

18 October 2012

Ms Deborah O'Neill MP
Chair
Parliamentary Joint Committee on
Corporations and Financial Services
PO Box 6100
Parliament House
Canberra ACT 2600

By email: corporations.joint@aph.gov.au

Dear Ms O'Neill

Personal Liability for Corporate Fault Reform Bill 2012

Thank you for the invitation to attend the Parliamentary Joint Committee on Corporations and Financial Services' public hearing into the Personal Liability for Corporate Fault Reform Bill 2012 (the Bill) on Monday 22 October 2012. Unfortunately on this occasion we will be unable to appear to give evidence before the Committee.

The Australian Institute of Company Directors' hopes that its written submissions to Federal Treasury on this issue (Attachments 1 to 3 of our submission to this Committee dated 10 October 2012) adequately articulate our position on the Commonwealth's contribution to the national reform of the provisions imposing personal criminal liability on directors.

As the Committee considers the Bill in light of the submissions received, we would like to re-iterate the following:

- The Federal Government's reforms presented in this Bill are just one part of the wider reform process being undertaken by the States as part of the director liability reform priority under the COAG *National Partnership Agreement to Deliver a Seamless National Economy*;
- The objectives of the director liability reform priority under COAG reform process include:
 - to achieve a *nationally consistent* approach to the imposition of personal criminal liability for directors and corporate officers in circumstances of corporate fault;¹ and
 - to provide greater certainty for directors as to when they may be personally criminally liable for the company's misconduct² given that the inconsistency of laws, differing standards of fault and responsibility and different defences

¹ COAG Reform Council, *Seamless National Economy Report on Performance*, February 2012 at p181.

² COAG Reform Council, *National Partnership Agreement to Deliver a Seamless National Economy: Performance Report for 2009-2010* at p206.

across jurisdictions can be burdensome and cause complexity and uncertainty for individuals in these roles.³

- While many of the reforms in the Bill are an improvement from the current criminal liability provisions that apply to directors, there are areas where the Federal Government could have gone further to contribute to national reform and reduce the burden and complexity upon directors;
- We remain of the view that the principles formulated by the Australian Institute of Company Directors should be used to determine whether provisions imposing personal criminal liability on directors for acts of the company are appropriate;
- Outside of the Corporations Act 2001 (C'th) and in the limited circumstances where provisions imposing personal criminal liability on directors for acts of the company are determined to be appropriate, the Australian Institute of Company Directors' model provision should be inserted to ensure consistency across State and Federal legislation;
- The application of the Australian Institute of Company Directors' principles and model provision avoids the inconsistent outcomes that have occurred (and will continue to occur) as a result of the COAG process; and
- Finally, we consider the presumption of innocence to be a fundamental principle of the Australian legal system and will continue to advocate for its preservation in legislation that has the potential to impose criminal liability on individuals (including taxation legislation). For this reason, we cannot agree with the COAG Guidelines that consider it appropriate in some circumstances for directors to bear the legal burden of proving themselves innocent. We therefore recommend that as a matter of priority section 8Y of the *Taxation Administration Act 1953* be amended.

We trust our additional comments are of assistance.

Yours sincerely,

John H C Colvin
Chief Executive Officer &
Managing Director

³ COAG Reform Council, *Seamless National Economy Report on Performance*, February 2012 at p181, referring to CAMAC's 2006 Report *Personal Liability for Corporate Fault* at pp3, 6.