officer of a corporation.

Schedule 3—Health Insurance Act

The Health Insurance Act 1973 (Health Insurance Act) provides for payments for medical benefits and hospital services. It imposes personal liability for corporate fault on company officers in a range of circumstances.

Section 129AA creates two offences of bribery:

- first, where a medical practitioner, a participating midwife, a participating nurse practitioner or a medical entrepreneur receives, or agrees to receive, a bribe from a proprietor of a private hospital in order to enable a person to be admitted as a patient in the hospital, where a benefit is payable by a private health insurer in respect of the patient and
- second, where a proprietor of a private hospital offers or agrees to pay a bribe to a medical practitioner, a participating midwife or a participating nurse practitioner in order to enable a person to be admitted as a patient in the hospital, where a benefit is payable by a private health insurer in respect of a patient.

Importantly, where the offence is committed by a corporation, subsections 129AA(2), (3) and (6) operate to extend liability to an officer of the corporation. The amendments in items 1 and 2 of Schedule 3 to the Bill will operate to prevent the extension of personal criminal liability to officers of the corporation where those officers were not directly involved in the conduct.

Existing section 23DZZIT provides that an executive officer of a body corporate commits an offence if the body corporate commits an offence and the executive officer:

- knew that the offence would be committed and
- was in a position to influence the conduct of the body in relation to the commission of the offence and
- failed to take all reasonable steps to prevent the commission of the offence.

67. Subsection 129AA(1A), Health Insurance Act.
68. Subsection 129AA(1B), Health Insurance Act.
69. Under section 23DZZID of the Health Insurance Act, executive officer of a body corporate means a person, by whatever name called and whether or not a director of the body, who is concerned in, or takes part in, the management of the body.

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Item 7 of Schedule 3 to the Bill amends the simplified outline to Division 3 of Part IIBA of the Health Insurance Act so that it is clear that an executive officer of a body corporate might commit an offence if the body corporate commits an offence against Division 3.\textsuperscript{70} Items 3–6 do not create new offences. Rather the items insert notes into the specified subsections to signpost a reference to section 23DZZIT of the Health Insurance Act in relation to the liability of an executive officer of a body corporate.

Schedule 4—National Vocational Education and Training Regulator Act

The \textit{National Vocational Education and Training Regulator Act 2011} (NVETR Act)\textsuperscript{71} established the National Vocational Education and Training Regulator and provides the regulatory framework for the vocational education and training system.

Existing section 133 provides that an executive officer\textsuperscript{72} of a registered training organisation commits an offence if the organisation commits an offence and the executive officer:

- knew that the offence would be committed and
- was in a position to influence the conduct of the organisation in relation to the commission of the offence and
- failed to take all reasonable steps to prevent the commission of the offence.

Item 2 amends section 133 to include a reference to section 133A. \textit{Proposed section 133A}, inserted by item 3, contains a table listing each section and/or subsection of the NVETR Act under which an executive officer may be personally liable for a corporate offence. Items 4–20 amend each section and/or subsection which is listed in the table to insert a note to signpost that sections 133 and 133A set out the liability of an executive officer under the NVETR Act. Item 22 inserts a note after subsection 116(2) in the same terms.\textsuperscript{73}

Schedule 5—Therapeutic Goods Act

The amendments to the \textit{Therapeutic Goods Act 1989} (TGA)\textsuperscript{74} in Schedule 5 to the Bill take the same form as those to the NVETR Act in Schedule 4 to the Bill. That is:

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\textsuperscript{70} Division 3 of Part IIBA of the Health Insurance Act relates to offences involving requesters, providers and others.
\textsuperscript{71} The text of the \textit{National Vocational Education and Training Regulator Act 2011} can be viewed at: \url{http://www.comlaw.gov.au/Details/C2012C00744/Download}
\textsuperscript{72} The term ‘executive officer’ is defined in section 3 of the NVETR Act and includes a person, by whatever name called and whether or not a director of the organisation, who is concerned in, or takes part in, the management of the organisation.
\textsuperscript{73} Section 116 of the NVETA Act creates an offence where a person who is not a registered course provider provides, or offers to provide, all or part of a vocational education and training course.
\textsuperscript{74} The text of the \textit{Therapeutic Goods Act 1989} can be viewed at: \url{http://www.comlaw.gov.au/Details/C2012C00355/Download}

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• existing section 54B of the TGA sets out the circumstances in which an executive officer of a body corporate commits an offence
• item 2 amends section 54B to include a reference to section 54BA
• item 3 inserts proposed section 54BA, which contains a table listing each section and/or subsection of the TGA under which an executive officer may be personally liable for a corporate offence and
• items 4–49 amend each section and/or subsection which is listed in the table to insert a note to signpost that sections 54B and 54BA set out the liability of an executive officer under the TGA.

