



**CHARTERED SECRETARIES
AUSTRALIA**

Leaders in governance

15 May 2009

The Hon Julia Gillard MP
Deputy Prime Minister; Minister for Employment and Workplace Relations; Minister for
Education; Minister for Social Inclusion
PO Box 6022
House of Representatives
Parliament House
CANBERRA ACT 2600

Dear Minister Gillard

National model occupational
health and safety laws:
proposed use of definition of 'officer' as defined in the
Corporations Act

Chartered Secretaries Australia (CSA) is the independent leader in governance, risk and compliance. As the peak professional body delivering accredited education and the most practical and authoritative training and information in the field, we are focused on improving organisational performance and transparency.

Members of CSA have a thorough working knowledge of directors' and officers' duties and the *Corporations Act 2001* (Commonwealth) (the Corporations Act), and many are themselves officers as defined in the Corporations Act. Our members are all involved in corporate administration, governance and compliance with corporate obligations under the Corporations Act and the Australian Securities Exchange (ASX) Listing Rules, with substantial knowledge of a great variety of legislative frameworks.

Background

CSA welcomed the national review into model occupational health and safety (OH&S) laws and the two reports of the National OH&S Review Panel (the Panel) tasked with reviewing OH&S legislation and making recommendations for a national approach.

CSA notes that, in its second report regarding model national OH&S legislation, a key recommendation made by the Panel is that officers of a company as defined in the Corporations Act be obliged to exercise 'due diligence' on safety issues.

The Panel's report states that officers should be required to take reasonable steps proactively and regularly to ensure:

- they have up-to-date knowledge of OH&S laws and compliance requirements
- they have an understanding of the nature of the operations of the company and the hazards and risks associated with those operations
- the company utilises and has available appropriate resources and processes to enable the identification and elimination or control of specific OH&S hazards and risks associated with the operations of the entity, and verification of the implementation of those matters, and
- a process for receiving, considering and ensuring a timely response to information regarding incidents, identified hazards and risks.

CSA believes that the focus on director responsibilities in relation to OH&S standards and practices in organisations has been an appropriate one in the evolution of OH&S laws. This focus has resulted in boards engaging with their responsibilities for the oversight of OH&S matters and ensuring that their 'tone from the top' approach engenders a culture of engagement with OH&S generally.

However, CSA also believes that all governance and risk management frameworks are in a process of constant evolution. With an increased focus on cascading governance and risk management throughout organisations, CSA believes that it is now appropriate to extend duties and liabilities below board level in order to bring about alignment between responsibility and accountability in relation to OH&S matters. CSA believes that criminal conduct should attach to those people who are responsible for managing hazards within organisations, subject to their having the authority and budget to do so, with responsibility for systemic failures or non-allocation of resources continuing to rest with the board. We set out our thoughts on this later in this submission.

Difficulties arising from the use of the definition of officer in the Corporations Act

Under current OH&S legislation, at both state and federal levels, company secretaries are not personally liable for breaches of OH&S legislation. The proposed use of the Corporations Act definition of officers would extend personal liability for breaches of OH&S laws to company secretaries, who are also 'officers' as defined in the Corporations Act.

CSA is concerned that the use of the Corporations Act definition of officer will not ensure that any model OH&S legislation applies to those with direct accountability for OH&S matters. This concern arises particularly in relation to company secretaries, who do not have the same oversight role as directors, nor any authority over OH&S matters.

CSA notes that, in large listed public companies, for example, the responsibilities of company secretaries often include driving and advising on best practice in corporate governance and appropriate governance frameworks; and bridging the interests of the board or governing body, management and stakeholders, such as shareholders.

However, company secretaries in large listed public companies usually have no direct operational responsibility and, therefore, no authority to implement or monitor OH&S standards or practices.

In smaller companies (listed, unlisted, private and not-for-profit), company secretaries may hold additional responsibilities to those outlined above. These may include responsibility for a range of operational issues, such as finance, general insurance, superannuation, taxation and OH&S. However, of itself the role of company secretary as an officer under the Corporations Act is not a guide to whether the company secretary has additional operational responsibilities, or commensurate authority for OH&S matters in relation to those responsibilities.

Possible other definition to ensure any model legislation will apply to those who are in a position of authority to implement or monitor OH&S standards and practices

In 2005, CSA responded to an inquiry conducted by the Corporations and Markets Advisory Committee (CAMAC) on extending corporate duties below board level. At that time, CSA noted that, in principle, it supports extending the personal duties and liabilities under the Corporations Act beyond directors and other officers. CSA continues to hold this view.

CSA believes that there is a gap in liability below board level. The current law on the liability of senior managers that are not classified as officers is unclear. Any legal regime for the enforcement of corporate governance standards that does not include the acts or omissions of at least some categories of senior managers that are not classified as officers will not be as effective as it should be.

