

3 September 2012

Ms Alix Gallo
Manager Governance and Insolvency Unit
Corporations and Financial Services Division
The Treasury
Langton Crescent, Parkes ACT 2600

Email: personalliabilityforcorporatefault@treasury.gov.au

Dear Ms Gallo,

Personal Liability for Corporate Fault Reform Bill 2012 (third tranche)

The Australian Institute of Company Directors welcomes the opportunity to comment on the third tranche of the Exposure Draft of the Personal Liability for Corporate Fault Reform Bill 2012 (C'th)(the Draft Bill).

The Australian Institute of Company Directors is the second largest member-based director association worldwide, with over 32,000 individual members from a wide range of corporations; publicly-listed companies, private companies, not-for-profit organisations, charities and government and semi-government bodies. As the principal Australian professional body representing a diverse membership of directors, we offer world class education services and provide a broad-based director perspective to current director issues in the policy debate.

The Australian Institute of Company Directors continues to closely monitor the progress of the current COAG reform agenda set out in the *National Partnership to Deliver a Seamless National Economy* and in particular, the reform stream relating to director liability. We have also comprehensively set out our position and model for reform in our submissions on the first and second tranches of this draft legislation, dated 30 March 2012 and 28 June 2012, respectively.¹ We therefore confine our comments below, to the specific amendments proposed in the third tranche.

1. Summary

In summary, the Australian Institute of Company Directors comments are as follows:

- a) We are disappointed that the Government has decided to retain section 8Y of the Taxation Administration Act 1953 (C'th) as currently drafted;

¹ These submissions are available at <http://www.companydirectors.com.au/Director-Resource-Centre/Policy-on-director-issues/Policy-Submissions>

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- b) Section 8Y of the Taxation Administration Act still reverses the onus of proof and fails to uphold the fundamental legal principle that a person is innocent until proven guilty;
- c) Section 8Y should be re-drafted so that it becomes an accessorial liability provision which requires the prosecution to prove a director's involvement as an accessory to a corporation's taxation offence;
- d) The amendments to section 444-15 of Schedule 1 to the Taxation Administration Act, section 252 (1)(j) of the Income Tax Assessment Act 1936 (C'th) and subsection 57(7) of the Superannuation Guarantee (Administration) Act 1992 (C'th) are welcomed, however, the effectiveness of these proposed amendments is undermined by the retention of section 8Y of the Taxation Administration Act.

2. Section 8Y Taxation Administration Act 1953 (C'th)

The Australian Institute of Company Directors is disappointed that the Federal Government has decided not to amend section 8Y of the Taxation Administration Act as part of the director liability reform stream under the COAG *National Partnership to Deliver a Seamless National Economy*. We are strongly of the view that section 8Y should be amended.

Section 8Y provides, in part, as follows:

- “(1) Where a corporation does or omits to do an act or thing the doing or omission of which constitutes a taxation offence, a person (by whatever name called and whether or not the person is an officer of the corporation) who is concerned in, or takes part in, the management of the corporation shall be deemed to have committed the taxation offence and is punishable accordingly.
- (2) In a prosecution of a person for a taxation offence by virtue of subsection (1), it is a defence if the *person proves* that the person:
 - (a) did not aid, abet, counsel or procure the act or omission of the corporation concerned; and
 - (b) was not in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the act or omission of the corporation.

Note 1: A defendant bears a legal burden in relation to the matters in subsection (2), see section 13.4 of the *Criminal Code*.

.....”

The effect of section 8Y of the Taxation Administration Act is that if a corporation commits a taxation offence, a director of the corporation *will be deemed to be guilty* of the same offence. In other words, the provision reverses the fundamental legal principle that a person is innocent until proven guilty.

A director deemed to be guilty under this section, in order to avoid punishment, must prove that they *were not* involved in the corporation's offence. A director must prove, for example, that they did not aid or abet the corporation's offence or that they were not in any way knowingly concerned in or party to the offence. The director bears the *legal burden* in proving these matters.

