



**CHARTERED SECRETARIES
AUSTRALIA**

Leaders in governance

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Manager
Governance and Insolvency Unit
Corporations and Capital Markets Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: personalliabilityforcorporatefault@treasury.gov.au

Dear Treasury

***Exposure Draft — Personal Liability for Corporate Fault
Reform Bill 2012 (tranche 2)***

Chartered Secretaries Australia (CSA) is the independent leader in governance and risk management. 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.

Our Members have primary responsibility to develop and implement governance frameworks in public listed, unlisted and private companies, and not-for-profit and public sector organisations. In listed companies they have primary responsibility to deal with the Australian Securities Exchange (ASX) and interpret and implement the Listing Rules. Our Members have a thorough working knowledge of the operations of the markets and the needs of investors, as well as compliance with the Corporations Act (the Act). We have drawn on their experience in our submission.

The Bill

CSA welcomes the proposed amendment to Commonwealth legislation other than Treasury portfolio legislation to comply with the Council of Australian Government (COAG) principles¹ that aim to ensure that where legislation imposes derivative liability, it is fair and principled, and is not imposed as a matter of course. The Personal Liability for Corporate Fault Reform Bill 2012 (the Bill) represents the second tranche of the Commonwealth Government's response to the directors' liability reform project implementing the COAG principles.

CSA notes that the explanatory memorandum attached to this bill provides explanation for the retention of criminal provision on public policy grounds. This had been conspicuously absent from the first tranche of proposed legislative amendment and the inclusion of such explanations with the second tranche greatly assists in understanding the decision making behind the Bill.

However, as with the first tranche, we also note that the explanatory memorandum for the Bill provides no explanation as to why some provisions are considered derivative liability and others accessory liability and therefore outside the scope of this review.

We also note that the scope of this project is restricted to a consideration of existing criminal liability provisions and does not extend to any simplification of legislation imposing criminal liability on officers, or effort to harmonise the standards of personal responsibility required under various provisions to better facilitate compliance, consistent with the COAG principles.

CSA continues to strongly recommend that the Commonwealth, state and territory governments endeavour to simplify the plethora of legislation imposing criminal liability on officers, consistent with the COAG principles.

We refer you to our earlier submission, which is attached.

Yours sincerely



Tim Sheehy
CHIEEF EXECUTIVE

End notes

ⁱ On 7 December 2010, COAG agreed to a set of six principles for the imposition of personal criminal liability for directors and other corporate officers in circumstances of corporate fault (COAG Principles). The Principles are that:

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.
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 (for example, 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; or
 - b. 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.