CSA recognises that extending corporate duties below board level should bring about better accountability in relation to OH&S matters. CSA believes that an exposure to liability based on a functional model, which extends the category of persons facing the liability into the senior management range, could produce an enhanced sense of responsibility and accountability in corporate decision making.

CSA is of the view that an extension of liability below board level on OH&S matters will enhance the effectiveness of OH&S programs. Risk management and compliance systems introduced by companies are likely to be more meaningfully executed if some degree of direct liability rests with those persons responsible for their design, implementation and ongoing management. It will also give more meaning to the law's move towards effective protection for whistleblowers.

CSA strongly believes that directors should continue to be responsible for the oversight of corporations. In other words, they are responsible for the strategy and objectives of a corporation and for monitoring the activities of management in pursuit of those objectives. Notwithstanding this, CSA notes that the HIH Insurance example illustrates the desirability of extending certain liabilities so that they attach to executives with corporate functional responsibility. This is a cornerstone of good governance, with responsibility and accountability aligned.

However, CSA also notes that an extension of liability to include executives will not eliminate the board's responsibility to set appropriate policies and review their effectiveness regularly. Indeed, it is important that individuals have authority to make decisions in local settings and the budget to sustain those decisions so that individuals will not be liable simply because they are carrying out functions nominated by senior managers, but without either the authority or resources to do so. Notwithstanding this, if individuals are carrying out functions that are not authorised, then they should be held liable.

CSA believes that personal liability for any breach of OH&S legislation should attach to the person whose acts or omissions caused the breach, rather than to 'officers' as defined under the Corporations Act. Limiting the scope of derivative liability to directors and executive officers may thwart safety efforts in corporations, as those responsible for particular worksites or groups of employees do not necessarily take 'ownership' of the safety obligations. For example, site managers are in a far better position than top executives to have an understanding of the hazards and risks associated with those operations. They should be accountable for the effective management of the site-based hazards and risks. Accountability for systemic or policy failures should rest with those responsible for oversight of the effectiveness of the systems: directors and officers. Indeed, this reflects the position under most current state OH&S legislation.

Federal Government audit of directors' liability

CSA notes that the Federal Government is conducting an audit of Commonwealth laws for provisions imposing personal liability on company directors (examining criminal liability). The COAG principles (against which the audit will be conducted) demonstrate that the audit is not about easing standards, or aiding those directors guilty of misconduct. The COAG principles state:

- where companies contravene statutory requirements, liability should be imposed in the first instance on the company itself
- personal criminal liability of a corporate officer for the misconduct of the corporation should generally be limited to situations where the officer encourages or assists the commission of the offence (accessorial liability), and
- in exceptional circumstances, where there is a public policy need to go beyond the ordinary principles of accessorial liability, a form of deemed liability could be imposed on a corporate officer only using a 'designated officer' approach (for minor offences) or a 'modified accessorial' approach (for more serious offences).

CSA points to the need to ensure that any model OH&S law aligns with the recommendations that may arise from the audit.

CSA recommendations

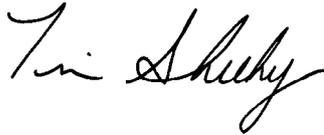
CSA recommends that new OH&S statutes should not impose personal liability on company secretaries simply because they are defined as 'officers' in the Corporations Act. The use of the definition of 'officer' as used in the Corporations Act as the definition for any model OH&S legislation would automatically expand personal liability to a category of executives who do not, by virtue of their role as company secretary, have the power to make decisions about OH&S standards and practices or the authority to enforce them.

CSA recommends that the objective of the recommendation by the Panel can best be achieved by clarifying the definition of officer as used in the Corporations Act to not only exclude company secretaries but also to extend to senior manager level (if those managers do not currently meet the current definition of 'officers' in the Corporations Act), but only to those managers charged and authorised with particular OH&S responsibility (for example, mine managers, ship captains). Such a definition will capture those company secretaries who *do* have the authority to make decisions affecting OH&S standards and practices. It will not, however, capture those company secretaries without such authority.

Conclusion

In preparing this submission, CSA has drawn on the expertise of the members of its two internal national policy committees. We would welcome the opportunity to meet with you to discuss any of our views in greater detail. Please call me if you would like to set up a meeting. I can also arrange a meeting with our members.

Yours sincerely

A handwritten signature in black ink that reads "Tim Sheehy". The signature is written in a cursive, flowing style.

Tim Sheehy
CHIEF EXECUTIVE

cc
National OH&S Review Panel (Robin Stewart-Crompton, Barry Sherriff and Stephanie Mayman)