

SECOND READING SPEECH

DIRECTORS' LIABILITY (MISCELLANEOUS AMENDMENTS) BILL 2012

Mr Speaker, I move that the Bill be now read a second time.

Directors' liability reform is one of the 27 deregulation priorities under the National Partnership Agreement to Deliver a Seamless National Economy (SNE NP). This Bill will implement this deregulation priority.

The project is being overseen by the Council of Australian Governments' (COAG) Reform Council (CRC) through the Business Reform Council Working Group (BRCWG).

A trend has developed in regulatory legislation across Australian jurisdictions towards imposing personal criminal liability on company directors as a consequence of their company (usually an employee of their company) breaching the relevant legislation. This is referred to as deemed liability.

Deemed liability is generally imposed on directors for corporate misconduct on the basis that it will deter misconduct. It has been argued that the prospect of being made personally criminally liable may provide a stronger incentive for directors to monitor their company's activities more closely and implement programs designed to prevent any breaches.

Criminal liability is generally imposed in situations where it is deemed appropriate to express public censure or disapproval of the conduct involved in the breach.

The main problem with deemed liability provisions is that they may impose criminal liability on directors in situations where the director may not be aware of, or have the ability to

prevent, the commission of an offence by a third party (for an example, an employee of the company).

In addition, a director who is a defendant in a deemed liability proceeding often bears the burden of proof, that is if a defence is available the director will have to prove all the elements of the defence on the balance of probabilities to escape liability. This is a reversal of the usual onus of proof and places a heavy burden on the director.

Deemed liability provisions may be contrary to corporate governance principles which state that directors, who are often part time and non-executive appointees, should be able to leave the day to day running of the company to expert managers employed on a full time basis for this purpose. The role of directors is largely seen to be to focus on the company's strategic direction.

There is considerable inconsistency in the application of deemed liability provisions across different legislation and jurisdictions. Provisions vary with respect to the persons subject to liability, the misconduct that attracts liability and the defences that may be available and how they need to be established.

This increases complexity and uncertainty, and also results in undue compliance costs being imposed on business. The array of different requirements makes it difficult for companies, and their directors and managers, to clearly assess their legal responsibilities, and therefore complicates efforts to ensure compliance.

It is important to draw a distinction between deemed liability provisions and other provisions that impose criminal sanctions on directors who have themselves breached the law. It is entirely appropriate that directors are held criminally liable where their own conduct amounts to a breach of directors'

duties or other statutory obligations. It is not proposed to change the approach to these laws.

COAG developed an agreed set of principles and a set of guidelines in respect of deemed liability for directors. Each jurisdiction has now audited its legislation against these principles and guidelines.

The Department of Justice has worked extensively with all Agencies to audit Tasmania's legislation and has provided the audit results to COAG, which has indicated that the Tasmanian approach meets the agreed principles and guidelines.

As a result of the audit, literally thousands of offences will no longer be subject to a deemed directors' liability offence. This Bill makes the required amendments.

In the future, all pieces of legislation developed in Tasmania and across Australia will only include provisions deeming directors' liable in the most exceptional of circumstances.

I commend the Bill to the House.