In addition, items 50–80, like items 4–49, do not create new offences but insert notes after various subsections of the TGA to signpost that sections 54B and 54BA set out the liability of an executive officer under that Act.

Schedule 6—Other Acts amended

Notifying and serving companies

Existing subsection 62(2) of the Child Support (Registration and Collection) Act 1988 (CS Registration and Collection Act)75 provides the manner in which service of any document or requisition will be sufficient service on a company for the purposes of that Act.

Item 3 of Schedule 6 to the Bill inserts proposed section 62A into the CS Registration and Collection Act to provide an alternative manner of service. Under proposed section 62A a notice or process may be given to, or served on, a company by giving the notice to, or serving the process on a director, the secretary or another officer of the company; or an attorney or agent of the company.

Item 1 inserts a note after subsection 62(2) to signpost that there is an alternative way to give notice to, or serve process on, a company, as provided for in new section 62A.


Liability of body corporate managers

Item 6 of Schedule 6 to the Bill repeals and replaces section 104 of the Classification (Publications, Films and Computer Games) Act 1995 (Classification Act)76 to set out the liability of body corporate

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managers. For the purposes of the Classification Act a ‘body corporate manager’ is the manager or governing officer (however described) of the body corporate; or a member of the governing body (however described) of the body corporate.  

Proposed section 104 provides that a body corporate manager commits an offence if the body corporate commits an offence and the manager:

- knew that the offence would be committed and
- was in a position to influence the conduct of the body corporate in relation to the commission of the offence and
- failed to take all reasonable steps to prevent the commission of the offence.

The terms of the offence are consistent with the offences arising from section 23DZZIT of the Health Insurance Act and section 133 of the NVETRA, which are outlined above.

Proposed subsection 104(2) creates an offence in the same terms for a state/territory body corporate manager—that is, a person who takes part in managing, administering or governing the business of a body corporate that operates within a state or territory.

Items 4 and 5 of Schedule 6 to the Bill insert notes which signpost that the liability of a body corporate manager or a state/territory body corporate manager is set out in section 104.

Liability of directors, employees and agents of insurers

Section 11B of the Insurance Contracts Act 1984 (Insurance Contracts Act) empowers the Australian Securities and Investments Commission (ASIC) to do all things that are necessary or convenient to be done in connection with the administration of that Act, including to review documents issued by insurers and to review particulars, statistics and documents given to ASIC by insurers.

Existing section 11C creates an offence if ASIC has, by notice in writing given to an insurer, required the insurer to provide specified documents within a specified time and the insurer fails, without reasonable excuse, to comply with the requirements of the notice. Importantly, it is a reasonable excuse for an insurer to refuse or fail to comply with the requirements of a notice if doing so would tend to incriminate the insurer.

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77. Section 99, Classification Act.
78. Ibid.
80. Subsection 11C(4), Insurance Contracts Act. Note, however, that the onus of proof is on a defendant who seeks to rely on this provision.

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Section 11D provides that ASIC may, by notice in writing given to an insurer, require the insurer to provide, within a specified time, written particulars of the insurer’s organisational structure and administrative arrangements; statistics about the nature and volume of the insurer’s business; or copies of any training guides, work manuals or other materials used by an insurer in instructing those of its employees who deal with persons who have, or may seek, insurance cover from the insurer. An insurer must not fail, without reasonable excuse, to comply with the requirements of such a notice. In addition an insurer must not, intentionally or recklessly, give ASIC particulars or statistics in response to such a notice that are false or misleading.

Each of the offences created by sections 11C and 11D is an ‘insurer offence’ which attracts a penalty of 150 penalty units.\(^{81}\)

**Item 21** of Schedule 6 to the Bill inserts proposed section 11DA into the Insurance Contracts Act to clarify the liability of directors, employees and agents of insurers for an ‘insurer offence’. Proposed subsection 11DA(1) operates so that a director of a company that is an insurer, or an employee or agent of the insurer, commits an offence if the person permits or authorises the insurer to engage in conduct which is an insurer offence.