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The Explanatory Notes state: "As such section 8Y operates, in substance, as an accessorial liability provision." Unfortunately we disagree with this analysis. We are of the view that section 8Y is not a true accessorial liability provision, as accessorial liability provisions generally require the *prosecution to prove* an individual's involvement in the corporation's offence, rather than the individual being required to prove their *lack of involvement* in the corporation's offence (as is the case in section 8Y).

The purpose of the Australian Institute of Company Directors seeking an amendment to section 8Y of the Taxation Administration Act is not to absolve those directors who are personally involved in a corporation's taxation offence but rather, to restore the normal principles of justice and fairness that apply to all other citizens prosecuted for criminal offences.

We again refer the Government to CAMAC's report *Personal Liability for Corporate Fault* which states:

- "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 organization 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."²

Section 8Y is contrary to the approach recommended by CAMAC and the COAG principles. We are of the view that the retention of this provision has not been sufficiently justified pursuant to the COAG approach. Further, and more importantly, no justification has been provided as to why it is appropriate to undermine the Rule of Law (a fundamental pillar of our democratic society) by deciding to retain this provision.

The Explanatory Notes to the Draft Bill suggest the retention of section 8Y is necessary because the ATO relies on the section to prosecute those directors "who repeatedly and seriously neglect their company's tax obligations. If the ATO is unable to prosecute these individuals it could significantly undermine the public's confidence in the fairness of the tax system and the ATO's ability to enforce the law."

We have a number of comments in relation to this statement:

- (1) As drafted section 8Y can be used to prosecute *any* director whose company does or omits to do, an act or thing which constitutes a taxation offence. As drafted, section 8Y is not confined to serious and repeated offences, it is a broad provision that renders directors guilty of any taxation offence of the corporation without the *prima facie* need for the involvement of the director in that offence;
- (2) If, as the explanatory notes suggest, the ATO only uses this provision to prosecute those "directors who repeatedly and seriously" neglect their company's tax obligations, this does not mean that the provision will continue to be used in

² CAMAC *Personal Liability for Corporate Fault* 2006 at p34.

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this way going forward (as set out above, the provision is not in any way limited to repeated and serious offences);

- (3) If the ATO uses this provision to target “those directors who repeatedly and seriously neglect their company’s tax obligations” there is presumably evidence available to the ATO to show that the directors have been involved in the taxation offences of their companies. On this basis, there is no reason why the prosecution should not have to prove that a director was an accessory to the corporation’s taxation offence;
- (4) We are of the view that public confidence is unlikely to be harmed by requiring the ATO to adhere to commonly accepted and recognised principles of criminal law, given that the public accepts the application of the same principles in more serious criminal prosecutions involving loss of life, liberty and personal safety. Public confidence in the ATO may in fact be enhanced if the ATO was required to prove criminal taxation offences according to commonly accepted and recognized principles of criminal law. Conversely, continuing to retain or introduce provisions that give wide powers to the ATO to enforce the law but which are unnecessarily onerous and operate harshly, may cause a loss of public confidence in the ATO’s ability to regulate fairly and justly; and
- (5) The Explanatory Notes suggest that if the ATO is “*unable to prosecute these individuals*” it would undermine public confidence in the tax system. Amending section 8Y to make it a true accessorial liability provision would not prevent the ATO from prosecuting these individuals. Rather, it would mean that in a prosecution, the ATO would need to establish the director’s involvement in the offence in accordance with recognized principles of criminal law. We are hopeful that this statement in the Explanatory Notes, is not intended to imply that it is easier for the ATO to secure convictions, by placing the legal burden for proving the defence on the director. Such an approach would be contrary to the fundamental principle that a person be innocent until proven guilty, would not reflect good regulatory policy and would not be an appropriate basis for failing to comply with the COAG principles in respect of section 8Y.

In addition, the Explanatory Notes also provide that the “ATO does not prosecute directors who repeatedly and seriously neglect their company’s tax obligations as a matter of course....the ATO has a range of compliance strategies available, such as the imposition of administrative penalties and the initiation of civil recovery processes, as alternatives to prosecutions.” We are of the view that the ATO’s range of available compliance strategies is also not sufficient justification for retaining criminal liability provisions that fail to comply with recognised and fundamental principles of criminal law.

