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Dear Committee members

## **Directors' Liability Reform Bill 2015**

Governance Institute of Australia (Governance Institute) is the only independent professional association with a sole focus on the practice of governance. We provide the best education and support for practising chartered secretaries, governance advisers and risk managers to drive responsible performance in their organisations.

Our members are all involved in governance, corporate administration, risk management and compliance with the Corporations Act 2001 (the Act) and other legislation governing corporate activity, with their primary responsibility being the development and implementation of governance and risk management frameworks in public listed and public unlisted companies, private companies, and not-for-profit organisations.

### **Support for the bill**

The Directors' Liability Reform Bill (the bill) makes amendments to limit and standardise provisions which impose personal criminal liability on directors for corporate misconduct.

Governance Institute supports the bill and welcomes the amendment of the Criminal Code and portfolio legislation to comply with the COAG principles<sup>i</sup> that aim to ensure that derivative liability is imposed on directors and other corporate officers in accordance with principles of good corporate governance and criminal justice, and is not imposed as a matter of course.

Governance Institute is on the public record over many years as being opposed to derivative liability provisions imposing criminal liability in situations where directors may not be aware of, or have the ability to prevent, the commission of an offence by the company. We note that such provisions frequently require directors to prove their innocence, which is a reverse of the burden of proof as it operates under the criminal law.

Governance Institute supports the principle that, where companies contravene statutory requirements, liability should be imposed in the first instance on the company itself, and that personal criminal liability of a corporate officer for the misconduct of the corporation should be limited to situations where the officer knowingly encourages or assists the commission of the offence or is reckless in attending to their duties as a corporate officer, thus allowing the offence to occur (accessorial liability).

The COAG principles were agreed following the report to the government by the Corporations and Markets Advisory Committee (CAMAC) in 2006<sup>ii</sup> that:

The Committee identified two principal areas of concern:

- a marked tendency in legislation across Australia to include provisions that impose personal criminal sanctions on individuals for corporate breach by reason of their office or role within the company (rather than their actual acts or omissions) unless they can establish an available defence
- considerable disparities in the terms of personal liability provisions, resulting in undue complexity and less clarity about requirements for compliance.

CAMAC noted that its concern was with the ‘overreach in the treatment of individuals where the company is in breach of the law, together with lack of harmony in the standards of personal responsibility required under various provisions’. It noted that this move to overreach was not new and referred to various inquiries dating back to 1989.

The CAMAC report set out strict criteria for the distinction between derivative and accessorial liability, stating that:

The Committee considers that:

- liability for breach of a legal requirement by a company should fall in the first place on the company itself. It should not be assumed that appropriately weighted monetary or other penalties will not have an impact on shareholders and others who have a stake in the success of a company or will not influence the behaviour of those individuals who control and manage the company, whether through their being held accountable by shareholders or otherwise
- in addition, an individual who is personally implicated in such a breach—who helps in or is privy to the misconduct—should be exposed to personal liability as an accessory in accordance with ordinary criminal law principles.

Beyond the approach supported above, the Committee considers that great care should be taken in considering any extension of personal liability for the breach of a law by a company. Proper account should be taken of the individual rights of corporate officers—and how their proposed treatment compares with the way other citizens, including individuals involved in the governance of non-corporate organisations, are dealt with—as well as the interest in promoting corporate compliance with relevant statutory requirements.

The Committee acknowledges 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. In effect, provisions of this kind impose a form of strict liability upon a designated officer. 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. It should not extend to areas where compliance requires the exercise of significant judgment or discretion.<sup>iii</sup>

Governance Institute members are of the view that the bill not only meets the COAG principles but also the criteria set out in the CAMAC report, given that it is not concerned with the criminal liability of directors who have committed offences themselves, or with those who are accessories to offences committed by bodies corporate, but only to situations where a director is made liable simply on the grounds of having been a director of a body corporate which has committed an offence.

## **Impact on sovereignty and law making powers of Western Australia**

Governance Institute members are of the view that the bill does not have a negative impact on the sovereignty and law making powers of Western Australia.

The CAMAC report noted that<sup>iv</sup>:

The Committee reviewed relevant provisions in Commonwealth, state and territory environmental protection, occupational health and safety, hazardous goods and fair trading laws. While not exhaustive of all statutes containing personal liability provisions, those categories were chosen because of their significance to the commercial operations of many enterprises. ...These differences in legislative approach, even in the same areas of regulation, and the consequential lack of harmony result in complexity and lack of clarity for individuals in considering their responsibilities. Directors and other individuals may be subject to differing standards of responsibility with divergent defences available to them under various statutes that affect the operations of their company in different jurisdictions. This very lack of harmony can impair ready communication of statutory requirements and effective compliance efforts.

The report commented that the concerns identified by CAMAC were not new, and had been highlighted in the report by the Senate Standing Committee on Legal and Constitutional Affairs *Company Directors' Duties* (1989); the Corporate Law Economic Reform Program *Paper No 3 Directors' Duties and Corporate Governance* (1997); the Australian Law Reform Commission (ALRC)'s report *Principled Regulation* (December 2002); and the Regulation Taskforce 2006 in its report *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*. The latter report included:

a review of various cross-jurisdictional issues affecting financial and corporate regulation. The Taskforce noted that various respondents to its inquiry had referred to inconsistencies across jurisdictions in provisions imposing personal liability on company directors and officers for corporate fault, with consequential complexity and uncertainty for individuals in these roles. The report recommended that the Council of Australian Governments initiate reviews to achieve more nationally consistent regulation of various matters. These would include personal liability of company directors and officers for corporate fault.

The COAG Principles for the imposition of personal criminal liability for directors and other corporate officers in circumstances of corporate fault were agreed to by all jurisdictions, including Western Australia, following consideration of the CAMAC report and in recognition of the need to facilitate a seamless national economy by removing inconsistencies across jurisdictions in provisions imposing personal liability on company directors and officers for corporate fault.

The bill therefore fulfils Western Australia's commitment to the COAG project to reform directors' liability, which was included in the National Partnership Agreement to Deliver a Seamless National Economy.

The bill facilitates a national economy by providing for consistency across jurisdictions in provisions imposing personal liability on company directors and officers for corporate fault. Governance Institute commends Western Australia for fulfilling its commitment to the COAG project to reform directors' liability.

Yours sincerely



Tim Sheehy  
Chief Executive

### End notes

<sup>i</sup> 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.

<sup>ii</sup> Corporations and Markets Advisory Committee, *Personal liability for corporate fault*, September 2006. The report was prepared in response to the reference to the Advisory Committee in July 2002 by the then Parliamentary Secretary to the Treasurer of issues relating to directors' duties and personal liability.

<sup>iii</sup> Corporations and Markets Advisory Committee, *Personal liability for corporate fault*, September 2006. The Report states on pp 33-35: 'The Committee is of the view that, as a general principle, individuals should not be made criminally liable for misconduct by a company

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except where it can be shown that they have personally helped in or been privy to that misconduct, that is, where they were accessories. There was strong support for this position in submissions. The Committee is concerned about the trend in various pieces of legislation to treat directors or other corporate officers as criminally liable for misconduct by their company unless they can make out 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 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 organisation, 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 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 organisations. 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.

Apart from objections in principle to this extended form of personal liability, the range and disparity in the form of the deeming provisions found in various pieces of legislation create complexity and work against clear understanding and effective compliance.'

<sup>iv</sup> Corporations and Markets Advisory Committee, *Personal liability for corporate fault*, September 2006, page 1