Importantly, proposed subsection 11DA(3) provides, for the avoidance of doubt, that a person specified in subsection 11DA(1) may be convicted of an offence even if an insurer has not been convicted or prosecuted for an insurer offence having relied on a defence.

**Item 20** inserts notes after subsections 11C(2), 11D(2) and 11D(3) to provide a signpost to the liability of directors, employees and agents of an insurer under section 11DA.

**Concluding comments**

The tension that this Bill and the accompanying Explanatory Memorandum does not dissolve is that there remain, at the Commonwealth and state levels, many provisions which impose derivative liability on directors, company officers and agents. In fact, at the same time that demand was being made for COAG reform, other Bills were introduced into the Commonwealth Parliament which increase the liabilities of directors in their personal capacity and the tax and corporate law obligations of the companies they represent.\(^{82}\) It would appear then, that calls for a consistent model law for director liability will continue.

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81. At the time of writing this Bills Digest section 4AA of the Crimes Act 1914 provided that a ‘penalty unit’ was equivalent to $110 so that the maximum penalty is $16 500. However the Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Bill 2012, which was introduced to the House of Representatives on 10 October 2012 will, if enacted, increase the penalty unit amount to $170. The effect would be that the maximum penalty would be $25 500.


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Annexure A

The ALRC model

Where a corporation contravenes a relevant provision, the prosecution must prove the following physical and fault elements in any criminal action against an individual in consequence of that contravention:

- the individual, by whatever name called and whether or not the individual is an officer of the corporation, is concerned, or takes part, in the management of the corporation [An alternative formulation would be to add a specific reference to ‘directors’]
- the individual was in a position to influence the conduct of the body corporate in relation to the contravening conduct
- the individual knew that, or was reckless or negligent as to whether, the contravening conduct would occur [An alternative formulation would be to substitute the word ‘might’ for ‘would’] and
- the individual failed to take all reasonable steps to prevent the contravening conduct. [An alternative formulation would be to impose an evidential onus on the defendant in this regard.]

Annexure B

Principles Recommended by MINCO

A. Ministers recommend the following principles for adoption on a national basis in relation to corporate liability and the circumstances in which directors may also be liable for corporate fault:

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.

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84. C Bowen (former Minister for Financial Services, Superannuation and Corporate Law), *MINCO agrees on principles for reform of directors liability provisions*, op. cit.

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4. The imposition of personal criminal liability on a director for the misconduct of a corporation should be confined to situations where:
   a. 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);
   b. liability of the corporation is not likely on its own to sufficiently promote compliance; and
   c. it is reasonable in all the circumstances for the director to be liable having regard to factors including:
      i. the obligation on the corporation, and in turn the director, is clear;
      ii. the director has the capacity to influence the conduct of the corporation in relation to the offending; and
      iii. 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:
   a. have encouraged or assisted in the commission of the offence;
   b. 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.

B. Ministers recommend the following action with a view ensuring that legislation imposing liability on directors for corporate fault operates fairly and can be clearly justified:

1. A legislative review by each jurisdiction to identify those existing offences for which directors' liability, or removal of that liability, is appropriate in accordance with above principles.

2. Harmonisation following cross-jurisdictional comparison in key policy areas.

3. A harmonised legislative approach to provisions imposing directors' liability around key concepts and definitions, including the clarification of the term "director" and matters raised by the panel.

4. Greater clarity about the offences for which directors may be liable through a specific listing or schedule approach.

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Annexure C

[section number] — Offences by corporations

1. If a corporation contravenes, whether by act or omission, any provision of this Act or the regulations, each person who is a director of the corporation or who is concerned in the management of the corporation will not be taken to contravene the same provision subject to subsection (2).

2. A director of the corporation or a person concerned in the management of the corporation will be liable for a contravention of the corporation where the person knowingly authorised or recklessly permitted the contravention.

3. A person may be proceeded against and convicted under a provision pursuant to this section whether or not the corporation has been proceeded against or convicted under the provision.

4. Nothing in this section affects any liability imposed on a corporation for an offence committed by the corporation against this Act or the regulations.

5. The Court may, on application by any interested person and taking into account all of the circumstances surrounding the contravention, make an order, unconditionally or subject to such conditions as the Court imposes, relieving a person in whole or part from any liability in respect of a contravention of subsection (2).

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Personal Liability for Corporate Fault Reform Bill 2012

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