We strongly recommend that the Government reconsider its decision to retain section 8Y as currently drafted.

3. Amendments to Taxation Administration Act 1953 (C’t), Income Tax Assessment Act 1936 (C’t) and Superannuation Guarantee (Administration) Act 1992 (C’t)

Tranche 3 of the Draft Bill proposes to amend the following legislation:

- Section 444-15 of Schedule 1 to the Taxation Administration Act 1953;
- Section 252 (1)(j) of the Income Tax Assessment Act 1936; and
- Subsection 57(7) of the Superannuation Guarantee (Administration) Act 1992.

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The Australian Institute of Company Directors welcomes the amendments proposed to the above mentioned sections of these Acts. As currently drafted the provisions essentially provide that a notice, process or proceeding directed to a company may be given to, or served on, any director, secretary or other officer of the company and that that person will have the same liability in relation to the notice as the company.

For example, section 252(1)(j) of the Income Tax Assessment Act 1936 provides that:

"Notwithstanding anything contained in this section, and without in any way limiting, altering or transferring the liability of the public officer of a company, every notice, process or proceeding which under this Act or the regulations thereunder may be given to, served upon or taken against the company or its public officer may, if the Commissioner thinks fit, be given to, served upon or taken against any director, secretary or other officer of the company or any attorney or agent of the company and that director, secretary, officer, attorney or agent shall have the same liability in respect of that notice, process or proceeding as the company or public officer would have had if it had been given to, served upon, or taken against the company or public officer." [emphasis added]

The amendments proposed will retain the ability for a notice to be served on a director but will remove the relevant part of the sections which impose automatic personal liability on the director.

As set out previously, directors or officers of corporations should only be criminally liable for the company's offence where they have been an accessory, or have knowingly authorised or recklessly permitted the company's offence. While case law to date has read down the onerous nature of section 252(1)(j) of the Income Tax Assessment Act, the provisions as drafted, are open to an interpretation which suggests that the director's liability for the company's offence is absolute regardless of their involvement. If personal criminal liability is imposed on directors for acts of the company simply because a person holds a particular position, these provisions do not meet either the Company Directors principles or the COAG principles for reform.

We therefore agree with the Government that the provisions identified should be amended as recommended. Unfortunately, the amendments proposed to these provisions will only be partially effective in achieving the economic reform contemplated by COAG. This is because section 8Y of the Taxation Administration Act (discussed in section 2 above) will be retained. Section 8Y of the Taxation Administration Act can still be used by the ATO to prosecute directors for breaches of the sections proposed to be amended. If section 8Y can still render directors *prima facie* liable for a company's taxation offence then the effectiveness of the amendments proposed is undermined.

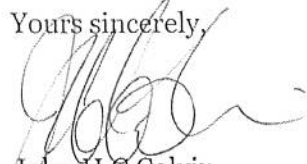
We are of the view that the amendments to sections 444-15 of Schedule 1 to the Taxation Administration Act, Section 252 (1)(j) of the Income Tax Assessment Act 1936 and subsection 57(7) of the Superannuation Guarantee (Administration) Act 1992 would be more effective in achieving the reform desired by COAG if section 8Y of the Taxation Administration Act was also re-drafted to become an accessorial liability provision that placed the burden of proof on the prosecution.

In summary, the amendments suggested, while welcomed, are not as effective as they could be at rectifying the economic issues sought to be addressed by the COAG reform process because section 8Y of the Taxation Administration Act, given its broad application, will still be retained in its current form. We emphasise, that at all times, it is critical that fundamental principles of natural justice and the Rule of Law are upheld.

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We hope that our comments will be of assistance to you. If you would like to further discuss our views please do not hesitate to contact me on (02) 8248 6600.

Yours sincerely,

A handwritten signature in dark ink, appearing to read 'John H C Colvin', written over the typed name.

John H C Colvin
CEO & Managing Director